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Crossing the (Blue) Line: Is the Criminal
Justice System the Best Institution to
Deal with Violence in Hockey?



John Timmer

SPORTS

I. Introduction

During a February 21, 2000 hockey game between the Vancouver Canucks and the Boston Bruins, Bruin Marty McSorley slashed Canuck Donald Brashear in the face with his hockey stick, causing Brashear to bang his head on the ice, sustain a concussion and lose consciousness for a few moments.¹ The National Hockey League (“NHL”) suspended McSorley for the remainder of the season for his conduct.² He was also brought up on criminal charges in Vancouver, Canada, the city in which the game took place.³ McSorley’s trial was the first trial for an on-ice attack by an NHL player since Dino Ciccarelli of the Minnesota North Stars was sentenced to one day in jail and fined \$1,500 for hitting Toronto’s Luke Richardson with his stick in 1988.⁴ McSorley’s violent behavior (and its implications) not only raises questions about the role of violence in sports, it also raises the legal issue of whether criminal sanctions are appropriate in a sport that not only condones violence but seems to support it.⁵

This Note argues that the criminal justice system is ill-equipped to, and thus should refrain from, prosecuting professional hockey players for violent acts committed during the course of play. Part II examines professional hockey and provides background regarding the nature of violence in the sport. Part III then discusses the history of prosecution of violent acts committed during professional hockey games, both in Canada and in the United States, providing some context for the type of violent actions that are prosecuted. Part IV examines some of the problems that arise in the prosecution of professional hockey players, including all applicable affirmative defenses available to players. This Note concludes by arguing that the NHL, not the criminal justice system, is the appropriate institution to punish, and thus deter, excessive violence in professional ice hockey.

II. Hockey and Violence

Hockey has traditionally been a very physical game, full of on-the-ice violence. Because of the fast pace of the sport and rules that allow body checking,⁶ violence has always been a part of hockey.⁷ Fighting is commonplace in professional hockey as well.⁸ Although technically prohibited under the rules of the game, fighting has been prevalent in hockey since its inception.⁹ Fans love to see a player who is willing to fight.¹⁰ Team owners

sign some players strictly for their fighting skills—known as “goons” or “enforcers”—in order to provide a physical presence for their team and to increase attendance.¹¹ The players themselves, who see fighting as a part of the game, ridicule players who are unwilling to “drop the gloves” and fight.¹²

Another factor contributing to violence in the NHL is the simple fact that all the players carry sticks, a necessary piece of equipment that can be easily transformed into a weapon. Slashing is the act of swinging one’s stick at an opponent and, depending on its severity, results in a penalty ranging from two minutes in the penalty box to being ejected from the game.¹³ Unlike fistfights, stick attacks are generally not considered to be an inherent part of the game.¹⁴ Nevertheless, it seems difficult to draw a distinction between the two violent infractions—fist fighting and slashing—both of which are against the rules of hockey but prevalent in professional hockey. It also seems difficult to clearly distinguish slashing that is acceptable within the norms of the sport from that which is not.

III. History of Criminal Liability in Hockey

The prosecutor must prove that the defendant intended an assault and battery, resulting in the opponent’s injury, in order to make a criminal charge stick.¹⁵ Because of the fast pace of hockey, where players react reflexively, it is often difficult to prove the requisite *mens rea* of intent to injure, and the issue of self-defense is frequently raised to negate the charge.¹⁶ The following cases, decided in Canada and the United States, suggest that courts have struggled to find a clear, legal solution to the problem of violence in hockey.

A. Canadian Cases

Several Canadian cases have addressed the issue of whether to impose criminal penalties for hockey violence. Like the United States, Canada would likely prosecute instances of hockey violence as assaults.¹⁷ The definitions of the relevant offenses are similar in Canada and the United States, thus these types of criminal cases would likely proceed similarly in both countries.¹⁸

In *Regina v. Maki*, Wayne Maki of the St. Louis Blues struck Ted Green of the Boston Bruins in the head with his stick fracturing Green’s skull, following an

altercation in which Green initially struck Maki in the face.¹⁹ The court held that Maki acted in self-defense when he struck Green.²⁰ There was no evidence in the record to show that Maki had the requisite intent to injure Green.²¹ The judge also opined that although players assume certain risks by participating in a sport, no athlete accepts a “malicious, unprovoked or overtly violent attack.”²² Green was also charged with criminal assault, but was acquitted because the court concluded that Green’s actions were instinctive and thus, under the doctrine of implied consent, no assault was committed.²³

In another Canadian case, *Regina v. Watson*, a court refused to accept a consent defense when Robert Watson went after David Lundrigan and choked him until he lost consciousness.²⁴ The court did say, though, that vigorous competition by players in the “slot” is a normal occurrence.²⁵ Nevertheless, Watson’s behavior crossed from vigorous competition to intentionally trying to seriously injure another player.²⁶

This issue was again raised in *Regina v. Gray* where the court found Gray guilty of assault when another player who had been involved in physical play on the ice began to skate away from the melee and Gray, who had been on the bench, jumped over the boards, skated at the player and struck him in the face and neck at full speed.²⁷ The court was particularly concerned that the victim had distanced himself from the fight

twice in the head with his stick and punched him in the mouth.³² Ciccarelli was sentenced to one day in jail and fined \$1,000.³³ Although Ciccarelli ultimately spent less than two hours in jail, many felt that the conviction was unwarranted in light of the fact that he was suspended for ten game by the NHL, which cost him over \$25,000.³⁴ The NHL suspension, it seemed, was a much stiffer penalty than the two hours he spent in jail.

More recently, in October 2000, Marty McSorley was convicted of assault with a weapon for slashing Donald Brashear in the face.³⁵ McSorley contended that it was not his intent to strike Brashear in the face, but that he meant to hit him in his upper shoulder.³⁶ The judge didn’t believe McSorley.³⁷ “He slashed for the head,” Judge William Kitchen said. “A child swinging as at a Tee ball would not miss. A housekeeper swinging a carpet beater would not miss. An NHL player would never miss.”³⁸

Nevertheless, McSorley’s sentence consisted of only an 18-month conditional discharge that essentially amounted to probation.³⁹ After the 18-month period, the conviction was expunged from his criminal record.⁴⁰

B. United States Cases

The first criminal proceeding in the United States for conduct occurring during a sporting event, *State v. Forbes*,⁴¹ was filed in 1975 and arose out of a con-

MANY courts are reluctant to convict athletes under criminal statutes for fear that such convictions would chill the aggressiveness that is an inherent part of many sports.

frontation between Boston Bruin Dave Forbes and Minnesota

North Star Henry Boucha.⁴² As officials led the two players to their respective penalty boxes following a skirmish between them, Forbes threw a punch at Boucha with his stick in his hand.⁴³ The stick hit Boucha above the eye causing him to drop to the ice and bleed profusely.⁴⁴ Forbes was indicted on charges of aggravated assault with a dangerous weapon, but the jury split nine to three and was ultimately unable to reach a verdict.⁴⁵ A key issue in the case was whether Forbes’ action occurred “in” or “out” of the game.⁴⁶ Of those jurors who voted for a conviction, most stated that their decision was largely based on the fact that the incident occurred “out of play.”⁴⁷ Had it been during

by skating away from it, which demonstrated to the court that he did not want to be associated with it.²⁸

In *Regina v. Henderson*, Henderson was found guilty of assault following a fight between Henderson and one of the victim’s teammates.²⁹ As Henderson was escorted to the penalty box, he struck the victim, who was simply waiting for play to resume, and knocked him unconscious.³⁰ The court found that although the victim’s teammate may have consented to being struck the victim did not, because he was “almost in the category of an innocent bystander.”³¹

In 1988, Dino Ciccarelli was convicted of assaulting Luke Richardson when Ciccarelli struck Richardson

play, they would have been reluctant to vote for conviction regardless of the extent of Boucha's injuries.⁴⁸

Following *Forbes*, no criminal cases were filed in the United States until 1998 when charges were filed against three hockey players for separate incidents.⁴⁹ The first and most egregious incident occurred in April 1998, during a game between the Plymouth Whalers and the Guelph Storm.⁵⁰ During the first period of this play-off game, Storm forward Andrew Long checked Jesse Boulerice into the boards.⁵¹ After a shoving match, Long skated off to rejoin the play. Boulerice then "grabbed his hockey stick at the end of the handle with both hands and swung his hockey stick, in a baseball-type swing, at Long."⁵² He struck Long across the bridge of the nose.⁵³ Long was rendered unconscious, collapsed onto the ice and went into convulsions.⁵⁴ He suffered a brain contusion, fractures to his nose, nasal cavity and cheekbone, a severe Grade III concussion accompanied by a seizure and a gash across his face requiring twenty stitches to close.⁵⁵ Boulerice was charged with criminal assault.⁵⁶ In August of 1999, Boulerice pled no contest to a lesser charge of aggravated assault and was sentenced to 90 days of probation.⁵⁷

A similar incident occurred on January 23, 1998, when Jason MacIntyre of the West Coast Hockey League's ("WCHL")⁵⁸ Phoenix Mustangs slashed Tacoma Sabercat Thom Cullen in the face with his hockey stick between the second and third periods.⁵⁹ Cullen suffered a broken nose and required twenty stitches on his face.⁶⁰ MacIntyre was banned from the WCHL for life and also charged with criminal assault.⁶¹ MacIntyre pled guilty to third-degree assault and was placed on probation for two years, fined \$500 and required to attend an anger management course.⁶²

Criminal charges have been filed as a result of violent incidents in amateur ice hockey as well. In June of 1998, Chris Fox, a University of Michigan hockey player, pled guilty to assault for a high-sticking incident during a game in a no-checking, recreational league.⁶³ The prosecuting attorney stated that "[c]harges were appropriate under these instances after reviewing the police investigation. It's our opinion here that what happened had nothing to do with sports."⁶⁴ The court sentenced Fox to three years of probation and two hundred hours of community service.⁶⁵

In another amateur hockey case, Robert Schacker

was charged with assault in New York for actions during a game in a no-checking league.⁶⁶ In this case, after the play was over, Schacker skated behind an opposing player standing near the goal and struck him on the back of the head, causing him to hit his head on the crossbar of the net.⁶⁷ The struck player suffered a concussion, headaches, blurred vision and memory loss.⁶⁸ Nevertheless, the court dismissed the assault charge, finding that the player assumed certain risks while playing hockey.⁶⁹ Therefore, in the courts view, in order to allege that an act occurring during a hockey game is a crime, the state must allege acts that show that the defendant's intent was to inflict physical injury unrelated to the play of the game.⁷⁰ Because the state failed to meet the requisite burden, the court dismissed the charge.⁷¹ The court also said that to rule against the defendant, the injuries must be so severe as to be unacceptable in normal competition, which the court did not find under these circumstances.⁷² The court's decision was seemingly influenced by the notion that competitiveness would be undermined if the usual criminal standards were applied to athletic competition, especially ice hockey.⁷³ To this end, the court said that the idea that a hockey player should be prosecuted under these circumstances runs afoul of the policy of encouraging free and fierce competition in athletic events.⁷⁴ The court's view reflects the belief held by many commentators that courts should not interfere in matters relating to incidents occurring during hockey games.

IV. Difficulties in Prosecution

Criminal prosecution of sports violence cases has faced substantial obstacles within the judicial system. According to the prevalent norms of hockey, players are presumed to consent to conduct that is "inherent in and reasonably incidental to the normal playing of the game," as well as "conduct closely related to the play."⁷⁵ Many courts are reluctant to convict athletes under criminal statutes for fear that such convictions would chill the aggressiveness that is an inherent part of many sports.⁷⁶

Some feel that the crimes of assault and battery should not be applicable in the professional sports context because of the tremendous physicality and aggression inherent in professional sports like hockey.⁷⁷ Furthermore, it is not feasible for prosecutors to keep abreast of all altercations between players in sporting events.⁷⁸

There is presumably also a belief that already overburdened prosecutors should leave sports aggressors alone and concentrate instead on prosecuting “real criminals.”⁷⁹

V. The Decision to Prosecute

There are several factors a prosecutor may consider when determining whether or not to prosecute a player for an act committed during a sporting event. These include (1) whether there is substantial doubt as to guilt of the accused; (2) whether the prosecution will deter similar acts by other individuals; (3) whether the prosecution will deter like offenses by the accused; (4) whether benefits will inure to the community; (5) the cost of the prosecution; and (6) the likelihood of securing a conviction.⁸⁰

In general, these factors weigh against prosecution of professional hockey players for on-ice incidents. There often is doubt as to guilt of the accused. Although the act itself may not be in question, guilt is also determined by the *mens rea* of the player, which is difficult to ascertain given the fast-paced action of hockey and the ability of the player to argue that his actions were merely reflexive. Players may argue self-defense as well, as in the

case where another player in some way started or contributed to the initial encounter with the player who allegedly committed the assault. The other factors also most often cut against going forward with a prosecution against a professional athlete as such actions are not likely to be repeated by the individual involved; the community at large does not really benefit from the conviction; there is a high cost to the prosecution given the high media scrutiny of the case; and wealthy athletes are often able to afford high-priced legal services that enable them to delay or evade a trial or conviction.

The likelihood of conviction in such cases is also lower than usual for several reasons. First, prosecution is difficult because the victims of professional sports violence often refuse to testify against the defendant, as was the case in the incident involving Jesse Boulerice.⁸¹ Athletes are hesitant to testify against other athletes either because they view the violence as a part of the game or they fear that testifying against a fellow athlete may be construed as “selling out”

their sport.⁸² Their teammates may also ridicule them for breaking an unwritten code of silence.

Second, it is difficult to secure a fair trial for a professional athlete because of the general bias of the actors in the criminal justice system in the area where the athlete plays.⁸³ For instance, it would probably have been difficult to prosecute Michael Jordan in Chicago in the mid-90s for any offense. Thus, prosecutors believe that a fair trial would be difficult to achieve because the jury would be overly sympathetic to a hometown player accused of a crime and, by contrast, overly harsh on a player prosecuted for a violent act against a hometown player.⁸⁴ Third, juries are often reluctant to convict athletes for on-the-field violence, as evidenced by statements from the jury in the Boucha-Forbes incident where some members of the jury considered what happened to be “part of the game.”⁸⁵

THE *criminal justice system should not involve itself in the prosecution of violent acts committed by and against NHL players during games.*

Although it is within the discretion of prosecutors to bring criminal charges against professional athletes, many prosecutors believe that the criminal system is not served by the prosecution of on-ice attacks.⁸⁶ Prosecutors hold this belief for several reasons.

Prosecution of professional hockey players does not generally serve the stated purposes of criminal punishment, which are retribution, deterrence, incapacitation and rehabilitation.⁸⁷ Many prosecutors feel that prosecuting professional athletes for actions taken during competition would not have a deterrent effect, as most athletes would not view their actions as criminal.⁸⁸ Furthermore, incapacitation and rehabilitation are generally not motives for prosecuting athletes because history has shown that it is unlikely that the players will be incapacitated for any period or forced into any sort of rehabilitation program. Also, because these actions do not subject the general public to danger, as the violence is committed only against other players, prosecutors are not motivated to protect the public from similar acts.⁸⁹ The goal of retribution—reaffirming a sense of justice and fair play by formally defining right and wrong⁹⁰—has probably the strongest resonance in these situations, but the general public sees professional sports as separate from everyday life, so the duty to define right and wrong is not as profound.

Many prosecutors are also hopelessly overburdened by non-sport matters and do not see these athletes as generally dangerous people from whom society should be protected, and so believe their efforts are better directed at “real criminals.”⁹¹ Finally, many prosecutors believe that the league itself is better equipped to curb on-ice violence.⁹²

Some commentators argue that, as a matter of policy, free and vigorous participation in athletic activities would be severely undermined if the usual criminal standards were applied to athletic competition, especially ice hockey.⁹³ While the rules of the game may prohibit certain conduct, the participants nevertheless continue to assume the risk of a strenuous and competitive athletic endeavor, which may include being subjected to acts that would be criminal if they occurred in another context.⁹⁴ Proponents of this argument believe that an increase in prosecutions by the criminal justice system of acts occurring during the course of professional games will lead to players being overly cautious for fear of prosecution. According to this argument, players would thus not be as aggressive as they usually would be for fear that some act of aggression on their part may cross the line and lead to prosecution. Proponents of this argument therefore believe that prosecution by the criminal justice system of professional athletes reduces the overall quality of play throughout the league, because of fear on the part of the players that their actions may be criminal.

V. Defining Criminal Conduct

If a prosecutor does decide to bring criminal charges against an athlete for violence during a game, the athlete is generally charged with battery.⁹⁵ Criminal battery is “the unlawful application of force to the person of another.”⁹⁶ Generally, sports violence is considered “lawful” behavior.⁹⁷ However, when behavior by an athlete during the course of a game is so heinous that it exceeds the level of contact considered lawful within the rules of the game, a prosecutor can argue that it is tantamount to a battery.⁹⁸ The ultimate question, however, is how to determine where to draw the line between conduct that is lawful within the rules of the game and that which is criminal.⁹⁹

In order to determine what actions are unlawful, courts often look to the intent of the athlete charged with a crime.¹⁰⁰ As one judge has suggested, it is hard to

imagine anyone having the requisite intent for criminal assault and battery during a game.¹⁰¹ The state bears the burden of demonstrating the *mens rea* of the player, which is to say that, it must show that the player had the conscious intent to cause physical injury to the victim.¹⁰² The very fact that the act occurred during the course of a sporting event is an affirmative defense that tends to preclude a finding of the requisite intent.¹⁰³ Thus, in order to allege that a criminal act occurred in a hockey game, the facts must support the claim that the physical contact had insufficient connection with the competition.¹⁰⁴

VI. Consent Defense

A major problem courts have faced in prosecutions for sports violence offenses has been the effect of the consent defense raised by athletes charged with a crime.¹⁰⁵ Generally, consent is not a defense to criminal battery because a criminal offense is a “wrong” that affects the general public, at least indirectly.¹⁰⁶ Therefore, a person harmed by the act may not consent because the public interest may not be frustrated by private license.¹⁰⁷ However, consent has sometimes been considered a valid defense in the sphere of sports violence.¹⁰⁸ In fact, the Model Penal Code explicitly allows a defense to criminal charges of battery arising from conduct in a sporting event.¹⁰⁹ Three variations on the defense of consent have been litigated in courts: (1) consent implied by participation in the game; (2) consent implied by specific acts during the game; and (3) public policy limitations on the ability to consent.¹¹⁰

A. Consent Implied by Participation in the Game

It is generally understood that “athletes impliedly consent to a ‘reasonably foreseeable’ amount of physical contact and violence on the playing field.”¹¹¹ The difficulty thus lies in determining which acts are “reasonably foreseeable.”

The question of whether the conduct is customarily part of the sport has been identified by courts as one test to determine whether there is consent or not.¹¹² Following this approach, a player consents to conduct normally associated with the particular sport.¹¹³ This leads to the next obvious threshold determination: What conduct is normally associated with the sport?¹¹⁴

In order to determine what contact is normally associated with ice hockey, it is first necessary to examine the norms of ice hockey. Some courts have held that

hockey players assume the risk of injury by voluntarily participating in a hockey game.¹¹⁵ Although fighting is against the formal rules of the game, it is viewed as an inherent part of it.¹¹⁶ And according to the informal rules of the game, fighting is clearly acceptable to players, coaches and fans.¹¹⁷ Players have stated that these informal rules even justify fighting in some situations.¹¹⁸ Fighting is not even considered to be violent.¹¹⁹ The great majority of owners even believe that fighting is a necessary marketing tool for hockey.¹²⁰ It should therefore not be surprising that the NHL has been accused of deliberately promoting fighting as a means to gain popularity.¹²¹ However, there seems to be an unspoken line.¹²² According to contemporary norms of NHL play, stick assaults are considered violent and unacceptable under all circumstances.¹²³ The NHL even supports a policy that considers fighting to be less serious than stick-related incidents.¹²⁴

This distinction would seem to support a legal conclusion that non-stick fighting falls within hockey's accepted norms, and is thus consented to by hockey players.¹²⁵ Slashing with a stick, however, falls outside the norms of ice hockey and thus is not consented to by participants.¹²⁶ Yet, such a distinction seems to oversimplify ice hockey's norms. Slashing with one's stick occurs in almost every hockey game. Therefore, a complex distinction must be drawn to distinguish the types of slashes punishable by penalties on the ice from those punishable by the criminal justice system.

B. Consent Implied By Specific Acts

A variation on the consent doctrine discussed above is a defense based on specific acts of another participant.¹²⁷ This type of consent defense was discussed in the Canadian decision, *Regina v. Watson*.¹²⁸ In *Watson*, two players jostled in front of the net, the victim dropped his stick and gloves and the defendant attacked him, choking him until he became unconscious.¹²⁹ The Court rejected the argument that by his acts, the victim, in any way, consented to the actions of the defendant.¹³⁰

Although the idea of consent implied by specific acts rather than by general participation in the sport is rarely explicitly discussed as a separate issue, it seems to underlie the analysis in many cases.¹³¹ For example, in *Regina v. Henderson*, the court recounted the events leading up to the incident that resulted in the prosecution,

including how no overt act by the victim immediately preceded the attack, nor occurred at any other time during the game.¹³² The victim was not looking in the defendant's direction at the time of the attack, there was no indication that the victim expected to become involved with the defendant and, at the time of the attack, the defendant was skating toward the penalty box and the victim was stationary.¹³³ Because the victim's participation in the game was not at issue, the recitation of the events leading up to the incident can only serve the purpose of demonstrating that the victim did not, by any conduct on his part, consent to the blow he received.¹³⁴

C. Consent As Limited By Public Policy

A number of courts have held that public policy does not permit consent to some types of assault.¹³⁵ This view was adopted in *Regina v. Watson* where the court stated that "[i]f an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it"¹³⁶ The general rule is thus that no person can license another to commit a crime.¹³⁷ There seems to be exceptions to this general rule, however.¹³⁸ The court in *Watson* suggested that a boxing match might be an exception to this rule where the object of the sport itself is to render an opponent unconscious.¹³⁹ However, the court said that this exception was not applicable to the case before it because rendering an opponent unconscious is not an object of the sport of hockey.¹⁴⁰ Therefore, courts may find that, from a policy perspective, in the context of a hockey game a person cannot consent to acts that are criminal in nature.¹⁴¹

VII. Self-Defense

Another defense available to athletes is self-defense. According to the doctrine of self-defense, a person who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes: (a) that he is in immediate danger of unlawful bodily harm from his adversary; and (b) that the use of such force is necessary to avoid this danger.¹⁴²

This defense is problematic in its application to sports violence for primarily two reasons. First, an athlete must show that only reasonable force was used in resisting

the attack.¹⁴³ To illustrate the point, if one player strikes an opponent with his fist, the struck player may not retaliate with his stick.¹⁴⁴ Second, the biggest problem with athletes claiming self-defense is that the defense is limited to those situations in which the defendant had no reasonable means of retreat and when force was necessary to avoid danger.¹⁴⁵ If a player could have avoided the confrontation by retreating, as is the case with most incidents of violence in sports, the player is not permitted to use the doctrine of self-defense.¹⁴⁶ This doctrine, however, fails to account for the social norms in hockey, which call for fighting in certain circumstances and the ridiculing of players who shy away from fighting when those circumstances arise.

VIII. Defining Assault

A. Offenses that Occur During Play Versus Offenses that Occur Once Play has Ceased

Courts have often tried to devise bright-line tests to determine when violence during a sporting event becomes an assault. One test that courts have used involves determining whether the incident took place during play or when play had stopped.¹⁴⁷ One court considered conduct that occurred after the blow of a referee's whistle to be essentially uninfluenced by the play that preceded it, and so applied a strict standard to the conduct.¹⁴⁸ At the other extreme, other courts have held that the emotional intensity of the play may justify conduct that would not be acceptable in calmer situations, and the effect of this intensity does not wear off as soon as the whistle is blown.¹⁴⁹

The Court in *Henderson* applied a different standard to assess liability for incidents occurring during play and after the whistle: whether the action is "incidental to the sport."¹⁵⁰ The Court held that stricter scrutiny should be applied to incidents that occur after play has ceased.¹⁵¹ Although the bright-line rule that violent actions occurring after a whistle has stopped play carries a greater presumption of criminality, such a position does not adequately address the complexities of the problem.¹⁵²

B. Observance of Game Rules Versus Non-Observance of Game Rules

Another proposed bright-line test is whether the conduct in question violated an official rule of the game. One court took the approach that when play occurs according to the rules of the game, players' consent to simple assaults that occurs during play; however, no consent is presumed when simple assaults are committed or bodily injuries are inflicted by a player in derogation of the rules of the game.¹⁵³ Several courts have adopted a test for determining consent from a civil case, *Agar v. Canning*, that concluded that a player must be held to consent to "an unintentional injury resulting from one of the frequent infractions of the rules of the game."¹⁵⁴ The problem with this approach is that penalties resulting from hitting another player with one's stick ("slashing") and getting into a fight with another player ("roughing") are frequently assessed in hockey. Courts in general, though, have placed little emphasis on whether or not the rules of the game were violated, as it seems illogical that the state's evaluation of criminal behavior should be controlled by the rulemaking of a private organization.¹⁵⁵

C. Offenses in Professional Versus Amateur Sports

Courts have also attempted to devise a sliding scale for determining whether a player consents to assault "based on whether one is playing professional or amateur sports."¹⁵⁶ In one case, a court recognized a continuum of consent to assaults based on the participant's amateur or professional status.¹⁵⁷ Another court has noted, however, that if everything that occurs after the whistle has blown is no longer part of the game, then the seemingly significant distinctions between professional and amateur play are not even relevant.¹⁵⁸

IX. Solutions

One alternative to determining whether, as well as when, to prosecute professional athletes is for the criminal justice system to stay out of the picture completely and let the league enforce its own rules.¹⁵⁹ In fact, the NHL developed enforcement procedures, in part, to circumvent the criminal and civil justice systems altogether.¹⁶⁰ One argument for leaving it to the league to handle disciplinary matters is that the league understands the sport

better than does any court.¹⁶¹ Certainly league officials are more familiar with customs of the sport and with what risks players assume than a judge or jury.¹⁶²

Furthermore, league action is much swifter than that of the criminal judicial system.¹⁶³ Officials are also better able to impose uniform and predictable sanctions, and thus better able to deter future excessively violent acts.¹⁶⁴ It also seems that the league is more willing to levy more severe punishments than the criminal justice system.¹⁶⁵ Although the collective bargaining agreement of the NHL restricts the league's maximum fine to \$1000, the NHL is able to impose suspensions for which players must sit out games without pay.¹⁶⁶ The punishments imposed by the NHL thus seem much more severe than those imposed by criminal courts, which largely consist of probation and a token fine. The greater severity of punishments imposed by the NHL, again, signals that such punishments would better serve as a deterrent to future conduct of the sort being punished.¹⁶⁷

One potential drawback with leaving to the league the responsibility of punishing violent acts is, as some may argue, that the NHL has an interest in promoting violence, and thus

will only protect players against in-game violence when it rises above a certain "entertainment" level.¹⁶⁸ Violence makes professional hockey more exciting and marketable to spectators, so the NHL has an interest in preserving some level of violence in the sport.¹⁶⁹ Thus, some contend that this interferes with the league's ability to objectively mete out punishments because, although it wants to eliminate the kind of violence that can seriously injure players, it does not want to overly deter the kinds of violence that it relies on to market its sport.¹⁷⁰

Nevertheless, it appears that the most efficient system is for the league to enforce its own rules. Although some may argue that the league has an interest in encouraging violence, it also has an interest in preventing its players from being seriously injured. Even though ice hockey is a rough and sometimes violent sport, there are nevertheless norms that the players follow and certain behavior is widely considered unacceptable. When deviant behavior occurs, the league should be responsible for punishing the violent player to demonstrate to that

player and the rest of the league that such behavior will not be tolerated. It thus seems that the NHL is becoming increasingly concerned with such matters, as four of the five longest suspensions without pay in NHL history have occurred after 1993, and three of those occurred after 1999.¹⁷¹ This suggests that the NHL is becoming even more determined to punish violent acts that go beyond the norms of professional ice hockey.

Another problem with allowing the criminal justice system to handle matters involving violence during hockey games is that, in these situations, the criminal justice system fulfills none of the goals for which it is designed. It does not deter future violence, does not protect the general public, does not punish the individual effectively and does not serve any retributive function.

Criminal sanctions do not act as a deterrent because as it is now, punishments are so inadequate that they (in no way) affect players' actions. Even for the slash by Marty McSorley to Donald Brashear's face, which one NHL player described as "the worst thing I've ever seen," McSorley's conviction for assault with a weapon

VIOLENCE makes professional hockey more exciting and marketable to spectators, so the NHL has an interest in preserving some level of violence in the sport.

resulted in no jail time and no probation.¹⁷² McSorley was sentenced only to a "conditional discharge," which provided that McSorley must not "engage in any sporting event where Donald Brashear is on the opposition" for 18 months.¹⁷³ Such a toothless sentence provides no deterrence and seems especially meek in light of the one full-year suspension imposed on McSorley by the NHL.¹⁷⁴

The criminal justice system's involvement in on-ice actions does not protect the general public because the danger of the act is confined to those few people who play professional hockey in the NHL. A crime is generally considered to be "an offense against the State or the United States."¹⁷⁵ This seems to imply that a crime is against the residents of a state or of the United States. However, in the case of hockey violence, the general public is not affected by dangerous acts on the ice. Only NHL players are affected by such actions. Because violence in hockey affects only a small and distinct segment of society, instead of society as a whole (as criminal acts are generally assumed

to do), it seems more efficient for that distinct segment to self-regulate the violence plaguing it.

Criminal law is also designed to punish an individual for committing an act against society. As discussed above, prior punishments for violence in hockey have been so weak that it is difficult to argue that the results of the criminal proceedings have effectively punished the athlete in any tangible way. McSorley's punishment is, again, an apt example.¹⁷⁶ No one can possibly think that McSorley's sentence effectively punished him for his attack on Brashear.

Another theory behind criminal law is that it serves a retributive function, in that punishment of the perpetrator satisfies the victim's desire for revenge. This policy is not served by prosecuting perpetrators of on-ice violence, because the punishments are so inconsequential that victims desire for revenge cannot possibly be satisfied. Additionally, in many cases, the victims bear no real ill will toward the players who committed the acts in the first place. In November 2000, Brad May of the Phoenix Coyotes slashed Columbus' Steve Heinze in the head and was suspended for twenty games by the NHL.¹⁷⁷ After the game, May said that he apologized to Heinze, who accepted the apology.¹⁷⁸ In general, it does not seem like NHL players, the class of potential victim's, really look to the criminal justice system for retribution for acts committed against them on the ice. And if they did, the players would certainly be disappointed with the meager punishments being doled out.

X. Conclusion

In conclusion, the criminal justice system should not involve itself in pursuing criminal charges against professional hockey players for acts that occur on the ice during NHL games. The McSorley incident clearly demonstrates why the criminal justice system has no place in pursuing criminal charges against players for on-ice assaults.

McSorley's "punishment" is not only embarrassing to the judicial system; it also seems to undermine the system itself. In essence, the system seems to provide much more lenient punishments for players convicted of on-ice assaults. These sentences indicate that courts evaluate violent acts occurring on the ice during professional hockey games under a partial assumption of risk doctrine. This doctrine seems to hold that violent acts during hockey games are partially justified because a

certain level of violence in hockey is normal. In practice, this doctrine does not really serve the objectives of the criminal justice system because players who have committed very dangerous acts essentially receive only slaps on the wrist as punishment. This is insulting to others who commit similar acts not during professional hockey games and receive much more severe penalties. This is a difficult legal argument to defend because courts have refused to clearly outline the partial assumption of risk defense. If the fact that violence occurred during a professional hockey game mitigates the damages so completely that the player is given only a token punishment, then, it seems, there is no reason to pursue the conviction in the first place.

The criminal justice system should not involve itself in the prosecution of violent acts committed by and against NHL players during games. The criminal justice system is not equipped to understand the norms of professional hockey, and it is a waste of time and money for an already overburdened system to prosecute players who pose no real threat to society. The management of the NHL has shown that it is capable and willing to punish players who commit acts that clearly violate the norms of hockey. Despite beliefs and publicity to the contrary, the league has been tough as of late in punishing these violations, as indicated by McSorley's one-year suspension.¹⁷⁹ Furthermore, there will always be a particularly burdensome standard of proof that must be met in order for athletes to be convicted for crimes committed during play. This burden is particularly tough because the requisite intent to injure another player is difficult to establish in the context of a physical, fast-moving game in which players' actions are often reflexive.¹⁸⁰ For all of these reasons, the criminal justice system should leave the disciplining of professional ice hockey players to NHL officials who better understand, and can thus more effectively deal with, players' actions.

JELP

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Notes

1. See *Espn.com, Final Arguments Offered in McSorley Trial*, at <http://www.espn.go.com/nhl/news/2000/0929/789249.html> (Oct. 4, 2000).
2. See *id.*
3. See *id.*
4. See *id.*
5. See Tom Jones, *Tough Guys Itching to Fight*, ST. PETERSBURG TIMES (Florida), Dec. 24, 1996, at 4C.
6. The term “checking” means generally hitting another player with one’s body as a means of controlling that person’s movement.
7. See Kenneth Colburn, Jr., *Deviance and Legitimacy in Ice-Hockey: A Microstructural Theory of Violence*, 27 Soc. Q. 63, 68 (1986).
8. See *id.*
9. See *id.*
10. See *id.*
11. See *id.*
12. See *id.*
13. See NHL.com, *NHL Rulebook: Rule 85 Slashing*, at <http://www.nhl.com/hockey/rulebook/rule85.html> (last visited Apr. 1, 2002).
14. See Kenneth Colburn, Jr., *Honor, Ritual and Violence in Hockey*, 10 CAN. J. OF SOC. 153, 156 (1985).
15. See Linda S. Calvert Hanson & Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORTS L. 127, 139 (1996).
16. See *id.* at 140
17. See Diane V. White, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts*, 1986 DUKE L.J. 1030, 1035 (1986).
18. See *id.*
19. See *Regina v. Maki*, 14 D.L.R.3d 164, 165 (1970).
20. See *id.*
21. See *id.* at 164-65.
22. See *id.* at 167.
23. *Regina v. Green*, [1970] 2 C.C.C.2d 442, 447-48 (Ont. Prov. Ct).
24. See *Regina v. Watson*, [1975] 26 C.C.C.2d 150 (Ont. Prov. Ct. 1975).
25. See *id.* at 152.
26. See *id.* at 151.
27. See [1981] 6 W.W.R. 654 (Sask. Prov. Ct. 1981).
28. See *id.*
29. See 5 W.W.R. 119 (B.C. Co. Ct. 1976)
30. See *id.*
31. See *id.*
32. See Austin Murphy, *North Star on Ice; Minnesota’s Dino Ciccarelli Went to Jail for Assaulting a Player During an NHL Game*, SPORTS ILLUSTRATED, Sept. 5, 1988, at 34.
33. See *id.*
34. See *id.*
35. See *Regina v. McSorley*, 2000 BCPC 0116 (2000).
36. See *id.*
37. See *id.*

38. *See id.*
39. *See* Greg Joyce, CNEWS, *McSorley Found Guilty; Hockey Bruiser Gets No Jail Time, No Criminal Record*, at http://www.canoe.ca/CNEWSLaw0010/06_mcsorley-cp.html. (Oct. 6, 2000).
40. *See id.* Following the conclusion of his one-year suspension by the NHL, McSorley attempted a comeback, but soon thereafter retired from professional hockey after fourteen games with the Grand Rapids Griffins of the International Hockey League.
41. *State v. Forbes*, No. 63280 (Hennepin Co. Minn. Dist. Ct., dismissed Aug. 12, 1975) (copy on file with author).
42. Bradley C. Nielson, *Controlling Sports Violence: Too Late for the Carrots—Bring on the Big Stick*, 74 IOWA L. REV. 681, 701 (1989).
43. *See id.*
44. *See id.*
45. *See id.* at 702.
46. *See id.*
47. *See id.*
48. *See id.*
49. *See* Steve Rushin & Jack McCallum, *Scorecard: Hockey Violence—Was His Play Criminal?*, SPORTS ILLUSTRATED, July 20, 1998, at 15.
50. *See id.*
51. *See id.*
52. *See id.* (citing police report).
53. *See id.*
54. *See id.*
55. *See id.* A Grade III concussion is the most serious form of concussion and differs from a Grade II concussion in that the head injury results in a loss of consciousness.
56. *See id.*
57. *See* Tim Panaccio, PhillyFlyers.com, *Ending Pre-season With Win, Flyers Have Choices To Make*, at <http://www.phillyflyers.com/NewsandNotesDetail.asp?Record=303> (last visited Feb. 22, 2002).
58. The WCHL is one of five minor league systems for the NHL, consisting of eight teams.
59. *See* Jack Hopkins, *Ex-Player Sentenced for Assault During Hockey Game*, SEATTLE POST-INTELLIGENCER, Apr. 17, 1998, at C3.
60. *See id.*
61. *See id.*
62. *See id.*
63. *See* *High Sticking Results in Charges*, TIMES UNION (Albany, NY), Jan. 8, 1998, at C4.
64. *See id.*
65. *See id.*
66. *People v. Schacker*, 670 N.Y.S.2d 308, 309 (N.Y. Dist. Ct. 1998).
67. *See id.*
68. *See id.*
69. *See id.*
70. *See id.*
71. *See id.* at 310.
72. *See id.*
73. *See id.*

74. *See id.*
75. Jonathan H. Katz, *From the Penalty Box to the Penitentiary—The People Versus Jesse Boulerice*, 31 RUTGERS L.J. 833, 853 (2000).
76. *See id.*
77. *See id.*
78. *See id.*
79. *See id.*
80. *See* Neilson, *supra* note 42, at 706.
81. *See* Plymouthwhalers.com, *Boulerice Faces November Acquittal*, at <http://www.plymouthwhalers.com/teamnews/99-2000stories/boulericerecap.htm> (last visited Mar. 20, 2001).
82. *See* Katz, *supra* note 75, at 855.
83. *See id.*
84. *See id.*
85. *See id.*
86. *See* Katz, *supra* note 75, at 854.
87. *See generally* P. LOW ET AL., CRIMINAL LAW: CASES AND MATERIALS (2d ed. 1986).
88. *See* Katz, *supra* note 75, at 855.
89. *See id.*
90. *See* Stanley K. Shernock, *Book Review: The Great American Crime Myth*, 78 J. CRIM. L. & CRIMINOLOGY 197, 199 (1987).
91. *See id.*
92. *See id.* at 856.
93. *People v. Schacker*, 670 N.Y.S.2d 308 (N.Y. Dist. Ct. 1998).
94. *Id.*
95. *See id.*
96. *See id.* (citing WAYNE R. LEFAVE & AUSTIN W. SCOTT, CRIMINAL LAW 685 (2d ed. 1986)).
97. *See id.*
98. *See id.*
99. *See id.*
100. *See id.* “Specific” or “general” intent crimes differ from strict liability crimes in that the actor must exhibit a “mens rea” or guilty mind before the actor may be convicted of the offense. *See* Kenneth M. Koprowicz, *Corporate Criminal Liability for Workplace Hazards: A Viable Option for Enforcing Workplace Safety?*, 52 BROOK. L. REV. 183, 187 n.19 (1986).
101. *See id.*
102. *People v. Schacker*, 670 N.Y.S.2d 308, 309 (N.Y. Dist. Ct. 1998).
103. *Id.*
104. *Id.*
105. *See* Katz, *supra* note 75, at 858.
106. *See id.*
107. *See id.*
108. *See id.*
109. *See id.* Section 2.11(2) of the Model Penal Code states:
When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if ... (b) the conduct and the injury are reasonably foreseeable hazards of joint partici-

- pation in a lawful athletic contest or competitive sport.
MODEL PENAL CODE § 2.11(2) (1985).
110. *See White, supra* note 17, at 1038.
111. *Katz, supra* note 75, at 858.
112. *See id.*
113. *See id.*
114. *See id.*
115. *See, e.g., People v. Schacker, 670 N.Y.S.2d 308, 309 (N.Y. Dist. Ct. 1998).*
116. *See Hanson & Dernis, supra* note 15, at 137-39.
117. *See id.*
118. *See id.*
119. *See id.*
120. *See id.*
121. *See id.*
122. *See id.*
123. *See id.*
124. *See id.*
125. *See id.*
126. *See id.*
127. *See White, supra* note 17, at 1045.
128. *See Regina v. Watson, 26 C.C.C.2d 150 (Ont. Prov. Ct. 1975); id.*
129. *See id.*
130. *See id.*
131. *See id.* at 1046.
132. *See id.*
133. *See id.*
134. *See id.*
135. *See id.* at 1046-47.
136. *See id.*
137. *See id.*
138. *See id.*
139. *See id.* at 1048.
140. *See id.*
141. *See id.*
142. *See Katz, supra* note 75, at 859.
143. *See id.*
144. *See id.*
145. *See id.*
146. *See id.*
147. *See White, supra* note 17, at 1048.
148. *See In re Duchesneau, 7 C.R.3d 70 (Que. Youth Trib. 1975); id*
149. *See Regina v. Leyte, 13 C.C.C.2d 458 (Ont. Prov. Ct. 1973).*
150. *See White, supra* note 17, at 1050.
151. *See id.*
152. *See id.*
153. *See id.* at 1051.

154. *See id.*
155. *See id.*
156. *See id.*
157. *See id.*
158. *See id.*
159. *See Katz, supra* note 75, at 863.
160. *See id.*
161. *See id.* at 864.
162. *See id.*
163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.* at 865.
167. *See id.*
168. *See id.* at 866.
169. *See id.*
170. *See id.*
171. Associated Press, May Already has Apologized to Heinze, *available at* <http://www.espn.go.com/nhl/news/2000/1115/879682.html> (Nov. 16, 2000).
172. Kostya Kennedy, *Up Against It*, SPORTS ILLUSTRATED, Nov. 20, 2000, at 36.
173. *Id.*
174. *Id.*
175. BLACK'S LAW DICTIONARY 370 (6th ed. 1990).
176. *See Kennedy, supra* note 172, at 37.
177. Associated Press, May Already has Apologized to Heinze, *available at* <http://www.espn.go.com/nhl/news/2000/1115/879682.html> (Nov. 16, 2000).
178. *See id.*
179. *See id.*
180. Barbara Svoranos, *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. SPORTS L. 487, 504 (1997).