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From Hockey Gloves to Handcuffs: The Need for Criminal Sanctions in Professional Ice Hockey

by TRACEY OH

I. Introduction

In February of 2000, Marty McSorely of the Boston Bruins raised his stick above his head and took a swing at opposing player Donald Brashear's head. Brashear fell hard to the ice and suffered a seizure before he was taken to the hospital on a stretcher. After the incident, Brashear's fellow Vancouver Canucks teammate Todd Bertuzzi declared that the incident was "disgusting, terrible, absolutely
disgusting. That does not need to be in the game of hockey. I've never seen anything like that in my life."

Ironically, almost four years later on March 8, 2004 during a game between the Vancouver Canucks and Colorado Avalanche, Bertuzzi channeled the same, if not worse malicious intent during his assault on Avalanche rookie Steve Moore. Bertuzzi sucker-punched Moore from behind with a force that sent Moore crashing down to the ice. Seconds after, Bertuzzi and other Canucks team members dog-piled the injured forward. Moore lay in an expanding pool of his own blood for a few moments before he was taken off the ice in a stretcher. The entire stadium sat in shocked silence. Barely escaping paralysis, Moore sustained multiple injuries, including a fractured neck and nerve damage. During a televised apology to Moore and his own team, Bertuzzi broke down in tears.

Whether or not he felt remorse, Bertuzzi's actions showed the world that sanctions from the National Hockey League (the "NHL") are clearly not enough to deter this kind of behavior. The NHL urges that disciplinary matters should be left to itself, not the courts. However, as shown by the growing frequency and intensity of violent acts on the ice, NHL sanctions are a mere slap on the wrist compared to the punitive weight offered by the legal forum. Because NHL


4. See CBC Sports Online, In Depth, The Bertuzzi Incident: A Blow By Blow Account, Mar. 11, 2004, http://www.cbc.ca/sports/indepth/bertuzzi/timeline/. Bertuzzi has had a history of poor judgment on ice. In 2003, he broke the nose of defenseman Karlis Skrastins, a non-fighter. He has also been suspended for hitting an official, who was breaking up a fight from which Bertuzzi would not back down. During the 2001-02 season, he left the bench to join in on an altercation four games into the season and was suspended 10 games. This suspension arguably cost him the scoring title. See Jim Kelley, Bertuzzi: a Product of Hockey's Culture, March 11, 2004, http://sports.espn.go.com/nhl/columns/story?columnist=kelley_jim&id=1757143.

5. As an enforcer, Bertuzzi was one of the largest men on the team. By the time he was 15, he was 6'2" and weighed 195 pounds. See Kellogg's Kidzworld, Todd Bertuzzi: Biography, http://www.kidzworld.com/site/p3874.htm (last visited Sept. 2, 2005).

6. CBC Sports Online, supra note 4.


8. CBC Sports Online, supra note 4.


sanctions do not carry much weight, they do not deter future acts of violence. Those that think violence on the ice is an NHL matter are naive. If it only affected the players involved, then perhaps adjudication would belong solely to the NHL. But in actuality, on-ice violence, even if shrouded in the veil of "horseplay," affects society as a whole. The broad social impact of on-ice violence necessitates the outside intervention of criminal courts.

Allowing courts to intervene promotes a sense of social responsibility. Tolerating continued violence of the degree that Moore experienced not only sends the message to aspiring ice hockey amateurs that violence is acceptable, but will also affect society outside the realm of ice hockey as a whole. With enough sickening violence seen on television and in movies, the last thing society needs is a sports culture that celebrates violence.

Excessive violence is no stranger to ice hockey. In the past, it has been dealt with predominantly via NHL sanctions, which are obviously incapable of deterring players from committing gross acts of violence on the rink. Had criminal charges been pressed against Marty McSorely, Bertuzzi probably would have thought twice about assaulting Moore. If the NHL would rather avoid the negative publicity of criminal prosecution of its players, it should beef up the implementation of its supposedly new and improved rules. Instead of merely paying token end-of-season lip service to the problem of violence and implementing new rules for each new season, the NHL needs to enforce its existing rules diligently.

If the NHL was capable of strictly enforcing its own disciplinary procedures, the alternative method of punishment, criminal sanctions, would not seem nearly as enticing. For example, during Game 4 of the Stanley Cup Finals in 1987, Ron Hextall of the Philadelphia Flyers viciously slashed Edmonton's Kent Nilsson across the knees. Instead of promptly suspending Hextall from the game, it waited until after the playoffs were over before it even reviewed the tape of the play. The NHL then decided to suspend Hextall for eight games of the next season. Therefore, Hextall was able to finish the rest of the season without paying for what he had done. The half-hearted

14. Id.
15. Id.
16. See E.M. Swift, The NHL Isn't So Tough, SPORTS ILLUSTRATED, Oct. 12, 1987,
investigation into the matter and resulting delay of punishment essentially trivialized the weight of NHL sanctions.

Bertuzzi’s barbaric behavior raises the issue of whether criminal sanctions are appropriate in a sport that condones as well as embraces violence. Though many people feel that the incident should stay within the scope of NHL adjudication, this note posits that criminal sanctions are needed to control acts of egregious violence on ice. Criminal sanctions may seem drastic, perhaps akin to a last resort. But the seriousness of Bertuzzi’s attack on Moore demonstrates that the NHL is in need of this last resort. Clearly, the NHL’s own sanctions are incapable of curbing the violence. Imposing criminal charges would carry retributive weight and also act as an effective deterrent, both of which NHL sanctions do not do.

It is important to emphasize that this note recommends criminal sanctions not for violent acts that are understandably correlated to the game, but for acts so deviant from acceptable behavior that they pervert the physical essence of the game.

Part I of this note will provide background regarding the nature of violence in ice hockey. It will also examine the role that fans as well as NHL officials play in encouraging the extent and type of violence during games. Part II will explain criminal liability in ice hockey and address several views which hold that the legal system has no place in ice hockey, or sports in general. Part III will examine past criminal prosecutions of ice hockey violence, analyzing the courts’ conservative trends in sentencing and other hindrances to successful criminal prosecution. This note concludes by pointing out that due to a deluge of problems faced by the NHL recently, the NHL is in no position to sit back and take such a lax stance on excessive violence in games. If the NHL is unable to reform itself to handle the violence more competently, then criminal courts are the obvious institution to punish and effectively deter excessive violence in professional ice hockey.

II. Why Hockey is so Violent

With the danger of concussions and broken ribs looming over each ice hockey game, it is not surprising that ice hockey players are suited up in padded protection thick enough to make them look like

snowmen. The game is extremely fast-paced; pucks fly at up to 90 mph and players skate at up to 30 mph.\textsuperscript{18}

Like football, ice hockey is a contact sport. Some of the injuries that happen are inevitable due to the nature of the game; collisions and clashes are common, intentional or not. But some injuries are clearly caused because of an intent to harm. This is the kind of violence that merits a criminal conviction. In order to understand how and why criminal sanctions against a professional athlete are appropriate, it is important to comprehend the unique hostile nature of ice hockey and why it is in a different realm than other competitive sports.

A. The Nature of the Game

No other sport in North America besides boxing has a greater history and reputation for violence than ice hockey.\textsuperscript{19} Hockey is a fierce sport for a number of reasons. First, the nature of the game is conducive to violence. In ice hockey, players are more dangerous by default to each other because they are armed with weapons—their hockey sticks.\textsuperscript{20} Frustrations run high as the bulky players are forced to maneuver in small quarters.\textsuperscript{21} Because of the heart put into the game by the players, the emotional intensity is high, tempers flare easily, and minor scuffles escalate into full bench-clearing brawls.\textsuperscript{22}

The second reason for the violence is that a certain degree of violence and fighting is regarded as part of the essence of the game.\textsuperscript{23} What gives ice hockey its notorious reputation is the often premeditated and retaliatory violence perpetuated in the game. This ritualized fighting is evident in the actual structure of the game as well as in the general sentiment amongst fans, players, and officials. Ice hockey is unique among all other sports because fighting and violence

\begin{itemize}
\item \textsuperscript{18} Brennan, \textit{supra} note 17.
\item \textsuperscript{19} Jonathan H. Katz, \textit{From the Penalty Box to the Penitentiary – The People Versus Jesse Boulerice}, 31 \textsc{RUTGERS} \textsc{L.J.} 833, 839 (2000).
\item \textsuperscript{20} John Timmer, \textit{Crossing the (Blue) Line: Is the Criminal Justice System the Best Institution to Deal With Violence in Hockey?}, 4 \textsc{VAND. J. ENT. L. & PRAC.} 205, 206 (2002).
\item \textsuperscript{21} Jay Greenberg, \textit{A Real Spiritual Game}, \textsc{SPORTS ILLUSTRATED}, Mar. 12, 1990, at 18.
\item \textsuperscript{22} Debra L. Feldman, \textit{Pandora’s Box Is Open: Criminal Prosecution Implemented; Violent Play in the National Hockey League Eliminated}, 2 \textsc{VA. SPORTS. & ENT. L.J.} 310, 316 (2003).
\item \textsuperscript{23} “Hitting is the soul of hockey, and there’s nothing like a resounding body check to change the flow of the game.” Michael Farber, \textit{Check, Please}, \textsc{SPORTS ILLUSTRATED}, Mar. 29, 1999, at 47.
\end{itemize}
are not only condoned, they are encouraged.24 Violence has become so prevalent in ice hockey games that the late Rodney Dangerfield once quipped: "I went to a fight the other night and a hockey game broke out."25

This "dirty side of hockey" has always existed, from the incipient stages of organized sports.26 Violence is woven so deeply into the fiber of the game that, for example, it affects the team roster as well as strategy.27 Team owners jump to sign players who are lacking in technical skills yet are known for their fighting ability, known as "enforcers."28 The enforcer's role is to provide a physical presence on the team and to protect the star players.29 Bertuzzi himself was a hefty 6-foot-3, 245 pounds.30 If necessary, the enforcer retaliates against players who intentionally or unintentionally hurt opposing players during the game.31 In this self-policing system, violence is in essence penalized with violence. The enforcer is generally the most penalized player on the team because of the latitude with which he behaves.32 He is often sent out onto the ice after a star player has been checked particularly hard to "send the message" to the perpetrator.33

In 1992, the NHL instituted the Instigator Rule, an political maneuver to salvage the game from its negative reputation.34 Instead

25. Jokes about the violence involved in ice hockey are prevalent. NHL Hall of Famer Brad Park has also joked, "We get nose jobs all the time in the NHL, and we don't even have to go to the hospital;" See Glenn Liebman, HOCKEY SHORTS 52 (Glenn Liebman ed., Contemporary Books 1996).
26. See Kelley, supra note 4. Author Jim Kelley says to blame Canada for Bertuzzi's actions, which were just a product of hockey's culture.
27. Feldman, supra note 22 at 313.
28. See Kenneth Colburn, Jr., Deviance and Legitimacy in Ice-Hockey: A Microstructural Theory of Violence, 27 SOC. Q. 63, 68 (1986). Enforcers are usually the biggest and strongest of the team. They get little playing time and are sometimes called "goons;" See also Jennifer Marder, Should the Criminal Courts Adjudicate On-Ice NHL Incidents?, 11 SPORTS L.J. 17, 19 n.11 (2004).
34. Clayton, supra note 29.
of paying the price of playing dirty on the ice by facing the other team’s enforcer, the player who instigates a physical confrontation is pulled out of the game. The rule has proven to be a mere formality, as players like Bertuzzi unofficially act as enforcers, continuing to seek vengeance on their own. Despite the NHL’s efforts to clean up the game, years of tradition have programmed violence into the heart of the game.

B. NHL policy

The NHL organizes the structure of the game according to a set of regulations, much like any other sport. In regards to rules governing violence, penalties are given to players who commit certain infractions, which range from minor to gross. Conduct that is unsportsmanlike, including, but not limited to hair-pulling, biting, and grabbing hold of the face mask, is punished with minor penalties. More physical conduct such as checking from behind, elbowing, and butt ending is punished with major or match penalties. Match penalties involve the suspension of a player for the remainder of the game. For more egregious behavior, misconduct penalties are issued and players must sit out for ten minutes and pay a fine of one hundred dollars. The referee may also impose “game misconduct” and “gross misconduct” penalties, both of which call for two hundred dollar fines and suspension from the game. In both types of penalties, the case may be referred to the NHL for further disciplinary action.

35. Id.

36. Bertuzzi’s attack on Moore was revenge for Moore’s own open-ice shoulder hit to Vancouver Canucks captain Markus Naslund’s head less than a month earlier during a February match in 2004. No penalty was called and no action taken by the NHL in the days that followed.

37. Rule 41(n) of the NHL Rulebook, available at http://www.nhl.com/hockeyu/rulebook/alphaindex.html (last visited Nov. 2, 2005). In severe cases of biting or hair pulling, and specifically when injury results, Rule 43—Attempt to Injure, or Rule 52—Deliberate Injury of Opponents, must be applied and a match penalty assessed.

38. Id. at Rule 48.

39. Id. at Rule 53.

40. Id. at Rule 46.

41. Id. at Rule 29.

42. Rule 28(a) and (b) NHL Rulebook, available at http://www.nhl.com/hockeyu/rulebook/alphaindex.html (last visited Nov. 2, 2005).

43. Id. at Rule 28(c) and (d). For all game misconduct and gross misconduct penalties regardless of when imposed, a total of ten minutes is charged in the records against the offending player.

44. Id.
Although these rules help prevent the escalation of a single fight from becoming a bench-clearing brawl, they provide only limited protection for players, no matter how diligent a referee may be in imposing them. The infrastructure of the game logistics, from the rules to the disciplinary measures, does not carry the punitive weight needed to encourage players, coaches, and other officials to adhere to rules in the first place.

The game penalties often do not deter players because they are simply a part of the game, especially since penalties are issued so frequently. There is no stigma attached to penalties. In fact, despite the consequences, fighting in ice hockey serves as an indication of talent.\(^4\) A player capable of pulling off a "Gordie Howe" hat trick, where he accomplishes the following in a single game—scores a goal, gets an assist and is penalized later for fighting—is praised for having such physical finesse.\(^4\) Furthermore, the NHL rulebook never defines "gross misconduct," which leaves players free to take advantage of the ambiguous limits before they incur more serious administrative forms of punishment.

C. Fans and NHL Administration

At an NHL game, the crowd roars the loudest when the home team scores.\(^4\) The second loudest reaction comes with a fight.\(^4\) Largely a Canadian sport, ice hockey continues to attract throngs of fans in the United States in part due to the amount of violence in the game.\(^4\) Because the fans enjoy the fighting so much, the NHL lacks the incentive to ban it. After all, fans provide the monetary sustenance for the NHL.

Thus, the climate of violence in the game is also fostered by people who run the show from behind the scenes. The truth is that professional ice hockey has become an entertainment business.\(^5\) For NHL management, everything translates into money. While there are fans that come to watch because they love the sport, there are fans

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45. FirstBaseSports.com, supra note 32.
46. The trick is named after legendary NHL player Gordie Howe who was known for his scoring ability and bellicose nature on ice.
47. See Brennan, supra note 17.
48. Id.
49. Wayne Gretzky once said "Hockey is not only surviving in the States with fighting . . . it's becoming more and more popular." Tom Nease, On the Hockey-Violence Front, No. 99 Missed the Mark, MONTREAL GAZETTE, Mar. 5, 1994, at B5.
50. Katz, supra note 19, at 834. Former NHL president John Ziegler offered, "Think of it as a business. We're in the entertainment business." See Brennan, supra note 17.
that come to watch the spectacle and the violence. The great majority of owners believe that fighting is a necessary marketing tool. Because violence brings in fans, and fans bring in money, the administrators are less inclined to rebuke the players too harshly for engaging in violence. Fans probably will not want to come to a game when their favorite players are sitting out.

There is an important distinction to be made between ice hockey as a sport and as a business. Many people who grew up playing ice hockey remember playing it outside over frozen lakes, unadulterated by the influence of profit and the need to entertain. Even fans that grew up playing ice hockey indoors didn't have as many concerns. Washington Capitals Coach Bryan Murray said, "I never wore a helmet when I played as a kid, and I never had to worry about a high stick. Your most serious opponent was really apologetic if he caught you near the head." NHL games are a glossier, testosterone-injected version of the original. This is apparent in the difference between the way amateur leagues and the professional league treat violence. When the Amateur Hockey Association of the United States (AHAUS) participates in international championships, during 28 games, not a single fight breaks out. Moreover, a strict rule applies: if a player fights, he is ejected from the championship.

On the other hand, the NHL tolerates as well as promotes violence. No other professional sport shows as much tolerance for fighting, or rule breaking for that matter, as ice hockey. In the NHL, a player can get into three fights before he is suspended from the game. One of the reasons why the NHL is so lenient is because it is a multi-million dollar enterprise. Fans want to be entertained. Players want to be paid a lot. Stakes are high to appease many people. Before it drew media attention due to recent savage on-ice episodes, the NHL was not subtle about promoting violence either. When Paul Mulvey was with the Los Angeles Kings, he was ordered to go out

52. See Brennan, supra note 17.
53. Id.
54. Id.
55. Id.
56. Id.
57. Consider the fact that a dispute between players and owners over a salary cap led to the cancellation of the 2005-2006 NHL season. Players wanted $49 million per team; the owners said $42.5 million. See Associated Press, Lockout over salary cap shuts down NHL, Feb. 16, 2005, http://sports.espn.go.com/nhl/news/story?id=1992793.
onto the ice and start a fight. When he refused, he was suspended and sent to the minor league.

Another example of just how important fans are to team officials is the fact that despite widespread consensus that widening the rink size would lessen the fighting by decreasing the congestion, the owners of the NHL have not acted. To increase the rink size would mean giving up good money-generating seats in the arenas. Hence, the players stay cooped up at the expense of their safety.

The game of professional ice hockey is in need of serious rehabilitation. Since the player's interests are directly yoked to the interests of the team, the coach, the manager, the owner, and the NHL, punishing the player for the wrong he has done punishes everyone intimately involved in the sport, thus providing the internal incentive to change. Criminal convictions against its players would generate negative press and cause financial loss for the NHL. With its revenue-generating players sitting in jail cells, the NHL would be more inclined to encourage its players to keep their conduct clean.

III. Arguments Against Imposing Criminal Liability

There are several arguments against imposing criminal sanctions on excessively aggressive players. However, they are weak because they fail to address the kind of physical assault that actually warrants criminal prosecution. Critics of criminal prosecution argue, for example, that it is too difficult to demonstrate the requisite mens rea element in some cases. Not all acts of violence on the ice call for criminal prosecution. Conduct that does rise to the level of deserving prosecution was motivated by intent so blatant and egregious as to fall outside the scope of the game of ice hockey. Therefore, proving mens rea is not an issue.

Critics of criminal liability also argue that putting NHL players on trial does not further the policy goals of the criminal justice system. This view tends to put players on a pedestal while underestimating the criminal court system. These arguments fail because hockey players are normal people who are just as much a part of society as their fans are. Therefore, the policy goals are still

58. See Brennan, supra note 17.
59. Id. Kings Coach Don Perry ordered Mulvey onto the ice to start a bench-clearing brawl in the 1981-82 season. He filed a lawsuit against the Kings which was settled out of court.
60. Id. The average NHL rink is 200 feet long by 85 feet wide. Olympic size rinks are 200 feet by 100 feet.
61. Id.
fulfilled, if not better, since the prosecution of famous players will have more of a social effect. The message would be loud and clear — gross acts of violence, no matter where they take place, are not tolerated.

A. The Difficulty of Proving Mens Rea

In both Canadian and United States courts, prosecutors charge acts of violence on the ice as assaults. In order for a criminal charge against a defendant to be successful, the prosecution must prove that the defendant intended the assault and battery which resulted in the opposing player's injury. One argument against the involvement of criminal courts is that it is too difficult to prove the required mens rea element of intent since many acts of violence in ice hockey are reflexive or occur in the midst of the commotion of the game.

Furthermore, the fast-paced, inherently physical nature of the game makes it hard to distinguish what is outside the normal amount of physical contact. Often times when it is difficult to determine the initial aggressor, the defendant will introduce the issue of self-defense as a means of negating the charge.

In order to find that a criminal act occurred during the game, the prosecution must prove that the physical contact was not related to the competition aspect of the game. Although courts have stated that the fact that the act occurred during the game is an affirmative defense tending to bar finding the requisite intent, in situations such as the Bertuzzi incident, where the circumstances clearly point to a conscious decision to commit a heinous act against an opponent, the argument that intent was lacking fails.

Bertuzzi did not make incidental contact with Moore during a rash move to get at the puck. Instead, Bertuzzi gave Moore the blow while he was vulnerably with his back turned toward Bertuzzi. They

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64. Id. at 140
65. Id.
67. Id. The court also stated that athletic competition includes intentional conduct that appears to look like criminal acts but are not, when evaluated in the context of the sport. Id. at 309.
68. See Katz, supra note 19, at 857.
were nowhere near the action of the game. Given that Bertuzzi was heard vowing to seek revenge on Moore for an unintentional injury he caused to Bertuzzi’s teammate during a prior game, Bertuzzi’s actions were clearly a manifestation of his personal vendetta against Moore.69 This was not an act consistent with ordinary injuries specific to the sport of ice hockey. Rather, it was an act more akin to something a person might do on the street and find himself in jail for.

B. Consent

Another argument against intervention by criminal courts is that when players participate in the game, they impliedly assume the risk of sustaining injuries. Again, this argument fails to acknowledge the instances when an act is obviously outside the scope of the natural game.

Jonathan H. Katz wonders in his note, at what point does hockey violence lose its consensual nature and cease to be a “part of the game?”70 The answer is simple: when a player commits an act of violence that is unrelated to the basic elements of the game. Bertuzzi committed an act that, isolated from the rest of the game, was uncomplicated by nuances of the ice hockey game. Translated into different terms, he walked up behind Moore and sucker-punched him hard enough to cause him to fall to the ice on his head. If it had happened on the street, criminal charges would have undisputedly followed. Since Moore’s participation in the game is not at issue, the events leading up to the attack show that he could not have consented to the blow he received.71 No athlete should be presumed to consent to a “malicious, unprovoked or overly violent attack.”72 The consent argument is limited further by a policy perspective.73 When an act is in itself a criminal act, a person cannot license another to commit a crime.74 The attack against Moore was criminal in and of itself.

69. On Feb. 16, 2004, Moore knocked Vancouver Canucks captain Markus Naslund unconscious with an open-ice shoulder hit to the head. Because no penalty was called and no action taken by the NHL in the days that followed, Bertuzzi was bitter. After the game, he called the officiating a joke, and his teammate Brad May indicated a bounty had been placed on the 25-year-old Moore, a rookie NHL player. See CBC Sports Online, supra note 4.

70. See Katz, supra note 19, at 839.


73. Id.

74. See Regina v. Watson, [1975] 26 C.C.C.2d 150, 158 (quoting The King v. Donovan, [1934] 2 K.B. 498, 507 (Crim. App. 1934)). An exception to this rule would be during a boxing match, where the object of the sport itself is to render the opponent
C. Criminal Justice Goals Are Not Served By Criminal Prosecution

Those opposed to criminal sanctions also argue that allowing the criminal justice system to handle matters involving violence during hockey games does not fulfill the main policy goals of the criminal justice system: retribution and deterrence. The retributive function of the criminal justice system acts to punish the criminal defendant for the wrong he committed and make society whole again. Some argue that the retributive function is pointless. They reason that since a violent act that takes place on the ice does not harm society, there is nothing to restore since the action is confined within the arena's borders.

John Timmer, for example, asserts in his article that the general public is not affected by dangerous acts on the ice, since only NHL players are affected by such actions. Timmer interprets his dictionary's definition of a crime ("an offense against the State or the United States") to mean that NHL players are not capable of committing crimes on the ice because they are not "residents of a state or of the United States." But NHL players, at least North American ones, are residents of a state and of the United States. Timmer seems to be interpreting the definition of crime as the definition of treason, rather than run-of-the-mill crime in general.

This kind of over-simplistic analysis fails to realize that hockey players are regular people. The implications of tolerated violence in ice hockey go beyond the hockey arena and infiltrate society. Accordingly, Timmer is gravely mistaken for asserting, "[i]t is a waste of time and money for an already overburdened system to prosecute players who pose no real threat to society." This view trivializes the serious and life-threatening injuries sustained by players such as Moore. Timmer implies that seeking justice for these kinds of criminal acts is less worthy than seeking justice against "real" criminals. Again, his opinion reflects the unfortunate pedestal that our society places athletes on. Individuals such as Bertuzzi do pose a real threat to society.

unconscious. Id. at 159.
76. Id.
77. See, e.g., Marder, supra note 28, at 32.
78. Id.
80. Id. at 213; see Black's Law Dictionary 370 (6th ed. 1990).
81. Id. at 214.
Athletes are glorified and adoring fans look to them as role models.82 Millions of viewers, including young children, watch the game and when the NHL merely slaps the player on the wrist with petty sanctions and fines, they absorb the message that this type of violence is acceptable.83 Gross misconduct not only perpetuates complacency towards violence in our society, it breeds more violence.84 Since children emulate their heroes, if they see that aggressiveness and fighting ability are desired traits in an athlete, these same traits will be desired at lower levels of competition such as peewee sports leagues.85

One perspective on sports violence is the Cultural Spillover Theory.86 The theory asserts that the more society legitimates violent behavior in sports, media, and other parts of culture, the greater the likelihood of more illegitimate violence “spilling over” into other social settings.87

An example of how society is affected by the violence that “spills over” is spectator violence.88 Consider the fight that broke out during an NBA game between the Detroit Pistons and the Indiana Pacers.89 A physical confrontation between players escalated into a chaotic and frightening melee between fans and players, and amongst fans themselves. Never before had fans gotten so involved in the violence. But consider what they had been observing minutes before they got involved: violence between the players. The conduct of the players

82. See Katz, supra note 19, at 834.
83. See Nielson, supra note 12, at 688.
84. Young athletes desire to emulate the sports stars they admire. See Silva, Factors Related to the Acquisition and Exhibition of Aggressive Sport Behavior, in PSYCHOLOGICAL FOUNDATIONS OF SPORT 261, 269 (J. Silva III & R. Weinberg eds. 1984).
85. See Nielson, supra note 12, at 689-90. See also Brennan, supra note 17. Ron Giovannucci, the coach of an amateur hockey league in Northern Virginia has said this about the NHL’s influence on children: “The NHL is a bad example . . . . I tell the kids to ignore the fighting they see. They do things they see the Caps or other teams do, and it’s wrong. They’re really surprised when they’re called on it.”
87. Id. at 66. Sport psychology researchers Gordon Bloom and Michael Smith conducted the only direct test of cultural spillover theory as it applies to sports violence in 1996. They tested a sample of 604 minor hockey players and a representative sample of 180 non-players. Id. at 69. Hockey players over the age of 17 who were playing in highly competitive select leagues were found to be more prone to a spillover-of-violence effect in other social settings. Id. at 74.
88. See J. Barnes, SPORTS AND THE LAW IN CANADA 80-83 (2d ed. 1988) (describing spectator violence amongst spectators themselves as well as spectator-player violence).
89. The incident occurred at the November 19, 2004 game at The Palace, in Detroit.
sent the message that violence of this nature was acceptable and compelled the fans to emulate the stars and get involved.\textsuperscript{90} Imposing criminal sanctions, depending on the severity of the violence, will send a clear message to fans, spectators, and the general public. This type of violence is never tolerated in society, even on the ice.

One core tenet of the criminal justice system is that the punishment will deter the individual from committing the crime again as well as provide strong incentive for others to abstain from committing the same acts.\textsuperscript{91} The deterrence theory is only effective of course, if the punishment really is abhorrent. Likening prisons to country clubs for felons, some argue that the conditions of American prisons today are so good that they completely negate the deterrent effect. For some criminals, the loss of liberty that comes with prison is a small price to pay for an upgraded life. Prison offers security and stability, and a structure to their lives that they didn’t have before, not to mention camaraderie and regular meals. Often, prisons even provide a chance for self-improvement through educational programs that provide vocational training.

However, prison time would be a strong deterrent for an athlete used to living a more than comfortable life as a sports star, even if the sunny images of prison life are not over-exaggerated. Even jail, which lacks the innate repressive culture of prison, would put a devastating cramp in his lifestyle. Being forced to spend time incarcerated would be such a drastic fall from the comforts and luxuries of a player’s normal life, that if prison or jail time did not work to deter him from assaulting players again, he probably would need psychiatric intervention to help him check that temper.

Some argue that the distinct sanctions of the NHL, including fines and suspension from games, are effective in dissuading athletes from engaging in egregious conduct. Many athletes enjoy the attention they get from their fans and would not want to disappoint the crowd by foregoing playing time for bench time.\textsuperscript{92} Jennifer Marder argues in her article on criminal adjudication of NHL violence that the deterrence goal of the criminal justice system is unnecessary because there could be no worse punishment for a hockey player than to be deprived from playing the game for a period of time.\textsuperscript{93} Therefore, the threat of being ejected from the game would be

\textsuperscript{90} See Nielson, \textit{supra} note 12, at 687-688.
\textsuperscript{91} See Cohen, \textit{supra} note 75, at 321.
\textsuperscript{92} See Katz, \textit{supra} note 19, at 865; See Hanson & Dernis, \textit{supra} note 63, at 152.
\textsuperscript{93} Marder, \textit{supra} note 28, at 32.
enough of a deterrent. But she forgets that indeed, there is a worse punishment: being deprived from playing ice hockey while sitting in a cell.

The NHL has become adept at acting more quickly in adjudicating violence. At best however, NHL sanctions are responsive, but not effective. NHL suspensions are not appropriate punishments for egregious conduct. Ejection from the game does not carry the deterrence weight of jail. With a suspension, the player still has his liberty. Furthermore, suspensions do not sufficiently satisfy the retributive function the way jail does. The players are only removed from the game, not from society, as convicted criminals are. They are still able to enjoy the luxurious amenities of their lifestyles and see their loved ones as often as they like. This is far from punishment. Also, simply being suspended from the game does not fulfill the deterrent function of prison. There is little doubt that the player would feel a lot less remorse when he is a free individual, able to go anywhere he pleases, than were he sitting alone in a cell with ample time to think about the wrong he committed. Players such as Bertuzzi deserve jail time because their crimes have nothing to do with hockey. As such, they should be treated as regular criminals, not privileged people.

Arguments such as Marder’s also undermine and underestimate the criminal justice system. The assumption that hockey players love the sport too much to risk not being able to play ignores the simple truth that ice hockey players are regular people. They would be just as discouraged from behaving egregiously by the threat of incarceration, or at the least, having a criminal charge on their record, as non-athletes in the general public would be, no matter how much they enjoy attention on ice. Hockey players are ordinary people, not above the rest of society. There is no need to soften their punishment.

Critics of criminal prosecution also argue that fines and loss of salary from suspensions are sufficient deterrents. However, ice hockey players earn a healthy salary to begin with. In 2003-04, the average NHL salary was $1.83 million. Another illustration is

94. Bertuzzi has not yet personally apologized to Moore. Moore’s lawyer Tim Danson has suggested that if Bertuzzi truly was remorseful, he would have made sure that Moore was in the court room when Bertuzzi plea bargained so that he could formally apologize. See Associated Press, Moore still waiting for Bertuzzi’s apology, Dec. 24, 2004, http://msnbc.msn.com/id/6751136/.

95. See About.com, Questions and Answers about the NHL, http://proicehockey.about.com/od/collectivebargainingfaq/t/nhl_salaries.htm (last visited Nov. 2, 2005). The NHL’s collective bargaining agreement also allows the League to suspend players without pay. See Dave Anderson, Sports of the Times: Hockey’s $1,000
Bertuzzi's welcome back salary for the 2005-2006 NHL season. He will receive $5.2 million to return to the Vancouver Canucks.  

The NHL's collective bargaining agreement also puts limitations on its monetary sanctions. For instance, the maximum fine is $1,000. To the average NHL player, the trivial fine probably makes it a bargain to attack the opponent.  

The problem with the assertion that the criminal prosecution of NHL players does not serve the goals of the criminal justice system is that it assumes that the NHL players are a separate sub-species of humans who are not part of the general public. Once these players are brought down from their pedestals, it is apparent that the same justice system that works for regular people would work for NHL athletes as well.

D. Courts Are Ill-Equippe—the NHL Understands the Sport Better Than Courts

Another criticism of judicial intervention in adjudicating on-ice violence is that the court is ill equipped to handle NHL matters. Since the NHL understands the nuances of ice hockey better than any court, attorney, or jury, critics feel that the NHL is best suited to administer punishment. The NHL may be more familiar with the rules and customs of the sport; it is also more sensitive to conduct that is acceptable and the risks players assume during games. However, the intellectual competence of a judge or jury should not be underestimated. Ice hockey is not rocket science. Little children as


97. See Anderson, supra note 95.

98. Id.

99. Id.

100. See Hanson & Dernis, supra note 63, at 151.

101. Id.

102. Id. at 151.

103. Id.

104. Marder interprets Judge Kitchen's finding of intent in the Marty McSorley case as an example of the court's inability to understand the complexity of ice hockey, without taking a moment to realize the logic of his words. See Marder, supra note 28 n. 49. Judge Kitchen astutely opined, "He slashed for the head. A child swinging as at a Tee ball would not miss. A housekeeper swinging a carpetbeater would not miss. An NHL player would never miss. Brashear was struck as intended." See CNN Sports Illustrated, McSorley found guilty of assault, avoids jail time, Oct. 7, 2000, http://sportsillustrated.ated.cnn.com/hockey/nhl/news/2000/10/06/mcsorley_assault.ap/. There is nothing entirely complex about figuring out whether someone meant to hit someone when the conduct is so egregious. A
young as four years old scramble to join amateur hockey leagues. If a child is old enough to be able to skate, he is old enough to learn the game. Similarly, even the most sports-illiterate jury could certainly be taught enough basics to understand what is and what is not clean hockey and be able to discern what conduct is so outside the boundaries of acceptable aggression as to be egregious. Furthermore, judges and juries often confront far more complex issues that require fine-tuned analysis on a daily basis, such as anti-trust matters, complex patent litigation, and copyrights.

While the NHL may understand the technicalities and beauty of the sport, this advantage over courts is undermined by the fact that the NHL has a very strong interest in preserving and promoting violence. Violence acts as a marketing tool to entice spectators because it adds excitement and adrenaline to the sport. It makes sense from a financial perspective for the NHL to adamantly insist on policing its own affairs. This conflict of interest hinders the NHL’s ability to objectively administer effective discipline on its players. Unlike the NHL, the criminal justice system would be able to administer punishment from an unbiased point of view.

IV. The History of Criminal Sanctions in The NHL

Prosecutors have brought criminal assault charges against players in many different sports besides ice hockey. However, because of the intrinsic violence of ice hockey, as well as other factors that serve as challenges to prosecution, successful criminal prosecution of ice hockey players faces a particular hurdle. While various players have been charged with criminal assault, very few have actually been successfully prosecuted. It is not enough to bring the players to court. The court’s timidity to actually convict them makes criminal charges mere empty threats. A brief timeline of the history of criminal

competent judge would be able to make a fair assessment.


106. Consider the fact that complex biomedical patent cases are patiently explained to ignorant juries. No one claims that the industry should self-regulate itself.

107. See supra note 59 and accompanying text (discussing how ex-NHL player Mulvey was sent onto the ice to intentionally start a bench-clearing brawl).

charges on ice illustrates how both U.S. and Canadian courts have been far too lenient with sentencing.

The first criminal assault charge brought against ice hockey players was in 1969 after a stick-swinging brawl between Wayne Maki of the St. Louis Blues and Ted Green of the Boston Bruins.109 As a result of their fight, Green suffered a fractured skull.110 Both were acquitted of assault charges.111

In 1975, "Dan Maloney of the Detroit Red Wings attacked Brian Glennie of the Toronto Maple Leafs from behind. Maloney was charged with assault causing bodily harm, but was acquitted...."112

That same year, Boston Bruins player Dave Forbes was charged with aggravated assault after a fight with Henry Boucha of the Minnesota North Stars.113 After a nine-day trial resulting in a hung jury, the prosecutor dropped the charges.114

In 1977, Dave "Tiger" Williams was acquitted of assault after he hit Pittsburgh Penguin Dennis Onchar with his stick during a game.115

In 1982, Jets enforcer Jimmy Mann left the bench during a game against the Pittsburgh Penguins, and hit Penguin Paul Gardner, breaking his jaw in two places.116 Police charged Mann, and he was fined $500 and given a suspended sentence.117

In 1988, Dino Ciccarelli of the Minnesota North Stars was charged with assault for striking Luke Richardson of the Toronto Leafs.118 Unlike the other players, Ciccarelli was actually convicted.119 However, his sentence was a mere slap on the wrist: one day in jail and a $1,000 fine.120 Even more absurd was the fact that he only stayed

110. Maki was not injured.
112. Wikipedia.org, supra note 111.
113. Id.
114. Id.
115. Id.
117. Id.
118. Id.
119. Id.
120. Id.
in jail for two hours, during which he signed autographs for most of the time.\textsuperscript{121}

In 2000, Boston Bruins defenceman Marty McSorely was also convicted of assault for hitting Vancouver Canuck Donal Brashear in the head with his stick.\textsuperscript{122} His sentence was a mere 18-month conditional discharge.\textsuperscript{123}

Now, Todd Bertuzzi is another NHL player to add to the list of players who have received grossly unproportional punishments. After the incident, the NHL held a hearing and suspended him indefinitely.\textsuperscript{124} He would miss 13 regular-season games, seven postseason games and lose nearly $502,000 in salary.\textsuperscript{125} Criminal charges for assault resulting in physical injury were brought against him to which he pleaded not guilty.\textsuperscript{126} He later agreed to a plea bargain, leaving him with no criminal record.\textsuperscript{127} Instead, he received a conditional discharge, as well as a year's probation during which he may not play in any game against Moore.\textsuperscript{128} He must also perform 80 hours of community service.\textsuperscript{129} After only a 17 month suspension, Bertuzzi was reinstated to play in the NHL.\textsuperscript{130} He will earn $5.2 million, which will more than compensate for the salary he missed out on during his suspension.\textsuperscript{131}

Even with the growing momentum towards charging players with criminal assault, criminal charges against delinquent players are only effective if the players are actually convicted. Courts have been rather timid about convicting players. Even when they do, the sentences are trivial.

There are several reasons why overall conviction rates are so startlingly low for ice hockey players. Prosecutors may hesitate to

\begin{itemize}
\item \textsuperscript{121} See Austin Murphy, \textit{North Star on Ice}, \textit{Sports Illustrated}, Sept. 5, 1988, at 34.
\item \textsuperscript{122} Wikipedia.org, \textit{supra} note 111.
\item \textsuperscript{123} \textit{Id}.
\item \textsuperscript{125} \textit{Id}.
\item \textsuperscript{126} Moore also filed a pending civil lawsuit in February of 2005 in a Colorado court. \textit{Id}.
\item \textsuperscript{128} \textit{Id}. Moore may not even be able to ever play again, since he is without an NHL contract and is still suffering physical consequences from the injuries.
\item \textsuperscript{129} \textit{Id}.
\item \textsuperscript{131} \textit{Id}.
\end{itemize}
bring charges because they see the whole situation as a lost cause, given the tenor of courts regarding actual conviction. Precedent clearly shows the chance of obtaining a guilty verdict is slight.\textsuperscript{132} Also, some prosecutors may prosecute less than zealously simply because they may be ice hockey fans themselves.\textsuperscript{133}

Once a player is convicted, the responsibility of meting out punishments that are proportionate to the crime lies with the court or jury. The actual number of sports players who have served time in jail versus the number who are convicted is severely disproportionate. Judges and juries seem to be uncomfortable with sending a professional athlete to jail, but in order to create legal consistency and allow the players to know what legal ramifications result from unbridled aggressiveness on the ice, they must stop sugar coating sentences. Bickering over whether criminal courts should get involved or not does no good if defendants are treated as "athletes" instead of regular people by prosecutors as well as judges and juries once they are haled into court.

When it comes to our nation's finances, the legal system has recently warmed up to the notion of sending high profile, unlikely inmates to jail, as demonstrated by the plights of domestic mogul Martha Stewart, former CEO of WorldCom Bernard Ebbers, and former Tyco CEO Dennis Kozlowski.\textsuperscript{134} Defrauding the public out of billions of dollars is reprehensible, but not barbaric. Assaulting a player with enough force to almost kill him is both. The general reluctance of the courts to either find athletes guilty of crimes or to send them to prison once they are convicted of the crimes must cease. The legal forum is only effective if criminal charges actually materialize into tangible and substantial consequences.

\textsuperscript{132} See Katz, \textit{supra} note 19, at 853.


V. Conclusion

Within the past year or so, the NHL has taken blow after blow of misfortune. First, the lockout revealed the internal friction between players and the NHL.\textsuperscript{135} Then, it received widespread negative press due to the Bertuzzi incident, which only worsened its already plummeting public esteem. Most recently, ESPN decided not to renew the $60 million dollar contract option to televise NHL games due to poor ratings.\textsuperscript{136} NHL ratings have become so low that when ESPN filled the airtime void during the lockout with low-popularity programming like “Bowling Night” and “Stump The Schwab,” these programs drew ratings close to the number of people who had watched NHL games.\textsuperscript{137} The NHL’s new broadcast home is Outdoor Life Network, or OLN, a station better-known for its niche in recreational sports such as hunting and fishing.\textsuperscript{138} This demotion is yet another reminder that the NHL is not what it once used to be. With an embarrassing lockout to its name and now ESPN’s rejection, the NHL simply cannot afford to crucify its credibility even more. There is no better time for the NHL to put serious effort into internal reform.

If the NHL operated out of a desire to remain true to the integrity of ice hockey rather than as a money-generating enterprise, perhaps there would never even be a need to relinquish adjudication to criminal courts. Ineffective punishments such as fines and suspensions, timid administration of these punishments, and implied support along with overt directives for violence all contribute to the fact that violence has gotten out of hand. Will it take a death on the ice before the NHL stops allowing players to slip through the cracks and escape true justice for their egregious acts? Perhaps an overhaul of NHL regulations, outlining stricter, more specific rules and imposing harsher sanctions and fines for misconduct would be a promising start to a safer game.


\textsuperscript{137} Id.

\textsuperscript{138} Id. OLN is based in Connecticut. Debuting in 1995, Comcast took full control of the network in 2001. The network reaches 60 million homes, compared with nearly 90 million for ESPN.
The criminal courts must also realize the seriousness of violence in ice hockey. To maintain their legitimacy as the bedrock of justice, criminal courts must treat victims such as Moore with dignity by imposing proportionate punishments, rather than by humoring them by going through the motions of formal procedures for conviction.

No matter how well organized and capable of self-policing the NHL may become in the future, players should never be immune from successful criminal prosecution once they step outside the boundaries of the behavior natural to the sport. If a physical assault on the ice would translate to a criminal assault on the street, the injured player becomes just a regular “innocent bystander,” and the assaulter should have to pay for it, just like anyone else. His fame and fortune should not shelter him from the criminal justice system. Even the most spirited ice hockey fans would agree that the hockey arena was never meant to be a sanctuary for sickening acts of violence.

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