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TOO MANY MEN ON THE ICE?: WHY CRIMINAL  
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ON-ICE VIOLATIONS IN THE NHL

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**TOO MANY MEN ON THE ICE?: WHY CRIMINAL PROSECUTORS SHOULD REFRAIN  
FROM POLICING ON-ICE VIOLATIONS IN THE NHL**

by Nicola Joyce\*

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## **Too Many Men on the Ice?: Why Criminal Prosecutors Should Refrain from Policing On-Ice Violence in the NHL**

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When sports fan and musician Five for Fighting's John Ondrasik came up with the name for his band, he meant it to refer to the punishment doled out by NHL referees for semi-serious altercations: five minutes in the penalty box.<sup>1</sup> Little did he think that only a few years later what used to get players five minutes in the penalty box could subject them to substantially longer time-outs – in jail. Since Boston Bruin Marty McSorley's 2000 conviction for assault against Vancouver Canuck Donald Brashear, criminal prosecution has become a real possibility for professional hockey players who get too violent during a game.<sup>2</sup> What is too violent though? Ondrasik's choice of name reflects the popular recognition and acceptance of fighting as a key component of the game of hockey. Fighting is of course officially prohibited, but expected, and even encouraged, all the way from management down to the fans. Physicality, aggression and collisions – accidental and planned – are inescapable aspects of the game of hockey; outright fighting is just the natural progression of this recipe,<sup>3</sup> and has become as natural as the forward pass. By writing sanctions into the rules of the game and drawing the line at a certain level of violence, game officials and players have in effect sanctioned any aggressive activity below that line, and thus incorporated fighting into the game. Players expect the possibility of a fight, and certain players even openly tout their reputations as “enforcers,” physical rather than finesse players, whose job it is to deliver preemptive hits

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<sup>1</sup> *VH1.com: Five for Fighting : Biography*, at [http://www.vh1.com/artists/az/five\\_for\\_fighting/bio.jhtml](http://www.vh1.com/artists/az/five_for_fighting/bio.jhtml).

<sup>2</sup> Indeed, some even feared it could mean the downfall of sports entirely. Gregory Schiller, *Are Athletes Above the Law? From a Two-Minute Minor to a Twenty-Year Sentence: Regina v. Marty McSorley*, 10 SPORTS LAW. J. 241, 264-265 (2003).

<sup>3</sup> See e.g., Barbara Svoranos, Comment, *Fighting? It's All in a Day's Work on the Ice: Determining the Appropriate Standard of a Hockey Player's Liability to Another Player*, 7 SETON HALL J. SPORT L. 487, 490 (1997).

to allow their own offensive players to set up plays, and to deliver retributive hits for questionable blows delivered on their teammates by opposing players. This physical aspect of the game is accepted, expected, and demanded by fans too.

However, in recent years, players have gotten bigger,<sup>4</sup> equipment has gotten bulkier, physical play has increased, and some might fear the physical aspect of the game has overshadowed the skill portions. Indeed, the NHL recently made several rule changes meant to open up the play and create more action. Nevertheless, hockey has been and will always be a naturally high contact, high adrenaline sport, and when the two combine, aggression will out. The question then becomes when does aggression cross the finely drawn line, and what should happen when that line is crossed? Moreover, it begs the question: who should draw that line?

Some scholars have suggested that on-ice violence should not be ruled out of the realm of the criminal authority of the state, and that criminal prosecution is necessary and desirable to curb the level of violence in the NHL.<sup>5</sup> This paper will respond to the arguments that criminal prosecution is both an appropriate and a viable mechanism for reducing the severity and frequency of professional hockey violence. Part One will give a brief introduction to the problem of excessive violence in hockey. Part Two will present the arguments promoting criminal prosecution as the appropriate solution to the problem. Part Three will respond with the deficiencies in the application of criminal law to the domain of the NHL. Part Four will explore the existing potential for internal League regulation. I will then conclude generally that criminal law is largely inappropriate and

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<sup>4</sup> The average player is one inch taller and 16 pounds heavier, at 6'1" and 204 pounds. KEN DRYDEN, *THE GAME* 285 (2003).

<sup>5</sup> See generally Schiller, *supra* note 2; Jeff Yates and William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 CORNELL J. L. & PUB. POL'Y 145 (2002).

ineffective in the enforcement of on-ice prohibitions against excessive violence, and that more efficient enforcement mechanisms lie within the contractual realm of the League itself.

## I. Hockey and Violence

"By the age of 18, the average American has witnessed 200,000 acts of violence on television, most of them occurring during Game 1 of the NHL playoff series."<sup>6</sup>

Hockey is a game of grit. While other sports may rival hockey in its level of hard-hitting, no holds barred action, when you add in the high speed, long sustained play, hard boards, and slick ice, none can compete. Football has the power, but the short plays lack the added adrenaline of sustained play. Soccer and basketball have comparable speed of play, but permit less contact between participants. When it comes down to it, nothing and no one can compete with the 6'2, 230 pound power forward, strapped into skates that add on another 3 inches, armed with a 63 inch wooden or metal stick,<sup>7</sup> determined to put the puck in the net at all costs. The game is incontrovertibly, inescapably and aggressively physical. Imagine 10 hulking athletes on skates moving more than 20 miles per hour,<sup>8</sup> competing for control of a 3 inch wide, 1 inch high disk of frozen vulcanized rubber<sup>9</sup> that itself can travel more than 100 miles per hour,<sup>10</sup> on a rock solid sheet of ice 200 feet by

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<sup>6</sup> *Hockey Quotes*, quoting Sports Illustrated writer Steve Rushin, at <http://www.springfieldicehockey.org/HockeyQuotes.htm>.

<sup>7</sup> NATIONAL HOCKEY LEAGUE OFFICIAL RULES 2006-2007 18 (2006) [hereinafter OFFICIAL RULES].

<sup>8</sup> *Science of Hockey: Skating*, at <http://www.exploratorium.edu/hockey/skating2.html>.

<sup>9</sup> OFFICIAL RULES, *supra* note 7, at 31.

<sup>10</sup> *Science of Hockey: Shooting the Puck*, at <http://www.exploratorium.edu/hockey/shooting1.html>.

85 feet, bound in by boards and glass.<sup>11</sup> The possibilities for disastrous accidental collisions are staggering. Moreover, physical contact is both permitted and encouraged to aid in the scramble for the puck, guaranteeing purposeful collisions.

In fact, not only is aggressive physical action foreseeable, it is written into the game itself. The rules of the NHL themselves, by defining the penalties for unacceptable physical interactions, implicitly incorporate anything falling short of the line, and serve not to eliminate illegal actions, but simply to set out the costs thereof. Even actions illegal under the formal rules of the game are often deemed sanctioned by unwritten rules or codes among players, coaches, and management.<sup>12</sup> As legendary goalie Ken Dryden and author of a classic book on hockey, *The Game*, writes, “It’s not what’s a penalty, it’s what the game allows.”<sup>13</sup> The gradual integration of the physical game begins at the peewee level of club hockey, when players are explicitly permitted to check each other, but players are introduced to “body play” beginning even earlier.<sup>14</sup> By the time players reach the professional level, physicality and aggression are indispensable; the failure to prove one’s ability to go up against the big guys can erase one’s chances of making it in the NHL.<sup>15</sup> Particularly as players have gotten bigger, a significant part of puck control

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<sup>11</sup> OFFICIAL RULES, *supra* note 7, at 1.

<sup>12</sup> How widespread and accepted the concept of such a code is may be debated. In a strong example in favor of the existence of such a code, Judge Kitchen in the McSorley case, after having heard extensive evidence about the game itself, concluded that such a set of unwritten rules do in fact exist. *See Regina v. McSorley, Reasons on Judgment, 2000 BCPC 0116, para. 21, available at* [http://www.provincialcourt.bc.ca/judgments/pc/2000/01/p00\\_0116.htm](http://www.provincialcourt.bc.ca/judgments/pc/2000/01/p00_0116.htm) [hereinafter McSorley (judgment)].

<sup>13</sup> DRYDEN, *supra* note 4, at 218.

<sup>14</sup> USA Hockey, a leading youth hockey organization allows for checking beginning at the peewee (age 12) level, but advises introducing techniques and safety issues at the younger levels. It publishes two guides for youth hockey coaches: “Introduction to Body Contact” and “Advanced Body Contact,” *available at* [http://www.usahockey.com/usa\\_hockey/coaches/coaches/coach\\_ed\\_materials/body\\_contact/body\\_contact](http://www.usahockey.com/usa_hockey/coaches/coaches/coach_ed_materials/body_contact/body_contact). *See also* Schiller, *supra* note 2, at 245.

<sup>15</sup> Players who fail to meet the standard of aggressive play may be “traded, cut, sent to the minors, or receiv[e] a lower salary.” Schiller, *supra* note 2, at 245. Sports agent Bob Woolf notes that teams wishing to secure a particularly skilled but less aggressive player may even offer to enroll the player in boxing classes to toughen him up. Yates & Gillespie, *supra* note 5, at 150.

has moved from stick-handling to use of the body to steal the puck, to move players out of the way, and to get players out of the game all together. Checking and blocking have always been a part of the defensive game; Dryden goes so far as to call collisions “our basic defensive strategy.”<sup>16</sup> Once the forward pass was introduced (it was fully in place by 1931), speed and force became as central to the offensive game, without reducing the effectiveness of body-checking as a defensive strategy.<sup>17</sup> Physical presence thus became as important as pure skill. In the 2003-2004 season, the Boston Bruins were actually noted for their so-called “700-Pound Line,” composed of Joe Thornton at 6’4” and 220 pounds, Glen Murray at 6’3” and 225 pounds, and Mike Knuble at 6’3” and 225 pounds.<sup>18</sup> The nickname points out how the potential for sheer force has come (in some cases) to overshadow the finesse game played by athletes like Wayne Gretzky (who came in at a mere 5’10”). Despite the potential of the forward pass for opening up the game to skating and passing skills, making the close games of stick-handling and checking less relevant, it simply served to speed up the game and enable defensemen to get in on the offense<sup>19</sup> – both of which created more opportunities for the hard-hitting action that appealed to fans and players alike.

Notwithstanding the obvious drawbacks, the raw, gritty action of the game is in fact a huge draw for players too. Whatever the sociological and psychological motivating factors, hockey players love the rush of the game’s speed, strength and aggression. All players undeniably accept the risks and inevitabilities of not only pain, but eventual debilitation. A typical player realizes that a career in hockey poses “risks and life-

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<sup>16</sup> DRYDEN, *supra* note 4, at 237.

<sup>17</sup> *Id.* at 238.

<sup>18</sup> DON WEEKES, *HARDCORE HOCKEY TRIVIA* 104 (2004).

<sup>19</sup> DRYDEN, *supra* note 4, at 238-239.

lingering side effects not present in other jobs,”<sup>20</sup> and can expect that his career will end not when he voluntarily chooses to retire, but when his body (or his team doctors) tell him he can take no more. As Dryden put it, on approaching his retirement, “more and more I find myself thinking: *I’ve lasted this long: please let me get out in one piece.*”<sup>21</sup> The injured hockey player doesn’t stop – in part because his gut tells him not to, in part because his teammates and coach tell him not to, and in part because the rules of the game themselves tell him not to.<sup>22</sup> They play because they love the game, pain be damned, and they play as long as they can, as hard as they can.

For example, during Game 7 of the 1952 Stanley Cup semifinals against the Boston Bruins, Montreal Canadien Maurice “The Rocket” Richard – famous for the fights he started and the fights he inspired – was knocked unconscious.<sup>23</sup> Rather than forcing to sit out the rest of the game, Richard was back on the ice 16 minutes later, where he scored the go-ahead goal.<sup>24</sup> In 1961, another Canadien, Bernie Geoffrion, in another semi-final game, actually convinced teammate Doug Harvey to help him saw off the cast on his knee, in transit to a game in Chicago, just for the chance to play.<sup>25</sup> At that point, the Canadiens were in pursuit of their sixth straight Stanley Cup, an aspiration that, to them, justified the risks involved in using a knife swiped from the train kitchen and hiding in the women’s restroom to get off the cast protecting Geoffrion’s not-yet-healed

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<sup>20</sup> Id. at 173.

<sup>21</sup> Id. at 131.

<sup>22</sup> The rules state that if an injured player wishes to leave the ice, he may do so, but play must continue. If the player is so injured that he cannot leave the ice on his own, the referee or linesman may stop play, but not until the injured player’s team gains possession of the puck. Moreover, if the injured player’s team is in possession of the puck at the time of the injury, the play should not be stopped if the team is in a scoring position. Injured goalies face the same incentives to play through the pain; the rules dictate that after sustaining an injury, the goalkeeper “must be ready to resume play immediately,” and no additional time shall be allowed for the injured goalie (or substitute goalie if necessary) to get back in the net. Injury is thus subordinated to the objective of goal-scoring. OFFICIAL RULES, *supra* note 7, at 13-14.

<sup>23</sup> DAN WEBER, THE BEST BOOK OF HOCKEY FACTS & STATS 216 (2004).

<sup>24</sup> Id.

<sup>25</sup> WEEKES, *supra* note 18, at 118.

torn ligaments.<sup>26</sup> Apparently the logic even convinced their coach, despite his initial anger, to allow Geoffrion to numb his knee with ice so he could play as much as he could.<sup>27</sup>

While the noble attempt to contribute to his team came to no avail – Chicago went on to win the series and the Cup<sup>28</sup> – three years later, a Toronto Maple Leaf demonstrated the hockey player’s almost superhuman ability to sublimate pain (and possibly common sense) simply in order to play, and how that attitude can mean the difference between a win and a loss. Late in the third period of Game 6 of the 1964 Cup finals, Toronto’s Bobby Baun took a shot in the ankle and had to be carried out on a stretcher.<sup>29</sup> When the game went to overtime, Baun – obviously a member of the “just tape it up” club – jumped right back on the ice where he scored the winning goal. Toronto would go on to defeat Detroit in Game 7, and Baun would learn his ankle was actually broken.<sup>30</sup> While Baun naturally probably did not regret his decision to return to the game, it appears neither did Geoffrion. The chance to play was enough, as it is for many players. In fact, unlike some other sports who offer competitors more money and more fame, heart and the pure desire to play must still serve as strong incentives for hockey players to subject their bodies to the things they do. Veteran Mark Messier’s comment on his forthcoming arthroscopic shoulder surgery is exemplary of the attitude players tend to take towards even serious injury: “The only way this would be a career-ending injury is if I didn’t come back and there’s no way I’m thinking like that.”<sup>31</sup>

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<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id.

<sup>29</sup> WEBER, *supra* note 23, at 220.

<sup>30</sup> Id.

<sup>31</sup> Id. at 146.

All these factors combine to produce an arena of unavoidable, even sought-out carnage, with the concomitant injuries to show for it, in particular eye and head injuries. Between the 1972-1973 and 2001-2002 seasons NHL players recorded 1,914 eye injuries.<sup>32</sup> As recently as 2000, in one of the most vivid incidents in recent memory, then Toronto Maple Leaf Brian Berard took a high stick from Ottawa Senator Marian Hossa, resulting in a broken orbital bone, a cut cornea and a detached retina – and gushes of blood on the ice.<sup>33</sup> While the retina was successfully reattached 10 days later, the injury so devastated Berard's vision he was forced to retire.<sup>34</sup> In true NHL spirit, even that could not keep him down – he managed to stage a comeback a year later thanks to a special contact lens that enabled him to meet the NHL 20/400 vision requirement.<sup>35</sup> Current Philadelphia Flyer Mike Knuble (of the above noted 700 Pound Line) recently suffered a broken cheekbone and a broken orbital bone, requiring surgery to implant two plates into his face.<sup>36</sup> The injuries occurred in a (clean) collision with New York Ranger Brendan Shanahan, who himself suffered a concussion that took him off the healthy roster.<sup>37</sup> Concussions are a major problem in hockey, with the record as of the 2003-2004 season being 94 concussions suffered by players in a single season.<sup>38</sup> Concussions have ended the careers of players like Pat LaFontaine and Brett Lindros,<sup>39</sup> and seriously hampered the careers of others, notably superstar Eric Lindros. In 2003-2004, concussions

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<sup>32</sup> WEEKES, *supra* note 18, at 19.

<sup>33</sup> Canadian Press, *The visor debate: Berard says they should not be mandatory*, Oct. 18, 2005, at <http://www.nhl.com/news/2005/10/239208.html>.

<sup>34</sup> *Id.*

<sup>35</sup> Even now, Berard does not support mandatory visors, arguing that eye injury is a foreseeable incident of the game and players, as both professionals and adults, should be able to decide for themselves whether to wear a visor or not. *Id.*

<sup>36</sup> Associated Press, *Flyers RW Knuble has surgery to insert a plate in his face*, Feb. 22, 2007.

<sup>37</sup> *Id.*

<sup>38</sup> WEEKES, *supra* note 18, at 57.

<sup>39</sup> *Id.*

contributed to the L.A. Kings record-setting loss of 629 man games due to injuries, including 2 top players lost to concussions, and others to shoulder injuries, pinched nerves, and torn knee cartilage.<sup>40</sup> On a typical day, the NHL Injury Report is populated by dozens of players sidelined by concussions or possible concussions; groin pulls; abdominal strains; broken hands, wrists, fingers, toes; sprained shoulders, knees, ankles, MCLs, and elbows; and the catch-all “lower body injury” or “upper body injury,” just to name a few.<sup>41</sup> These of course only constitute the injuries that actually sideline players; many will play through the pain. In perhaps the most devastating example of hockey-related injury, in 1937, Howie Morenz, then playing for the Montreal Canadiens suffered a serious leg break after an entirely legal hit by Chicago Blackhawk Earl Seibert while his skate was caught in a crack between the boards.<sup>42</sup> Not only did the break end Morenz’s career, but his life, as he died several weeks later due to complications.<sup>43</sup>

Those are just the consequences of normal play, legal hits, and accidents, and represent largely unavoidable injuries. Perhaps surprisingly, full-out fights do not often result in major injuries. Fights have become a matter of show; players engage in fights in order to pump up their teammates, to show their bravado.<sup>44</sup> Even when players instigate fights in retaliation for questionable hits against their teammates that perhaps went unpenalized, it is more of a “ritual fight” – a matter of intimidation and symbolic reproach rather than an attempt to injure.<sup>45</sup> While officially illegal, fighting has become not only acceptable conduct, but an accepted part of game strategy. From the player’s

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<sup>40</sup> Id. at 107.

<sup>41</sup> The NHL Injury Report can be accessed at <http://sports.espn.go.com/nhl/injuries>.

<sup>42</sup> WEBER, *supra* note 23, at 149.

<sup>43</sup> Id.

<sup>44</sup> In fact, Judge Kitchen ascribed this very reason to Marty McSorley’s assault on Donald Brashear in highly charged match between the Boston Bruins and the Vancouver Canucks. McSorley (judgment), *supra* note 12, at para. 73.

<sup>45</sup> DRYDEN, *supra* note 4, at 210.

perspective, “It is a legitimate response to a wrongful act committed by another player...the honorable response would be to initiate a fight because it is considered more respectful to your opponent than retaliating with the same objectionable conduct.”<sup>46</sup> The thinking extends up through the coaching ranks too, with coaches like Buffalo Sabres’ Lindy Ruff admitting he directed his players “go out and run ‘em” after an Ottawa Senator delivered an objectionable elbow to Sabre Chris Drury, starting a brawl that would last 5 full minutes and result in 100 minutes in penalties.<sup>47</sup> Fighting it seems has some unofficially recognized utility notwithstanding the official penalties – sometimes hockey players – and coaches<sup>48</sup> – really do take one for the team. Rarely do these fights cause the participants major injuries though; they are usually symbolic scuffles.

The real problem, most critics of the sport would agree, is when players cross even beyond the scope of this informally incorporated ritual fighting to conduct that clearly offends even the most desensitized observer. Illegal hits with no legitimate purpose other than to so injure the other player as to keep him off the ice, bashing another player’s head into the ice once he has bowed out of a mutual fight, slashing or high-sticking in a way that will inevitably pose a high risk of serious injury – all these are examples of behavior that falls neither within the formal rules or any unwritten code, if there is any such thing, and that has no recognizable contribution to the game. The Forbes, McSorley and Bertuzzi incidents, discussed further hereinafter, all serve as evidence that the NHL provides clear opportunity for extreme and blatant violence that almost no one would legitimate for any purpose. At the same time, players and followers

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<sup>46</sup> Svoranos, *supra* note 3, at 492.

<sup>47</sup> Canadian Press, *NHL fines Sabres coach Lindy Ruff for sending out tough guys in brawl*, Feb. 24, 2007, at <http://www.nhl.com/nhl/app?articleid=289522&page=NewsPage&service=page> [hereinafter *NHL fines Sabres coach*].

<sup>48</sup> Coach Lindy Ruff was fined \$10,000 by the NHL for his role in inciting the fight. *Id.*

of the game would agree the hockey not only contemplates, but condones a level of violence and aggression that makes risk and injury unavoidable. The questions then are twofold: First, where exactly is this line of clearly excessive aggressive behavior? The inescapability of “the intense physicality of the sport” combined with the informal acceptance (perhaps even prescription<sup>49</sup>) of fighting make determining the proper standard of behavior among NHL players more complex than would seem at first glance. Second, what should the consequences of such behavior be, and who should administer those consequences?

## II. Criminal Court Intervention

“[T]o suggest that the governing body of a particular sport determine appropriate sanctions for a quasi-criminal or a criminal act would be tantamount to granting the board of directors of General Motors jurisdiction over the determination of guilt or innocence and the appropriate punishment for one of their employees who, while on the job, killed his foreman.”<sup>50</sup>

While Dave Forbes faced assault charges in 1975,<sup>51</sup> and Dino Ciccarelli became the first NHL player convicted for on-ice assault in 1988,<sup>52</sup> the potential for criminal enforcement against on-ice violence really came into the popular consciousness with the

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<sup>49</sup> Svoranos, *supra* note 3, at 490, noting “players say that these informal rules even prescribe fighting in appropriate situations.”

<sup>50</sup> Gary W. Flakne & Allan H. Caplan, *Sports Violence and the Prosecution*, 13 TRIAL MAG. 33, 33-34 (1977), *quoted by* Yates & Gillespie, *supra* note 5, at 152.

<sup>51</sup> *See infra* text accompanying notes 58-61.

<sup>52</sup> Ciccarelli earned the further title as the first professional athlete of any kind to be convicted and jailed for in-game conduct. Yates & Gillespie, *supra* note 5, at 154.

trial of Marty McSorley in 2000 for his actions against Donald Brashear. In the wake of McSorley's conviction of assault with a weapon, critics of the League's apparent failure to reign in the violence had ample fodder for arguments that the criminal courts were indeed the proper intervening authority to restore order – or at least a semblance of it – to the ice.

The argument for criminal enforcement against excessive violence in the NHL proceeds in four basic parts. First, the frequency and magnitude of extreme violence in the NHL evinces a problem equivalent to criminal assault. Second, the NHL (including management, coaches and players) has both insufficient incentives and insufficient mechanisms to effectively enforce prohibitions against such violence such that intervention by state authorities is necessary. Third, the state has clear interests justifying intervention including promoting the integrity and even application of the criminal law, and controlling the overspill effects of on-ice violence at the amateur hockey and spectator levels. Fourth, past cases have proved that actions against players for on-ice violence are viable,<sup>53</sup> but have not exploited the courts' full potential as punitive and deterrent force.<sup>54</sup>

Proponents of criminal court intervention into on-ice violence contend that while there may be a special standard of care for sports in general and hockey in particular, the NHL has fostered a climate of violence that exceeds any definition of legitimate aggression. They argue that there are times when on-ice altercations not only clearly violate any possible standard of behavior, but actually meet the basic definition of

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<sup>53</sup> Id. at 154, suggesting that past precedent provides “encouraging evidence” for the future of criminal prosecutions against athletes for on-ice conduct.

<sup>54</sup> Schiller in particular asserts that *Regina v. McSorley* presents a failure of the court in this respect. Schiller, *supra* note 2, at 273-274.

criminal assault<sup>55</sup>, which has three components: (1) an act (or omission); (2) with an intent to kill or injure or with criminal negligence; (3) and resulting harm (generally a bodily injury).<sup>56</sup> When athletes behave in a way that constitutes criminal assault, be it on the ice or off the ice, they should be held responsible for it under the criminal law. While the League may impose its own penalties, many critics argue nothing the League can do can either “accurately depict the level of violence on the ice...[or] supplant legal action for criminal violence.”<sup>57</sup>

The first true example of such clearly excessive, one-sided violence<sup>58</sup> occurred in 1975, in a fight between Boston Bruin Dave Forbes and Minnesota North Star Henry Boucha that led Minnesota authorities to charge Forbes with aggravated assault with a weapon.<sup>59</sup> After allegedly threatening Boucha saying “I’ll get you; but it won’t be with this [his glove]. It’ll be with my stick; I’ll shove it down your throat,” Forbes, coming straight out of the penalty box, hit Boucha with a high stick to the eye (characterized by many as an attempt to actually gouge out Boucha’s eye), causing permanent injury,<sup>60</sup> and then “repeatedly slammed Boucha’s head into the ice.”<sup>61</sup>

In 1988, Dino Ciccarelli used his stick in a similar manner, hitting Luke Richardson in head twice followed by a punch to the mouth<sup>62</sup> – a move with no recognizable value apart from injuring Richardson. In 2000, Marty McSorley, in pursuit

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<sup>55</sup> See generally Schiller, *supra* note 2; also Yates & Gillespie, *supra* note 5.

<sup>56</sup> WAYNE R. LAFAVE, CRIMINAL LAW 816 (2003).

<sup>57</sup> Schiller, *supra* note 2, at 248.

<sup>58</sup> St. Louis Blue Wayne Maki and Boston Bruin Ted Green were separately prosecuted for assault for a mutual fight in a 1969 game. Maki was acquitted on a claim of self-defense; Green successfully argued “instinctive action” and was likewise acquitted. Yates & Gillespie, *supra* note 5, at 153.

<sup>59</sup> Yates & Gillespie, *supra* note 5, at 159.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at note 117.

<sup>62</sup> *Id.* at 154.; see also Svoranos, *supra* note 3, at 506. Some sources indicate Ciccarelli actually hit Richardson three times over the head. Schiller, *supra* note 2, at 247.

of Donald Brashear, apparently seeking a fight, blindsided Brashear with a slash in the side of the head, causing Brashear to fall to the ice where he suffered a grand mal seizure and a grade three concussion.<sup>63</sup> Brashear was further prohibited from physical activity for a full month afterwards.<sup>64</sup> Only four years later, Todd Bertuzzi assaulted Steve Moore in a near fatal incident that knocked Moore unconscious and left him hospitalized for several weeks with facial lacerations, a concussion, and fractures of the C3 and C4 vertebrae.<sup>65</sup> All four of these players engaged in conduct with no legitimate connection to the game of hockey, crossing the line of acceptable conduct drawn not only by the NHL, but by the criminal law. The only purpose or foreseeable result of their conduct was the serious bodily harm of another, which committed under other circumstances would be punishable by law.

The fact that the NHL prohibits and punishes such conduct does not remove the conduct from the police power of the state.<sup>66</sup> In fact, so the argument goes, the history of the NHL's treatment of such violence only reinforces the proposition that the state should in fact intervene. The continuing occurrence of such extreme violence despite the penalties, suspensions and fines doled out by the League demonstrate a lack of effective enforcement mechanisms for deterring inappropriate aggression.<sup>67</sup> Offending players are given anywhere from 2 minutes in the penalty box for roughing to full match penalties during a game, and the NHL can later impose additional game suspensions and/or

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<sup>63</sup> McSorley (judgment), *supra* note 12, at para. 53-59.

<sup>64</sup> *Id.* at para. 59.

<sup>65</sup> Regina v. Bertuzzi, Excerpt from Proceedings, Reasons at Sentence, 2004 BCPC 0472, para. 21-24, available at [http://www.provincialcourt.bc.ca/judgments/pc/2004/04/p04\\_0472.htm](http://www.provincialcourt.bc.ca/judgments/pc/2004/04/p04_0472.htm) [hereinafter Bertuzzi].

<sup>66</sup> Schiller, *supra* note 2, at 248; also Yates & Gillespie, *supra* note 5, at 152.

<sup>67</sup> Schiller suggests that the penalty statistics with regard to fighting and other violent infractions do not reflect the actual level of violence that occurs in the NHL. Schiller, *supra* note 2, at 248.

monetary fines,<sup>68</sup> but these penalties may not necessarily match the severity of the offenses. For instance, when McSorley was convicted of assault for the aforementioned incident, NHL Commissioner Gary Bettman initially suspended him for the rest of the season and the playoffs, later extending the suspension to a full year, then the harshest penalty ever imposed by the League.<sup>69</sup> While McSorley never got another chance to play in the NHL,<sup>70</sup> Bertuzzi's assault on Moore earned him an immediate 10 minute penalty for intent to injure under the NHL rules,<sup>71</sup> and a suspension spanning the remainder of the season and the playoffs.<sup>72</sup> That NHL season was followed by a lock-out, during which Bertuzzi remained officially suspended, and prohibited from playing for Team Canada in the 2004 World Cup, as well as in any European professional league as many other players did during the lock out, but the League reinstated Bertuzzi in time for the next season played, 2005-2006.<sup>73</sup> Bertuzzi actually ended up banned from fewer NHL games (20 games) than did McSorley (23 games) despite the severity of Moore's injuries. In fact, only one player has ever been banned from the NHL for life: In 1927, the NHL banned Boston Bruin Billy Coutu for punching a referee and inciting a melee during a Stanley Cup finals game.<sup>74</sup> Even his suspension was lifted two years later to allow Coutu to play in the minor leagues, though he never played in the NHL again.<sup>75</sup> Though multi-game suspensions also carry a forfeit of salary – Bertuzzi, for example, forfeited over

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<sup>68</sup> OFFICIAL RULES, *supra* note 7, at 33-60. The Rules further define each infraction at length. *Id.* at 87-155.

<sup>69</sup> Associated Press, *NHL banishes Islanders' Simon for regular season and playoffs*, Mar. 12, 2007, available at <http://sports.espn.go.com/espn/wire?section=nhl&id=2796308> [hereinafter *NHL banishes Simon*].

<sup>70</sup> *Id.*

<sup>71</sup> Bertuzzi, *supra* note 65, at para. 35.

<sup>72</sup> CBC Sports Online, *A star player goes offside*, Feb. 15, 2005, available at <http://www.cbc.ca/sports/indepth/bertuzzi> [hereinafter *A star player goes offside*].

<sup>73</sup> *Id.*

<sup>74</sup> John Niyo, *Simon suspension ranks among most severe*, The Detroit News, Mar. 12, 2007, available at <http://www.detnews.com/apps/pbcs.dll/article?AID=/20070312/SPORTS0103/703120370/1128/SPORTS0103>.

<sup>75</sup> *Id.*

\$500,000 dollars in salary, as well as potential endorsements<sup>76</sup> – it is unclear how effectively a temporary suspension and loss of wages works as a deterrent mechanism for athletes with considerable financial security. A temporary suspension might arguably even give athletes more time to hone their skills, giving them an edge once their suspension has been lifted.

Critics also point out that the NHL lacks sufficient incentives to create effective deterrent mechanisms; neither do they share the basic public interest in protecting the health and welfare of all citizens.<sup>77</sup> To the contrary, management and coaches have a strong incentive to amp up the “adrenaline game”<sup>78</sup> that arguably leads to such extreme incidents because fans pay to see the “speed, violence, and excitement.”<sup>79</sup> To effectively reduce extreme violence would risk rule changes and officiating changes – such as banning fighting – that might affect the overall appeal of a sport that already struggles compared to the revenue generating capacities of other sports.<sup>80</sup> Above all, owners, managers, and coaches who write the rules “are businessmen. They may love hockey profoundly, but they have an investment to protect.”<sup>81</sup> Part of that investment is in creating an atmosphere to which a certain level of violence is indispensable. To tamper with the fine lines between desirable aggression, merely acceptable aggression and clearly offensive conduct would pose a risk to that investment that the NHL has little incentive to take. Moreover, Dryden asserts there is actually “an NHL theory of violence,” that rather than discourage violence, takes it as unavoidable aspect of the close

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<sup>76</sup> *A star player goes offside, supra* note 72.

<sup>77</sup> Schiller, *supra* note 2, at 266.

<sup>78</sup> DRYDEN, *supra* note 4, at 247.

<sup>79</sup> *Id.* at 230.

<sup>80</sup> Recent studies show a correlation between fighting and game attendance such that managers may see fighting as “a necessary marketing tool.” Svoranos, *supra* note 3, at 294.

<sup>81</sup> DRYDEN, *supra* note 4, at 254.

physical play.<sup>82</sup> Rather than encourage an environment that inhibits extreme aggression, the League accepts “savage overreaction” as a given and merely hopes that such feelings are “vented quickly...[and] channeled towards, if not desirable, at least more tolerable, directions.”<sup>83</sup> Dryden sums up the NHL theory of violence as “original violence tolerated and accepted, in time to turned into custom, into spectacle, into tactic, and finally into theory.”<sup>84</sup>

On the other hand, the state has clear interests in enforcing prohibitions against on-ice violence. The same general principles justifying criminal assault laws apply to conduct on the ice.<sup>85</sup> Most obviously, the state has an interest in preventing the bodily harm that constitutes a part of the crime’s definition,<sup>86</sup> no less in the context of a hockey game than a mugging in Central Park.<sup>87</sup> Not only should offending hockey players not be above the criminal law simply because their conduct occurs at a certain time in a certain place, neither should the victimized players lose the deterrent protection and retributive power of the criminal law. Moreover, the state has an interest in preventing the overspill effects that the failure to prosecute such conduct produces across society.<sup>88</sup> Hockey violence can have a direct a spill-over effect off the ice, provoking violence among fans.<sup>89</sup> For instance, in 1955, in response to the League’s suspension of Maurice Richard for instigating a fight in an earlier game, more than 10,000 fans inside the Canadiens’ rink, joined by another 800 outside, rioted until 3 in the morning, leading to more than

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<sup>82</sup> Id. at 210.

<sup>83</sup> Id.

<sup>84</sup> Id. at 211-212.

<sup>85</sup> Critics assert “no particular segment of society can be licensed “to commit crime with impunity.” A crime is a crime no matter where it occurs. Yates & Gillespie, *supra* note 5, at 152.

<sup>86</sup> See LAFAVE, *supra* note 56, at 13 for a general discussion of the purposes of criminal law.

<sup>87</sup> The example of the Central Park mugging is drawn from Yates & Gillespie, *supra* note 5, at 162.

<sup>88</sup> Yates & Gillespie, *supra* note 5, at 150-152.

<sup>89</sup> Yates & Gillespie cite the violent nature of the game as a contributing factor to a recent fatal beating of one youth hockey father by another after a disagreement about their sons’ game. Id. at 151.

100 arrests.<sup>90</sup> Dan Weber calls it “a two-fisted answer from Canadiens fans to league’s strong response and season-ending suspension for [the] multiple stick-breaking incident Richard inflicted on Boston Bruin Hal Laycoe.”<sup>91</sup> The riot demonstrates not only the ripple effect on-ice violence has on spectators, but shores up the lack of incentive the NHL has to reprimand such behavior when it risks not only losing revenues, but inciting violent protests. When the police power becomes responsible for the consequences of hockey violence, it goes without saying that the state has an unavoidable interest in preventing the on-ice violence in the first place.

The implicit acceptance of on-ice violence has effects that spread beyond the immediate scope of actual spectators. The high profile of the individuals involved in these cases plus the inherent public nature and broadcast of the incidents magnifies the influence that unpunished conduct has on other players, spectators, and media viewers in reinforcing “cultural notions of acceptable conduct.”<sup>92</sup> The celebrity that attaches to professional athletes makes them “examples, metaphors because [they] enter every home, models for the young because their world is small and we do what they do.”<sup>93</sup> Violence at the pro level thus perpetuates it at the younger levels, creating a nasty cycle of aggression and injury.<sup>94</sup> Furthermore, a society that tolerates violence in one arena may become more violent overall as individuals are desensitized to aggression and gore, and transfer that acceptance to daily experiences.<sup>95</sup>

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<sup>90</sup> WEBER, *supra* note 23, at 218.

<sup>91</sup> Id. at 183.

<sup>92</sup> Yates & Gillespie, *supra* note 5, at 150-151.

<sup>93</sup> DRYDEN, *supra* note 4, at 182.

<sup>94</sup> Schiller, *supra* note 2, at 245.

<sup>95</sup> Presumably this is what Yates & Gillespie mean about “cultural notions of acceptable conduct.” See text accompanying note 92, *supra*.

Once it is accepted that society has a strong interest in intervening to prevent and punish extreme on-ice violence, it must be determined whether such actions are feasible and effective.<sup>96</sup> Critics of the League point to several successful prosecutions of NHL players to demonstrate the viability of criminal prosecution. In 1969, Ontario officials charged both Boston Bruin Ted Green and St. Louis Blue Wayne Maki with assault for the same fight.<sup>97</sup> Though both were acquitted based on ordinary defenses to criminal assault,<sup>98</sup> proponents of state intervention argue that “their dicta laid the foundation for successful subsequent prosecutions.”<sup>99</sup> In 1975, Minnesota prosecutors brought a charge of aggravated assault with a weapon against Dave Forbes for the incident described above. Like Maki and Green, Forbes escaped without punishment, this time by virtue of a hung jury, with three of the twelve jurors opposed to conviction.<sup>100</sup> The state declined to retry Forbes, but argued that the publicity of the case had made the point that such offensive behavior was unacceptable even in the context of a hockey game.<sup>101</sup> These early cases established the power of symbolic prosecution. Thus, by 1988, when Dino Ciccarelli assaulted Luke Richardson, Ontario officials were able to successfully convict him of assault, subjecting Ciccarelli to one day in jail and a fine of \$1,000.<sup>102</sup> Again, symbolism played a significant role, with the judge noting, “[i]t is time now that a message go out from the courts that violence in a hockey game or any other circumstances is not acceptable in our society.”<sup>103</sup>

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<sup>96</sup> Yates & Gillespie, *supra* note 5, at 152-153.

<sup>97</sup> *Id.* at 153.

<sup>98</sup> *See* note 58, *supra*.

<sup>99</sup> Yates & Gillespie, *supra* note 5, at 153-154.

<sup>100</sup> *Id.* at 159.

<sup>101</sup> *Id.* at 160.

<sup>102</sup> *Id.* at 154. The authors also note that Ciccarelli received a 10 day suspension from the League, at a loss of \$25,000 in salary. *Id.* at note 59.

<sup>103</sup> *Id.* at 154.

The next case against an NHL player did not occur until 2000, when Vancouver authorities charged Marty McSorley with assault for his conduct towards Donald Brashear. McSorley, like Ciccarelli, was convicted; his sentence was an 18-month conditional discharge plus a prohibition from ever playing against Donald Brashear again.<sup>104</sup> Judge W.J. Kitchen noted “it is my conclusion that it was less serious than many assaults, but with significant consequences that cannot be ignored.”<sup>105</sup> The grave sentiment appeared a sincere reflection not only of Kitchen’s perspective, but that of the larger community, as Vancouver prosecutors brought charges again only four years later, this time against Todd Bertuzzi for the far more serious injuries inflicted on Steve Moore. For his part, Bertuzzi pled guilty and accepted a sentence of a 1-year conditional discharge,<sup>106</sup> 80 hours of community service,<sup>107</sup> a prohibition against ever playing against Moore,<sup>108</sup> and a \$500 “victim fine surcharge.”<sup>109</sup>

Proponents of regular criminal prosecution of excessive hockey violence assert that these cases demonstrate the feasibility of actions at the most fundamental level.<sup>110</sup> They demonstrate a societal desire to reign in illegal game conduct, a willingness to invest prosecutorial resources, and the ability of courts to apply ordinary criminal assault standards to the specialized context of the game of hockey. Geoffrey Schiller goes so far as to call it a “prosecutorial duty to [bring charges]” and continues, “it is not as difficult as some have argued.”<sup>111</sup> Given the wealth of evidence, including hundreds of witnesses

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<sup>104</sup> Regina v. McSorley, Reasons on Sentence, 2000 BCPC 0117, para. 21 *available at* [http://provinciacourt.bc.ca/judgments/pc/2000/01/p00\\_0117.htm](http://provinciacourt.bc.ca/judgments/pc/2000/01/p00_0117.htm) [hereinafter McSorley (sentencing)].

<sup>105</sup> Id. at para. 2.

<sup>106</sup> Bertuzzi, *supra* note 65, at para. 54.

<sup>107</sup> Id. at para. 61.

<sup>108</sup> Id. at para. 59.

<sup>109</sup> Id. at para. 68.

<sup>110</sup> Yates & Gillespie, *supra* note 5, at 154-155.

<sup>111</sup> Schiller, *supra* note 2, at 255.

and videotapes showing the incident from several angles, and the near impossibility of the defendant from running from the law,<sup>112</sup> the main challenge prosecutors face is establishing the standard by which to prosecute.<sup>113</sup> Even this, proponents argue, is not impossibly complicated.

Criminal assault requires the intent to injure or criminal negligence resulting in bodily harm.<sup>114</sup> The availability of both these theories creates more opportunities for authorities to prosecute both hockey players who deliberately and incontrovertibly attempt to injure another player – such as punching – as well as those who perform highly risky actions that are likely to result in serious harm – like high-sticking to the face area. The commonality is a departure from conduct with a reasonable connection to the game itself – conduct that is assumed to be acceptable despite the inherent risks. The theory is that while sports bear inherent and unavoidable risk (some more than others), sports also carry an intrinsic social utility.<sup>115</sup> We accept the risks that go hand in hand with the game, and assume the players consent to such behavior,<sup>116</sup> ruling the intent out of the category of offensive intent that characterizes assault, and presumably into socially tolerable behavior.

Courts might take one of two basic approaches to determine what bears a legitimate connection to the game. First, the court might look to the NHL rules themselves, creating a standard of behavior that would rule any conduct that violates the

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<sup>112</sup> *Id.*

<sup>113</sup> Yates & Gillespie, *supra* note 5, at 155, remarking that there are “doctrinal rough spots” that need to be smoothed out.

<sup>114</sup> LAFAVE, *supra* note 56, at 816.

<sup>115</sup> Yates & Gillespie, *supra* note 5, at 161.

<sup>116</sup> Both the basic approaches courts have taken in deciding the appropriate standard of behavior for athletes look to the conduct’s nexus to the sport and its objective. *Id.* at 161-163.

written rules open to challenge by the criminal courts.<sup>117</sup> The Model Penal Code approach, considerably more lenient, would question what the “reasonably foreseeable hazards” of the game are; conduct in excess of this standard would bear no reasonable connection to the social utility of the sport, and therefore should be subject to criminal prosecution.<sup>118</sup> This latter approach provides the advantage of allowing the court to consider unwritten rules and player “codes of conduct,” if any such thing exists. Both standards would allow for input from the League itself, which should placate any fears that the courts would assume authority to redefine the game for the NHL and its players.

Conduct bearing a legitimate connection to the objectives of the game speak to another element pertinent to assault charges in the context of a sports competition: consent. One generally cannot consent to be a victim of a crime, whether explicitly or implicitly.<sup>119</sup> The issue of consent should therefore be irrelevant in the cases where an athlete exhibits a clear intent to injure another. The intent to injure plus resulting injuries clearly fulfills the basic criminal assault rubric, and no jury or judge should find difficulty convicting any player whose conduct demonstrably meets those standards.<sup>120</sup> Consent may, however, become an issue when prosecutors choose the criminal negligence theory of assault. While a player can never consent to battery as such, consent applies to the determination of the appropriate standard of care on the ice. What risks players “consent” to are opposed to “unreasonable” risks that then constitute criminal negligence, regardless of the offending player’s intent.

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<sup>117</sup> Id. at 161-162.

<sup>118</sup> Id. at 162-163.

<sup>119</sup> Id. at 161.

<sup>120</sup> Id. at 163, noting that this requires a manifest intent by the player(s) in question, something that may often be difficult to determine, and that the standard may also be underinclusive if relied on as the sole theory of prosecution.

The courts (Canadian and U.S. alike) have not set out a single bright-line set of criteria for determining what risks inhere to sports generally, but an influential list of criteria relevant to “sports consent” came out of the Saskatchewan Court of Appeal in *Regina v. Cey*:

- (1) The conditions under which the game in question is played;
- (2) The nature of the act;
- (3) The extent of the force;
- (4) The degree of risk of injury and probabilities of serious harm;
- (5) That state of mind of the accused;
- (6) Whether the rules of the game contemplate contact;
- (7) Whether the action was an instinctive reflex reaction;
- (8) Whether the action was closely related to play; and
- (9) Whether the action fell within the customary norms and rules of the game.<sup>121</sup>

The precedents created by other sports violence cases, particularly in the minor leagues, thus give the courts considerable guidance for navigating the possibility murky, particularized waters of an intricate game, in which some intolerable behavior might otherwise go insufficiently punished.<sup>122</sup> Moreover, there are incidents like the Bertuzzi-Moore incident that clearly go beyond the scope of the game as contemplated by anyone – players, management, and fans alike. In such cases, the court must be permitted to intervene to apply appropriate disciplinary measures, just as in any other case of excessive violence.

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<sup>121</sup> Id. at 163-164.

<sup>122</sup> Id. at 164, asserting that while past precedents “do not furnish a bright-line rule, they provide a common basis for courts to analyze sports violence.”

Critics further argue that the courts have the mechanisms to effectively punish and deter it. The threats of jail sentences and fines, not to mention the sufferance of a very public trial clearly<sup>123</sup> surpass the deterrent power of the occasionally arbitrary imposition of comparably weak penalties by the NHL.<sup>124</sup> While the judicial system faces the challenges of a vague standard, lack of expertise for determining a proper standard of care, and possible obstinacy by the very witnesses whose interests the courts seek to serve,<sup>125</sup> the imperfect mechanism of the courts still exceeds the alternative, which is to leave a private contractual organization to police behavior that occurs within its own province but has substantial negative effects for all society. Private entities do not share the public's interest.<sup>126</sup> Judge Kitchen explains, “[T]here should be a heavy onus on those purporting to pre-empt the normal criminal process, particularly where it is a private organization such as a group of hockey owners. Statutory bodies must act in the public interest; businessmen have no such obligation.”<sup>127</sup>

### III. The Case against Criminal Cases

“We’re hoping there’s no criminal action. We believe we’re adequately and appropriately policing our own game.”<sup>128</sup>

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<sup>123</sup> Schiller, *supra* note 2, at 258-259.

<sup>124</sup> *Id.* at 248.

<sup>125</sup> Schiller, *supra* note 2, at 51, noting that players may often be unwilling to bring charges on their own for fearing of being “looked down upon” by other players, the NHL, and fans, and that the same disincentives apply to cooperating with the prosecution.

<sup>126</sup> McSorley (judgment), *supra* note 12, at para. 12.

<sup>127</sup> *Id.*

<sup>128</sup> Kevin Allen, *Bettman wants matter closed*, USA Today, Mar. 11, 2004 available at [http://www.usatoday.com/sports/hockey/nhl/2004-03-11-bettman-wants-no-police\\_x.htm](http://www.usatoday.com/sports/hockey/nhl/2004-03-11-bettman-wants-no-police_x.htm), quoting, Gary Bettman, NHL Commissioner while charges were pending against Todd Bertuzzi.

As pleasingly simple as the critics' account seems, the imposition of the criminal justice system onto the disciplinary mechanisms of the NHL poses significant difficulties – with intent, consent, and incentive issues – and furthermore, ignores the real possibilities for internal organizational policing. Critics like Schiller explicitly recognize these problems,<sup>129</sup> but gloss over them in favor of exaggerating the case for criminal prosecution.

The simplest case of excessive violence a court could encounter would involve an obvious attempt to injure, completely outside the scope of the rules, conduct not resembling any type of legitimate action. Such conduct clearly meets the requirements of a criminal assault. However, the question of intent raises three major problems as applied to the context of excessive on-ice violence.

First, as with many other cases of assault outside the realm of hockey, intent is rarely ever explicit.<sup>130</sup> Prosecutors must establish intent by circumstantial evidence – eyewitnesses, implications based on earlier vendettas, the severity of the injuries, and so on. While videotapes can show the conduct itself from every possible angle, prosecutors might have a hard time convincing jurors that players actually intended to physically injure their opponents and nothing else.<sup>131</sup> Indeed, one juror who voted to acquit Forbes in 1975 said after the trial, “Three of us...did not feel [Forbes] intended to inflict any bodily harm.”<sup>132</sup> While some commentators might argue, “This conclusion obviously runs counter to evidence presented at trial showing that Forbes repeatedly slammed

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<sup>129</sup> See Schiller, *supra* note 2, at 250-255.

<sup>130</sup> Id. at 252-252; also Yates & Gillespie, *supra* note 5, at 163, noting the manifestation of intent may be unclear where “the actions occur rapidly and within a broader interaction (such as a bench-clearing brawl).”

<sup>131</sup> McSorley (judgment), *supra* note 12, at para.51, admitting that even with videotapes “are only useful for analyzing relative body positions, but give misleading impressions of deliberateness in movements.”

<sup>132</sup> Yates & Gillespie, *supra* note 5, at note 117.

Boucha's head into the ice,”<sup>133</sup> those jurors claimed “violence and fighting in hockey made the attack just part of the game” notwithstanding the severity of the injuries.<sup>134</sup> The fine line between acceptable aggression and intolerable violence make pointing to an unequivocal pure intent to injure difficult for even the most capable prosecutor – especially before a jury of sports lovers.<sup>135</sup> Furthermore, even a judge would have difficulty figuring out from a videotape what and why an incident occurred. As Judge Kitchen noted in explaining his judgment in against Marty McSorley, “care must be taken in drawing conclusions from slow-motion or frame-by-frame analysis. These techniques are only useful for analyzing relative body positions, but give misleading impressions of deliberateness in movements.”<sup>136</sup>

The second problem with an “intent to injure” requirement raises the question of the appropriate course of action when an intent to injure does not result in major bodily harm, or the harm is not clearly linked to the offensive conduct.<sup>137</sup> Naturally, the almost impossibility of escaping even a clean match without injury makes this seem an irrelevant question – if players get hurt during “clean” play, certainly they will not escape a purposeful attempt at injury without harm. However, it does demand attention if what critics oppose is no less the excessively violent conduct than the injuries themselves. Though criminal assault is in part defined by the production of bodily injury, it seems that any effective deterrent mechanism must act against the unsuccessful intent to injure just as strongly as against conduct actually producing injury. Yet Tates & Gillespie note that

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<sup>133</sup> Id.

<sup>134</sup> Id. at 159-160.

<sup>135</sup> Schiller, *supra* note 2, at 252, noting that prosecutors may find a jury of sports fans an obstacle to successful conviction.

<sup>136</sup> McSorley (judgment), *supra* note 12, at para. 51.

<sup>137</sup> For example, a player may have been nursing an injury from a previous game, or have suffered a minor injury earlier in the same game that the conduct merely exacerbated.

it is “highly unlikely that a jury would convict a player for violation of a game safety rule where no serious injury had been suffered by the victim.”<sup>138</sup> Still, one might argue that malicious conduct that fails to produce harm is just as destructive of social norms of behavior as simply negligent conduct that does produce injury. Indeed, in noting his reasons on sentence for McSorley, Judge Kitchen recognized as much, stating “I find the facts of the Ciccarelli Case more serious than McSorley’s, even though the consequences were less severe.”<sup>139</sup> If, however, we require a demonstrable harm resulting from an intent to injure in order to justify a prosecution, we create an ex post determination of what offenses in fact constitute a crime. If without injury, there is no crime, or without intent but *with* injury,<sup>140</sup> there is a crime, players face a level of uncertainty about the appropriate standard of care. Such an uncertainty would result in either underdeterrence if players are particularly risk-seeking, or overdeterrence if they are risk averse. Most likely, players will continue to play as physically as they do because the game as they know it demands it, and because the judicial standard does not clearly tell them to act otherwise. In either case, because hockey regularly produces injury such that intent and harm are more often unrelated than not, the standard will always be poorly tailored to the context to which critics seek to apply it. The criminal standard simply does not fit a game defined by a separate set of rules that allows and encourages a certain level of violence – something that cannot be said of the criminal law.

This connects to the third problem with criminalizing an intent to injure in the context of ice hockey: an intent to injure is, to a certain degree, an implicitly accepted

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<sup>138</sup> Yates & Gillespie, *supra* note 5, at 162, calling it “highly unlikely that a jury would convict a player for violation of a game safety rule where no serious injury had been suffered by the victim.”

<sup>139</sup> McSorley (sentencing), *supra* note 104, at para. 14.

<sup>140</sup> As there would be under a criminal negligence standard.

game tactic.<sup>141</sup> Though criminal assault statutes may vary in the degree of harm necessary to trigger charges, hockey players regularly engage in conduct they know poses a high risk or even inevitability of causing some harm to another player. This makes the comparison to the mugger in Central Park less apt. While they both have an intent to injure, we should hesitate to equate the mens rea of the mugger with the hockey player in the heat of the game – a game that requires a certain level of aggression.<sup>142</sup> The very point of a legal hit is to disable a player, usually just long enough to be out of the momentary play. However, even “clean” hits can be used to injure a player for considerably longer. Even Luke Richardson, the “victim” in the 1988 Ciccarelli case admits that sometimes an effective hit is an acceptable strategy, even though it will necessarily injure another player: Remarking on a check he delivered to New York Ranger Tony Granato that resulted in Granato’s hospitalization, Richardson said, “It was sort of a plus to get him out of there. It’s too bad he ended up in the hospital, but better there than on the ice, where he could have scored the winner.”<sup>143</sup>

The scope of appropriate physical aggression goes beyond the written rules. Thus in *Regina v. McSorley*, Judge Kitchen had to determine “whether the slash by McSorley, although in contravention of the written rules, was nevertheless within the customary norms and rules of the game.”<sup>144</sup> In *Regina v. Bertuzzi*, Judge Weitzel noted, “hockey is a sport in which there is significant physical contact, and in certain circumstances fighting is considered to be part of the game,”<sup>145</sup> so even given the horrific consequences of the

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<sup>141</sup> See *infra* notes 145-149 and accompanying text.

<sup>142</sup> Thus Canadian judges have recognized that “when one engages in a hockey game, one accepts that some assaults, which would otherwise be criminal, will occur and consents to such assaults.” McSorley (judgment), *supra* note 12, at para. 13, quoting *Regina v. Watson* (1975) 26 C.C.C. (2d) 150 at 156.

<sup>143</sup> Svoranos, *supra* note 3, at 487.

<sup>144</sup> McSorley (judgment), *supra* note 12, at para. 25.

<sup>145</sup> Bertuzzi, *supra* note 65, at para. 35.

Bertuzzi-Moore incident, Weitzel had to admit “The confronting of Moore initially may have been within the bounds of the game.”<sup>146</sup> He went on to say Bertuzzi’s conduct did then escalate beyond this initial “okay” aggression.<sup>147</sup> However, the quick transition between acceptable and intolerable conduct illustrates both the fine line between the two, and the difficulty of towing the line in the high-paced, highly-charged game of ice hockey. As Judge Kitchen recognized in *Regina v. McSorley*, “It is a legitimate game strategy to slash another player...; It is a legitimate game strategy to fight another consenting player.”<sup>148</sup> Even highly risky conduct might be considered legitimate: “slashes and cross-checks to various parts of the body, including the shoulders, were recognized as legitimate means of initiating fights.”<sup>149</sup> Temporary debilitation from both explicit and unspoken risks thus becomes just another part of the game: another risk players accept, another risk players inflict.

This brings us to the issue of consent. If players implicitly assume the risk (or inevitability, if you prefer) of bodily harm as a legal adjunct to the game, the statutory rubric of criminal assault fits even more poorly. Assault statutes are based on two primary harms: harm to state’s interest in the general welfare of its citizens, and the actual harm to the citizens themselves.<sup>150</sup> If the citizens accept the harm, and in fact recognize it as welfare *enhancing*, it erodes the justification for state intervention. Likewise, if the state accepts the sport and the social utility it carries, it must weigh that against the harm it perceives in the so-called offensive conduct.<sup>151</sup>

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<sup>146</sup> Id. at para. 38.

<sup>147</sup> Id.

<sup>148</sup> *McSorley* (judgment), *supra* note 12, at para. 21.

<sup>149</sup> Id. at para. 63.

<sup>150</sup> LAFAVE, *supra* note 56, at 13, on the principles of criminal law.

<sup>151</sup> *Yates & Gillespie*, *supra* note 5, at 161.

Critics might still argue that conduct still occurs to which players do *not* consent, either explicitly or implicitly,<sup>152</sup> empowering the state to act, completely aside from the League's failure to control such conduct. Judges have agreed, noting "[T]o engage in a game of hockey is not to enter a forum to which the criminal law does not extend. To hold otherwise would be to create the hockey arena a sanctuary for unbridled violence to which the law of Parliament and the Queen's justice could not apply."<sup>153</sup> In the McSorley case, Judge Kitchen reaffirmed the reasoning in *Regina v. Cey*, quoting "[T]here are some actions which can take place in the course of sporting conflict that are so violent it would be perverse to find that anyone taking part...had impliedly consented to subject himself to them."<sup>154</sup>

Such an argument necessitates a determination as to just what that unconsented-to conduct is. The common reference points are the written rules themselves and other "foreseeable hazards," such as conduct that falls within "unwritten codes" or other customs and norms of the game. But under this approach, there clearly exist norms among the hockey community that tolerate and even encourage violence – a clear discordance with the approach of the criminal law. However, we allow hockey, just as we allow football, boxing, and ultimate fighting. Critics assert that we do tolerate a certain level of aggression, but only such aggression as is reasonably related to the game. Any violence unrelated to the objectives of the game, they say, should lose legitimacy and protection from the criminal law.

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<sup>152</sup> Presumably players cannot consent to conduct that (1) violates the written rules under the Violation-Of-the-Rules standard, or (2) surpasses the reasonably foreseeable hazards of the game under the Model Penal Code standard.

<sup>153</sup> Bertuzzi, *supra* note 65, at para. 36, quoting *Regina v. Watson* (1975) 26 C.C.C. (2d) 150.

<sup>154</sup> McSorley (judgment), *supra* note 12, at para.70, "It is equally clear that there are some actions which can take place in the course of a sporting conflict that are so violent it would be perverse to find that anyone taking part in a sporting activity had impliedly consented to subject himself to them.," quoting Gerwing J.A. writing for the majority in *Regina v. Cey* [1989] 75 Sask. R. 53 (Sask. Ct. App.).

The problems with such a definition are threefold. First, it requires reference to the very constituency – the hockey players, coaches and managers – critics assert have no incentive to draw the bright lines between objectives and tangents, acceptable and unacceptable play, tolerable and excessive violence.<sup>155</sup> Second, hockey players demonstrably acknowledge that the sport contemplates a high level of physicality and aggression; even they would have trouble drawing the line between legal, acceptable conduct and illegal, intolerable conduct.<sup>156</sup> Third, if we allow even the relatively clear written rules to define the boundaries of permissible conduct, we already compromise the integrity of the criminal law – athletes may no longer be above the law, but only because they define it. In referring to the rules and customs of the game to define what conduct amounts to battery, we are no longer the same criminal law as we apply to the rest of society, we are judicially legislating a special sports criminal assault law – something national and state legislatures have refused thus far to do.<sup>157</sup> By giving over a measure of control over the definitions of the criminal law to the NHL, we implicitly conflate NHL interests and social interests, and thereby negate one of the very reasons for taking enforcement out of the hands of a private entity’s hands – namely, that private entities lacks incentives that coincide with the public interest such state enforcement of standards

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<sup>155</sup> See e.g. Svoranos, *supra* note 5, at 493-494, asserting the financial incentive; also DRYDEN, *supra* note 4, at 254, claiming “[The owners and managers] have an investment to protect.”

<sup>156</sup> Judge Kitchen admits that “The rules by which [they are] playing I have characterized as indefinite, making compliance by the players more difficult.” McSorley (sentencing), *supra* note 104, at para. 2.

<sup>157</sup> In 1980, U.S. Representative Ronald Mottl proposed the Sports Violence Act of 1980 seeking to federally criminalize the use of “excessive physical force” in sports, providing for monetary fines or jail sentences for violators. Schiller, *supra* note 2, at 249. The bill failed for several reasons, among them vague and circular language, and the opinion of both legislators and local officials that such criminal activity was the proper province of local authorities themselves. Yates & Gillespie, *supra* note 5, at 155-156. Another factor may have been the opposition of the major sports leagues themselves. Schiller, *supra* note 2, at 249. Further legislative attempts by Mottl in 1981 and Representative Tom Daschle in 1982 met the same fate. Yates & Gillespie, *supra* note 5, at note 72.

is necessary. We at first presume a single standard of behavior that on-ice violence offends, only to immediately qualify it by reference to the context.

At the same time, if the courts are to police the level of violence on the ice, recourse to the League is inevitable, for only it can supply the definitions and standards necessary for the courts to determine the proper standard of care and the appropriate punishments to handle excessive violence. As Judge Kitchen states, judges are presumed to have only the knowledge of the average citizen plus the evidence put before them.<sup>158</sup> At the same time “It may be that many people know less of the game than we expect,” which means judges must discern the rules and customs from the evidence and witnesses put forth in the case.<sup>159</sup> Even then, the rules are so convoluted and indefinite that judges often have “little direct evidence...explaining the game” and must work through inference to complete the picture.<sup>160</sup> The picture coming out of this inference work is still not a clear one, with multiple complications developing out of the combination of written rules and unwritten code of conduct – what Judge Kitchen calls an “amalgam of...composite rules.”<sup>161</sup> Moreover, the considerable discretion granted to referees means that even that amalgam remains a wavering body of guidelines rather than rules, more applicable in some situations than in others. As Dryden puts it, “A league, through its referees, sends messages to the game, the players react, the game takes on it form.”<sup>162</sup> In the end, “the players are then expected to govern themselves accordingly. This requires the players to have a thorough knowledge of the written rules, a familiarity with the unwritten code, and an understanding of the guidelines the referee is signaling to the

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<sup>158</sup> McSorley (judgment), *supra* note 12, at para. 15.

<sup>159</sup> *Id.* at para. 16.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at para. 21.

<sup>162</sup> DRYDEN, *supra* note 4, 219.

players during the game through his assessment and non-assessment of penalties.”<sup>163</sup>

Such a comprehensive understanding the ins and outs of the game come only after years of study and participation – something that judges necessarily must rely on players, referees, and other insiders of the hockey world to provide.

This means that courts will inevitably resort to League definitions of infractions, officials’ testimony as to the normal course of play,<sup>164</sup> and players’ representations as to the expected risks. This not only stands as a departure from the usual role of witnesses in the criminal court in determining what is or is not acceptable conduct in the way of violence, but it means the courts have effectively taken jurisdiction over a case only to grant it back to the League. Thus, critics may argue that the hockey arena is not outside the domain of the criminal law and should therefore be subject to the same rules as any other place in society,<sup>165</sup> but the combined effect of the murkiness of the rules, the countenance of violence in degrees, and the established social acceptance of the game means the game and the rink unavoidably become a specialized context that the courts cannot appropriately exert power over without reference back to the organizers themselves to explain that context. Like it or not, a game of hockey is different than a mugging on the street, a gang beating, or a drunken barroom brawl. It does have special rules, and it does create unique opportunities for particular kinds of violence, violence that would not occur outside the scope of the game itself. These acts occur in the heat of a high adrenaline, high aggression game; conduct is directed towards other players as

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<sup>163</sup> McSorley (judgment), *supra* note 12, at para. 22.

<sup>164</sup> Judge Kitchen denotes a significant portion of his Reasons on Judgment in the McSorley case to testimony by NHL linesman Michael Cvik and referee Brad Watson. *See id.* at para. 19-23, 37,40-41, 49.

<sup>165</sup> “[N]o particular segment of society can be licensed to commit crime with impunity.” Yates & Gillespie, *supra* note 5, at 152. *See also* Schiller, *supra* note 2, at 256: “Although a criminal act occurs during a sports competition, criminal law still applies.”

players, not as individual persons. Thus, in giving his reasons for his conditional discharge of the conviction of McSorley, Judge Kitchen remarks that “it is clear the risk of Mr. McSorley doing this would only occur in an NHL game.”<sup>166</sup> Even proponents of criminal prosecution admit that public safety is not a clear concern when dealing with in-game violence.<sup>167</sup> When the conduct is confined to a specialized context with limited external effects, the argument for outside intervention loses its force. The courts implicitly recognize their lack of expertise and lack of authority to define a game and punish intolerable conduct for its constituency by largely deferring to game players and organizers to explain the rules of conduct.

This inability to determine the proper standard of behavior extends to the question of the appropriate punishment. While several players have been prosecuted and convicted, Dino Ciccarelli’s sentence of 1 day in prison and \$1,000 fine<sup>168</sup> stands as the sole use of judicial power to impose more than a conditional discharge. In particular, in both the Bertuzzi and McSorley cases, the judges granted their conditional discharges based on the assumption that the penalties suffered under the jurisdiction of the League, coupled with “the process itself: by the laying of the charge, by the public notoriety attracted by the charge, by the incredible disruption of one’s personal life who is the subject of the charge, and then by the significant financial consequences which already have flowed as a result of the charge.”<sup>169</sup> Indeed, Weitzel, the judge who heard the Bertuzzi case, referred to these normal consequences of any trial as “mitigating factors”

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<sup>166</sup> McSorley (sentencing), *supra* note 104, at para. 8. Judge Kitchen also concludes, “protection of the public is a lesser consideration” when dealing with on-ice violence. *Id.* at para.17.

<sup>167</sup> Schiller, *supra* note 2, at 257-258.

<sup>168</sup> *See supra* note 102 and accompanying text.

<sup>169</sup> Bertuzzi, *supra* note 65, at para. 51. *See also* McSorley (sentencing), *supra* note 104, at para. 17.

that called for conditional discharge as an appropriate sentence.<sup>170</sup> Both judges make reference to the financial penalties imposed by the suspensions and fines given by the NHL as reasons not to impose further punishment.<sup>171</sup> Judge Kitchen further justified his conditional discharge of McSorley's conviction by a change to the Criminal Code after the Ciccarelli case instructing that judges should seek alternatives to jail sentences whenever possible.<sup>172</sup> This unwillingness to impose a strong sentence may reflect a further recognition of the courts' lack of proper information as to what sentences *will* work as effective deterrents. Without evidence that a jail sentence would really work, the court is left with little additional deterrent or punishment power compared to the League itself. In addition to relying on League evidence of the standards of play, the courts must further rely on the League to provide the real deterrent mechanism. Rather than a failure to exploit the deterrent possibilities of a criminal case against an NHL player,<sup>173</sup> the cases demonstrate a lack of such deterrent possibility. The sole deterrent contribution of criminal charges becomes the hardships of going through a "trial," and the court implicitly admits the inapplicability of another reason to deny a private entity the right to punish bad behavior – namely, that the state has more and better punishment mechanisms at hand.

Prosecuting authorities explicitly try to justify their intervention by placing emphasis on the symbolic message to the community about what kind of violence is tolerable and what is not. Minnesota authorities, for example, declined to re-try Forbes in

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<sup>170</sup> Bertuzzi, *supra* note 65, at para.40.

<sup>171</sup> Bertuzzi, *supra* note 65, at para.42-43; McSorley (sentencing), *supra* note 104, at para. 17.

<sup>172</sup> McSorley (sentencing), *supra* note 104, at para. 14.

<sup>173</sup> Schiller, *supra* note 2, at 273-274, asserting that the conditional discharge granted to McSorley means "[t]he deterrent value this case could have potentially possessed is now lost."

1975 because they thought they had made their point just by bringing charges.<sup>174</sup> Judge Weitzel stated with regard to the Bertuzzi case, “The issue of denunciation [of excessive on-ice violence] is clear; again, addressed by the bringing of the charge.”<sup>175</sup> Judge Kitchen asserted, “[A] message must be sent to the community as a reminder of what the consequences are for such an offence. Mr. McSorley must be used as an example.”<sup>176</sup>

The power of the example becomes questionable when two points become clear. First, the example remains restricted to the context of professional hockey, having no real force for society in general. Certainly we would not expect the same consequences for the same conduct were it to occur on the street. Thus while Weitzel stresses that he wishes to make clear that “violence certainly is not something that is countenanced in the Canadian society,”<sup>177</sup> he merely succeeds in making it clear that excessive violence between two professional athletes in the midst of an elite competition, for which they are being paid, will not be tolerated. The example, no matter how strong, remains relevant only to NHL players. Moreover, the compromise of the criminal standard in incorporating NHL standards of conduct reduces the symbolic effect prosecution has in maintaining the integrity of the law itself. Seeing a special set of rules applied to professional athletes, the public might actually lose confidence in the evenhandedness of the criminal justice system. Second, despite the successful high-profile prosecutions of two top players, events of intense violence and borderline conduct with severe consequences continue to occur, indicating a failure of the League and the public to absorb the symbolic message courts have tried to send.

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<sup>174</sup> Yates & Gillespie, *supra* note 5, at 160.

<sup>175</sup> Bertuzzi, *supra* note 65, at para. 52.

<sup>176</sup> McSorley (sentencing), *supra* note 104, at para. 6.

<sup>177</sup> Bertuzzi, *supra* note 65, at para. 3.

In February 2007, a hit delivered from behind by Ottawa Senator Chris Neil left Buffalo Sabre Chris Drury with a laceration across his forehead that required 20 stitches and a concussion.<sup>178</sup> While the hit itself drew no penalty, Sabres players and coach Lindy Ruff took a page out of the unwritten code and sought retribution in the form of a fight – despite the fact that Sabre Drew Stafford already engaged in a fight with Neil immediately following the hit, while Drury lay on the ice, a fight that earned both Stafford and Neil five for fighting.<sup>179</sup> Ruff sent out three tough forwards to purposefully incite a fight, beginning with Buffalo’s Adam Muir punching Ottawa’s Jason Spezza in the head, and descending into an all-out brawl amongst all the players on the ice, including the goalies.<sup>180</sup> The end result was a 20 minute delay of game and more than 100 minutes in penalties, including the ejection of the goalies.<sup>181</sup> The League also fined Buffalo coach Lindy Ruff \$10,000 for his role in instigating the fight.<sup>182</sup> No criminal action was sought however – this fight, despite its magnitude, still counted as part of the game.

Only a few weeks later, during a game between the New York Islanders and the New York Rangers, Islander Chris Simon took a hard hit from Ranger Ryan Hollweg, driving him into the boards (and giving him a later diagnosed concussion).<sup>183</sup> Hollweg’s hit went unpenalized;<sup>184</sup> it was what happened next that drew controversy. Simon recovered from the boarding only to pursue Hollweg and deliver a two-handed stick hit to

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<sup>178</sup> *NHL fines Sabres*, *supra* note 47.

<sup>179</sup> Canadian Press, *Both goalies ejected, Sabres, Senators in wild brawl after Drury hurt*, Feb. 22, 2007 available at <http://www.nhl.com/nhl/app?articleid=289434&page=NewsPage&service=page>.

<sup>180</sup> *NHL fines Sabres coach*, *supra* note 47.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *NHL banishes Simon*, *supra* note 69.

<sup>184</sup> *Id.*

Hollweg's face and chin.<sup>185</sup> The hit knocked Hollweg off his feet, onto his back; he then rolled onto his stomach by the boards, getting up a few moments later with blood dripping from his chin.<sup>186</sup> He suffered no major injuries, practicing with the team the next day as normal, and playing in the Ranger-Penguin game the day after that.<sup>187</sup> The hit drew Simon a record 25 game suspension by the League, surpassing even the penalty given McSorley, keeping Simon off the ice for the rest of the regular season and the playoffs.<sup>188</sup> The suspension will also result in a loss of over \$80,000 in salary.<sup>189</sup> With this his sixth suspension and his 1 year contract with the Islanders set to expire at the end of the season, Simon's very career may be in jeopardy at the relatively young age of 35.<sup>190</sup> While the ultimate decision to prosecute currently remains with Nassau County officials, for his part Hollweg has indicated he will not press charges, saying "What's done is done. The league has made its decision and it's time to move forward now. I think it's fair."<sup>191</sup> A more general feeling of allegiance to the unwritten code as defined amongst the players themselves may reinforce this lack of alacrity to press charges, and the underscores potential for failure to cooperate should prosecutors make a habit of bringing criminal charges of their own volition.<sup>192</sup>

In fact, Hollweg's sentiments echo those of Donald Brashear in 2000,<sup>193</sup> pointing to a general trend among players. In giving his Reasons on Sentence, Judge Kitchen

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<sup>185</sup> Id.

<sup>186</sup> Id.

<sup>187</sup> Id.

<sup>188</sup> Id.

<sup>189</sup> Id.

<sup>190</sup> Id.

<sup>191</sup> Id.

<sup>192</sup> See *supra* note 125.

<sup>193</sup> Brashear said, "I could have died. I don't think this guy should be playing in the league anymore." Schiller, *supra* note 2, at 265. At the same time, Brashear did not think criminal charges should be brought. Id. at 251.

noted, “My conclusion is that Mr. Brashear simply wants to forget this matter. What this court does is almost irrelevant to him.”<sup>194</sup> The court thus tacitly acknowledged its own lack of authority over the players and the future development of the game. The game will be what the organization, the officials, and, ultimately, the players make it. Part of this is by virtue of the in-game evolution of the game. As Judge Kitchen noted in the McSorley trial, the indefiniteness of the rules sometimes makes compliance difficult even for the most knowledgeable players.<sup>195</sup> The rules become the amalgam of the written and unwritten rules, as enforced by the discretion of the referees.<sup>196</sup> A lack of a solid body of rules gives the players a sense of propriety over their own game, such that the imposition by an outside party of definitions and standards of play highly objectionable. The court, beyond lacking sufficient expertise to do so in terms of pure knowledge and experience, also lacks the legitimate authority to dictate to players how they can and cannot play. The most that a court can achieve then is to promote “a healthy discussion of hockey and the role of violence in the sport...If this is a trial of the game of hockey, the judge and jury are the...public.”<sup>197</sup>

Given the vagueness of the legal standard, the lack of judicial expertise, and the potential disincentives for the hockey world’s cooperation, prosecutors must ask themselves important questions, questions that reveal additional obstacles to the efficient use of the criminal courts to police on-ice violence. With the three most recent attempts at prosecution – the Bertuzzi, McSorley and Ciccarelli cases – all ending successfully in convictions, prosecutors may feel more confident about their chances of securing a

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<sup>194</sup> McSorley (sentencing), *supra* note 104, at para. 10.

<sup>195</sup> *See supra* note 156.

<sup>196</sup> *See supra* notes 160-162 and accompanying text.

<sup>197</sup> McSorley (judgment), *supra* note 12, at para. 7.

finding, or alternatively a plea, or guilt. All three cases were, however, brought in the Canadian courts. Canadian prosecutors, for their part, face a two-part “approval standard” before bringing charges at all.<sup>198</sup> They must explicitly determine whether a conviction is substantially likely, and whether there is a public interest in prosecuting.<sup>199</sup> While the Canadian cases have proved successful (at least in terms of convictions), how strong these precedents may be in an American court remains unclear. With many Canadian teams having migrated south of the border and expansion teams being placed in American cities, the vast majority of teams – 24 of 30 – are now in the United States. This means that more of the games, and more of the questionable incidents, will occur in American jurisdictions. While the context of the incidents remains the same, American prosecutors may face different pressures and constraints than Canadian prosecutors and courts, such that the precedential value of the Canadian cases may be less than proponents of criminal prosecution believe. Moreover, the Canadian precedents themselves are less than clear, with opinions “delivered orally, lacking the detail, precision, and organization of a written appellate decision.”<sup>200</sup>

Prosecutors anywhere must not only determine the strength of the case and the likelihood of conviction, but also ask what the effect of a conviction will really be – both on the NHL itself and society at large. Arguably, the state has an abiding interest in preventing the overspill effects of on-ice violence, but is unclear that it is true that “spectator violence is reinforced if sports violence is implicitly condoned by

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<sup>198</sup> Schiller, *supra* note 2, at 262.

<sup>199</sup> *Id.*

<sup>200</sup> Yates & Gillespie, *supra* note 5, at 153.

prosecutorial inaction,”<sup>201</sup> or that the “pernicious effect of sports violence on the human psyche is not limited to children.”<sup>202</sup> Without such a clear demonstrable externality, the public interest weighing in favor of prosecution wanes. The courts themselves have stressed the symbolic power of criminal charges against professional athletes, but the reach of the example remains intrinsically limited to the context-specific world of hockey from which it is drawn. If the real value of criminal prosecution lies in symbolic prosecution,<sup>203</sup> prosecutors must justify the expenditure of significant prosecutorial and judicial resources simply to spark a public debate about the nature of sport. If American citizens generally care less about hockey than Canadian audiences, the value of prosecution in the States drops even further. The public simply will not, as Judge Kitchen admonished, use the opportunity to demand change in the way the game is played,<sup>204</sup> no matter how vociferous the prosecution. Moreover, prosecutors will face pressure to pursue “real criminals” rather than spend time and money on policing a private contractual organization of well-paid, grown men.<sup>205</sup> Judge Kitchen remarks that with regard to hockey violence, “protection of the public is a lesser consideration.”<sup>206</sup> In fact, to most people, it is of no consideration at all. Even to the players themselves, what the courts do “is almost irrelevant.”<sup>207</sup>

The bottom line is the case for state policing of on-ice violence has more problems than proponents admit, problems with the legal standards, the ambiguous nature of the incidents and the questionable value of the prosecution to society at large.

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<sup>201</sup> Schiller, *supra* note 2, at 256, quoting RICHARD B. HORROW, SPORTS VIOLENCE: THE INTERACTION BETWEEN PRIVATE LAWMAKING AND THE CRIMINAL LAW 115 (1980).

<sup>202</sup> Yates & Gillespie, *supra* note 5, at 151.

<sup>203</sup> This is the conclusion reached by Yates & Gillespie, *supra* note 5, at 168.

<sup>204</sup> See *supra* note 197 and accompanying text.

<sup>205</sup> Schiller, *supra* note 2, at 251.

<sup>206</sup> McSorley (sentencing), *supra* note 104, at para. 17.

<sup>207</sup> See *supra* note 194 and accompanying text.

Theoretically and precedentially, critics must admit that the courts have failed to produce effective deterrent sentences despite the unquestionable offensiveness of the conduct in question.<sup>208</sup> With the power of symbolic prosecution unclear and the costs of prosecution obvious, a solution to excessive violence in the NHL is unlikely to come from outside the League itself.

#### IV. The Potential for Internal League Regulation

“This is no public enterprise. Why should we think of hockey as a national possession?”<sup>209</sup>

While the critics may be right that the League faces some strong incentives to ignore the excessive violence that takes place on the ice, they overstate the strength of these incentives and overlook the strong incentives the League has to *curb* the level of aggression on the ice. Moreover, critics neglect the undelegable authority the League has over the game and over players, given its control over the information necessary to set appropriate standards and the power of the mechanisms it has to enforce these standards among the players. It follows that an effective solution to the problem of excessive violence that takes place in the NHL can only come from *within* the NHL.

As the courts have recognized, the game of hockey in the NHL is defined and described extensively within the written rules issued by the League. Everything from the width of the painted crease to the thickness of the players’ padding is prescribed by the

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<sup>208</sup> Schiller, *supra* note 2, at 273-274, concluding as much.

<sup>209</sup> DRYDEN, *supra* note 4, at 255.

League in its Official Rules.<sup>210</sup> The League dictates player eligibility, legal equipment, and officials' attire and conduct.<sup>211</sup> The majority of the rulebook, however, is dedicated to the definition of various penalties, minor and major, and their consequences. Besides the brief section on abuse of officials, the League identifies the following physical fouls: boarding, charging, checking from behind, clipping, elbowing, fighting, head-butting, kicking, kneeling, roughing, slew-footing, throwing equipment, holding, hooking, interference, tripping.<sup>212</sup> The League creates a separate category for stick fouls, among those being butt-ending, cross-checking, high-sticking, hooking, slashing, and spearing. There is a further catch-all offense of general "unsportsmanlike conduct," not to mention to a number of nonphysical disruption of game flow offenses such as delay of game, refusal to play the puck, illegal substitution, and too many men on the ice.<sup>213</sup>

The rulebook forms only the basis of the full scope of the game. Despite argument to the contrary, most people would agree that there is an unspoken code of conduct that allows players to transgress the rules with legitimate cause.<sup>214</sup> Thus fighting becomes a legitimate response to an earlier uncalled hit on a teammate,<sup>215</sup> and slashing or hooking becomes a legitimate attempt to incite a fight.<sup>216</sup> Part of this is a function of the discretion granted to referees and linesmen to "let the players play." The fewer offenses the officials call, the more power the players have to set the pace of play and define their own standards of conduct. Given this leeway in the rules, some sort of unwritten code is

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<sup>210</sup> See generally OFFICIAL RULES, *supra* note 7.

<sup>211</sup> These guidelines can be identified from the rulebook's table of contents. *Id.* at vii-xxviii.

<sup>212</sup> *Id.* Each foul and the appropriate penalty is further detailed within the rules themselves. The League even describes and depicts with pictures the proper signals to be used by officials when awarding these penalties.

<sup>213</sup> *Id.*

<sup>214</sup> Again, note that Judge Kitchen expressly concluded there is such a code. McSorley (judgment), *supra* note 12, at para. 21.

<sup>215</sup> See *supra* text accompanying note 46.

<sup>216</sup> See *supra* text accompanying notes 148-149.

inescapable, among players, and between the players and officials. Developing the game of hockey thus becomes a joint enterprise between the NHL, the officials, and the players. It is a game partly defined by written rules and partly by experience and judgment.

Two implications follow from such an arrangement. The first weighs against the regular intervention of the criminal courts, and the second weighs positively in favor of internal league regulation. A game characterized by intricacies difficult to explain to any non-player, be they explicit in the rules or implicit in the customs of the team or league, is not amenable to external imposition of rules and duties. Excessive violence in the NHL bears little resemblance to the GM employee who kills his foreman while on the job<sup>217</sup> because the conduct in the NHL case is directly tied to the job performance, and, moreover, is tacitly accepted as a natural, if undesirable, aspect of the game. While a court can clearly say that an employee who kills his foreman while on the job must have surpassed the boundaries of his job,<sup>218</sup> it can less clearly say when the NHL player crossed the line into excessively violent behavior. The court as an outside party lacks the knowledge known only to the individuals and organizations involved necessary to make efficient judgments, and further lacks the legitimate authority to do so in eyes of the individuals involved. Players, officials, and management alike – even fans – might resent the intrusion of the state into a domain where they have previously held sway, particularly when their conduct acts to create a social surplus without demonstrable

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<sup>217</sup> Flakne & Caplan, *supra* note 50, at 33-34, quoted by Yates & Gillespie, *supra* note 5, at 152.

<sup>218</sup> This assumes, of course, that the employee's job description does not involve conduct that regularly involves swinging around a long stick and trying to crush his manager into the walls to keep control of a tiny rubber disk.

negative externalities.<sup>219</sup> Whether because of an allegiance to a player code of conduct and concomitant reluctant to recognize the courts' authority to intrude into the world of hockey,<sup>220</sup> or because of less possessive recognition that the courts simply lack the proper perspective and sufficient information to reach the right result, hockey insiders will ascribe less weight to externally imposed "solutions." Ultimately then, the courts will have little influence over the game.

A fluid arrangement also exposes opportunities to exploit incentives among all the parties involved to properly channel behavior in ways that work simply because they are internal to the organization. The way the game takes shape provides multiple openings for the League and the players to take control over their own conduct to maximize their different objectives: revenue generation, maximum freedom to play the game how they want to, and preserving the love and respect of the game amongst the fans. There are simple ways for the NHL, the players, and the officials to tweak their behavior and expectations that would yield exponential results. For instance, the rulebook, which is the League's main contribution to the rules, defines the game largely negatively, by *illegality* rather than by proper play. With an existing framework already set out in terms of what is *not* allowed, the NHL has ample opportunity to explicitly prohibit the kind of outrageous conduct that has been the subject of criminal suits. Although no rule, however bright, can completely eliminate a certain level of borderline offensive behavior, by institutionalizing prohibitions against the most blatantly inappropriate kind of behavior, the League can inculcate a norm that will continue to pervade the game consciousness, with an effect that

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<sup>219</sup> Schiller, *supra* note 2, at 247-248, asserting, "The sports industry is striving to retain control over the punishment and regulation of its athletes. The leagues argue that there is no need for outside judicial or legislative involvement when they have an internal system to curtail wrongdoings."

<sup>220</sup> As evidenced by both Hollweg's and Brashear's declination to press charges against their offenders. *See supra* notes 191 and 193 and accompanying text.

increases with each new generation. The League can thus very simply exploit its innate control over the evolution of the game.<sup>221</sup> More than control, the NHL carries significant influential power by virtue of its position as the most elite professional hockey organization. Players and coaches at all levels look to the League to mark out not only valuable game tactics, but the proper limits of appropriate play.<sup>222</sup> Within the League itself, it has the authority – both by virtue of contract over the players as well as the aforementioned basic credibility as “the” hockey organization – to hand out punishments in the way of both suspensions and fines,<sup>223</sup> authority that is accepted with little challenge, if perhaps the occasional disgruntlement. The NHL has in fact demonstrated its ability to respond with commensurately serious penalties with each incident of blatantly illegal conduct. McSorley received what was at the time the most severe penalty ever handed down by the League, and Bertuzzi’s penalty was even harsher.<sup>224</sup> Continuing this trend, and perhaps indicating a crackdown on unacceptable conduct, the League’s suspension of Chris Simon for his stick attack on Ryan Hollweg is again harsher than any other in the League’s history, surpassing even Bertuzzi’s.<sup>225</sup> The NHL is not oblivious or, even worse, tolerant, of the extreme violence that has occurred. It recognizes and responds to such offenses before outside officials even have a chance to look at the tape and evaluate the conduct.

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<sup>221</sup> Indeed, Dryden argues that only the heads of the NHL – the Commissioner and the owners – have the power to effect real change in the game. DRYDEN, *supra* note 4, at 254.

<sup>222</sup> This power of influence is one of the reasons proponents of criminal prosecution believe intervention is necessary. All it really establishes is the authority of the League – not the League as shaped by the courts. If it evinces a failure of the NHL thus far to exploit this authority, it is indeed a reason to do something about the excessive violence, but it points in the opposite direction than critics assume, suggesting that an effective solution should come from within rather than from without.

<sup>223</sup> These penalties are outlined in the OFFICIAL RULES, *supra* note 7.

<sup>224</sup> Niyoy, *supra* note 74.

<sup>225</sup> *Id.*

The officials, through the National Hockey League Officials Association, can make an explicit commitment to use their discretion and power to control the pace of play to effectively convey a consistent message about tolerable and intolerable conduct such that players are not tempted to push their luck. Because the League also exerts its own controls over the NHLOA by virtue of the rules, the League too can require more consistent officiating, imposing penalties on referees who fail to demonstrate an ability to apply the rules in an evenhanded, effective manner. Depending on how strong an iron hand the NHL wants to lay on the level of aggressive play, it might even consider bonuses for officials who display the most dependable officiating skill.<sup>226</sup>

The players obviously have the ultimate control over the pace of play, the emotion of the play, and the results of the play. At the end of the day, especially given the flexibility in the rules, the game is what the players make it, no matter who imposes the standards. The players themselves hold the most potential for reshaping the game and moving away from the aggressive model that has spawned outrageous conduct. Direction from groups with the most insight and the most investment will naturally have more influence, which is why intrusion by the court will be seen as such – intrusion. By exploiting a sense of ownership over the game, players can be, amongst themselves and by other interested groups like the NHL and fans, led to modify their behavior and foster a less dangerous environment on the ice. Players can also utilize the power of contract to exert pressure on the League to change the written rules as need be. Through the NHL

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<sup>226</sup> Such a system might resemble that of traffic cops who receive awards for handing out the most tickets. The NHL could give bonuses for the most penalties called, or the “best” penalties called, depending on the incentives it wanted to create for officials. The League would not want to encourage penalties for penalties’ sake because it slows the game, frustrating players and fans alike, and nominal penalties would not do much to reign in the most offensive behavior. More efficiently, the League could think about rewarding the officials whom players, coaches, and managers alike agree to be the fairest and most effective managers of play.

Players Association, the players can collectively lobby for rule changes that promote safety and reduction of both accidental and purposeful injury. The ongoing collaborative project of making hockey what it should be and keeping it from what it should not be, culminating during games themselves, can thus occur in within the existing framework, the “amalgam of written rules and the unwritten code.”<sup>227</sup> It is within this framework that the effective mechanisms lie.

Despite arguments to the contrary, the proper incentives to pursue a reworking of the game environment also lie within the organization itself. Admittedly, the NHL has declined repeatedly to issue an outright ban on fighting<sup>228</sup> and has obvious incentives to promote a degree of aggression within the game. Fighting may have a positive correlation to game attendance, because it adds to the excitement and energy of the event.<sup>229</sup> Owners also feel the promotion of fighting is “a necessary marketing tool.”<sup>230</sup> The financial incentive thus lies on the side of fighting. Barbara Svoranos asserts that some have “accused [the NHL] of deliberately promoting fighting as a means to gain popularity.”<sup>231</sup> Indeed, NHL Commissioner Gary Bettman has said “the decision isn’t (necessarily) to get rid of fighting it’s (to see) how much fighting should be allowed.”<sup>232</sup> Players too accept and encourage fighting as a legitimate, if limited, part of the game: a “natural consequence” of the game, in certain situations it may even be prescribed.<sup>233</sup>

At the same time, as Bettman’s quote implies, the NHL also has strong incentives to control the amount of fighting that goes on during games. Excessive violence erodes

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<sup>227</sup> McSorley (judgment), *supra* note 12, at para. 21.

<sup>228</sup> Svoranos, *supra* note 3, at 492-494.

<sup>229</sup> *Id.* at 494.

<sup>230</sup> *Id.* at 494.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 493.

<sup>233</sup> *Id.* at 490.

the integrity of the game<sup>234</sup> and causes disgust among fans, so the League actually stands to *lose* money when excessive violence becomes habitual. The League will also fail to attract potential fans as it loses credibility as an upright sports organization through negative media attention. Moreover, if players stand to suffer the risks of excessive violence in order to play the game they love and make a living doing it in the NHL, they will use the power of exit, moving to other leagues, particularly in Europe and Russia, where they may accept less fame and money but also less risk.<sup>235</sup> If players *accept* excessive violence as a part of the deal, the event of devastating injuries will become a regularity rather than a rarity, and players will quit by virtue of necessity. Either way, the League stands to lose players on top of fans. “[Excessive violence] degrades, turning sport to dubious spectacle, bringing into question hockey’s very legitimacy, confining it forever to the fringes of sports respectability,”<sup>236</sup> something the NHL cannot risk given the financial investment, let alone the heartfelt dedication to the game itself that many managers and owners feel. The League has thus taken action not only to penalize excessive player-initiated violence, as in the McSorley, Bertuzzi, and Simon cases, but also in the case of inappropriate fighting: Not only did the recent Sabres-Senators brawl result in 100 penalty minutes for players, but coach Lindy Ruff also received a \$10,000 for inciting his players.<sup>237</sup>

As for the players themselves, Yates and Gillespie argue, “Players will not refrain from using excessive violence as a weapon until incentives are provided for them to do

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<sup>234</sup> See *infra* text accompanying note 236.

<sup>235</sup> Players demonstrated their willingness to play in other leagues when faced with no alternative, a situation created by the lockout during the 2003-2004 season. While the cause of that migration was the total impossibility of playing in the NHL, it evinces (1) an overriding desire to play hockey despite significant costs; and (2) a willingness to hold their ground when negotiating with the NHL for contractual conditions that matter to them.

<sup>236</sup> DRYDEN, *supra* note 4, at 212.

<sup>237</sup> *NHL fines Sabres coach*, *supra* note 47. See also *supra* text accompanying notes 178-182.

so.”<sup>238</sup> These incentives already exist. Obviously players have the basic incentive to refrain from excessive violence for their own safety, particularly given the sport’s reputation for retaliation as a recognized, if not officially sanctioned, phenomenon. The Golden Rule applies with all the more force when one knows that it is actually an enforced custom. Moreover, the power of contract that subjects them to League penalties gives players additional incentives to control their conduct within the boundaries of the rules, written and unwritten. Sports law professor Steve Sugarman remarks, “It’s a much more serious threat [than criminal prosecution] that you can’t earn a living and are shamed by the league.”<sup>239</sup> Besides the monetary penalties, the negative media attention occasioned by an incident of extreme violence is itself enough a deterrent; the additional “hardships” of a trial that courts have called a deterrent are unnecessary.

In the end, the same reason that critics call for state intervention – the fact that the NHL is a private contractual organization – is the reason why courts should decline to take on the role of enforcer and try to mandate how the game is played. As with any other private contract, the court should assume the parties themselves have the best information and incentives to monitor their own behavior. Naturally, the parties should have recourse to the courts to resolve any disputes arising out of that contract,<sup>240</sup> but barring that (or the externalities that in the case of the NHL remain uncertain), the courts should not presume that they have greater knowledge or better mechanisms to enforce the provisions of the

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<sup>238</sup> Yates & Gillespie, *supra* note 5, at 151.

<sup>239</sup> Allen, *supra* note 128.

<sup>240</sup> For example, players would be able to sue the League for its failure to control the level of violence. Such a solution might require the NHL to set up an arbitration board, a suggestion mentioned by Schiller, *supra* note 2, at 248-249. Along with such a board, the NHL could create a player account from which damages could be drawn. In addition, players would still be free to press criminal charges of their own volition, or bring civil suits against the offending player directly and recover in tort. The important thing is that the state refrain from attempting to regularly monitor the NHL to no effect, just as it refrains from policing private contracts unless the parties themselves bring the dispute to the courts for resolution.

contract, particularly when performance occurs in such a specialized context. While NHL interests might not coincide directly with the social interests behind the criminal law, neither does the behavior with which the NHL is concerned coincide directly with the behavior with which the criminal law is concerned. Moreover, any social interest in constraining levels of violence within the very limited context of professional hockey remains speculative at best.<sup>241</sup> When coupled with the internal incentives the League has to regulate itself, the case for state intervention becomes even weaker. Berkeley sports law professor Steve Sugarman would agree that so long as leagues demonstrate a good faith effort to appropriately and meaningfully police their own organization, courts should entrust them to do so.<sup>242</sup> Such internal regulation is more efficient and more legitimate in the eyes of the sports world itself. While making rhetorical flourishes about the “heavy onus on those purporting to pre-empt the normal criminal process,”<sup>243</sup> the courts have essentially allowed the very same private entity to dictate the course of the criminal process, implicitly recognizing that the management of the game must come from within, summed up in Judge Kitchen’s admonishment to Marty McSorley: “You are a man of influence in the game... You could use your influence to effect changes to the game... There is work to be done. The game deserves it.”<sup>244</sup>

## Conclusion

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<sup>241</sup> The evidence Yates & Gillespie give for the societal effects of excessive sports violence is largely limited to observations like “Sports can be seen in one form or another at any time of day or night, and athletes are among the most publicized individuals in the world.” Yates & Gillespie, *supra* note 5, at 150-151. They also refer to the “detrimental effect on society [that] is well-documented in psychological and sociological studies,” but do not explain the results or methodology of those studies, leaving the case for a strong society-wide effect unconvincing. *Id.*

<sup>242</sup> Allen, *supra* note 128.

<sup>243</sup> McSorley (judgment), *supra* note 12, at para. 12.

<sup>244</sup> McSorley (sentencing), *supra* note 104, at para. 20.

Professional hockey clearly creates opportunities for excessive violence, both intentional and accidental. Because the game itself not only contemplates but calls for a high level of physical contact and aggressive play, the line between acceptable and unacceptable conduct is not only a fine one to draw, but a fine one to toe for the players themselves. The result: occasional incidents of blatantly outrageous conduct and devastating consequences. Most people – critics and fans of the NHL alike – would agree that the level of violence in hockey can reach intolerable extremes, and that something should be done about it. Assuming the League itself has demonstrated an unwillingness and/or inability to deal effectively with the ongoing problem, critics suggest the proper solution is to be found in criminal prosecution. However, criminal authorities lack adequate information either to determine the proper standard of consent in order to call these incidents assault per se, or to enforce prohibitions against such conduct effectively. To seek investment of significant public resources in regular monitoring and the pursuit of meaningless convictions would represent a failure on the part of the criminal justice system. On the other hand, the NHL does, in fact, have several strong incentives to manage the problem, and only it has the actual mechanisms and symbolic legitimacy to enforce appropriate standards. If society is to have any effect on the development of the game of hockey, the incitement must be directed at the League level, not the level of the individual player. Dryden remarks, “Who is the keeper of the game? John Ziegler? The NHL owners? They are surely the only ones who can do something [about excessive on-ice violence].”<sup>245</sup> Judge Kitchen wisely notes, “If the game is to become less violent, it will likely only be in response to pressure brought by the fans.”<sup>246</sup> Ultimately, it will take

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<sup>245</sup> DRYDEN, *supra* note 4, at 254.

<sup>246</sup> McSorley (sentencing), *supra* note 104, at para. 19.

a combination of fan pressure, player pressure, and management willingness to make meaningful changes. In the end, only those who love the game, those who *know* the game can change the game for the better in a meaningful and lasting way.