HIT SOMEBODY: HOCKEY VIOLENCE, ECONOMICS, THE LAW, AND THE TWIST AND MCSORLEY DECISIONS

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Buddy's real talent was beating people up.
His heart wasn't in it but the crowd ate it up.
Through peewees and junior, midgets and mites
He must have racked up more than 300 fights.
A scout from the Flames came down from Saskatoon,
Said, "There's always room on our team for a goon.
Son, we've always got room for a goon."
"Hit somebody!" It rang in his ears.
Blood on the ice ran down through the years.
The king of the goons with a box for a throne,
A thousand stitches and broken bones,
He never lost a fight on his icy patrol.
But deep inside, Buddy only dreamed of a goal.
He just wanted one damn goal.[1]

I. INTRODUCTION

> . . . on the charge against Marty McSorley that he assaulted Donald Brashear with his hockey stick during a hockey game on February 21, 2000[2]. . . I must find you guilty as charged[3]. . . I grant you a conditional discharge for 18 months.[4]

-Mr. Justice Kitchen,
in *R. v. McSorley*

There is an ongoing dispute over the effects of violence in professional team sport and the adequacy of existing policy responses.[5] While no major league sport is absolutely unique in its penchant for violence, each

1. WARREN ZEVON AND MITCH ALBOM, HIT SOMEBODY! (THE HOCKEY SONG) (Artemis, 2001). *See*, Grant Wahl, *Scorecard*, SPORTS ILLUSTRATED, Feb. 5, 2001, at 35.

2. R. v. McSorley, [2000] B.C.J. 116, at 1.

3. *McSorley*, [2000] B.C.J. 116, at 109.

4. *McSorley*, [2000] B.C.J. 117, at 21.

5. In a reference database of sports journals, popular journals, and journals in law, sociology, psychology and economics, there were 1725 items (in English) dealing with sports violence from 1975 through Dec. 2000. *See Sports Information Resource Centre* on CD-ROM Sports Discus, version 3.1, current through Dec. 2000. *See generally* R.C. YEAGER, SEASONS OF SHAME: THE NEW VIOLENCE IN SPORTS (McGraw Hill, 1979); DONALD ATYEO, BLOOD AND GUTS: VIOLENCE IN SPORT (Van Nostrand Reinhold, 1981); M.D. SMITH, VIOLENCE AND SPORT (Butterworths, 1983); D.S. Eitzen, *Violence in Professional Sport and Public Policy*, in ARTHUR J. JOHNSON AND JAMES H. FREY, GOVERNMENT AND SPORTS: THE PUBLIC POLICY ISSUES 99-114 (Rowan and Allenheld, 1985); C.J. Carlsen, *Violence in Professional Sports*, in GARY A. UBERSTINE, THE LAW OF PROFESSIONAL AND AMATEUR SPORTS 16-1 – 16-32 (Boardman, 1988).

having its share of egregious examples,[6] the focus of attention falls inevitably on the National Hockey League (NHL). This is principally due to the fact that it is the only major league in which violence is, if not quite institutionalized, nevertheless, actively encouraged.[7] Since violence is a societal "bad," there is a general presumption that some attempt to curb violence in hockey — or in any other sport for that matter — is appropriate. However, there is considerable dispute over the nature and adequacy of existing remedial measures.[8]

It is possible to discern two main viewpoints. One view is that sporting violence should be judged by the same standards as societal violence in general. Hence, irrespective of the degree of implied consent,

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6. In addition to the National Hockey League (NHL), the major league sports considered here are: Major League Baseball (MLB), the National Basketball Association (NBA) and the National Football League (NFL). Three oft-quoted "classic" examples of egregious violence are: Juan Marichal hitting catcher John Roseboro in the head with a baseball bat (MLB) (*see* Rick Minshall, "Marichal Clobbers Roseboro", available at http://www.baseballpressbox.com/CVintageSelect.asp?ItemNumber=24 (last visited Nov. 2, 2001) (detailing Marichal's attack)); Kermit Washington punching Rudy Tomjanovich in the face, fracturing his jaw, nose, and skull and causing a concussion (NBA) (*see* Curry Kirkpatrick, "Shattered and Shaken," SPORTS ILLUSTRATED, Jan. 2, 1978 (detailing the aftermath of the attack and effects on both careers)); and Charles Clark hitting Dale Harkbart in the back of the head after the play was over, causing three broken vertebrae, muscular atrophy, and loss of reflexes (NFL). Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979). *See also* Section III *infra*.

7. *See* NEIL D. ISSACS, CHECKING BACK: A HISTORY OF THE NATIONAL HOCKEY LEAGUE (Norton, 1977); IRA GITLER, BLOOD ON THE ICE (Henry Regnery Co., 1974); STAN FISCHLER, SLASHING (Thomas Y. Cromwell, 1974); STAN FISCHLER AND SHIRLEY FISCHLER, BREAKAWAY 87-88: THE HOCKEY ALMANAC (Totem Books, 1987); JEFF Z. KLEIN AND K.E. REIF, THE KLEIN AND REIF HOCKEY COMPENDIUM, Ch. 9 (1st rev. ed.) (McClelland and Stewart, 1987); STAN FISCHLER, ULTIMATE BAD BOYS: HOCKEY'S GREATEST FIGHTERS (Warwick Publications, 1999) (hereinafter FISCHLER II); KEVIN ALLEN, CRUNCH: A HISTORY OF FIGHTING IN THE NHL (Triumph Books, 1999).

8. *See generally* Carlsen, *supra* note 5; Eitzen, *supra* note 5; B.C. Nielson, *Controlling Sports Violence: Too Late for the Carrots — Bring on the Big Stick*, 74 IOWA L. REV. 681 (1989); K. Melnick, *Giving Violence a Sporting Chance: A Review of Measures Used to Curb Excessive Violence in Professional Sports*, 17 J. LEGIS. 123 (1990); D.R. Karon, *Winning Isn't Everything, It's the Only Thing: Violence in Professional Sports: The Need for Federal Regulation and Criminal Sanctions*, 25 IND. L. REV. 147 (1991); L.B. Pincus, *Sports Violence: The Argument for the End of Brutality with Impunity*, 13 ENTM'T. & SPORTS L. 13 (1992); J.C.H. Jones, K.G. Stewart & R. Sunderman, *From the Arena Into the Streets: Hockey Violence, Economic Incentives and Public Policy*, 55 AMER. J. OF ECON. & SOC., 231 (1996); L.S. Calvert Hanson & C. Dennis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORTS L. 127 (1996); B. 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 (1997); G.M. Moore, *Has Hockey Been 'Checked From Behind' North of the Border? Unruh, Zapf, and Canada's Participant Liability Standard*, 18 LOY. L.A. INT'L & COMP. L.J. 641 (1996); H.C. Doerhoff, *Penalty Box or Jury Box? Deciding Where Professional Sports Tough Guys Should Go*, 64 MO. L. REV. 739 (1999).

players should be protected from violence and the rule of law upheld; and potentially negative externalities, those invidious third party effects, should be rectified. In these terms, the existing policy responses are deemed ineffective because the current corrective mechanisms — *de facto* league self-regulation and the judicial system — are demonstrably inadequate. The NHL, it is argued, appears to lack any incentive to reduce violence; and the courts seem loath to punish the perpetrators. The recent cases involving Tony Twist (1998) and Marty McSorley (2000)[9] are noted as the latest in a line of American and Canadian decisions that testify to the impotence of the laws in both countries when faced with flagrant hockey violence. The upshot is the continued existence of a constituency favoring direct governmental regulation.[10]

Not surprisingly, the alternative view is that current mechanisms work quite well, so that any move towards direct regulation is patently unnecessary. Hockey, it is argued, is an aggressive game in which violence, albeit an unintended spontaneous by-product, can have therapeutic (for players) and cathartic (for fans, a positive externality!) properties.[11] League self-regulation is seen as the quickest, most effective, and only equitable way of policing violence. The major alternative, the court system, is problematic because games are played in two different countries and numerous sub-national jurisdictions (states or provinces), all of which have either different laws or different interpretations of the same laws. Nevertheless, the judicial treatment of sporting violence, as in the

9. Formerly, there was only one case directly involving Tony Twist, *McKichan v. Twist*, 1996 WL 928452 (St. Louis City County, Mo. Trial Ct.). McKichan filed suit against Twist, Twist countersued, the players dismissed their respective claims, and McKichan proceeded against the St. Louis Blues. *See* Doerhoff, *supra* note 8, at 741. The key decision, however, was in the Missouri Court of Appeal, *McKichan v. St. Louis Hockey Club, L.P.*, 967 S.W.2d 209 (Mo. Ct. App. 1998). In this paper we refer to both cases as "the *Twist* cases," since they were both the result of Tony Twist's behavior. The cases will be dealt with in some detail in Section III *infra*. For the McSorley reference, *see* note 2 *supra*.

10. See Carlsen, *supra* note 8, Melnik, *supra* note 8, and Karon, *supra* note 8, for the arguments for and against direct regulation by an independent Board. In the U.S., legislation along these lines was introduced as *The Sports Violence Act of 1980* and *The Sports Violence Arbitration Act of 1983*. *See* Melnik, *supra* note 8, at 130-35; Karon, *supra* note 8, at 157-60. Neither piece of legislation became law. *Id.* In Canada, the closest the government came to setting up an independent Board to deal with hockey violence was in 1986. *Id.* An advisory committee, *The Fair Play Commission*, was set up to "campaign" against hockey violence. *Id.* The Commission had no regulatory powers whatsoever, beyond operating on a vague "moral suasion" premise. *See* James Davidson, *Hockey Cleanup a Difficult Task for Jelinek*, TORONTO GLOBE & MAIL, Apr. 12, 1986, at D4. Not surprisingly, this went nowhere and the Commission eventually merged with the *Canadian Centre for Ethics in Sport*. *Id.*

11. *See* Eitzen, *supra* note 8, at 103. For example, John Ziegler, a former NHL President, asserted to a Congressional sub-committee that violence was therapeutic for the players. *See* DOUG BEARDSLEY, COUNTRY ON ICE 157 (Polstar Press, 1987), for a discussion on fan catharsis.

Twist and *McSorley* cases, is justifiably different from the standard treatment of violence, because the former, as the doctrine of implied consent recognizes, is different. *Ergo*, given that prosecutorial resources are presumably scarce, they should be devoted to pursuing "real criminals," not hockey players.[12]

On the face of it, it is not obvious which viewpoint is correct. This is clearly consequential for policy, since one view suggests maintaining the *status quo*, while the other indicates major changes, perhaps even by-passing the judicial system altogether and going to direct regulation. Our view is that the policy dilemma can be substantially resolved — or, at least, the area of ignorance significantly reduced and the direction for policy clarified — if an economic model is applied to the violence problem in hockey. Therefore, the object of this paper is to apply an economic-violence model to the NHL and consider its implications, in light of the *Twist* and *McSorley* cases, for the policy instruments associated with the judicial system and league self regulation.

Methodologically, our procedure is fairly standard: we briefly outline the model, evaluate its validity empirically and consider the implications for policy in the context of the *Twist* and *McSorley* cases. More specifically, we proceed in the following sequential steps. In Part II, we: (i) present the economic-violence model and its predictions; (ii) review the empirical evidence verifying the predictions and hence validating the model; and (iii) evaluate the implications for economic incentives and externalities and their relevance for remedial action. In Part III, in light of the findings established in Part II, we consider, in the context of the *McSorley* and *Twist* decisions, the implications for: (i) the judicial systems in Canada and the U.S.; and (ii) league self-regulation. Finally, some concluding comments will be offered in Part IV.

Our major findings can be summarized as follows. The economic-violence model is valid and, since there is no incentive for teams to reduce violence and as negative externalities emanate from the violence, remedial action is justified. However, to be effective, any policy response must target the team, not merely the offending player. The present legal approach, as exemplified by the *McSorley* and *Twist* decisions, focuses principally on the player and does nothing to change team incentives. Hence, using the criminal or civil law to constrain hockey violence, is largely ineffectual. The same can be said of league self-regulation because teams and leagues have no incentive to reduce violence. The upshot is, as long as sports violence is considered a societal "bad," it is difficult to

12. *See* Svoranos, *supra* note 8, at 511.

reject the call for more direct government action given the ineffective nature of the current policy instruments.

II. VIOLENCE: THE ECONOMICS

"If they cut down on the violence too much, people won't come out to watch...Violence sells!"[13]

-Bob Clark, former professional hockey player and current General Manager of the NHL's Philadelphia Flyers

(i) The Theory

In economic terms, the NHL and its constituent clubs are seen as economic agents. The league may be considered a private cartel that serves to codify the rules that govern inter-team behavior. Each agent is motivated by its desire to maximize profits: the league wishes the teams to act so as to maximize the joint profits for the group; and each team acts so as to maximize its own profits. Thus, league and team behavior can be primarily explained by economic factors.[14] In this context, violence is a "goods characteristic" — an attribute of the product derived from behavior designed to maximize profits.[15]

On the demand side, there are two mechanisms through which violence potentially affects revenue and hence profits. One is associated with the "intimidation" hypothesis.[16] This works through the supposedly positive effect violence has on winning (the oft celebrated "winning through intimidation" theory, glorified in hockey as the "if you can't beat 'em in the alley you can't beat 'em on the ice"[17] syndrome), and the positive effect winning has on attendance, and consequently, on revenue,

13. *See* Melnik, *supra* note 8, at 125, quoting W.M. LEONARD II, A SOCIOLOGICAL PERSPECTIVE OF SPORT, 169, 177 (3d ed., 1988).

14. *See* J.C.H. Jones, *The Economics of the National Hockey League*, 2 CAN. J. OF ECON. 1 (1969), on the economics of the NHL. *See* D.G. Ferguson, J.C.H. Jones, K.G. Stewart & A. LeDressay, *The Pricing of Sporting Events: Do Teams Maximize Profits?*, 39 J. OF INDUS. ECON. 297 (1991), for empirical evidence on the NHL and its member teams as profit maximizing agents. *See* D.G. Ferguson, J.C.H. Jones & K.G. Stewart, *Competition Within a Cartel: League Conduct and Team Conduct in the Market for Baseball Player Services*, 82 REV. OF ECON. & STAT. 422 (2000), for a formal modeling of leagues and teams applicable to all sports leagues but applied specifically to baseball.

15. *See* K.G. Stewart, D.G. Ferguson & J.C.H. Jones, *On Violence in Professional Team Sport as the Endogenous Result of Profit Maximization*, 20 ATLANTIC ECON. J. 55 (1992).

16. *Id.* at 55-6.

17. CONN SMYTHE WITH SCOTT YOUNG, CONN SMYTHE: IF YOU CAN'T BEAT EM IN THE ALLEY (McClelland & Stewart, 1981).

and ultimately, on profitably. If this mechanism is correct, it predicts a positive relationship between violence and attendance via winning.

The other mechanism is more direct and depends on the "hockey as blood sport" phenomenon. It assumes that crowds are attracted, and revenue is increased, by the exercise of violence irrespective of the game's outcome. This is the "hockey as blood sport," also, alternatively known as, the "hockey as show biz," syndrome.[18] If this is correct, there is a predictable positive relationship between violence and attendance.

Of course, this is not to argue that violence cannot occur for other reasons. For example, for what Lorenz might call biological reasons[19] (hockey player as "homo ferox"); or because of what sociologists term the violation, perhaps verbal ("your father wears lace panties"[20]), of occupational sub-cultural norms; or merely because of some temporary aberrant reaction to an aggressive body contact sport.[21] However, the economic hypothesis, in either of the mechanisms outlined above, focuses on violence as a deliberate strategy which exists (and persists) in the NHL because teams have a financial incentive to encourage it.

On the supply side, the violence is provided by a class of player known by a variety of euphemisms, of which, "policeman," "enforcer" and "goon" are the most graphic.[22] These players possess two attributes: physical size and a deficiency in the standard hockey player skills of skating, passing, and shooting.[23] Their role is to bring a degree of force — a degree of violence — to the game. If this characterization is correct, then violence should show up as a positive determinant of player salary,

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18. *See*, Stewart et al., *supra* note 15; J.C.H. Jones, D.G. Ferguson & K.G. Stewart, *Blood Sports and Cherry Pie: Some Economics of Violence in the National Hockey League*, 52 AMER. J. OF ECON. & SOC. 63 (1993); and Jones et al., *supra* note 8.

19. *See* KONRAD LORENZ, ON AGGRESSION (Wilson trans., Harcourt, Brace & World, 1966).

20. *See* Gitler, *supra* note 7, at 21. This idea is freely adapted from the statement of noted "enforcer" Ted ("Terrible Teddy") Green, "The sport calls for a lot of body contact — and there are not many guys out there wearing lace panties." *See infra* notes 22 and 23.

21. Even noted hockey pacifists occasionally tangle. For example, on Jan. 13, 2001 Pierre Turgeon acquired the *second* fighting major of his NHL career (979 games over 17 seasons, 446 goals, 1119 total points and 340 penalty minutes). *Inside the NHL*, TORONTO GLOBE & MAIL, Jan. 15, 2001, at S4. Turgeon thought he had been slashed by Tony Hrkac so, he cross-checked Hrkac in the head with his stick. *Id.* Hrkac then acquired the *first* fighting major of his NHL career (571 games over 15 seasons, 102 goals, 289 total points and 139 total penalty minutes), by retaliating and knocking out Turgeon with one punch. *Id.* Turgeon suffered a minor concussion. *Id.*

22. *See* J.C.H. Jones, S. Nadeau & W.D. Walsh, *The Wages of Sin: Employment and Salary Effects of Violence in the National Hockey League*, 25 ATLANTIC ECON. J. 2 (1997). A more complete taxonomy of player types would also include those players known as, "muckers," "grinders," and "bangers," whose hockey skills are somewhat higher and fighting ability somewhat lower than the standard "goon." *Id.* The common characteristic uniting these player types is that they all specialize in the exercise of some degree of force on the ice. *Id.*

23. *Id. See* Jones et al., *supra* note 18, at 68-69.

since, in neoclassical theory, any skill that generates revenue should yield a monetary return to the factor. If violence is valued on the demand side, the purveyor of violence on the supply side (the player) will be paid for it. Hence, violence is predicted to be one positive determinant of player salaries. Since the validity of any model depends on the empirical verification of its predictions, how well do the predictions of our model hold up?

(ii) The Empirical Evidence

Briefly, the empirical evidence largely verifies the predictions of the model. If we define violence operationally as "the use of force outside the rules of the game," then it can be measured as penalty minutes.[24] In these terms, on the demand side, there is significant statistical support (a positive relationship between violence and attendance) for the "blood sport" hypothesis.[25] Of course, whether the crowd achieved catharsis is moot. However, there is little support for the "intimidation" hypothesis, although "winning" *per se* is a significant determinant of attendance.[26]

There is also an interesting element to the "blood sport" results: they show that, while spectators in both Canada and the U.S. favor some degree of violence, only in the U.S. is attendance positively related to the more extreme forms of violence.[27] These are the forms that are most likely to be egregious enough to provoke a societal (judicial) response.

As anticipated, these results on the demand side are complemented by the results for player salary determination on the supply side. There is consistent evidence that violence and player salary are positively related.[28] In addition, the NHL salary structure seems to reflect the fact that the salary determination process for skill players is different from the process for the purveyors of violence.[29] Thus, the NHL employs two distinct groups of players: those whose employment depends on skating, passing, and shooting skills; and those whose employment depends on their ability

24. *Id*; Jones et al., *supra* note 8; Stewart et al., *supra* note 15.

25. *See* Jones, *supra* note 8

26. *See* Stewart, *supra* note 15.

27. *See* Jones et al., *supra* note 18; Jones et al., *supra* note 8. The attendance of U.S. teams is positively related to the highest penalty minutes awarded for the most extreme physical infractions. *Id.*

28. *See* J.C.H. Jones & W.D. Walsh, *Salary Determination in the National Hockey League: The Effects of Skills, Franchise Characteristics and Discrimination*, 41 INDUS. & LAB. REL. REV. 592 (1988); J.C.H. Jones, S. Nadeau & W.D. Walsh, *Ethnicity, Productivity and Salary: Player Compensation and Discrimination in the National Hockey League*, 31 APPLIED ECON. 593 (1999).

29. *See* J.C.H. Jones et al., *supra* notes 22-23.

to bring force – to bring violence – to the game.[30]

Given that the model is validated, what are its implications for any incentive to reduce violence and for the existence of externalities? If there are no league and team incentives to reduce violence, and if violence is a societal "bad," then presumably whatever measures the league might take to curb violence will be insufficient. Additionally, if negative externalities exist, the problem is only aggravated. Both situations suggest the application of external (for example, judicial or regulatory) constraints.

(iii) Incentives and Externalities

(a) Incentives

Two clear implications emerge from the analysis and empirical outcomes reported in (i) and (ii) above. The first is that there is a positive incentive for teams to promote violence. Violence is revenue enhancing. Simply put, "violence sells."[31] This incentive is particularly strong for American teams where crowds prefer the more flagrant forms of violence, and suggests that, to be effective, any remedial efforts should be directed at the U.S. teams in particular.[32]

The second implication is that team incentives for violence are reinforced by the almost total absence of cost disincentives. That is, any costs of violence are shifted primarily from the team to the player. Hence, the team has no incentive to stop violence. For example, should a punishable violent act occur during a game, it is the player, not the team (owner, management, coaching staff), who is disciplined (perhaps fined and/or suspended). Should a court case ensue, again the focus, in criminal cases, is on the player; although in civil cases, vicarious liability can come into play.[33] Thus, a team has the incentive to promote violence, hires players for that specific purpose, but, if and when the violence occurs, is rarely culpable.

In economic terms, the player is at least the "agent" of the team carrying out an explicit or implicit role. This obviously suggests that

30. *Id.*

31. *Id.*

32. This is not to argue that Canadian teams are "without sin," only that there is a significant difference between the way Canadian and American hockey crowds respond to extreme forms of violence. *See* Section III *infra*. For the record, some epic battles have been waged in Canadian rinks and, in a number of cases, criminal charges have resulted. *Id.*

33. Vicarious liability occurs when a "supervisory party (such as an employer) bears responsibility for the actionable conduct of a subordinate or associate (such as employee) because of the relationship between the two. BLACK'S LAW DICTIONARY 927 (7th ed. 1999).

liability – the cost disincentive – should apply to both player and team. The only way cost disincentives exist in the current situation is if "goons" injure or disable some of the skill players so that the other team's ability to win and attract crowds, is compromised. However, this can be counteracted to some extent if all teams employ goons (which they do) and practice mutual deterrence.[34]

This, of course, could (would) exacerbate the violence problem. By analogy, it could transform a lions v. Christians (goons v. skill players) problem into a gladiatorial (goon v. goon) problem. Ironically, this might make the violence more attractive to spectators. It may, indeed, be the best of all worlds for the teams: skill players would be most responsible for wins and thus attracting crowds, and goons would be responsible for violence and attracting crowds. Is this a great game or what?

On balance, we conclude that there are few effective cost disincentives for the team, other than some constraints potentially associated with vicarious liability.

(b) Externalities

There are two types of potential negative externalities arising from hockey violence. First, there is the general perception that acceptance of violence in any sport may encourage violence to spread to other non-sports areas. As one Canadian jurist aptly put it, "Violence in sport is the father to violence in everyday life."[35] Essentially, it is the same type of argument made with respect to violence on television, film, or in video games.

However, like media violence, there is no clear, unequivocal, and quantitative connection running from sports violence to general societal violence. Yet, the existing evidence on causation running from sports

34. The latest and most obvious example concerns Mario Lemieux, a player with sublime skills (812 games over parts of 14 seasons, totaling 654 goals, plus 947 assists for a total of 1601 points and 769 minutes in penalties, through April 3, 2002). *NHL Player Statistics*, available at http://nhl.com/lineups/player /8448782.html (last visited Apr. 3, 2002). Lemieux retired in 1997 after a bout with Hodgkin's disease and complaining vociferously about the "clutch, grab and slash" style of NHL play. Kostya Kennedy, *Punch Line,* SPORTS ILLUSTRATED, Jan. 29, 2001, at 92. In December 2000 he staged a comeback with the Pittsburgh Penguins and was an instant success. *Id.* Other teams tried to contain Lemieux by physically "beating on him." *Id.* Following notable "assaults" by the 6'7", 240-pound Boston Bruin, Hal Gill (Jan. 9, 2001) and the 6'9", 255-pound New York Islander, Zdeno Chara (Jan. 12, 2001), Pittsburgh reacted. *Id.* The Penguins immediately acquired the 6'3", 230-pound checking wing Kevin Stevens, the 6'2" 215-pound American Hockey League winger Billy Tibbets (185 penalty minutes in only 38 AHL games), the 6'8", 255-pound Steve McKenna, and the 6'5", 235-pound Krzysztof Oliwa (the last three players are well known goons). *Id.* The Penguin General Manager said other teams should now know, "they can't take liberties." *Id.* Lemieux's response was, "It certainly helps me feel safer." *Id.*

35. R. v. Ciccarelli, [1989] 55 C.C.C. 3d 126.

violence to societal violence is, even at its anecdotal worst, highly suggestive.[36] Nevertheless, it must be recognized that it is also possible that cause and effect may run the other way (from societal violence to sports violence), or both ways (sports violence begets societal violence and sports violence merely reflects societal violence). Regrettably there is no way to be more definitive.

The second type of negative externality is NHL specific: hockey violence during a game may lead to violence in the stands and beyond. Hockey does have a record of generating fighting among spectators and between spectators and players during and after a game.[37] As one Canadian jurist remarked, hockey violence, "spills over from the arena into the streets."[38] While there is no suggestion that such violence is in the same category as the riots, hooliganism, and deaths that have characterized English soccer, it is, nevertheless, far from insubstantial.[39]

Perhaps more significant is the fact that NHL behavior acts as a negative role model for minor professional and amateur players and leagues. Minor leagues (the American Hockey League, the International Hockey League and the East Coast Hockey League, for example), have adopted the violent NHL style of play, and, in many instances, extended it.[40] In particular, goons rarely make the jump directly from the amateur

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36. *See* M.D. SMITH, VIOLENCE IN CANADIAN AMATEUR SPORT: A REVIEW OF THE LITERATURE (Canadian Ministry of State for Fitness and Amateur Sport, 1987); Carlsen, *supra* note 5.

37. *See* Gitler, *supra* note 7, at 227-34; Fischer, *supra* note 7, at 22-27; and JOHN BARNES, SPORTS AND THE LAW IN CANADA 253-54 (Butterworth 3d ed. 1996).

38. R. v. Ciccarelli [1988] (unreported, as quoted in Nielson, *supra* note 8, at 703).

39. In fairness, it must be said that it is doubtful whether the riots in English soccer have any direct relationship to violence on the field of play. *See* Barnes, *supra* note 37, at 252-253. 4-16. Soccer riots take place before, during and after the game and seem unconnected with either anticipated, or actual, specific game violence. *Id.* The game merely seems a staging ground (or what economists might call a co-coordinating mechanism) for violence; and the reasons for the violence are obviously more complex, reflecting perhaps social conflicts, and working class alienation. *Id.* In contrast to soccer, British rugby, both Rugby League and Rugby Union, display far more in-game violence, but rarely generate pre or post-game riots, irrespective of whether the games are played in middle class or working class areas. *Id.* In Canada there have been large scale riots following NHL games — for example, the Richard riot in Montreal in 1955, (*See The Montreal Riot*, at http://www.letsgowings.com/history/ moments/riot.html (last visited Nov. 3, 2001) (detailing the riot)); the Stanley Cup riot in Montreal in 1993 (*See* Dave Anderson, *Sports of The Times: In the 'New York, New York' 90's, Winners Abound*, NY TIMES, Oct.26, 1998, at C1.) (detailing the championship riot)); and the Vancouver Stanley Cup riot in 1994 (*See* http://www.vancouver.cbc.ca/ civelec/crime.html (last visited Nov. 3, 2001)(detailing that riot))— but they appear to have nothing directly to do with the violence involved in the preceding games. With the exception of the Richard riot, they seem to ape celebratory riots in American cities, which have occurred after winning a championship series. *See, e.g., Riots after Lakers Win NBA Title*, at http://news.bbc.co.uk/hi/english /sport/newsid_798000/798383.stm (last visited Nov. 3, 2001) (detailing that riot).

40. As an example, the following print advertisement appeared for the Columbus Chill of the

ranks (principally the age limited Canadian Junior Leagues) to the NHL, because they lack the physical strength and experience. The minor leagues serve as a proving ground where prospective goons gain seasoning and can, in effect, audition for the NHL.

With the amateur leagues, there is considerable evidence that teams — particularly the Junior Leagues in Canada, the major suppliers of NHL players — have adopted the violent NHL style of play.[41] In other words, NHL imprinting has taken place that extends violent behavior into the amateur ranks. This, in turn, has led to physical injury in the arena and in the streets (or at least in the parking lots).[42]

In contrast, the NHL implies that negative externalities, even if they exist, are less significant than the fact that fighting is cathartic and therapeutic for the players, a reaction to, and a by-product of, an aggressive game.[43] If fighting were stopped, more extreme consequences would follow — sometimes referred to as the Labine reaction — associated with "stickwork", a euphemism covering the use of the hockey stick as a "club," "sword," or "ax."[44] And it is true that a number of the

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East Coast Hockey League: "For $5, we can help you with all that unresolved anger you have for your mother. Deep down, when she was at her worst, didn't you want to check her real hard into the boards? Well, have we got a catharsis for you!" James Hirsch, *Hockey Chill: A Hot Ticket but a Tepid Team*, TORONTO GLOBE & MAIL, Jan. 3, 1992, at 15. More recently, Brandon Sugden of the Peoria Riverman of the East Coast Hockey League was banned for life for hitting a female spectator with his stick. Canadian Press, *ECHL Stick Swinger Hit with Lifetime Ban*, VICTORIA TIMES COLONIST, Feb. 2, 2001, at A17. Sugden said, "I tried to hit the guy [a spectator who had spit on him] with my stick and he ducked it and it hit the lady." *Id.*

41. *See* W.R. MCMURTRY, INVESTIGATION AND INQUIRY INTO VIOLENCE IN AMATEUR HOCKEY (Canadian Ministry of Community and Social Services, 1974); E.W. VAZ, THE PROFESSIONALIZATION OF YOUNG HOCKEY PLAYERS (University of Nebraska Press, 1982); and M.D. Smith, *supra* note 32. Following the McSorley decision, the President of the Canadian Amateur Hockey Association, Bob Nicholson, noted, "From the hockey point of view. . .it [violence] does trickle down to the amateur side. Everything that happens in the NHL has a direct impact [on children playing amateur hockey.]" David Shoalts, *NHL's Verdict: No Change*, TORONTO GLOBE & MAIL, Oct. 7, 2000, at S3. It should also be emphasized that player roles in the NHL are learned in the amateur leagues; that is, "goons" in the NHL were inevitably "goons" in the amateur leagues. *See* Jones, et al., *supra* note 20.

42. *See* Smith *supra* note 36; "Comments on Fair Play and Violence in Sport" in COMMISSION FOR FAIR PLAY (Canadian Ministry of State for Fitness and Amateur Sport, 1987); and Moore *supra* note 8, at 651-652, for reviews of some of the evidence on physical injury. The "parking lot" reference is to the case, *R. v. Smithers*, [1977] 34 C.C.C. 2d 427, where a midget hockey player (16 to 17 years of age) was convicted of manslaughter after an in-game fight was resumed tragically in the arena parking lot.

43. As one NHL President, John Ziegler, put it, "I believe that the outlet where two players willingly drop their gloves when they are totally frustrated is an acceptable act of violence." *Excessive Violence in Professional Sports, Hearing on H.R. 7903 Before the House Sub Committee on Crime of the Committee on the Judiciary, 96th Cong.* (1980).

44. "[I]f you eliminate the fisticuffs the stick will come into play." Statement of John Ziegler, Former NHL President, *Id.* at 161. The Labine reaction is named for Leo Labine, an "artiste" with

more egregious injuries have been caused by the stick.[45] However, these incidents took place even though fighting has never been outlawed. Presumably, the burden of the argument is that, if fighting was outlawed, stick incidents would increase. The result would be that, since sticks as weapons have larger potential negative externalities than fists, negative externalities would increase.

In addition, others have argued that fighting on the ice is therapeutic for the crowd. This argument is particularly associated with some members of the Canadian literati.[46] There is, however, no direct evidence that this is true, unless incidents of audience participation (fan v. fan, fan v. player) are considered a positive externality.

On balance, while no quantitative measure is possible, it seems reasonable to conclude that net negative externalities exist.

(iv) Conclusions

The following conclusions emerge from the foregoing analysis. First, the economic model recognizes, and empirical analysis validates, that hockey violence is a "goods characteristic," a deliberate strategy in the drive to maximize profit. As such, there is little or no incentive for teams to reduce violence. Second, violence is usually purveyed by a special category of player, "goon," "enforcer," "policeman." Even though the player is the agent of the team, teams have successfully shifted a large proportion of the costs of violence — league fines, suspensions, and/or court cases — to the player. Thus, there is even less incentive for the teams to reduce violence. Third, on balance, negative externalities exist, particularly the impact NHL behavior has on minor and amateur hockey leagues.

The upshot is that, given violence is a societal "bad," and given that there are no incentives to reduce violence and negative externalities exist, some policy response is justified. Since this has traditionally involved either the court system and/or league self-regulation, it is to the efficacy of these responses that we now turn.

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the stick, who once said, "I don't know anyone who likes to eat wood, unless he's a beaver. If a guy gives you a stick in the mouth you retaliate." Gitler, *supra* note 7, at 116.

45. A number of the "classic" Canadian cases involved violence with the stick. *See* Champagne v. Cummings, [1999] A.C.W.S. 3d 503; R. v. St. Croix, [1979] 47 C.C.C. 2d 122; R. v. Maki, [1970] 3 O.R. 780; R. v. Green, [1970] 1 O.R. 591; R. v. Ciccarelli, [1999] 54 C.C.C. 3d 121; R. v. Cey, [1989] 48 C.C.C. 3d 480.

46. Hugh MacLennan for example, referred to hockey violence as meeting the need for national "release," and calling it "the counterpart of Canadian self restraint." Beardsley, *supra* note 11, at 133.

III. VIOLENCE: THE LAW AND SELF-REGULATION

Is that egregious enough for you or shall I lengthen my backswing?

-Anonymous

In Canada and the U.S., hockey violence has been dealt with by the judicial system under both civil and criminal procedures. Most of the litigation in the U.S. has involved civil (tort) law, the *Twist* cases being the most recent example. In Canada, however, all cases involving NHL player violence — including the *McSorley* case — have been tried under the Criminal Code.[47] Indeed, one commentator has called the criminal prosecution of players for offenses committed during a game the distinctive Canadian contribution to the law of sports.[48]

Thus, the *Twist* and *McSorley* cases provide interesting counterpoints to two different legal approaches to hockey violence in two different countries. In terms of our conclusions in II (iv) above, is one approach to be judged superior to the other, or are they both equally wanting? If so, is self-regulation the answer?

(i) Canada: The Criminal Law and the McSorley Decision

(a) The Jurisprudence[49]

In a prosecution under the Criminal Code the emphasis is on individual responsibility for criminal acts.[50] There is no immunity for hockey players merely because disciplinary action has been taken by the league: the private interests of the league are subservient to the public interest enunciated in the statute. The usual charge is assault.[51] For a conviction, general intent must be established, and the offense proven beyond a reasonable doubt.[52] However, self-defense is an acceptable

47. *Maki*, 3 O.R. 780; *Green*, 1 O.R. 591; R. v. Maloney, [1976] 28 C.C.C. 2d 323; *Ciccarelli*, 54 C.C.C. 3d 121; *McSorley*, [2000] B.C.J. 116. Ciccarelli and McSorley were found guilty. Ciccarelli was fined $1,000 and sentenced to one day in jail. *Ciccarelli*, 54 C.C.C. 3d at 121. For McSorley, *see* Part III *infra*.

48. *See* Barnes, *supra* note 37, at 255.

49. *Id.* at 255-269.

50. *See id.* at 255.

51. Assault is committed under section 265 of the *Criminal Code* when, "without the consent of another person, "force is applied intentionally to that other person, directly or indirectly." *See Id.* at 258.

52. *Id.*

defense.[53]

Assault is committed only when force is applied without the explicit or implicit consent of the victim; and establishing the presence of consent is the key to a successful defense.[54] The limits to consent were established by the Supreme Court of Canada in *R. v. Jobidon*, a case involving not exactly your standard sporting event, a consensual fistfight in the parking lot of a bar.[55] The *Jobidon* Court drew a distinction between fistfights and contact sports, arguing that criminal liability can turn on social or economic values.[56] As such, "unlike fistfights, sporting activities and games usually have significant social value; they are worthwhile."[57] Consent, in sporting activities is then determined by, "the customary norms and rules of the game."[58]

The *Jobidon* Court quoted, with approval, the analysis of the limits to implied consent established by the Saskatchewan Court of Appeal in *R. v. Cey*, a case involving amateur hockey players.[59] The *Cey* Court noted that:

> It is clear that in agreeing to play the game a hockey player consents to some forms of intentional bodily contact and to the risk of injury therefrom. Those forms sanctioned by the rules are the clearest example. Other forms, denounced by the rules but falling within the accepted standards by which the game is played may also come within the scope of consent. It is equally clear that there are some actions which can take place in the course of a sporting conflict that are so violent that it would be perverse to find that anyone taking part in a sporting activity had impliedly consented to subject himself to them.[60]

In establishing whether the "ambit of the consent" was "exceeded," the *Cey* Court stressed that, in addition to establishing subjective intent, game conditions, the nature of the act, the extent of the force employed, the degree of risk of injury, and the probabilities of harm should also be considered as material.[61] Finally, the law established that standards applied to implied consent for an offence involving a NHL player are different from those applied to players in amateur leagues.[62] How was the jurisprudence applied in the *McSorley* case?

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53. *Id.*
54. *Id.* at 259.
55. [1991] 2 S.C.R. 714.
56. *Id.* at 748.
57. *Id.* at 766-67.
58. *Id.*
59. [1989] 48 C.C.C. 3d 480.
60. *Id.*
61. *Id.* at 490
62. *Id.* (citing R. v. St. Croix, [1979] 47 C.C.C. 2d 122, 124).

(b) The McSorley Case: The Incident

The *McSorley* case involved two well-known enforcers, Marty McSorley and Donald Brashear.[63] It arose from an incident — really, the culmination of a series of incidents — during an NHL game between the Vancouver Canucks and the Boston Bruins on February 21, 2000, played in Vancouver, British Columbia.[64] Working from testimony and a video of the game, the *McSorley* Court reviewed the sequence of incidents in some detail. Briefly, the following progression of relevant events took place.

Very early in the first period Vancouver went into the lead.[65] At 2:09 McSorley initiated a fight with Brashear (which he lost), and took a penalty.[66] Brashear engaged in some posturing, "dusting off" his hands as he passed the Boston bench, "suggesting he made short work of McSorley."[67] In the vernacular, Brashear "dissed" the Boston bench.[68]

Vancouver went further ahead, building up a 4 - 0 lead.[69] Mid-way through the period McSorley attempted to initiate another fight with Brashear by cross-checking him from behind.[70] Brashear failed to respond and McSorley was penalized.[71] Shortly after, Brashear took a penalty for interfering with the Boston goaltender.[72]

No further incident of note took place until mid-way through the final period.[73] Brashear was slashed, a Boston player (not McSorley) was penalized, and Brashear engaged in more posturing, a "Hulk Hogan" pose,[74] for the Boston bench.[75] With 20 seconds to go in the game and no

63. Marty McSorley played in the NHL for all or part of 17 seasons. *See* Fischler, *supra* note 5, at 224-227. Up to the end of the 1999/2000 season, he had played 961 games, scored 108 goals, plus 251 assists for a total of 359 points and accumulated 3381 career penalty minutes. *Id.* He is the third most penalized NHL player of all time. *Id.* He is considered, by the aficionados of the genre, one of the top fighters in the NHL and has been ever since he entered the league in 1983/84. *Id.* Donald Brashaer, currently of the Philadelphia Flyers, is younger and has played for all or part of 11 seasons in the NHL. *NHL Player Statistics*, *available at* http://nhl.com/lineups/player/8459246.html (last visited Apr. 5, 2002). Through April 5, 2002, he played 544 games, scored 57 goals, plus 74 assists for a career total of 131 points and accumulated 1607 career penalty minutes. *Id.* He is also considered a top fighter. *See* Fischler, *supra* note 7, at 26-32.

64. *McSorley*, [2000] B.C.J. 116, at 27-30.

65. *Id.* at 27.

66. *Id.*

67. *Id.* at 35.

68. *McSorley*, [2000] B.C.J. 116, at 35.

69. *Id.* at 36.

70. *Id.*

71. *Id.*

72. *McSorley*, [2000] B.C.J. 116, at 39.

73. *Id.* at 41.

74. Hogan wrestles for the World Wrestling Federation. *See* http://www.wwf.com (last visited Apr. 5, 2002).

75. *McSorley*, [2000] B.C.J. 116, at 41.

hope of a Boston victory, McSorley was put on the ice (there was no overall line change) by the assistant Boston coach.[76] Brashear was already on the ice playing a regular shift. McSorley followed Brashear down the ice and with 3 seconds to go in the game (19:57), slashed at Brashear with his stick.[77] The slash hit Brashear in the head.[78] He fell to the ice, suffering a grand mal seizure[79] and a third- degree concussion.[80] McSorley was assessed a match penalty and suspended by the league.[81] McSorley was subsequently charged with assault with a weapon by the Attorney General of British Columbia.[82]

(c) The Jurisprudence Applied: Mr. Justice Kitchen's Judgement, or McSorley as Carpetbeater.

Basically, the Court followed the jurisprudence established in *Jobidon* and *Cey*, both of which it quotes with approval. The application of the jurisprudence to the incident may be summarized as follows.

First, the Court rejected the defense's contention that the case should be pre-empted because disciplinary procedures had already been taken against McSorley by the NHL.[83] It emphasized that hockey owners, as private businessmen, have no obligation to act in the public interest as conceived by the statute.[84] Second, the Court discussed what constitutes the "customary norms and rules of the game," as a necessary preliminary to considering the consent defense.[85] That is, "whether the slash by McSorley, although in contravention of the written rules, was nevertheless within the customary norms and rules of the game."[86] Based on testimony from game officials, the Court defined the "rules of the NHL game of hockey" as being a "somewhat finite framework" composed of three elements.

These rules and norms are evidently quite elastic. First, there are

76. *Id.* at 46 (emphasis added).
77. *Id.* at 42-46 (emphasis added).
78. *Id.* at 53.
79. *McSorley*, [2000] B.C.J. 116, at 59. A grand mal seizure is "a generalized convulsive seizure attended by loss of consciousness." Miller-Keane Medical Dictionary, 2000, *available at* http://www.webmd.com (last visited Nov. 3, 2001).
80. *McSorley*, [2000] B.C.J. 116, at 59.
81. *Id.* at 11-12.
82. *Id.*
83. *Id.*
84. *McSorley*, [2000] B.C.J. 116, at 12.
85. *Id.* at 15-25.
86. *Id.* at 25.

written rules in the rulebook.[87] Second, there is an unwritten code of conduct agreed to by players and officials that is "superimposed" on the written rules when the latter are breached.[88] For example, slashing (a legitimate game strategy) is prohibited by the written rules, "but the unwritten code says that slashing is permissible as long as it is during play and not at the head."[89] Fighting (also a legitimate game strategy) is outside the written rules, but its form (no head butting or hair pulling) is guided by the code of conduct.[90] Finally, there is official discretion in calling penalties during a game.[91]

Third, the Crown argued that the evidence established either that McSorley deliberately intended to strike Brashear in the head; and/or "recklessly struck him in the head, not necessarily aiming for the head directly."[92] The defense argued implied consent, with the blow to the head being accidental.[93] More specifically, McSorley was fulfilling his role as a "policeman."[94] Boston started the game "flat" and his role was to "fire up" the team by fighting Brashear, his chosen opponent.[95] McSorley spent the entire game trying to fight Brashear who continually avoided him, but did "not properly honor the integrity of the Boston goaltender" and repeatedly taunted the Boston bench (for example, the "Hulk Hogan" pose).[96] McSorley was put on the ice with 20 seconds to go in the game, to start a fight with Brashear, "to give Boston some pride to take into the next game."[97] He slashed at Brashear's shoulder, but, due to an injury and Brashear unexpectedly dipping his shoulder, accidentally hit him in the head.[98]

The Court, applying the procedure suggested in *Jobidon*, focused on whether McSorley intended to strike Brashear in the head.[99] If so, he would be "guilty of assault," provided the Crown could prove "a culpable state of mind beyond a reasonable doubt."[100] It carefully reviewed the

87. *Id.* at 17.
88. *McSorley*, [2000] B.C.J. 116, at 18.
89. *Id.* at 18.
90. *Id.* at 20.
91. *Id.* at 22. It is well established that game officials call penalties differently depending on, the game, the stage of the season, the playoffs, etc. *See* Jones et al., *supra* note 15, at 69.
92. *McSorley*, [2000] B.C.J 116, at 60.
93. *Id.* at 62.
94. This is McSorley's preferred description of his role. *Id.* at 80.
95. *Id.* at 73.
96. *Id.* at 84.
97. *Id.* at 86.
98. *McSorley*, [2000] B.C.J. 116, at 88.
99. *Id.* at 78.
100. *Id.* at 78-79.

video evidence and testimony and concluded:

> He [McSorley] had an impulse to strike him [Brashear] in the head. His mindset, always tuned to aggression, permitted that. He slashed for the head. A child, swinging as at a Tee ball, would not miss. A housekeeper swinging a carpetbeater would not miss. An NHL player would never, ever miss. Brashear was struck as intended. Mr. McSorley, I must find you guilty as charged.[101]

Finally, in the matter of sentencing, the Court granted McSorley a conditional discharge for 18 months.[102] This sentence was chosen because of the Criminal Code mandate that jail should be avoided if other measures achieve the same results, as well as the sentencing results in previous hockey cases.[103]

(d) Conclusions

There are three clear conclusions. First, from the legal viewpoint, the jurisprudence on the limits to implied consent, established in the *Jobidon* and *Cey* cases, clearly hold in criminal prosecutions of NHL hockey players. Assault in the sporting context is treated differently because, to quote Gonthier, J. again, "sporting activities and games usually have significant social value."[104] Second, those critics who advocate using the criminal law to deal with sports violence will not be appeased by the fact that McSorley was found guilty. The conditional discharge would be considered inadequate.

Third, the case focused on McSorley, the individual, but neglected the team that, explicitly or implicitly, defines the enforcer's role, and pays him to carry it out. As the analysis in Section II indicates, to reduce hockey violence, costs must be imposed on the team. In the game, McSorley was carrying out his enforcer's role. Part of that role is to be what is called a "flag waver."[105] When the team is playing listlessly, ("coming out flat") and losing, the job of a flag waver is to try to inspire them by fighting (and winning), often with the other team's enforcer. This is clearly what McSorley attempted to do repeatedly with Brashear. Both the referee and the Vancouver coach understood this.[106]

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101. *Id.* at 108-09.

102. *McSorley*, [2000] B.C.J. 116, at 21.

103. *Id.* at 12-16.

104. *Id.* at 68.

105. An "enforcer" has a number of sub-roles: acting as a so-called "White Knight" (punish the other team when your skilled players are roughed up), "Black Knight" (intimidate the opposition), or "Flag Waver" (inspire by fighting). *See* Allen, *supra* note 7, at 81-82.

106. *McSorley*, [2000] B.C.J. 117 at 34.

Brashear's enforcer response is also programmed: not to initiate or respond to a fight when a team is leading, for fear of giving up a power play opportunity.[107] Thus, when, with Vancouver leading 4-0, McSorley initiated a fight, the following verbal exchange is quite understandable:

McSorley: "Come on, Don. You have to fight me again."
Brashear: "No, Marty, I am not going to fight you. We're beating you four to nothing."[108]

Brashear continually avoided McSorley throughout the game confining his reactions principally to taunting the Boston bench.[109] When McSorley was sent on to the ice with 20 seconds to go in the game, he knew it was to fight. That was his role, which he characterized as, "you try to leave your team something to leave the game with."[110] To shirk this duty might lose him his job.[111]

Yet, in all this, only McSorley is culpable. Since the team is not, where is the incentive for the team to control violence, particularly, as Part II above indicates, violence and attendance are positively related? But vicarious liability does not apply under the Criminal Code, and as the Crown did not see fit to include the Boston Bruins and McSorley in a joint charge — the possibility of conspiracy comes to mind — there seems little reason to believe that the Criminal Code is the vehicle to end hockey violence.

A related question relevant at this juncture is, do these conclusions apply just to Canada or is the U.S. any different? This is of some significance, since the more extreme forms of violence preferred by crowds at U.S. arenas are those most likely to produce judicial action. The short answer is that any criminal prosecution of in-game violence in the U.S. is even less common, and less successful, than in Canada.

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107. Florida Panthers General Manager and former coach, Bryan Murray, put it as follows: "All I say to my teams is if you are ahead by a goal of two, no fighting allowed. If you are behind a goal or two, you are allowed to fight, if necessary." Allen, *supra* note 7, at 82.

108. *McSorley*, [2000] B.C.J. 117, at 37.

109. *Id.* at 42.

110. Rod Mickleburgh, *Head Chop Called an Accident*, TORONTO GLOBE & MAIL, Sept. 28, 2000, at A3; Mickleburgh, *Fighting Expected, Enforcer Testifies*, TORONTO GLOBE & MAIL, Sept. 28, 2000, at S2.

111. McSorley was an aging enforcer who was picked up by Boston as a free agent and (according to McSorley) was welcomed by the Boston Assistant General Manager "for his toughness." *Id.* at S2. To refuse to fight when "directed" to do so, might have meant unemployment. *See* Jones et al., *supra* note 18, at note 8. It has happened before in the NHL. *Id.* In 1982 Paul Mulvey was ordered by his coach on to the ice to fight ("Don't dance!"). *Id.* Mulvey refused, was demoted to the minors, and did not play in the NHL again. *Id.*

The leading, and the first, U.S. case is *State v. Forbes*.[112] Dave Forbes of the Boston Bruins was prosecuted under Minnesota's criminal law for aggravated assault, after he attacked Henry Boucha of the Minnesota North Stars, subjecting him to the full treatment, first with a stick to the face, then by punching him and finally, by pounding his head into the ice.[113] The jury failed to reach a verdict (9-3 for conviction) and the case was dismissed.[114] After that case, there has been a studied reluctance to use the criminal law in U.S. sports-violence incidents.[115] This is probably due to a combination of factors: the difficulties of proving *mens rea*[116] "beyond a reasonable doubt" and establishing the limits to consent; the fear that criminal prosecution might radically change contact sports for the worse; and, given the normal level of criminal activity, the feeling that resources should be devoted to prosecuting "real criminals," not athletes for on-ice/field activities.[117]

The overriding conclusion from the *McSorley* decision in Canada and the infrequent use of the criminal law in the U.S. is that the criminal law is not the weapon to constrain violence in hockey. Is using the civil law a better approach?

(ii) United States: The Civil Law and the Twist Decisions.

Civil law is a more promising approach. First, as contrasted with criminal law, tort offenses do not have to be proven, "beyond a reasonable doubt." Rather, a lesser standard based on the notion of "preponderance of the evidence" holds.[118] Second, the doctrine of vicarious liability is applicable. Hence, an employer can be held liable for the actions of an employee, if those actions advance the employer's business.[119] Since the

112. No. 63280 (Dist. Ct. Minn. 1975).

113. Boucha's injuries required and included: 25 stitches, three operations to repair a fractured eye socket, and an eight month recovery period for a double vision problem. Nielson, *supra* note 8, at 702.

114. An interesting element in the case, particularly in view of our emphasis on imposing costs on teams and leagues, was the question of responsibility. Who was responsible for Forbes actions, the individual or the team/league? The pro-conviction jurors decided Forbes was responsible for his actions; and one juror noted, "any man is responsible for his own actions regardless." L. Hallowell and R.I. Meshbesher, *Sports Violence and the Criminal Law*, 13 TRIAL 28 (1977). The non-conviction jurors largely blamed the league; and one said it was, "just like if I had committed some crime because of my job then my employer should suffer or should answer [for] it — not me." *Id.*

115. *See id.*

116. *Mens Rea* is "the state of mind that the prosecution, to secure a conviction, must prove that a defendant had while committing a crime." BLACK'S LAW DICTIONARY 999 (7th ed. 1999).

117. *See* Hanson and Dennis, *supra* note 8, at 140-142.

118. *Id.* at 143.

119. *Id.*

key point of our analysis is that the enforcer is the agent of the team and the team encourages violence for financial reasons, vicarious liability would seem to be the natural route to take. As a successful case involves financial reparations, it would go some way to providing a disincentive for the team to promote violence.[120]

There are, however, some problems. Remarkably, in such a litigious society, professional athletes have shown a reluctance to sue fellow players. The reasons for this reticence range from fears of ostracism, potential retaliation, and violation of the "macho code" which seems to pervade hockey in particular.[121] Although, as salaries escalate, the opportunity cost of a career ending injury due to violence may force a change. In addition, leagues and teams pressure players not to sue; and the fact that tort law is applied differently in different states, introduces another element of uncertainty into the judicial process.

Nevertheless, given the way the criminal law has been applied, civil action holds out, at least on the surface, the hope of a more favorable response. In the last analysis, however, it comes down to how the courts apply the law of torts to professional sport.

(a) The Jurisprudence

U.S. courts have noted three theories of recovery in actions for sports injury (negligence, recklessness, and intentional tort) and two affirmative defenses (assumption of risk and implied consent).[122] However, the basic criteria for a finding of participant liability depends on the state, the sport, and the degree of contact. For a contact sport such as hockey, ordinary negligence — acting unreasonably and so causing injury — is insufficient for liability. With a contact sport, "conduct which might be 'unreasonable' in everyday society is not actionable because it occurs on the athletic field."[123] Instead, a criterion of "reckless disregard" has been adopted by most jurisdictions where sports injuries have been litigated.[124]

120. For example, in the *Forbes* case discussed above, a threatened suit for civil liability was settled out of court. *See* Nielson, *supra* note 8, at 702. However, the point is, compensation was paid. In addition, in 1978 a federal court awarded Dennis Polonich of the Detroit Red Wings $500,000 in compensatory damages and $350,000 in punitive damages following a hockey stick in the face blow by Wilf Paiement of the Colorado Rockies. *See* Hanson et al. *supra* note 8, at 144. There have been some large financial penalties in cases involving Canadian amateur hockey players. *See* text *infra*.

121. *See* Melnik *supra* note 8, at 127-128; and Hanson et al. *supra* note 8, at 148-149.

122. *See* Hanson and Dennis *supra* note 8, at 145-148; Svoranos *supra* note 8, at 507-509; and Doerhoff *supra* note 8, at 742.

123. *McKichan*, 967 S.W.2d at 212.

124. Missouri and Illinois are the only states that have different standards for contact

This stems from a judgment of the Illinois Court of Appeals in *Nabozny v. Barnhill*,[125] which involved an amateur soccer game. Here the Court held that liability for injury depended upon a course of conduct that is pursued deliberately, willfully, "or with reckless disregard for the safety of the other player."[126] The Court was apparently making an attempt to provide redress for injury, but at the same time protect the vigor of athletic competition from the chill of "a new field of personal injury litigation."[127] The "reckless disregard" criterion was affirmed as applicable to professional sport by the Tenth Circuit Court of Appeals in *Hackbart v. Cincinnati Bengals, Inc.*,[128] a case involving an injured football player and a National Football League team.

Since *Hackbart*, the case law has defined "reckless disregard" as lying between an intentional and a negligent act. That is, it "exists when a player knows that an act is harmful and intends to commit the act but does not intend to harm an opponent."[129] The two major defenses against a charge of recklessness are assumption of risk and implied consent. Players engaged voluntarily in a contact sport "assume the risk of another player's negligence, but not the risk of that player's recklessness."[130] Presumably, assumption of risk implies consent. The ultimate determination of "recklessness" depends on a case-by case analysis.

(b) The Twist Cases: The Incident[131]

The case *McKichan v. St. Louis Hockey Club, L.P.*,[132] concerns an incident during a game in Peoria, Illinois between the notorious enforcer Tony Twist, and a goaltender, Stephen McKichan, when both were playing in the International Hockey League.[133] The game was played on

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(recklessness) and non-contact (negligence) sports. *See* Doerhoff *supra* note 9, at 748-750. Eleven states recognize "recklessness" as the only standard governing all sports; and three states rely on a negligence standard. *Id.*

125. 334 N.E.2d 258 (Ill. App. 1975).

126. *Id.*

127. Hanson and Dernis *supra* note 8, at 146.

128. 601 F.2d 516 (10th Cir. 1979), *cert. denied*, 444 U.S. 931 (1979).

129. Hanson and Dernis, *supra* note 8, at 146-147.

130. *Id.* at 148.

131. *See* Doerhoff *supra* note 8, at 739-741.

132. 967 S.W.2d 209 (E.D. Mo. 1998).

133. Tony Twist later became the consensus heavyweight champion of the NHL. *See* Fischler *supra* note 7, at 220-222. Before his NHL career ended in 1998 due to an off-ice accident, Twist's NHL numbers were: 9 seasons, 445 games, 10 goals plus 18 assists for 28 points, and 1121 accumulated penalty minutes. *Id.* With Peoria, Twist was gaining experience and auditioning for his future NHL role. *Id.* McKichan was a career minor league goaltender who played 1 game in the NHL. *Id.* His career ended after the 1990/91 season. *Id.* At the time of the incident, Twist is listed

December 15, 1990, when Twist performed for the Peoria Rivermen and McKichan for the Milwaukee Admirals; both teams were farm teams of NHL clubs.[134]

At 15:57 of the third period, Peoria, leading 10-4, shot the puck into the Milwaukee end, but it ended up out of the rink and out of play.[135] A linesman blew his whistle indicating the play had ended.[136] McKichan came out of his net and skated towards the boards.[137] Twist, who was already on the ice, skated full speed from the blue line at the partially-turned McKichan.[138] The referee blew his whistle at Twist, who ignored it, and, with his stick outstretched, checked McKichan in the back and side, into the boards, and into unconsciousness.[139] Twist, received a match penalty and was suspended for every game McKichan was injured.[140] Twist indicated that the reason for his action was to "deliver a message" to McKichan who had punched him with his gloved hand (his "blocker") in the second period.[141]

(c) The Jurisprudence Applied: Or Don't Turn Your Back Even When the Whistle Blows to End the Play

In 1994, McKichan filed suit against Twist and Peoria's parent club, the NHL St. Louis Blues, under the doctrine of vicarious liability.[142] The subsequent trial was held in 1996.[143] The plaintiff argued that he suffered post-concussion syndrome following Twist's check, which prevented him from pursuing a professional hockey career.[144] Twist's actions, the plaintiff charged, were intentional and exceeded the realm of acceptable play.[145] The defendant denied liability and contended the plaintiff assumed the risks of physical contact.[146] The outcome was that the case against the defendant, Twist, was dropped, the co-defendant was found

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at 6'1" and 230 pounds and McKichan at 5'11" and 180 pounds. *Id.* While goaltenders often use the stick as an ax against any player in or near the goal-crease, there is no goaltender at any playing level who is an enforcer. *Id.*

134. Doerhoff *supra* note 8, at 739-40.
135. *Id.* at 740.
136. *Id.*
137. *Id.*
138. Doerhoff, *supra* note 8, at 740.
139. *Id.* at 740-41.
140. *Id.* at 741.
141. *Id.*
142. *McKichan*, 967 S.W.2d at 210.
143. *Id.*
144. *Id.*
145. *Id.*
146. *McKichan*, 967 S.W.2d at 210.

liable and McKichan was awarded $175,000.[147] The St. Louis Blues appealed, principally on the ground that, "the conduct at issue was a risk inherent in professional hockey and one assumed by plaintiff."[148] The Missouri Court of Appeals rendered its judgment in 1998.

The Court found that Missouri had essentially adopted the *Nabozny* rule in the case *Ross v. Clouser*,[149] a case involving an amateur slow pitch softball game in a church league — where the state supreme court rejected the trial judge's negligence theory in favor of a "recklessness" criterion.[150] Since there were no relevant Missouri or Illinois cases on professional sports, the Court of Appeals turned to *Averill v. Luttrell*,[151] a case involving minor league baseball, and *Hackbart*, and appeared to confirm that recklessness should be the standard applied to professional sports.[152]

Whether a player's conduct was actionable was to be determined, following *Ross*, by a number of "relevant factors," such as

> ... the specific game involved, the ages and physical attributes of the participants, their respective skills... their knowledge of its rules and customs, their status as amateurs or professionals, the type of risks which are inherent to the game and those which are outside the realm of reasonable anticipation, the presence or absence of protective uniforms or equipment, the degree of zest with which the game is played.[153]

The Court found that,

> ... tough play is commonplace in professional hockey. [Players] trip opposing players, slash at them with their hockey sticks and fight on a regular basis, often long after the referee blows the whistle.... They are professional players with knowledge of its rules and customs including the violence of the sport.[154]

In summary, the Court held

> [A] severe body check, is part of professional hockey. This body check, even several seconds after the whistle in violation of several rules of the game, was not outside the realm of reasonable anticipation. For better or for worse, it is "part of the game" of professional hockey. As such, we hold that as a matter

147. *Id.*
148. *Id.* at 211.
149. 637 S.W.2d 11, 14 (Mo.1982) (*en banc*).
150. *Id.*
151. 311 S.W.2d 812 (Tenn. Ct. App. 1957).
152. *Id.* Doerhoff argues that the court seemed, "to struggle with the question of whether "recklessness"... should apply to professional cases. It left the question unanswered, however, when it opted to use the factors adopted in Missouri cases as its analytical framework." Doerhoff, *supra* note 8, at 755. This, she argues, is an improvement because it "avoids confusing (and sometimes artificial) discussions of assumption of risk, consent, and limited duty." *Id.* at 758.
153. *McKichan*, 967 S.W.2d at 212.
154. *Id.* at 212-13.

of law that the specific conduct which occurred here is not actionable.[155]

(d) Conclusions

Two major conclusions can be drawn from the *Twist* cases. First, there does not seem much that is actionable in professional hockey. Virtually everything, including a cross-check in the back after the play has been whistled dead that permanently disables a player, falls within the realm of reasonable anticipation. What is outside the realm is clearly moot and presumably awaits the next egregious act to reach the courts. Since there is already a problem getting injured players to charge perpetrators in court, this decision dulls the civil law as a means of controlling hockey violence. Similarly, while vicarious liability is appropriate, the substance of the decision in this case makes it irrelevant. Thus, when one commentator concludes that this decision, "goes a long way in insulating professional hockey players from civil liability,"[156] it is difficult to disagree.

Second, the court chose to emphasize the disciplinary mechanisms controlled by sports leagues: "we also recognize that the professional leagues have internal mechanisms for penalizing players and teams for violating league rules and for compensating persons who are injured."[157] This seems to indicate, or at least can be interpreted to mean, that it may be a preferred mechanism to any kind of judicial oversight of on-ice behavior. If so, it is a further indication that U.S. courts regard the civil law as an inappropriate instrument for constraining professional hockey violence.

Is the situation with Canadian civil law any better? The answer is not clear. On the one hand, there has not been a case involving NHL players so we have no indication of how the law might be applied at the level of professional hockey. On the other hand, there have been some substantial awards to amateur hockey players, which might suggest that the courts are open to similar awards for professional players.[158]

As the law presently stands, a hockey player injured in an in-game situation can seek redress either through intentional tort or negligence.[159] The leading case of intentional tort is *Agar v. Canning*.[160] Here the court

155. *Id.* at 213.

156. Doerhoff, *supra* note 8, at 755.

157. *McKichan*, 967 S.W.2d at 213.

158. *See* Unruh v. Webber, [1992] 98 D.L.R. 4th 294; Zapf v. Muckalt, [1995] 11 B.C.L.R. 3d 296. In both cases, the plaintiff was awarded approximately $4 million Canadian.

159. *See* Moore, *supra* note 8, and Svoranos, *supra* note 8, at 500-504. *See generally*, Barnes, *supra* note 37, at 269-318.

160. [1965] 54 W.W.R. 302.

held that, although hockey involves violent contact that may be defended under the doctrine of implied consent (assumption of risk), there are limits to consent where the intent is to injure.[161]

With negligence, the standard for a finding of liability appears to differ with the jurisdiction.[162] In British Columbia simple negligence is the standard. This means that what constitutes the behavior of a reasonable competitor has to be assessed, but there is no necessity to prove intent. However, in all other Canadian provinces, the standard, heavily influenced by *Agar*, is simple negligence plus an intent or recklessness requirement. The defenses are voluntary assumption of risk and/or the inherent risk in sport.

The leading cases in British Columbia are *Unruh v. Webber*[163] and *Zapf v. Muckalt*.[164] Although the facts in these cases are somewhat different, the common element is that the plaintiffs, both junior players, were checked from behind and sustained injuries that rendered them quadriplegics.[165] Both defendants were referred to as "reckless" by the courts, but there is no suggestion that the "negligence plus" standard of the rest of Canada was being applied.[166] However, the parties responsible for paying the judgments in the *Unruh* case did intimate that the verdict was more a question of policy than of law.[167]

The most recent example of the "negligence plus" standard is found in the Ontario case, *Champagne v. Cummings*.[168] The case involved a stick altercation between two players in a men's amateur tournament.[169] The plaintiff suffered injuries to his mouth.[170] In his decision, the judge noted his approval of the *Agar* judgment, and added, "when a player is injured in a hockey game, in order for liability to exist, intention to injure, recklessness, or negligence must be shown on the defendant's part."[171] He

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161. *Id.*

162. Moore, *supra* note 8, at 643.

163. [1992] 98 D.L.R. 4th 294 (B.C. Sup. Ct.).

164. [1995] 11 B.C.L.R. 3d 296 (Sup. Ct.), [1996] 20 B.C.L.R. 3d 124, [1996] 26 B.C.L.R. 3d 201.

165. *Unruh*, 98 D.L.R. 4th at 294, and *Zapf*, 11 B.C.L.R. 3d at 304.

166. *Id.*

167. *See* Moore, *supra* note 8, at 663. Canadian Amateur Hockey Association Director, Hal Lewis as saying, after the *Unruh* verdict: "We've also come to the conclusion that in a lot of these situations, the court simply looks at an 18 - or 19 - year-old sitting in a wheelchair and the judge says to himself, 'Somebody's got to look after this kid for the rest of his life.' Then he puts together the arguments to support his decision." *Id.*

168. [1999] O.J. No. 3081, Court File No. 870/97.

169. *Id.* at *1.

170. *Id.*

171. *Id.* at *9

concluded, "... that the intention of the defendant was not to injure the plaintiff... [and] the actions of the defendant cannot accurately be described in the circumstances as being negligent, reckless or careless," and dismissed the case.[172]

Therefore, we must conclude that, while Canadian civil law has the potential to impose financial constraints on professional teams and leagues, until it actually does, it would be foolish to treat the civil law as a certain method of restraining hockey violence. The civil law is not a panacea.

(iii) Conclusion: The Law as Constraint on Hockey Violence

It must be concluded from the foregoing analyses that the law, both criminal and civil, as it presently stands in Canada and the U.S., is not an effective constraint on hockey violence. As far as the criminal law is concerned, it is true that McSorley was found guilty of assault. But it is difficult to argue with critics who assert that the penalty is less than effective. In addition, it did nothing to deal with the team and/or league that uses McSorley — and all enforcers for that matter — to purvey violence. Violence is revenue enhancing, because violence sells. The fans apparently like it, particularly in the U.S. But in the U.S. it is virtually impossible to successfully employ the criminal law to deal with in-game on-ice violence.

On the face of it, the civil law seems more appropriate. The doctrine of vicarious liability would target the team and/or league in addition to the individual, so that all parties responsible for the violence would be liable. However, the decision by the Missouri Court of Appeals in *McKichan* calls for a degree of "recklessness" which is unimaginable until it occurs. In the Canadian situation there is more potential based on awards to amateur hockey players. But there have been no cases involving NHL players so the outcome is conjecture and, further complicating the problem, the standard seems to differ between British Columbia and the rest of the country. At best the situation is quite uncertain. If the law is unsuitable, is self-regulation the answer?

(iv) League Self-Regulation

On the face of it, self-regulation as a constraint on violence has a definite appeal. Compared to the judicial process, internal sanctions can be applied faster, and presumably more equitably, across players, teams,

172. [1999] O.J. No. 3081, Court File No. 870/97. at *10

and political jurisdictions. In terms of speed, even though the *McSorley* trial and judgment took place within the year the offense was committed, the *McKichan* decision was not finally rendered until eight years after Twist cross-checked him. This latter result took entirely too long, particularly if it is to be viewed as the major instrument checking violence. An effective instrument should operate quickly, not with an eight-year lag.

In addition, it can be claimed with some justification, that the Commissioner's sanction of McSorley — one year's suspension[173] — was more severe than that applied by the criminal court, even though he was found guilty of assault with a hockey stick. However, the Commissioner did not penalize the assistant coach who sent McSorley out to fight or the team for whom McSorley acted as an agent. This is the nub of the problem: self-regulation to reduce violence only works if those regulated have an incentive to reduce violence. If they do not — and remember the economic evidence is that violence and revenue are positively related — the private system of justice will not produce results compatible with the perception of violence as a societal "bad."

It is sometimes suggested that the league president/commissioner could serve an independent regulatory function regardless of the wishes of the teams. After all, the president/commissioner has been self-characterized as having control over the "morals of the game,"[174] and has the power, under the NHL Constitution, Bylaws, and Collective Bargaining Agreement, to enforce discipline over conduct "detrimental to the League or the game of hockey."[175] However, no matter how attractive this viewpoint may seem, to accept it is to misunderstand the role and power of the league's president/commissioner *vis-à-vis* that of the constituent teams.

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173. McSorley was suspended by Colin Campbell, Executive Vice President and Director of Hockey Operations, after the incident for the balance of the 1999/2000 season. *Commissioner's Decision Regarding Supplementary Discipline for Marty McSorley*, Nov. 7, 2000, at http://www.nhl.com/onthefly/news/5993.html (cite no longer available on-line). Following the trial judgment, Commissioner Bettman, using his authority under NHL Official Rule 33A (Supplementary Discipline) and Article 18 (Commissioner Discipline) and Exhibit 8 (Procedures Relative to Commissioner Discipline) of the Collective Bargain Agreement, suspended McSorley until Feb. 21, 2001, making the total suspension one year in duration. *Id.* The Commissioner noted in his decision that this was the eighth time in McSorley's career that he had been disciplined under the league's supplementary discipline procedures (four of which were stick-related incidents). *Id.* He also found that McSorley's on-ice action was "wanton and reckless;" and his "post-trial comments have brought unfair disrepute on the game and its players." *Id.*

174. *See* Jones, *supra* note 14, at 4. This was the claim of longtime (1946-1977) NHL President Clarence Campbell, made during the Kefauver Hearings on Organized Professional Sport in 1958. *Id.*

175. *See* T.J. Arkell, *National Hockey League Jurisprudence: Past, Present and Future*, 8 SETON HALL J. SPORT L. 135, 163 at n. 136 (1998).

The model usually invoked to support the view of the president/commissioner as independent regulator is the appointment of Judge Kenesaw Mountain Landis as the first Commissioner of Major League Baseball (MLB).[176] The teams gave Judge Landis the right to act "in the best interest of baseball" as an antidote to the problems created by the Black Sox scandals.[177] However, Judge Landis' independence and power to act in the best interests of the game (the game *qua* game not the game *qua* MLB product), may be more mythical than real; and any independence shown by subsequent MLB Commissioners has been repeatedly and routinely quashed by the owners as the latest victims, Fay Vincent and Bud Selig, can testify.[178]

Certainly, no one with any knowledge of the history of the NHL would suggest that a NHL president/commissioner has a great deal of independence of action.[179] While incumbent, no president/commissioner has advocated eliminating fighting. The penultimate president, John Ziegler, when asked whether fighting should be eliminated, responded that it "did not matter to him" as he was in "the entertainment business. . .so if it's not broke, don't fix it."[180] The last president, Gil Stein, noted he was not advocating the removal of fighting, "because that was up to the 24 businessmen who run this game in each NHL city,"[181] which clearly answers the question about independence and control during his tenure. The first Commissioner and present incumbent, Gary Bettman, has added that his concern is not with getting "rid of fighting," but "determining how much fighting should be allowed."[182] Clearly, the decision whether or not to sanction violence lies with the owners, and to eliminate violence the

176. *See* Biography of Landis *available at* Baseball Hall of Fame Website (http://www.baseballhalloffame. org/hofers_and_honorees /hofer_bios/landis_kenesaw.htm) (last visited Nov. 10, 2001) (detailing Landis's career).

177. *See generally*, "SportsCenter Flashback: The Chicago Black Sox banned from baseball," *available at* http://espn.go.com/classic/s/black_sox_moments.html (last visited Nov. 3, 2001) (detailing the infamous Black Sox scandal).

178. *See generally*, JOHN HELYAR, LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL (Willard Books, 1994) and ANDREW ZIMBERLAST, BASEBALL AND BILLIONS 43-45 (Basic Books, 1992), for the Commissioner's role in MLB.

179. *See* DICK BEDDOES, PAL HAL 77(McMillan, 1989). For example, Stafford Smythe, owner of the Toronto Maple Leafs, once said of then NHL President Clarence Campbell, "Where else could we find a Rhodes Scholar, graduate lawyer, decorated war hero, and former prosecutor at the Nuremberg trials, *who'll do what he's told.*" *Id.* (emphasis added). There is no evidence that the succeeding Presidents, John Ziegler and Gil Stein, were regarded any differently by the owners. *Id.* In fact the manner of their dismissals suggests otherwise. *Id.*

180. Svoranos, *supra* note 8, at 491.

181. Larry Wigge, *A Hockey Fan is the Right Man for the Time*, SPORTING NEWS, Aug, 1992, at 51.

182. Svoranos, *supra* note 8, at 491.

owners must have a financial incentive.

For example, in 1992 there was an extended internal debate in the NHL over whether the league should take steps to reduce violence.[183] The key point at issue was whether, in order to obtain a national TV contract in the U.S., a reduction in game violence was necessary.[184] It was argued that U.S. TV would not broadcast a game rife with violence — Saturday morning cartoons and the World Wrestling Federation notwithstanding. However, uncertainty over the TV contract led to a shelving of the issue in favor of the tried and true business as usual.[185] Even Wayne Gretzky, the most famous player in the game, who in 1990 castigated NHL violence in his autobiography, changed his mind in 1992.[186] He claimed that his original opposition was due to the fact that he thought violence reduced attendance.[187] But since this did not appear to be true in the 1990's he was no longer opposed.[188] This, arguably, must rank as one of the greatest conversions since Saul of Tarsus hit the Damascus road.[189] Regrettably, we must conclude that to rely on self-regulation will not end NHL violence, because it is simply not in the team owner's best interest to do

183. A NHL internal pro-fighting report noted: "This is a business. With player salaries and costs increasing exponentially some member clubs are riding a tenuous line between fiscal failure and success. This is not the time to experiment. Elimination of fisticuffs may be a disaster. . .and once removed will be impossible to reinstate without a media backlash." Al Strachan, *NHL Bracing for an Internal Battle*, TORONTO GLOBE & MAIL, Aug. 24, 1992, at A14. The ultimate suggestion, geared to having the best of all worlds, came from then Edmonton Oilers General Manager, Glen Sather, at Hearings before the Canadian Radio-Television and Telecommunications Commission. Phillip Day, *Gretzky, Not-So-Great One*, VICTORIA TIMES COLONIST, Feb. 27, 1994 at A4; Day, *Hockey Heavies Trade Blows*, VICTORIA TIMES COLONIST, Feb. 27, 1994, at B6 (hereinafter Day II). Sather was trying to make the case for a pay-per-view hockey channel and was being questioned by members of the Commission on hockey violence and TV. Day at A4. He did not advocate changing the games as presently played. *Id.* But, he did advocate not showing any of the brawling on TV (presumably the cameras would cut away), and reining in all TV commentators who extol the virtues of fighting in hockey. *Id.* This combination of "show no evil and speak no evil" is market segmentation with a vengeance. *Id.* The application for the hockey channel failed, although whether it had anything to do with hockey violence (probably not) is conjecture. *Id.*

184. Day II, *supra* note 183 at B6

185. *Id.*

186. WAYNE GRETZKY WITH RICK REILLY, GRETZKY, AN AUTOBIOGRAPHY (Harper Collins, 1990), Ch. 17.

187. Day II, *supra* note 183, at B6.

188. Day II, *supra* note 183, at A4.

189. *See Acts* 9:1-18. It is interesting to note that Gretzky, whose career benefited from having McSorley as a "minder" (a "White Knight," *see supra* note 64), appeared at the McSorley trial. Rod Mickleburgh, *Hockey Tough Guy Pleads Not Guilty*, TORONTO GLOBE & MAIL, Sept. 26, 2000, at A3. He noted, "I'm just here to support my friend." *Id.* One of the most recognized and beloved athletes in all of Canada, he was inundated with requests for his autograph from counsels for the Crown and the defense. *Id.* In 2001, Gretzky acquired part ownership of a NHL team. *See* http://www.phoenixcoyotes.com (last visited Nov. 3, 2001) (detailing Gretzky's role). He has not made public any recent views on hockey violence.

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IV. CONCLUSION: ECONOMICS, THE LAW, AND HOCKEY VIOLENCE

"As long as there's hockey, there'll be a need for what I do."

-Tony Twist, Enforcer[190]

What can we conclude from the analysis in Parts II and III? First, from the analysis of the economic-violence model in Part II, we know that there is an economic incentive for teams to engage in violence and negative externalities flow from that violence. This means that, as long as violence is a societal "bad," remedial action is justified, but, to be effective, that action must focus on the team. There must be some way of imposing costs on the team, otherwise the incentives for violence will remain.

Second, our standard remedial response in dealing with societal "wrongs" is to use the judicial system. Therefore, and quite properly, incidents of hockey violence have been subject to both criminal and civil sanctions. The criminal law targets the player alone. The team is not considered culpable. There is no joint charge — conspiracy is apparently inapplicable — even though the player is clearly the agent, the instrument, of the team. How under these circumstances are costs to be imposed on the team so that there is a disincentive to promote violence? In addition, even a guilty verdict, as the *McSorley* case demonstrates, does not guarantee a severe penalty. All that can be said for the Canadian system of criminal law, is that it at least addresses the problem. In contrast, in the U.S., the hockey violence-criminal law confrontation is unlikely to happen.

The civil law seems a stronger weapon for changing team incentives. Teams are potentially liable under the doctrine of vicarious liability and, in the Canadian system, there have been significant monetary awards for egregious injury to amateur hockey players. Therefore, the possibility exists that awards such as these could be extended to professional players, provided a player brings the charge. Of course, we will not know until a case is brought and a verdict delivered. How strong a disincentive this possibility is at present for professional teams, is, at best, conjectural. In the U.S., as the verdict of the Missouri Court of Appeals in the *Twist* case demonstrates, what constitutes "reckless disregard" is so extreme as to be

190. Austin Murphy, *Fighting for a Living*, SPORTS ILLUSTRATED, Mar. 16, 1998, at 45.

unfathomable at this point. Overall, it is difficult to argue that the criminal and civil laws in Canada and the U.S. impose any effective constraint on team incentives to promote violence.

Third, in terms of efficiency, and possibly equity, there is something to be said for allowing the league to constrain team incentives to promote violence. This is especially true if there is no conflict between team incentives and externalities, and if the league *qua* league actually has the power to compel teams to behave in the best interests of society, regardless of the private incentives at work. However, in this case, team incentives clearly conflict with external effects; and there is no evidence that the league can force teams to behave against their best interests to limit societal "wrongs."

While it is arguably true that the penalties the league imposed on McSorley were more severe than those imposed by the courts, it is difficult to justify extrapolating this single instance into a general principle. No doubt the NHL would like to substitute its private system of justice for public justice — in effect the league petitioned the Crown to do just this in the *McSorley* case and the Court rejected it[191] — and the decision of the appeals court in the *Twist* cases suggests that there is some support from some of the U.S. judiciary for a move in this direction. Indeed, it may not be too big a stretch to interpret the legal decision as *de facto* allowing disciplinary power over violence to be placed totally in the hands of the league. The problem, however, is still the fact that the team's self-interest clashes with violence as a societal "wrong."

Where do we go from here? Do we ignore hockey violence and leave it to the leagues to enforce some discipline consistent with the team's incentive for promoting violence? This is tantamount to declaring hockey violence not to be a problem. Do we wait for the next egregious act to find out if the civil law can be applied and under what circumstances? Or, do we consider some form of direct regulation? We hesitate to recommend direct regulation, but, given the alternatives, we cannot dismiss it out of hand.

What we do know is that, if fans disliked violence and refused to attend games, the teams would undoubtedly resolve the problem by reducing violence. As Mr. Justice Kitchen perceptively noted, "if the game is to become less violent, it will likely only be in response to pressure brought by the fans."[192] This is the way the market works. The

191. Commissioner Bettman noted "the League's efforts to persuade the Crown Counsel in British Columbia that criminal prosecution of Mr. McSorley... was neither warranted nor appropriate." *See supra* note 173. The judge, of course, rejected the notion. *Id.*

192. *McSorley*, [2000] B.C.J. 117, at 19.

demand for enforcers is derived from the demand for violence. Or, conceivably, if enforcers could score goals — if they had better hockey skills — there would be no supply of enforcers. Blaming everything on the fan's choice set and the lack of an enforcer's hockey skills may seem trite but, nevertheless, it is true. Unfortunately, this is not going to get us very far in our search for effective measures.

In his final season, on his final night
Buddy and a Finn goon were pegged for a fight.
Thirty seconds left, the puck took a roll,
And suddenly Buddy had a shot on goal.
The goalie committed, Buddy picked his spot.
Twenty years of waiting went into that shot.
The fans jumped up, the Finn jumped too
and coldcocked Buddy on his follow-through.
The big man crumbled, but he felt all right,
'Cause the last thing he saw was the flashing red light.
He saw that heavenly light.[193]

193. Zevon et al., *supra* note 1.