

**CONFRONTING THE YOUTH SPORTS
CONCUSSION CRISIS: A CENTRAL ROLE
FOR RESPONSIBLE LOCAL
ENFORCEMENT OF PLAYING RULES**

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Introduction	75
I. Preventing Youth Sports Concussions	83
A. The Contemporary Sports Concussion Crisis	83
1. Professional Sports	83
2. Youth Sports	88
B. Meeting the Youth Sports Concussion Crisis	95
1. Ongoing Review of National Playing Rules	96
a. Pop Warner football	96
b. USA Hockey	98
2. Implementation of Playing Rules: “All Safety is Local”	99
a. Medical Research	103
b. Abuse of Game Officials.....	104
II. The Law's Role in Youth Sports Safety	106
A. Recent State Concussion Legislation	106
B. Litigation.....	108
Conclusion	109

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INTRODUCTION

By late 1905, college football was at a crossroads. Raw violence and unremitting bloodshed had stalked the gridiron for years. In that season alone, eighteen players died and scores more were seriously injured in intercollegiate games.¹ As Americans cringed, calls to abolish the “barbaric” sport grew louder because games and death did not mix on college campuses.²

The specter of death in college football was serious business at the dawn of the 20th century. A national professional league was still a few years away, so the collegiate game was the most prominent form of football played in America. Today, even one on-the-field death among several thousand college football players would attract national attention. Because far fewer collegians played football in 1905, eighteen deaths in a single season comprised an astounding percentage of the players, a grim toll unlikely to abate without meaningful changes to the rules of the game.

Most of the deaths were from what doctors diagnose today as multiple concussions, skull fractures, or other traumatic brain injury.³ At the turn of the century, some intercollegiate football players wore skimpy protective equipment and soft leather helmets without face guards, but helmets did not become mandatory in the National Collegiate Athletic Association (NCAA) until 1939.⁴ Game photos from the period show that most players went helmetless,⁵ even though college football degenerated into “a game of mass interference which leveled the defense. Line play deteriorated to brute force where linemen slugged one another

¹ MARK F. BERNSTEIN, *FOOTBALL: THE IVY LEAGUE ORIGINS OF AN AMERICAN OBSESSION* 80 (2001).

² LINDA CARROLL & DAVID ROSNER, *THE CONCUSSION CRISIS: ANATOMY OF A SILENT EPIDEMIC* 50 (2011).

³ *Id.*

⁴ Michael L. Levy et al., *Birth and Evolution of the Football Helmet*, 55 *NEUROSURGERY* 656, 656 (2004).

⁵ See, e.g., BERNSTEIN, *supra* note 1 (photographs following page 146); IVAN N. KAYE, *GOOD CLEAN VIOLENCE: A HISTORY OF COLLEGE FOOTBALL* 55 (1973) (photograph of players without helmets); JOHN SAYLE WATTERSON, *COLLEGE FOOTBALL: HISTORY, SPECTACLE, CONTROVERSY* (2000) (photographs following page 98).

and the ball carrier was pulled and pushed into this mass of humanity.”⁶

Some colleges, notably Columbia University and Northwestern University, reacted to the carnage by eliminating their football programs altogether.⁷ Disgusted by the unrelenting bloodshed, President Theodore Roosevelt grew worried that more colleges would follow suit, including his alma mater, Harvard.⁸

Roosevelt was one of the most athletic Presidents in American history, a vigorous sportsman who respected athletic competition.⁹ He was also a “gridiron enthusiast”¹⁰ who closely followed Harvard’s eleven, a team he might have joined as an undergraduate a little more than twenty-five years earlier but for his nearsightedness.¹¹ He embraced football for manifesting rugged Americanism just a few years after the U.S. Census Bureau inspired national soul-searching by announcing the closing of the frontier in 1890.¹² When he charged San Juan Hill during the Spanish-American War, his Rough Riders included former college football players who won his respect.¹³

“To borrow a simile from the football field,” Roosevelt said in 1897, “we believe that men must play fair, but that there must be no shirking, and that the success can only come to the player who ‘hits the line hard.’”¹⁴ From the White House, he wrote to his son, Theodore, Jr., who played on Harvard’s freshman team: “I am delighted to have you play football. I believe in rough, manly sports.”¹⁵

⁶ TOM PERRIN, *FOOTBALL: A COLLEGE HISTORY* 53-54 (1987).

⁷ WATTERSON, *supra* note 5, at 73-74, 92.

⁸ *Id.* at 64-65.

⁹ JOHN SAYLE WATTERSON, *THE GAMES PRESIDENTS PLAY* 71-72 (2006).

¹⁰ WATTERSON, *supra* note 5, at 64.

¹¹ BERNSTEIN, *supra* note 1, at 12; EVAN THOMAS, *THE WAR LOVERS: ROOSEVELT, LODGE, HEARST, AND THE RUSH TO EMPIRE, 1898*, 56 (2010).

¹² BERNSTEIN, *supra* note 1, at 38; WATTERSON, *supra* note 5, at 65; THOMAS, *supra* note 11, at 55-57; FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* 1-38 (1920).

¹³ TR Saves Football, THEODORE ROOSEVELT ASS’N, <http://www.theodoreroosevelt.org/kidscorner/football.htm>.

¹⁴ In His Own Words, THEODORE ROOSEVELT ASS’N, <http://www.theodoreroosevelt.org/life/Quotes.htm>.

¹⁵ CARROLL & ROSNER, *supra* note 2, at 50; *see also* WATTERSON, *supra* note 5, at 64-65 (quoting Roosevelt’s letter to a friend: “I would rather see my boys play [football] than see them play any other [sport]”).

In October of 1905, with “football staring hard at the prospect of demise,”¹⁶ President Roosevelt summoned the head coach and alumni committee head from each of the “Big Three” collegiate gridiron powers—Harvard, Yale and Princeton—to convene at the White House and explore ways to maintain the game’s distinctiveness as a collision sport, yet stem its unrestrained brutality.¹⁷

Barely a month before the college football delegations arrived, Roosevelt mediated an end to the Russo-Japanese War, an effort that earned him the Nobel Peace Prize.¹⁸ With participants considerably less hostile toward one another than warring nations, the White House football summit led to safety-based rule changes that would soon make deaths on the field remnants of the past.¹⁹ The summit also led to the creation of the NCAA, the national governing body that oversees the enforcement of playing rules by member colleges and universities.²⁰

Safety-based rule changes did not doom public enthusiasm for football. On the contrary, college and professional football remain the nation’s most popular spectator sports today,²¹ and the highest award the NCAA bestows on an individual is the Theodore Roosevelt Award, honoring the man whose presidential initiative saved the game from itself.²²

Without suggesting intervention by Congress or any state legislature, President Roosevelt confronted college football’s brain injury crisis by advocating national rule changes that conferences, coaches, and referees would administer responsibly in local games.

¹⁶ JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA’S FIRST CENTURY* 41 (2006).

¹⁷ BERNSTEIN, *supra* note 1, at 79-83 (2001); CROWLEY, *supra* note 16, at 40-43.

¹⁸ HENRY F. PRINGLE, *THEODORE ROOSEVELT* 185-96 (1956); EDMUND MORRIS, *THEODORE REX* 131-37, 150-69; *THEODORE ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY* 555-58 (1913); *The Nobel Prize 1906: Theodore Roosevelt*, NOBELPRIZE.ORG,

http://www.nobelprize.org/nobel_prizes/peace/laureates/1906/roosevelt-bio.html.

¹⁹ WATTERSON, *supra* note 5, at 100-10.

²⁰ CROWLEY, *supra* note 16, at 43-44.

²¹ *Football is America’s Favorite Sport as Lead Over Baseball Continues to Grow: College Football and Auto Racing Come Next*, HARRIS INTERACTIVE (Jan. 25, 2012), http://www.harrisinteractive.com/vault/Harris%20Poll%209%20-%20Favorite%20sport_1.25.12.pdf.

²² Theodore Roosevelt Award, NAT’L COLLEGIATE ATHLETIC ASSOC., <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Events/Honors+Calebration/Theodore+Roosevelt+Award>.

Injury prevention was central to the President's formula because mere reaction to serious injury came too late, only after the player and his family suffered irreparable loss.

Today the sports world faces a similar crisis from the epidemic²³ of serious and often permanent brain injury. This crisis—"the predominant youth sports safety issue of the 21st century"²⁴—concerns concussions, a form of traumatic brain injury from externally inflicted trauma.²⁵ "[H]ead trauma in sports is a topic that leads nightly newscasts and is debated at every level of amateur and professional sports."²⁶ Concussions produce "contact sports' nastiest byproducts," with "long-term effects . . . [that] are proving to be absolutely terrifying."²⁷

Until recently, the national spotlight shined brightest on concussions suffered by professional athletes, particularly football and ice hockey players. As neurosurgeon William P. Meehan reports, we know now that "concussion is a risk in almost any sport."²⁸ We also know, as *Time* reports, that "concussions are an alarmingly commonplace injury, particularly among kids and most particularly among active, athletic ones."²⁹ Whether or not the

²³ See, e.g., CARROLL & ROSNER, *supra* note 2.

²⁴ Brooke de Lench, *Praise For MomsTEAM Is Nice, But The Fight To Make Youth Sports Safer Isn't Over*, MOMSTEAM (May 23, 2012), <http://www.momsteam.com/blog/brooke-de-lench/praise-momsteam-nice-but-fight-make-youth-sports-safer-not-yet-over#ixzz22VEOtIR9>; see also, Lyle J. Micheli, Foreword, in , KIDS, SPORTS, AND CONCUSSION: A GUIDE FOR COACHES AND PARENTS XI (William Paul Meehan III, 2011) ("[a] true health crisis"); Alan Schwartz, *High School Players Shrug Off Concussions, Raising Risks*, N.Y. TIMES, Sept. 15, 2007, at A1 (quoting Robert Sallis, president of the American College of Sports Medicine, who states, "Poor management of high school players' concussions 'isn't just a football issue.' 'It's a matter of public health.'").

²⁵ *Rehabilitation of Persons With Traumatic Brain Injury*, NIH CONSENSUS DEV. PROGRAM, at 5, <http://consensus.nih.gov/1998/1998traumaticbraininjury109html.htm>.

²⁶ ROBERT CANTU & MARK HYMAN, CONCUSSIONS AND OUR KIDS 2 (2012).

²⁷ Alan Siegel, *How to Fix Sports' Concussion Crisis*, THE ATLANTIC, Sept. 27, 2011.

²⁸ WILLIAM PAUL MEEHAN III, KIDS, SPORTS, AND CONCUSSION: A GUIDE FOR COACHES AND PARENTS XI 37 (2011); see also Michael W. Kirkwood et al., Pediatric Sport-Related Concussion: A Review of the Clinical Management of an Oft-Neglected Population, 117 PEDIATRICS 1359, 1360 (2006) ("Nearly all athletic endeavors pose some risk of concussive injury.").

²⁹ Jeffrey Kluger, *Headbanger Nation*, TIME (Feb. 3, 2011), http://www.time.com/time/specials/packages/article/0,28804,2043395_2043506_2043494_00.html.

victim loses consciousness,³⁰ a concussion at any age “can affect memory, judgment, reflexes, speech, balance, and muscle coordination and can result in serious complications, such as swelling, bruising, or bleeding of the brain, which can cause permanent disability or death.”³¹

Today’s concussion crisis³² summons a range of preventive strategies, including the one President Roosevelt prescribed for college football in 1905 – public education about safety risks, ongoing review of national playing rules based on new learning, and responsible local implementation of these rules in practice sessions and games. Mere reaction to a player’s brain injury is insufficient to undo prior damage.

This Article concerns the effect of playing rules on efforts to confront today’s concussion crisis in youth sports. The term “youth sports” covers the two primary sources of organized athletics for children: (1) community leagues and teams conducted by parents in private associations or clubs or by public parks and recreation departments, and (2) interscholastic leagues conducted by public and private secondary schools.

I remain awed by the sheer quality and quantity of research and commentary generated in recent years by prominent medical professionals who seek to stimulate public awareness of sports-related brain injuries in children. Without venturing into a profession in which I lack training, I seek to apply this learning from my vantage point both as a lawyer and as a youth hockey coach, concerned for more than 40 years about player safety. For ten of these years, I also served as the president of a youth hockey program and, thus, designed and helped supervise safety measures implemented by other volunteer coaches.

³⁰ CANTU & HYMAN, *supra* note 26, at 106-07 (stating that 95% of victims who suffer concussions do not lose consciousness); James P. Kelly, *Traumatic Brain Injury and Concussion in Sports*, 282 J. AM. MED. ASS’N 989, 990 (1999) (“Concussion . . . may or may not involve loss of consciousness”).

³¹ U.S. GOV’T ACCOUNTABILITY OFFICE, *Concussion in High School Sports*, GAO-10-569T (May 20, 2010) (referencing the statement of Linda T. Kohn, Director, Health Care); Brooke de Lench, *Concussions Double For Younger Athletes In Team Sports*, Study Finds, MOMSTEAM (Sept. 1, 2010), <http://www.momsteam.com/health-safety/concussions-double-among-younger-athletes-in-team-sports-study-finds> (quoting Dr. Lisa L. Bakhos: “[C]oncussions can happen to anyone. Some [parents] may think, my child is too young to get really hurt in sport, but that is not the case.”).

³² CARROLL & ROSNER, *supra* note 2.

President Roosevelt sought to save football, not to eradicate it. I recognize that participation in sports inevitably brings risk of injury at any age, and that contact and collision sports depend on a measure of controlled violence within the rules of the game. We can significantly reduce the risk of childhood sports-related concussions and other brain trauma, however, by periodically adjusting safety-based playing rules in light of medical learning, and then by taking meaningful measures to assure their responsible enforcement by coaches, league administrators, game officials and parents who remain committed to sportsmanship and mutual respect in vibrant local games.

Now that children's spontaneous sandlot play has yielded to organized youth sports programs conducted by adults,³³ injury prevention, grounded in fidelity to the rules of the game, is more than an adult challenge and opportunity. This central injury-prevention strategy is an adult responsibility because "every hit to the head leaves a mark, or a legacy, on a child's future."³⁴

Part II of this Article discusses rules-based prevention of concussions and other traumatic brain injury in youth sports, a proactive stance that the National Institutes of Health says holds "great promise."³⁵ Primary responsibility for the rules rests with national youth sports governing bodies (USA Soccer, USA Hockey, and others), and with the state high school activities associations that oversee the interscholastic sports programs conducted by their member public and private secondary schools. Rule making remains a work in progress, but national and state rule makers have proved increasingly responsive to parents, medical professionals, legislators and similar advocates of periodic review.

National and state rule making, however, does not end the story because children play games from coast to coast on fields and other local venues largely beyond the direct day-to-day supervision of national and state governing bodies. Part II explains why the rules of the game stand the best chance of

³³ Douglas E. Abrams, *The Challenge Facing Parents and Coaches in Youth Sports: Assuring Children Fun and Equal Opportunity*, 8 VILL. SPORTS & ENT. L.J. 253, 264-65 (2002).

³⁴ *Our Story*, SPORTS LEGACY INST., <http://sportslegacy.org/about-sports-legacy-institute/about-sli>.

³⁵ NIH CONSENSUS DEV. PROGRAM, *supra* note 25, at 9.

protecting players when coaches, league administrators, game officials and parents enforce the rules responsibly.

Part II concludes by discussing how local adult irresponsibility, particularly when passion to win overcomes reason in the heat of competition, can neutralize national and state safety-based playing rules and put young athletes in harm's way. These rules resemble an impressive building, which may take years to design and construct with care, but which can implode locally in moments.

Part III discusses the role of legal constraints in the quest for greater safety from concussions in youth sports. Most states have taken a giant step forward since 2009 by enacting concussion legislation that, while not displacing safety-based review and local enforcement of playing rules, holds potential to make life better for the nation's youngest athletes. Parents, coaches and players generally must receive information and education about the dangers of concussions and when to suspect that a player may have suffered one. When someone suspects that a player has suffered possible concussive injury, teams and coaches must immediately remove the player from practice sessions and games until the player secures medical clearance to return to action.

Thus far, private litigation has played comparatively little direct role in preventing youth league concussions. The specter of lawsuits by injured players might influence and accelerate safety initiatives by stimulating the sensibilities of rule makers and other concerned adults, either by jeopardizing the availability of insurance at favorable rates or by leaving individual parents reluctant to enroll their children in a particular sport. These prospects seem to have already moved national and state governing bodies toward greater safety measures, but lawsuits in large numbers remain unreported in youth sports.³⁶

Recovery in an injured player's tort suit against governing bodies, leagues and coaches helps ease the frequently substantial financial burdens of short-term and long-term care following a concussion or other traumatic brain injury. Recovery, however, comes only after the player suffers immediate and sometimes

³⁶ See *infra* note 55 and accompanying text (discussing class action lawsuit by more than 2,000 former National Football league players against the NFL arising out of the concussion crisis).

permanent damage. In practice sessions and games, proactive prevention best protects youth leaguers from concussions and other serious injuries, rather than essentially reactive tort law.

I. PREVENTING YOUTH SPORTS CONCUSSIONS

Emphasizing injury prevention initiatives in youth sports plows no new ground. Prevention initiatives in the schools and the greater community already seek to protect children from an array of potential dangers, such as delinquency, bullying, and school violence.³⁷ Because parents also strive to prevent childhood injuries in their homes (including injuries from sports and games), it seems natural to contemplate injury prevention initiatives in the organized sports their children play in the community.

Prevention initiatives measure success by rates of reduction rather than by total elimination of targeted conduct. The nation cannot eliminate all delinquency, bullying, school violence or youth sports concussions, but parents and safety advocates can strive for significant reduction rates, rather than tolerate the continued high rates of adverse outcomes that are controllable through due care.³⁸ As Benjamin Franklin said, “an ounce of prevention is worth a pound of cure.”³⁹

A. *The Contemporary Sports Concussion Crisis*

1. Professional Sports

When parents first enroll a child in a youth sports program, their perceptions about sports typically come almost entirely from following professional games.⁴⁰ “[T]hrough their pervasive presence in the media,” says the U.S. Court of Appeals for the Sixth Circuit, “sports . . . celebrities have come to symbolize certain ideas and values in our society and have become valuable

³⁷ See, e.g., Douglas E. Abrams, *A Coordinated Public Response to School Bullying*, in *OUR PROMISE: ACHIEVING EDUCATIONAL EQUALITY FOR AMERICA'S CHILDREN* 399, 410-12 (Maurice R. Dyson & Daniel B. Weddle eds., 2009).

³⁸ *Id.* at 410-12.

³⁹ See *In re Lower Merion Twp. Fire Dep't Labor Standards Litig.*, 972 F. Supp. 315, 320-21 (E.D. Pa. 1997) (referencing Benjamin Franklin's *Gazette*, Jan. 28-Feb. 4, 1735, at 1).

⁴⁰ Abrams, *supra* note 33, at 273.

means of expression in our culture.”⁴¹ Amid the unprecedented saturation of professional sports in the broadcast and print media and, more recently, on the Internet,⁴² the impetus toward concussion prevention in youth sports reflects adult reactions to the well-publicized concussion crisis that besets several professional sports.

The Minnesota Twins’ all-star first baseman Justin Morneau, the American League’s Most Valuable Player in 2006, acknowledged these reactions when he returned to the lineup last season after being sidelined with his second concussion. “If anything good comes” from his prolonged recovery, said Morneau, “it’s the fact that if parents see us big guys, professional athletes, missing good chunks of time, they’re going to take it seriously and not rush their high school kids back out there to play a football game.”⁴³

Traumatic brain injury in sports has been called a “silent epidemic,” partly because until recently its potentially devastating effects had received relatively moderate attention from medical researchers amid concern for other neurological conditions that afflict the general population, such as Alzheimer’s disease and stroke.⁴⁴ In the United States’ “sports-dominated culture,”⁴⁵ dramatic media accounts broke the silence regarding professional athletes in distress, often years after their retirement. These accounts typically chronicled not the immediate disability and death that stained college football by 1905, but the lingering physical incapacity, dementia and early death attributable to concussions and other brain trauma, particularly in contact and collision sports.

It might seem odd that so much of the nation’s early attention to sports-related traumatic brain injuries focused

⁴¹ ETW Corp. v. Jireh Publishing, Inc., 332 F.3d 915, 937-38 (6th Cir. 2003).

⁴² Douglas E. Abrams, *Sports in the Courts: The Role of Sports References in Judicial Opinions*, 17 VILL. SPORTS & ENT. L.J. 1, 6 (2010).

⁴³ Tyler Kepner, *Feeling Right, Finally*, N.Y. TIMES, Aug. 5, 2012, at 10 (quoting Morneau).

⁴⁴ Kelly, *supra* note 30; *see also*, Philipp R. Aldana & Mark S. Dias, *Are You Ready for the “Silent Epidemic”?*, 32 AAP NEWS 1 (July 1, 2011); Siegel, *supra* note 27 (attributing silence to the reluctance of many former professional players to acknowledge publicly the likelihood of future deterioration).

⁴⁵ Butts v. Nat’l Collegiate Athletic Ass’n, 751 F.2d 609, 612 (3d Cir. 1984) (citation omitted).

primarily on the professional leagues, which included a few thousand of the nation's elite adult athletes, and not on youth leaguers, the estimated thirty to thirty-five million boys and girls who play each year.⁴⁶ Hefty youth sports enrollments comprise nearly half the children in America.⁴⁷ Nearly every child has some experience with organized sports, and thus some exposure to serious injury, before turning eighteen.⁴⁸

Odd or not, the headlines first spotlighted the pros. Knowing they suffered multiple concussions in contact or collision sports, some professional athletes or their families have donated their brains to the Sports Legacy Institute in Boston for post-mortem examination.⁴⁹ Examinations of a few deceased football and hockey players' brains reveal that most suffered from chronic traumatic encephalopathy (CTE), a progressive degenerative brain disease caused by repeated blows to the head, including concussions.⁵⁰ CTE is linked to behavioral changes, dementia, and premature death.⁵¹ Indeed, football players with CTE may suffer the same type of brain damage as Alzheimer's disease patients⁵² or as combat "veterans who endured bomb blasts in Iraq and Afghanistan."⁵³ A September 2012 study of nearly 3,500 retired

⁴⁶ Douglas E. Abrams, *Achieving Equal Opportunity in Youth Sports: Roles for the "Power of the Permit" and the "Child Impact Statement,"* in LEARNING CULTURE THROUGH SPORTS; PERSPECTIVES ON SOCIETY AND ORGANIZED SPORTS 32 (Sandra Spickard Prettyman & Brian Lampman eds., 2011) (citations omitted).

⁴⁷ See America's Children: Key National Indicators of Well-Being, FORUM ON CHILD AND FAMILY STATISTICS, at 3 (2012) (showing that in 2011, there were 73.9 million children under eighteen in the United States).

⁴⁸ See, e.g., Bari Katz Stryer et al., *A Developmental Overview of Child and Youth Sports in Society*, 7 CHILD & ADOLESC. PSYCHIATR. CL. N. AM. 697, 697 (1998); Having Fun is a High Priority, USA TODAY, Sept. 10, 1990, at 14C (estimating that only 1 in 20 children has not played an organized sport).

⁴⁹ See, e.g., Legacy Donors, SPORTS LEGACY INST., <http://sportslegacy.org/research/cte-concussions-sli-legacy-donors/>.

⁵⁰ CANTU & HYMAN, *supra* note 26, at 90-104; see also, Mary Pilon, *Family of Seau Decides to Give Brain for Study*, N.Y. TIMES, May 5, 2012, at 3.

⁵¹ CANTU & HYMAN, *supra* note 26, at 90-104.

⁵² *Id.* at 90; Andy Staples, *Justified Or Not, Seau's Death Puts Football Under Question Again*, SPORTS ILLUS., May 3, 2012 (recalling that when 44-year-old former NFL player Andre Waters committed suicide in 2006, his brain "resembled what one would expect in an 85-year-old man in the early stages of Alzheimer's").

⁵³ Kay Lazar, *Football, Combat Brain Trauma Similar: Study Finds That the Head Injuries in Players, Veterans Cause Comparable Impairments*, BOSTON GLOBE, May 17, 2012, at B1.

NFL players found that the players die from Alzheimer's, Parkinson's disease, amyotrophic lateral sclerosis ("Lou Gehrig's disease"), and other brain diseases at rates three to four times higher than other Americans.⁵⁴

More than 2,000 former National Football League (NFL) players also attracted national attention by filing a class action lawsuit alleging that the league knew, or should have known, about the lifelong dangers of concussions and other head trauma.⁵⁵ Some former pros have retired early from collision or contact sports, such as football and hockey, for fear that further concussions would haunt them later in life.⁵⁶ A few former pros have died young from ailments or painkiller overdoses evidently traceable to traumatic brain injury.⁵⁷ Others have committed suicide in suspected attempts to escape progressing debilitation.⁵⁸

What does the looming concussion crisis bode for the future of professional football and for the future of youth football? Despite persistently high rates of serious injury, writer James A. Michener found in 1976 that "there is no cry to end football, nor will there be, because every society decides what it is willing to pay for its entertainment."⁵⁹ Michener concluded, "Football is the American

⁵⁴ Everett J. Lehman et al., *Neurogenerative Causes of Death Among Retired National Football League Players*, NEUROLOGY (Sept. 5, 2012); see also Kevin Cook, *Dying to Play*, N.Y. TIMES, Sept. 12, 2012, at A31.

⁵⁵ *2,000 Players Unify in Suing NFL Over Head Injuries*, CNN (June 7, 2012, 12:20 PM), http://news.blogs.cnn.com/2012/06/07/2000-players-unify-in-suing-nfl-over-head-injuries/?hpt=hp_t1.

⁵⁶ CARROLL & ROSNER, *supra* note 2, at 17-24; Lorenzo Arguello, *10 Athletes Whose Careers Came To A Tragic End After Suffering Concussions (Or Kobe's Worst Nightmare)*, BUSINESS INSIDER, Feb. 29, 2012.

⁵⁷ See, e.g., John Branch, *In Hockey Enforcer's Descent, a Flood of Prescription Drugs*, N.Y. TIMES, June 4, 2012 (stating that 28-year-old ex-N.Y. Rangers hockey player Derek Boogaard died of drug overdose and was found to have CTE); CHRISTOPHER NOWINSKI, HEAD GAMES: FOOTBALL'S CONCUSSION CRISIS FROM THE NFL TO YOUTH LEAGUES 71-75 (2007) (stating that NFL Hall of Famer Mike Webster died of heart failure at age 50, and post-mortem brain examination found evidence of CTE); Alan Schwartz, *Hockey Brawler Paid Price, With Brain Trauma*, N.Y. TIMES, Mar. 3, 2011, at A1 (stating that NHL "enforcer" Bob Probert died of heart failure at 45 and suffered from CTE).

⁵⁸ See, e.g., Seau, *Football: Game of Death*, CHI. SUN-TIMES, May 8, 2012, at 63 (Junior Seau, 43-year-old NFL star and likely future Hall of Famer); Alan Schwartz, *Duerson Lawsuit Says N.F.L Ignored Concussion Risks*, N.Y. TIMES, Feb. 24, 2012, at 15 (stating that 50-year-old former NFL player Dave Duerson committed suicide with gunshot wound to chest and requested that his brain be studied for severe damage).

⁵⁹ James A. Michener, SPORTS IN AMERICA 85 (1976).

form of violence . . . because we have given it our moral sanction.”⁶⁰

Journalist Buzz Bissinger, author of the acclaimed *Friday Night Lights* high school football chronicle,⁶¹ may be right that raw violence defines football’s popularity among Americans. “Take [violence] away,” he writes, “and the game will be nothing.”⁶² Columnist George F. Will similarly wrote recently about the “fiction that football can be fixed and still resemble the game fans relish.”⁶³

Other commentators suggest that public unease about concussions and other traumatic brain injury may lead many fans to spurn NFL games between players they know are destined for early debilitation.⁶⁴ Conjuring images of the crisis that afflicted college football when President Roosevelt interceded in 1905, the *New Yorker’s* Malcolm Gladwell likens football to dog fighting.⁶⁵

⁶⁰ *Id.*

⁶¹ H.G. BISSINGER, *FRIDAY NIGHT LIGHTS: A TOWN, A TEAM, AND A DREAM* (1990).

⁶² Buzz Bissinger, *NFL Playoffs: Why Football Needs Violence*, THE DAILY BEAST (Jan. 17, 2011), <http://www.thedailybeast.com/articles/2011/01/18/nfl-playoffs-buzz-bissinger-on-why-football-needs-violence.html>; see also Buzz Bissinger, *The NFL’s Hypocritical Outrage Against Bonuses for Injuring Players*, THE DAILY BEAST (Mar. 5, 2012), <http://www.thedailybeast.com/articles/2012/03/05/the-nfl-s-hypocritical-outrage-against-bonuses-for-injuring-players.html> (“[W]e watch football . . . [b]ecause it is barbaric and terrifying and sick. Because we love good hits and kamikaze safety blitzes and a quarterback sitting on the field after a sack with visions of Tweety Bird dancing in his brain.”).

⁶³ George F. Will, *Football’s Problem with Danger on the Field Isn’t Going Away*, WASH. POST, Aug. 6, 2012; see also, Tim Layden, *The Power of the Game*, SPORTS ILLUS., Feb. 13, 2012, at 15-16 (calling the NFL’s concussion crisis “a possibly irresolvable problem” because meaningful safety-based rules changes would blunt fans’ passion for the pro game).

⁶⁴ See, e.g., Jonathan Tamari, *Concussion Lawsuits Put Spotlight on NFL Policies*, PHILA. INQUIRER, Feb. 12, 2012, at E1 (arguing that lawsuits filed by former NFL players “carry a steep public relations risk” for the league, striking at its “sustainability” over time); Gary Myers, *With the State of Game and Concussions, Jets LB Scott Does Not Want Son to Play Football*, N.Y. DAILY NEWS, May 27, 2012, at 76 (calling concussion crisis “the biggest threat to the future of” football); Ken Belson, *For N.F.L., Concussion Suits May Be Test for Sport Itself*, N.Y. TIMES, Dec. 30, 2011, at A1; Andy Staples, *supra* note 52 (calling head shots “the biggest problem the sport has right now”).

⁶⁵ Malcolm Gladwell, *Offensive Play: How Different are Dogfighting and Football?*, THE NEW YORKER, Oct. 19, 2009; see also Katy Waldman, *College Football Should Be Banned*, SLATE (May 9, 2012, 10:41 AM), http://www.slate.com/articles/sports/intelligence_squared/2012/05/ban_college_football_how_buzz_bissinger_and_malcolm_gladwell_won_the_slate_intelligence_squared_deba

Accusing the NFL of “chewing up players like a meat grinder,” former *New York Times* columnist Bob Herbert says that “[w]ith the carnage increasingly emerging from the shadows, there is no guarantee that football’s magical hold on the public will last.”⁶⁶

To promote effective responses to the youth sports concussion crisis, it is not necessary to choose sides in the prognoses over the NFL’s future. If the commentators predicting storm clouds ahead for the pro game prove to be correct, however, any significant loss of popularity would likely affect the youth game’s vitality in many communities.

2. Youth Sports

The American Academy of Pediatrics calls sports-related concussions “a common problem for children and adolescents.”⁶⁷ The professional and youth sports concussion crises may share similarities, but tolerance for serious injury should be considerably lower in children’s games than in the pros.

Professional athletes are well-compensated adults, employed by major corporations in billion-dollar businesses.⁶⁸ The law’s conception of personal autonomy generally grants competent adults considerable right to decide on their own health care and personal safety in the absence of harm to others.⁶⁹ Former

te_on_may_8_2.html (quoting Gladwell, who wrote that college football should be banned because of “the collateral damage [it] has left in its wake.”); Buzz Bissinger, *Why College Football Should be Banned*, WALL ST. J., May 8, 2012 (advocating a ban on college football, partly because of the “the medical dangers of football in general caused by head trauma over repetitive hits”).

⁶⁶ Bob Herbert, *The Sport Needs to Change*, N.Y. TIMES, Mar. 15, 2011, at A5; see also, Tim Sullivan, *Love of Football Just Might Not Be Enough to Keep It Viable*, SAN DIEGO UNION-TRIB., May 28, 2012, at D1 (arguing that unless the NFL meets the concussion crisis with meaningful rules changes, “football will eventually be deemed so dangerous that that its participants will progressively reflect much the same desperate demographic as boxing”); Jake Simpson, *Will Concussions Kill Football?*, THE ATLANTIC, Sept. 21, 2010 (“If the NFL, NCAA, and other football bodies do not take serious action right now to combat the constant, destructive head trauma that is as much a football staple as the extra point, the sport could face a massive decline in popularity and relevance over the next 20 to 30 years.”).

⁶⁷ William P. Meehan & Richard G. Bachur, *Sport-Related Concussion*, 123 PEDIATRICS 114, 119 (2009).

⁶⁸ See, e.g., JERRY GORMAN & KIRK CALHOUN, *THE NAME OF THE GAME: THE BUSINESS OF SPORTS* (1994).

⁶⁹ See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (“Parents may be free to become martyrs themselves. But it does not follow they are free, in identical

National Hockey League Hall of Fame goalie Ken Dryden observes correctly that “[f]or players or former players, owners, managers, coaches, doctors and team doctors, league executives, lawyers, agents, the media, players’ wives, partners and families, it’s no longer possible not to know and not to be afraid, unless we willfully close our eyes.”⁷⁰ The pros bargain collectively with team owners about safety measures and other terms of employment, and thus, may determine for themselves how much risk of injury they wish to tolerate.

Children, however, play sports without lucrative contracts and nationwide audiences of millions because they seek to have fun, win games and develop their skills.⁷¹ Christopher Nowinski, co-director of the Sports Legacy Institute, puts it well: “What’s good television is not necessarily good for kids. They’re not little men. They’re children.”⁷² Few youth leaguers progress to the Division I collegiate ranks, and fewer still progress to the pros and receive a single paycheck for their play.⁷³ For most parents, youth sports are an opportunity to provide children with memories, during a lifetime of good health, as free as possible from the chronic effects of childhood injury.⁷⁴

circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”).

⁷⁰ Ken Dryden, *Head Shots Should Be History*, *GLOBE & MAIL* (Canada), Mar. 12, 2011, at F5.

⁷¹ See, e.g., MICHENER, *supra* note 58, at 10 (“If the game isn’t fun, it has lost at least half its justification”); Ron Borges, *Counting Cost to Children*, *BOSTON HERALD*, Feb. 4, 2012, at 42 (quoting Christopher Nowinski, co-founder of the Sports Legacy Institute).

⁷² Ron Borges, *Counting Cost to Children*, *BOSTON HERALD*, Feb. 4, 2012, at 42 (quoting Nowinski).

⁷³ *Estimated Probability of Competing in Athletics Beyond the High School Interscholastic Level*, NAT’L COLLEGIATE ATHLETIC ASS’N, <http://www.ncaa.org/wps/wcm/connect/public/test/issues/recruiting/probability+of+going+pro>.

⁷⁴ See, e.g., Jonathan Tamari, *Young Athletes Growing Mindful of Concussion Danger*, *Philly.com* (Feb. 12, 2012) http://articles.philly.com/2012-02-12/sports/31052461_1_concussion-awareness-traumatic-encephalopathy (quoting neurosurgeon Robert Cantu who wrote, “[i]ndividuals who aren’t being paid need to be informed of the risk they’re taking and then decide whether they want to take those risks.”).

The numbers define the imposing contours of the youth sports crisis, with “[c]oncussions representing an estimated 8.9% of all high school athletic injuries.”⁷⁵ It is commonly reported that

300,000 sport-related concussions occur each year, although it was estimated in a recent review that up to 3.8 million recreation- and sport-related concussions occur annually in the United States. . . . Because of the large numbers of participants in youth and high school sports, concussions in the pediatric and adolescent age groups account for the majority of sport-related concussions.⁷⁶

The pediatric concussion crisis affects more sports than traditionally imagined. As Dr. Stanley Herring told a congressional committee, the crisis “is not a football issue. It’s not a boy sport issue.”⁷⁷ The American Academy of Pediatrics finds that “[a]mong the more commonly played high school sports, football and ice hockey have the highest incidence of concussion, followed by soccer, wrestling, basketball, field hockey, baseball, softball, and volleyball.”⁷⁸ The concussion rate in girls’ soccer is almost as high as it is in boys’ football, and girls have higher rates of reported concussions than boys in similar sports and may experience more difficulty than boys in recovering from concussions.⁷⁹

⁷⁵ Mark E. Halstead & Kevin D. Walter, *Clinical Report—Sport-Related Concussion in Children and Adolescents*, 126 PEDIATRICS 597, 599 (2010).

⁷⁶ *Id.* at 598-99; see also, Meehan & Bachur, *supra* note 66, at 114 (“the majority of at-risk athletes are children,” and “children are particularly susceptible to” sport-related concussions).

⁷⁷ *Protecting Student Athletes from Concussions*: Hearing on H.R. 6172 before the Comm. on Educ. and Labor, 111th CONG. 27 (2010) (referencing the statement of Dr. Stanley Herring, clinical professor, Dep’t of Rehabilitative Medicine, Orthopedics and Sports Medicine and Neurological Surgery, Univ. of Wash.).

⁷⁸ Kirkwood et al., *supra* note 28, at 1359, 1360; see also MEEHAN III, *supra* note 28, at 29-37 (discussing concussions in various sports); *The Impact of Concussions on High School Athletes*: Hearing before the H. Educ. and Labor Comm., 111th Cong. 7 (2010) (referencing the statement of Dr. Gerard Gioia, director of neurophysiology, Children’s Nat’l Med. Center, Washington, D.C.) (showing there is a possibility that children can suffer concussions in any sport that has high risk of direct contact, including wrestling, cheerleading and gymnastics); GAY CULVERHOUSE, *THROWAWAY PLAYERS: THE CONCUSSION CRISIS FROM PEE WEE FOOTBALL TO THE NFL* 77-78 (2012) (discussing concussions in sports other than football).

⁷⁹ Halstead & Walter, *supra* note 75 at 599 ; Chris G. Koutures & Andrew J. M. Gregory, *Injuries in Youth Soccer*, 125 PEDIATRICS 410, 412 (2010); Randall W. Dick, *Is*

The hefty numbers and broad reach likely shroud an even more profound crisis because “underreporting of concussions exists in all sports and is a special challenge in a few sports such as football and ice hockey.”⁸⁰ Not only do national and state injury databases provide inexact measures of concussive injuries,⁸¹ but players, parents and coaches also often do not recognize concussive symptoms.⁸²

Many youth leaguers, particularly boys, also remain reluctant to report head injuries to their elders.⁸³ The “shake it off and tough it out” ethic, a manifestation of children’s notions that they are invincible,⁸⁴ encourages a “code of silence” among young athletes who fear that reporting may cause them to lose playing time, lose their position to a teammate, lose permission to play at all, incur disfavor from coaches, or let their team down.⁸⁵

“Sometimes we have ignored concussions in younger athletes, and we now realize those athletes are most significantly affected,” says Dr. Daniel Kraft, director of Riley Hospital for Children’s Sports Medicine at Indiana University Health.⁸⁶ “Young athletes pose a unique challenge,” add two other researchers, “because

There a Gender Difference in Concussion Incidence and Outcomes?, 43 BRIT. J. SPORTS MED. 146, 149 (2009); Anahad O’Connor, *Concussions May Be More Severe in Girls and Young Athletes, Study Says*, N.Y. TIMES, May 11, 2012, at 12.

⁸⁰ CANTU & HYMAN, *supra* note 26, at 14; *see also* Schwartz, *supra* note 24 (stating that concussions in high school football are “drastically underreported”).

⁸¹ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 31, at n.3.

⁸² *See, e.g.*, Halstead & Walter, *supra* note 75, at 605-06; Jack Kelly, *What Dangers Await the Young Athlete?*, PITTSBURGH POST-GAZETTE, June 4, 2012, at C1.

⁸³ *See, e.g.*, Halstead & Walter, *supra* note 75, at 599; Jack Kelly, *Concussion, The Invisible Injury*, PITTSBURGH POST-GAZETTE, June 4, 2012, at C1; Tom Avril, *Researchers Say Hockey Concussions Underreported*, PHILA. INQUIRER, Dec. 18, 2011, at E11; Brooke de Lench, *Athletes’ Resistance To Self-Reporting of Concussion Continues Despite Increased Education*, MOMSTEAM (July 18, 2012), <http://www.momsteam.com/health-safety/athletes-resistance-to-self-reporting-concussion-continues-despite-increased-education#ixzz22VB4nmrp>.

⁸⁴ Am. Acad. of Pediatrics, *Policy Statement: Use of Performance-Enhancing Substances*, 115 PEDIATRICS 1103, 1103 (2005).

⁸⁵ *See, e.g.*, NOWINSKI, *supra* note 57, at 129-34; Fred Theye & Karla A. Mueller, “Heads Up”: *Concussion in High School Sports*, 2 CLIN. MED. & RES. 165, 167-68 (2001).

⁸⁶ Mark Ambrogi, *Rethinking Kids Sports*, INDIANAPOLIS STAR, July 8, 2012, at A1 (quoting Dr. Kraft).

their brains are still developing and may be more susceptible to the effects of a concussion.”⁸⁷

Children also appear particularly susceptible to repeated sub-concussive blows to the head that occur over the span of one or more seasons.⁸⁸ “[S]econd-impact syndrome, a rapid and often fatal condition associated with a second head injury while the person is still symptomatic from a first, has been described mainly in adolescent athletes.”⁸⁹ Because concussed children seem to require longer recovery periods than concussed adults, continued hits can produce devastating consequences even if none of the hits by itself would cause serious injury.⁹⁰

Some voices have suggested that greater public awareness of the particularly high concussion rates in contact and collision youth sports may jeopardize the ability of leagues and high school programs to maintain insurance at rates affordable to many families.⁹¹ Other voices speculate that heightened danger of traumatic brain injury may cause more manufacturers of protective equipment to turn away from the prospect of impending legal liability.⁹² The *San Jose Mercury News* anticipates an even

⁸⁷ Halstead & Walter, *supra* note 75, at 597; *see also*, Kirkwood et al., *supra* note 28, at 1359, 1367 (“younger athletes may respond more poorly” than adults to brain injuries); Paul McCrory et al., *Can We Manage Sport Related Concussion in Children the Same as in Adults?*, 38 BRIT. J. SPORTS MED. 516, 517-18 (2004).

⁸⁸ Frank J. Genuardi & William D. King, *Inappropriate Discharge Instructions for Youth Athletes Hospitalized for Concussion*, 95 PEDIATRICS 216, 216 (1995); Lindsay Barton, *Sub-Concussive Hits: A Growing Concern in Youth Sports*, MOMSTEAM (July 23, 2012), <http://www.momsteam.com/sub-concussive/sub-concussive-hits-growing-concern-in-youth-sports>.

⁸⁹ Jordan D. Metzl, *Concussion in the Young Athlete*, 117 PEDIATRICS 1813, 1813 (2006); *see also*, Bonnie R. Swaine et al., *Previous Head Injury Is a Risk Factor for Subsequent Head Injury in Children: A Longitudinal Cohort Study*, 119 PEDIATRICS 749, 749 (2007) (having a head injury increases a child’s risk of having a later head injury); Robert C. Cantu, *Second-Impact Syndrome*, 17 CLIN. SPORTS MED. 37 (1998).

⁹⁰ *See, e.g.*, Gladwell, *supra* note 65 (quoting Dr. Robert Cantu); Alice Park, *Kids’ Concussion Symptoms May Persist for a Year*, TIME, Mar. 6, 2012.

⁹¹ *See, e.g.*, Bonnie Cavanaugh, *Concussions, Sexual Abuse the Latest Hot-Button Issues for Youth-Sports Insurers*, PROP. AND CAS. 360 (Apr. 23, 2012) (“While serious coverage implications due to concussions have yet to emerge, insurers, coaches and league officials are looking at prevention, testing and return-to-play guidelines”); *Seau, Football: Game of Death*, *supra* note 58, (“it’s reasonable to ask what entity will insure a sport such as football someday”).

⁹² Sullivan, *supra* note 66; James H. Andrews, *Injury Lawsuits Said to Cause Financial Crisis for Many US Companies*, CHRISTIAN SCI. MON., Jan. 25, 1994, at 11;

wider net: “[J]unior high and high school principals, athletic directors and coaches are soon going to have to start worrying about their liability” unless they take meaningful preventive measures in the face of known dangers.⁹³

Perhaps even more ominous for the futures of some youth collision and contact sports, the specter of concussions may depress enrollment by leaving some parents reluctant to register their children to play in the first place.⁹⁴ Emile Therien, former president of the Canada Safety Council, spoke recently about safety-based rule changes that USA Hockey has made over the past few decades. His son Chris played twelve years in the National Hockey League, but the elder Therien says that, “If we hadn’t made changes to the equipment back then . . . the game wouldn’t exist today. Parents just wouldn’t enroll their kids. It would be child abuse.”⁹⁵

Because parents ultimately decide with their children what level of risk remains tolerable, parental reluctance amid the well-publicized concussion crisis may help explain the recent national declines in the numbers of youngsters who play youth league and

NOWINSKI, *supra* note 57, at 116 (discussing helmet manufacturers that have left the industry because of litigation losses).

⁹³ *California Parents Ignoring Risks of High School Football*, (SAN JOSE, CAL.) MERCURY NEWS, Aug. 29, 2011 (editorial); *see also*, Tyler Cowen & Kevin Greer, What Would the End of Football Look Like?, GRANTLAND (Feb. 9, 2012), http://www.grantland.com/story/_id/7559458/cte-concussion-crisis-economic-look-end-football (“The most plausible route to the death of football starts with liability suits. . . . If you are coaching a high school football team, or refereeing a game as a volunteer, it is sobering to think that you could be hit with a \$2 million lawsuit at any point in time.”).

⁹⁴ *See, e.g.*, Eric Sondheimer, *Sports Doctor Answers: “Would I Let My Son Play Football?”*, L.A. TIMES (Varsity Times Insider), July 1, 2012 (quoting Andrew Blecher, M.D., who would give his son a “qualified yes,” but would hope that he would not play particularly dangerous positions); *see also*, William C. Rhoden, *Football’s Future Rests on Parents as Much as Players*, N.Y. TIMES, Sept. 3, 2012, at D2 (“The more options a family has, the less attractive football may become, except where college scholarships are involved. Then there are parental ego and male vanity.”); Jonathan Anker, *Why My Son Will Never Play Football*, HLN (May 22, 2012), <http://www.hlnv.com/article/2012/05/04/why-i-will-not-let-my-son-play-football> (“[T]here are other sports out there. The world needs teachers and doctors. It does not need football players.”) (emphasis in original).

⁹⁵ Chris Hemond, *Hockey Concussion: Is It Child Abuse?*, 184 CANADIAN MED. ASS’N J. 861 (May 15, 2012) (quoting Emile Therien).

high school football.⁹⁶ Columnist George F. Will speculates that “in this age of bubble-wrapped children, when parents put helmets on wee tricycle riders, many children are going to be steered away from youth football, diverting the flow of talent to the benefit of other sports.”⁹⁷

Emerging parental reluctance actually extends well beyond the bubble-wrap set. Even some professional football players have stated publicly that they do not want their own sons to play the sport under present rules, or that they would hesitate to permit them to play. Former quarterback and two-time NFL Most Valuable Player Kurt Warner, for example, openly discusses his “fear of placing any of [his] kids in an environment where brain trauma is a possible byproduct of the competition.”⁹⁸

Former Pittsburgh Steelers Hall of Fame quarterback Terry Bradshaw, who still suffers headaches from the hits he absorbed during his fourteen-year NFL career,⁹⁹ states unequivocally “If I had a son today . . . I would not let him play football.”¹⁰⁰ After ten NFL seasons, New York Jets linebacker Bart Scott says, “I don’t want my [seven-year-old] son to play football. I play football so he won’t have to. . . . I don’t want to have him deal with getting a concussion and what it would be like later in life.”¹⁰¹ Derek Brown, who played eight seasons in the NFL, says “a lot of guys in

⁹⁶ Mike Kaszuba, *End of the Innocence*, STAR TRIBUNE (Minneapolis, Minn.), Aug. 5, 2012, at 3C (discussing falling youth football enrollments in five Minneapolis-area communities); Bob Holmes, *Fewer Played Football in 2011*, BOSTON GLOBE, June 5, 2012, at C7 (“For the fifth straight year, participation in football across the state has dropped.”).

⁹⁷ Will, *supra* note 63 (emphasis in original).

⁹⁸ Kurt Warner, *Love For Game of Football Means Safety First*, USA TODAY, June 13, 2012, at 9A.

⁹⁹ CULVERHOUSE, *supra* note 78, at 66.

¹⁰⁰ Richard Koenig, *Terry Bradshaw and I Would Like to Tell You About Concussions*, PITTSBURGH POST-GAZETTE, July 29, 2012, at B1.

¹⁰¹ Myers, *supra* note 64; *see also*, *Outside the Lines, Future of Football*, ESPN (Feb. 4, 2011, 5:35 PM), <http://espn.go.com/video/clip?id=6091106>; *Student Athlete Concussions*, *supra* note 76 (statement of Sean Morey, retired NFL player) (“Football is the profession I have chosen. I choose to risk my health to financially provide for my family. . . . However, our children’s developing brain is far more sensitive to chemical and metabolic changes of concussion.”).

the [NFL] feel the same way” about exposing their children to the risk of concussions.¹⁰²

Neurosurgeons report that some parents still push their children to return to the lineup too soon after a concussion,¹⁰³ but Kurt Warner expresses the attitude of parents who refuse to dismiss the prospect of brain injury as “part of the game.” Warner claims, “We fall short as guardians if we don’t try to reduce traumatic injuries such as concussions, especially with the information we now have.”¹⁰⁴

B. Meeting the Youth Sports Concussion Crisis

Millions of children play organized sports each year,¹⁰⁵ a number much larger than the number of collegians who played football when Theodore Roosevelt intervened in 1905. With these imposing numbers, injury prevention today does not depend on White House summits or other intercessions by the President or any other national political leader (though the President’s Council on Fitness, Sports and Nutrition partners with the Centers for Disease Control and Prevention to promote “Heads Up: Concussions in Youth Sports,” the Centers’ educational campaign for coaches, parents and athletes).¹⁰⁶

Injury prevention in youth sports depends instead largely on parents, medical professionals, legislators, journalists and other

¹⁰² Pete Iorizzo, *Goal For Kids is Safety First*, TIMES-UNION (Albany, N.Y.), Aug. 5, 2012, at A1 (quoting Brown who stated, “To be honest, I’d probably rather [his 11-year-old son] not play football.”); *see also*, Gwenn Knapp, *A Zero Tolerance Policy Toward Football*, S.F. CHRONICLE, May 25, 2012, at B2 (quoting Tom Brady, Sr., father of the Boston Patriots quarterback, “I would be very hesitant to let him play.”); Dan Pompei, *Duerson Lawsuit a Major Hurdle*, CHI. TRIB., Feb. 24, 2012, at 1 (quoting Troy Aikman who “said if he had a son, he might not encourage him to play football.”); Joe Nocera, *The Cost of Football Glory*, N.Y. TIMES, Feb. 4, 2012, at A21 (quoting former Dallas Cowboy tight end Jean Fugett, “I cried when my youngest son took a football scholarship.”).

¹⁰³ *Some Hockey Parents Take Risks With Young Brains, Expert Says*, TORONTO STAR, Sept. 18, 2011, at S4 (quoting Dr. Michael Cusimano of St. Michael’s Hospital, Toronto).

¹⁰⁴ Warner, *supra* note 98.

¹⁰⁵ *See supra* notes 46-47 and accompanying text.

¹⁰⁶ President’s Council on Physical Fitness and Sports, *Heads Up: Concussion in Youth Sports*, <http://137.187.25.232/newspartnersandfriends-headsupinitiative-cdc.htm>; *Heads Up: Concussion in Youth Sports*, CTR. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/concussion/HeadsUp/youth.html>.

voices who spur national youth sports governing bodies and state high school activities associations toward ongoing rule changes in the name of greater safety. Concerned about the prospects of diminishing enrollments and perhaps difficulties maintaining insurance, governing bodies seem to be listening.

For example, neurosurgeon Julian Bailes, chair of Pop Warner Football's Medical Advisory Board, says that the organization's recently announced rule changes, discussed below, "can eliminate 60-plus percent of the brain impacts or concussions."¹⁰⁷ "We're not trying to fundamentally change the game," he explained,

We're trying to ensure its survival by reducing the potential for injury in practice.... For the future of the sport, we need to morph it now and take the unnecessary head contact out of the game. If parents were considering allowing their child to play football, [the new rules changes] should assure them.¹⁰⁸

1. Ongoing Review of National Playing Rules

Two recent actions suggest the influence of parents and other advocates for greater safety in youth sports. As part of their continuing efforts to enhance player safety, Pop Warner Football and USA Hockey have adopted rule changes that retain the essential character of their respective sports, but postpone or reduce contact or collision until the age levels when medical experts conclude that players are developmentally ready.

a. Pop Warner football

A 2012 Virginia Tech study, which gathered data from sensors placed inside helmets, showed that some head hits suffered by seven- and eight-year-old football players resemble the

¹⁰⁷ Te-Nehisi Coates, *Youth Football Starts to Change*, THE ATLANTIC, June 14, 2012 (quoting Dr. Bailes).

¹⁰⁸ Tom Farrey, *Pop Warner to Limit Practice Contact*, ESPN (June 15, 2012, 2:27 PM), http://espn.go.com/espn/story/_id/8046203/pop-warner-toughens-safety-measures-limiting-contact-practice; Jamie McCracken, *Ahead of Season, Pop Warner Renews Safety Emphasis*, USA TODAY, June 13, 2012, at 9C.

harder hits taken by college football players.¹⁰⁹ The cumulative effects of sub-concussive hits can also exact a toll, even when none by itself rises to the level of a concussion.¹¹⁰

Reflecting a “new focus on brain injuries in [the] youngest athletes,”¹¹¹ Pop Warner instituted new national rule changes recommended by its medical advisory board in 2012. The organization, which enrolls players between the ages of five and sixteen,¹¹² now limits body contact to a third of a practice session (or a maximum of forty minutes), and prohibits full speed head-on blocking or tackling drills where players line up more than three yards from each other.¹¹³

ESPN’s Tom Farrey reports that with these rule changes, Pop Warner “challenges the longtime culture of America’s most popular game” by becoming “the first nationwide league at any level of football to restrict the amount of contact players experience.”¹¹⁴ The *Bergen Record* also reports that even before the national organization acted, some local youth football associations already instituted safety measures of their own.¹¹⁵

Pop Warner’s executive director confidently claims that “[f]ootball . . . is very capable of evolving and changing appropriately. If new research comes out, we will continue to change our rules to keep our kids as safe as we can.”¹¹⁶ Controversy remains, however, because American Youth Football says that Pop Warner has gone “overboard” and argues that health risks to young players can be better managed through sportsmanship and proper coaching.¹¹⁷

¹⁰⁹ Tim Rohan, *Pop Warner Weighing Research and Risks in Concussion Prevention Efforts*, N.Y. TIMES, June 15, 2012, at 14.

¹¹⁰ See *supra* notes 88-89 and accompanying text.

¹¹¹ Lindy Washburn, *New Focus on Brain Injuries in Youngest Players*, THE RECORD (Bergen County, N.J.), June 15, 2012, at A1.

¹¹² About Us, POP WARNER LITTLE SCHOLARS, http://www.popwarner.com/About_Us.htm.

¹¹³ Farrey, *supra* note 108; McCracken, *supra* note 108.

¹¹⁴ Farrey, *supra* note 108.

¹¹⁵ See, e.g., Jeff Roberts, *Youth Teams Battle Concussion Risk*, THE RECORD (Bergen County, N.J.), June 17, 2012, at A1.

¹¹⁶ McCracken, *supra* note 108.

¹¹⁷ *Id.*

b. USA Hockey

Several years ago, USA Hockey banned body checking in the mite and squirt age levels, which enroll players under the age of eleven. In June of 2011, the organization extended the ban to the peewees (ages eleven to twelve), and thus postponed checking until the bantams (ages thirteen to fourteen).¹¹⁸ The organization's Progressive Checking Skill Development Program tightens standards of play for intimidation checks beginning in the bantams.¹¹⁹ The bans affect only boys' hockey because checking is already banned in girls' hockey.

USA Hockey acted after most medical studies found that body checking dramatically increases risks of concussion and other serious injury in particularly young hockey players.¹²⁰ The *Journal of the American Medical Association*, for example, published a 2010 University of Calgary study that found that body checking at the peewee level tripled concussion rates.¹²¹

Dr. Robert Cantu and Mark Hyman are right that “[y]outh hockey is a safer sport for the checking restrictions – that’s beyond dispute.”¹²² USA Hockey’s decision to postpone checking is the latest step in a march toward greater player safety that began decades ago.¹²³ Much of what passed for protective equipment when I first laced up my skates in the mid-1960s (including soft leather helmets that left the ears and much of the head exposed) would appear laughable today to anyone who peruses family snapshots in an old scrapbook. Concussions and other head

¹¹⁸ 2011-2013 Official Rules of Ice Hockey, USA HOCKEY, R. 604, at 58, http://usahockey.com/uploadedFiles/USAHockey/Menu_Officials/Menu_RulesEquipment/2011%20-%202013%20Rulebook.pdf.

¹¹⁹ *USA Hockey Board of Directors Approves All Points of Progressive Checking Skill Development Program*, USA HOCKEY (June 11, 2012), http://www.usahockey.com/Template_Usahockey.aspx?NAV=AU_02_03&id=305004.

¹²⁰ See, e.g., Roman Augustoviz, *Checking Ban Has Governing Bodies at Odds*, STAR TRIBUNE (Minneapolis, Minn.), June 8, 2012, at 1C.

¹²¹ Carolyn A. Emery, *Risk of Injury Associated with Body Checking Among Youth Ice Hockey Players*, 303 J. AM. MED. ASS’N 2265 (2010); see also, Augustoviz, *supra* note 119 (quoting Dr. Michael Stuart, USA Hockey chief medical officer and Mayo Clinic Sports Medicine Center co-director; “numerous studies document significant risks of injuries, including concussions, in leagues that allow body checking at the peewee level”).

¹²² CANTU & HYMAN, *supra* note 26, at 22.

¹²³ See, e.g., Glen Colbourn & Lois Kalchman, *Pashby Changed the Face of the Game: Hockey Pioneer Saved Many Players*, TORONTO STAR, Aug. 25, 2005, at A1.

injuries must have been common, if often undiagnosed, ignored or misunderstood, in those days.

After some initial resistance to periodic rule changes that appeared odd or unusual, parents, coaches and players adapted each time. They seem also to have adapted to the latest postponement of body checking. “I have eleven- and twelve-year-old boys,” concludes parent, Hockey Night in Canada analyst, and former NHL star Mike Milbury, who was known for his physical play during his career.¹²⁴ “At that age, their heads and necks are not developed. They’re more susceptible to concussions and the after-effects. . . . They should take hitting out until kids are in bantam.”¹²⁵

2. Implementation of Playing Rules: “All Safety is Local”

Thomas P. (Tip) O’Neill, former Speaker of the U.S. House of Representatives, famously said, “all politics is local.”¹²⁶ Decision-making in Washington, D.C., surely influences voters, but the former Speaker recognized that local happenings could influence voters even more by affecting their daily lives directly. O’Neill’s explanation holds relevance in youth sports, where ultimately “all safety is local” because protocols and playing rules are enforced, or not enforced, in practice sessions and games in towns and cities largely beyond the direct day-to-day supervision of national and state governing bodies.

“The life of the law,” explained former Harvard Law School Dean Roscoe Pound, “is in its enforcement.”¹²⁷ Pound meant that achieving a statute’s protective purpose depends on responsible enforcement because words on paper protect no one, and statutes do not apply themselves. A youth sport’s playing rules – the “statutes of the game”—similarly are merely words on paper, and they achieve their protective purpose only with responsible local enforcement by coaches, league administrators, game officials and parents.

¹²⁴ Bruce Dowbiggin, *The “Wussifi . . .” er . . . Enlightenment of Mike Milbury*, *GLOBE AND MAIL* (Canada), Mar. 25, 2011, at S1.

¹²⁵ *Id.*

¹²⁶ THOMAS P. O’NEILL, *ALL POLITICS IS LOCAL, AND OTHER RULES OF THE GAME* (1994); THOMAS P. O’NEILL, *MAN OF THE HOUSE* 26 (1987).

¹²⁷ Roscoe Pound, *Mechanical Jurisprudence*, 8 *COLUM. L. REV.* 605, 619 (1908).

Youth sports playing rules can lose much of their protective force when adults intimidate referees, skirt the rules, or incite the players in local games. For nearly fifteen years, sports safety advocates have been haunted by an overheated Chicago-area youth hockey game in which these three manifestations of local irresponsibility led to a fifteen-year-old player's catastrophic injury. The player suffered quadriplegia, not a concussion, but the story provides harsh lessons about the tenuous role of safety-based playing rules in youth sports generally.

On the night of November 3, 1999, New Trier High School's junior varsity hockey team faced off against bitter rival Glenbrook North High School in the Chicago suburb of Gurnee. With only a few seconds remaining in the game, New Trier led, 7-4, in the teams' first meeting since Glenbrook North had edged them, 3-2, for the Illinois state junior varsity title a season earlier.¹²⁸

The November rematch was out of control from the opening faceoff. "[V]iolence flared repeatedly as the mood grew ugly,"¹²⁹ and eyewitnesses later described "an intense battle"¹³⁰ as each team's parents and students taunted rival fans and players.¹³¹ The players trash talked to one another and squared off in confrontations unrestrained by their coaches,¹³² the leaders recognized by pediatric professionals as "the most important individual[s] for maintaining safety" in youth sports.¹³³ The referees called sixteen penalties, an especially high number for a junior varsity hockey game.

At the final buzzer or within a second or two afterwards, a fifteen-year-old Glenbrook North player sped across the ice, blind-sided New Trier sophomore co-captain Neil Goss, and body

¹²⁸ Megan O'Matz, *Teen Charged With Battery in Hockey Hit: Intent to Injure Is Cited: Foe Paralyzed From Check*, CHI. TRIB., Dec. 8, 1999, at 1; Bryan Smith et al., *Emotions High Before Hockey Tragedy*, CHI. SUN-TIMES, Dec. 9, 1999, at 1.

¹²⁹ Assoc. Press, *Hockey Charge Reduced: No Contest: Illinois Prep Enters Plea*, TELEGRAPH-HERALD (Dubuque, Iowa), Aug. 8, 2000, at B1.

¹³⁰ Debbie Howlett, *Teen May Face Trial In Sports Injury*, USA TODAY, May 5, 2000, at 3A.

¹³¹ Assoc. Press, *supra* note 129; *see also*, Smith, *supra* note 128.

¹³² Richard Roeper, *Decatur Fight Child's Play Next to Hockey Violence*, CHI. SUN-TIMES, Dec. 13, 1999, at 11.

¹³³ Charles H. Tator et al., *Spinal Injuries in Canadian Ice Hockey: An Update to 2005*, 19 CLIN. J. SPORT MED. 451, 455 (2009).

checked him head-first into the boards.¹³⁴ “This is what you get for messing,” the player said as Goss lay prone on the ice, permanently paralyzed from the neck down.¹³⁵

USA Hockey’s national playing rules did not fail Neal Goss.¹³⁶ He wore a helmet, face cage and other protective equipment that met safety specifications. No report indicated that any coach or referee had evaded or failed USA Hockey’s nationally mandated criminal or child abuse background checks or lacked the classroom training required of coaches and officials. The Glenbrook North attacker received a penalty for crosschecking and a thirty-day suspension pending a hearing before state amateur hockey officials.¹³⁷

Instead, players on both teams were left vulnerable by rabid adults who let their emotions get the better of them. As the game spiraled out of control for an hour or more, no coach, referee, league administrator or parent had the common sense to stop the game, deliver a public address announcement requesting respect for the rules, or otherwise move the teams from the brink before it was too late.

We cannot prove that adult irresponsibility caused the cheap shot that left Neal Goss a quadriplegic, but adults concerned about player safety do not need any such proof. Parents seek to protect their children every day based not on demonstrable proof, but on their own intuition and common sense.

Intuition and common sense suggest that, particularly in contact and collision sports, adults heighten the risk of concussion or other avoidable injury when they tolerate or encourage dirty play and other violence outside the rules of the game. Adult irresponsibility may not render serious injury inevitable, but adult

¹³⁴ Tony Gordon, *Plea Deal Ends Emotional Hockey Case*, CHI. DAILY HERALD, Aug. 8, 2000, at 1; Howlett, *supra* note 130, at 3A.

¹³⁵ Dirk Johnson, *Hockey Player, 15, Is Charged After Seriously Injuring a Rival*, N.Y. TIMES, Dec. 9, 1999, at A21; Megan O’Matz, *Hockey Suit Detailed: Family Seeks Damages*, CHI. TRIB., Dec. 9, 1999, at 1.

¹³⁶ See Megan O’Matz, *supra* note 135 (discussing the Goss family’s lawsuit, which did not name USA Hockey as a defendant).

¹³⁷ Douglas E. Abrams, *Player Safety in Youth Sports: Sportsmanship and Respect as an Injury-Prevention Strategy*, 39 SETON HALL J. OF SPORTS AND ENT. L. 1, 9-10 (2012).

irresponsibility creates a toxic local atmosphere that can make serious injury more likely.

Nearly 15 years after the Chicago junior varsity hockey tragedy, too many parents and coaches continue moving in the wrong direction. In 2010, Reuters News and the market research company Ipsos jointly conducted a survey in twenty-two nations. The survey ranked parents in the United States as the world's worst behaved parents at children's sports events.¹³⁸ Sixty percent of U.S. adults who had attended youth sports contests reported they saw parents become verbally or physically abusive toward coaches or officials; runners-up were parents in India (59%), Italy (55%), Argentina (54%), Canada (53%) and Australia (50%).¹³⁹

"It's ironic that the United States, which prides itself in being the most civilized country in the world, has the largest group of adults having witnessed abusive behavior at children's sporting events," said an Ipsos senior vice president.¹⁴⁰

The Reuters/Ipsos survey confirmed earlier surveys that uniformly found significant rates of adult violence, vulgarity and abuse at children's games in the United States.¹⁴¹ Observers report "innumerable cases . . . throughout the country every month . . . of games turning tragic at the hands of enraged parents."¹⁴² "Waves of head-butting, elbowing and fighting have been reported at youth sporting events across the country."¹⁴³

These reports and the consistent survey numbers suggest that when ill-tempered adults tolerate or incite local rules violations, the adults risk neutralizing national safety standards that seek to protect youth leaguers from concussions and other preventable injury. Dr. Michael Stuart, professor of orthopedic

¹³⁸ *Four In 10 (37%) Global Citizens Have Been To Children's Sports Event*, Market Wire (Apr. 7, 2010, 1:00 PM), <http://www.marketwire.com/press-release/Four-In-10-37-Global-Citizens-Have-Been-To-Childrens-Sports-Even-1143748.htm>.

¹³⁹ *Id.*

¹⁴⁰ *U.S., India Parents Seen as Worst Behaved at Kids' Sports?*, REUTERS (Apr. 7, 2011, 1:11 PM), <http://www.reuters.com/article/2010/04/07/us-parents-abuse-odd-idUSTRE6364CZ20100407>.

¹⁴¹ Abrams, *supra* note 137, at 15-16.

¹⁴² Gwen Morrison, *Parent Rage in Youth Sports: Giving the Game Back to Our Children*, *I PARENTING* (Nov. 1, 2010), <http://www.sp2.upenn.edu/ostre/pysc/prog/documents/ParentRageInYouthSports.pdf>.

¹⁴³ Michael S. James & Tracy Ziemer, *Are Youth Athletes Becoming Bad Sports?*, ABCNEWS (Aug. 8, 2000), <http://abcnews.go.com/Sports/story?id=99665>.

surgery at the Mayo Clinic and USA Hockey's chief medical officer, helped design the organization's recent ban on peewee body checking, but he recognizes that rule changes are not enough: "The hardest thing of all is trying to instill sportsmanship and mutual respect."¹⁴⁴

On the first anniversary of the fateful New Trier-Glenbrook North junior varsity game, a veteran local referee said that "nothing" had changed in Chicago-area high school hockey.¹⁴⁵ "It's just as bad as it ever was," he concluded. "There's kids being carried off the ice every night. You have parents acting like animals in the stands, coaches acting like animals on the bench.... But when their kid gets hurt, they can't figure out why."¹⁴⁶

a. Medical Research

The link among adult irresponsibility, local rules breakdowns, increased risk of concussions and other serious sports-related injuries finds support in medical research. Researchers have intimated that the United States should perceive "foul play" in youth sports as a "public health concern" for the risk of serious injuries that persistent rules violations pose in games played by millions of children each year.¹⁴⁷

A recent study by the Center for Injury Research and Policy at Nationwide Children's Hospital, one of the nation's most comprehensive pediatric research institutes, demonstrates not only how clean play enhances player safety, but also how dirty play enhances preventable risk.¹⁴⁸ The study concerned nine high school sports: boys' football, soccer, basketball, wrestling and baseball; and girls' soccer, volleyball, basketball and softball.¹⁴⁹

¹⁴⁴ Lisa Kocian, *Checking Head Injuries in Winter Sports*, BOSTON GLOBE, May 24, 2012 (quoting Dr. Stuart).

¹⁴⁵ Barry Rozner, *One Year After a Hockey Tragedy, What Has Changed?*, CHI. DAILY HERALD, Nov. 3, 2000, at 1.

¹⁴⁶ *Id.*

¹⁴⁷ S. K. Fields et al., *Violence in Youth Sports: Hazing, Brawling and Foul Play*, 44 BRIT. J. SPORTS MED. 32 (2010).

¹⁴⁸ See Christy Collins et al., *When the Rules of the Game Are Broken: What Proportion of High School Sports-Related Injuries Are Related to Illegal Activity?*, 14 INJURY PREVENTION 34, 34 (2008).

¹⁴⁹ *Id.* at 35.

The Children's Hospital researchers estimated that between 2005 and 2007, more than 98,000 injuries in these nine sports were directly related to an act that a referee or disciplinary committee ruled illegal.¹⁵⁰ In four of the nine sports that were studied, illegal acts were responsible for more than ten percent of injuries: boys' soccer (11.4%), girls' soccer (11.9%), boys' basketball (10.3%) and girls' basketball (14.0%).¹⁵¹ Thirty-two percent of these injuries were to the head or face, and twenty-five percent were concussions.¹⁵²

The Children's Hospital study was unequivocal: "Reducing the number of injuries attributable to illegal activity in general among United States high school athletes can specifically reduce the number of injuries to the head/face and concussions."¹⁵³

To spur injury reduction, the Children's Hospital researchers urged better local rules enforcement through "targeted education about the dangers of illegal activity for players, coaches and referees."¹⁵⁴ "Each sport has . . . rules developed to promote fair competition and protect participants from injury," the researchers explained.¹⁵⁵ "[E]nforcing rules and punishing illegal activity is a risk control measure that may reduce injury rates by modifying players' behavior."¹⁵⁶

b. Abuse of Game Officials

The American Academy of Pediatrics reports agreement among sports medicine professionals that "[o]fficials controlling the physicality of the game . . . can . . . play significant roles in reducing contact injuries."¹⁵⁷ Another recent medical study concurs that "[t]o be effective for promoting safety," a youth sport's

¹⁵⁰ *Id.* at 34.

¹⁵¹ *Id.* at 35-6.

¹⁵² *Id.* at 36.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 34.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; see also, U.S. CENTERS FOR DISEASE CONTROL AND PREV., *Nonfatal Traumatic Brain Injuries Related to Sports and Recreation Activities Among Persons Ages Under 19 Years—United States, 2001-2009*, 60 MORBIDITY AND MORTALITY WEEKLY REP. 1337, 1340 (2011) (advising that to help prevent concussions and other traumatic brain injury, the agency urges "adhering to rules of play with good sportsmanship and strict officiating").

¹⁵⁷ Koutures & Gregory, *supra* note 79, at 410.

rules “must be enforced rigorously and consistently by referees and leagues.”¹⁵⁸

In many communities, however, parents and coaches thwart rigorous, consistent rule enforcement by creating directly or indirectly a chronic shortage of referees and other game officials.¹⁵⁹ A primary reason for the chronic shortage is the steady exodus of experienced officials who grow disgusted with the verbal, and sometimes physical, abuse inflicted on them by adults on the benches and in the stands.¹⁶⁰ Efforts to recruit replacement officials may not keep pace with attrition because, according to the *Deseret Morning News*, “[b]rand-new officials often suffer through their first season of abuse before deciding that refereeing just isn’t worth it.”¹⁶¹

“Officiating a youth sports game is becoming an increasingly risky job,” explains Positive Coaching Alliance executive director Jim Thompson, who says, “[y]outh sports officials are under attack – literally.”¹⁶² The risk has increased so much that the National Association of Sports Officials offers youth sports officials insurance for “injuries suffered when an official is the victim of an assault and/or battery by a spectator, fan or participant.”¹⁶³

Particularly in contact or collision youth sports at older age levels, player safety suffers when veteran officials hang up their whistles each year. Many replacement officials are inexperienced and unprepared for responsibilities thrust on them, and frequently unable to keep up with fast-paced games. But for the veteran officials’ departures, many replacements would not be on the field.

¹⁵⁸ Tator et al., *supra* note 133, at 455.

¹⁵⁹ Abrams, *supra* note 33, at 260-61.

¹⁶⁰ CANTU & HYMAN, *supra* note 26, at 153.

¹⁶¹ Dan Rasmussen, *Referee Shortage Hurting Soccer*, DESERET MORNING NEWS (Utah), Apr. 26, 2005.

¹⁶² JIM THOMPSON, THE DOUBLE-GOAL COACH 4 (2003).

¹⁶³ *The Need for Comprehensive Protection*, NAT’L ASSOC. OF SPORTS OFFICIAL, at 6, http://www.naso.org/Portals/0/downloads/SOS-Insurance_2012.pdf.

II. THE LAW'S ROLE IN YOUTH SPORTS SAFETY

A. Recent State Concussion Legislation

“Between 2009 and July 2012, at least thirty-four states have enacted statutes concerning traumatic brain injury. In 2012, at least fourteen states have introduced some type of traumatic brain injury legislation.”¹⁶⁴ By targeting concussions in youth sports in such unison,¹⁶⁵ this flurry of nationwide legislative activity demonstrates the persuasive force of both emerging medical research and commentary and the responses and expectations of parents and sports safety advocates.

Nearly all the new statutes require that before each season, state education departments or local boards of education provide parents, coaches, administrators, and players with information and education about the nature and dangers of concussions, how to recognize symptoms of potential brain trauma, and how to help insure healthy recovery.¹⁶⁶ Some of the statutes contemplate provision of written materials, and others specify face-to-face group presentations.¹⁶⁷

Most of the new statutes also require that coaches immediately remove from a practice session or game any player suspected to have suffered a concussion.¹⁶⁸ Most also specify that the player may not return to action until a physician or other licensed medical professional clears the player and affirms that return is medically appropriate.¹⁶⁹

The new concussion statutes take giant steps in the right direction, but they do not displace safety-based review and responsible enforcement of playing rules. The statutes merely

¹⁶⁴ *Traumatic Brain Injury Legislation*, NAT'L CONF. OF STATE LEGIS. (July 2012), <http://www.ncsl.org/issues-research/health/traumatic-brain-injury-legislation.aspx>.

¹⁶⁵ *Id.* (presenting state-by-state summary).

¹⁶⁶ *See, e.g.*, 2011 ALASKA SESS. L., ch. 12; 2011 IND. ACTS, P.L. 144; 2011 KAN. SESS. L., ch. 45.

¹⁶⁷ *See, e.g.*, CONN. ACTS, P.S. 1062 (Reg. Sess.) (requiring that coaches complete annual training and review, and complete refresher courses once every five years); 2011 IND. ACTS, P.L. 144 (Dep't of Educ. must develop and disseminate guidelines, information sheets and forms).

¹⁶⁸ *See, e.g.*, TRAUMATIC BRAIN INJURY LEGISLATION, *supra* note 164 (presenting state-by-state summary).

¹⁶⁹ *Id.*

establish prudent protocols for preventing and reacting to actual and suspected concussions that players suffer in practice sessions and games.

Nor do the statutes' protocols appear to protect all young athletes who need the law's protection. For example, many of the statutes do not appear to reach private youth sports associations, even ones that enroll millions of children and use public fields and other facilities under permits or licenses granted by local government bodies.¹⁷⁰ The legislature surely "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,"¹⁷¹ but child safety advises extending the statutory mandates to these associations. Government agencies have long held discretionary authority to regulate private use of public property that charters, statutes, or ordinances commit to agency management.¹⁷²

The new statutes' implementation remains challenging because most coaches and game officials, who are not medical professionals, may lack first-aid training and typically must make immediate on-the-spot decisions without medical advice.¹⁷³ Less than half of high schools have certified athletic trainers on staff, and many high schools do not enlist local volunteer physicians to play formal roles at practices and games.¹⁷⁴ In community youth leagues, certified trainers are rare indeed.

¹⁷⁰ See, e.g., 2011 Ariz. Sess. L., ch. 167 (school boards); 2011 Colo. Sess. L., ch. 67 (youth athletic interscholastic activity in public and private middle, junior and high schools); 2011 Minn. L., ch. 90 (organizations that charge a fee for a youth athletic activity).

¹⁷¹ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955).

¹⁷² EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 28.68, 28.69 (2009 rev.); see also CHARLES J. RUSSO, *REUTER'S THE LAW OF PUBLIC EDUCATION* 376-80 (7th ed. 2009) ("uses of school property").

¹⁷³ See, e.g., Shubha Singh et al., *Gymnastics-Related Injuries to Children Treated in Emergency Departments in the United States, 1990-2005*, 121 *PEDIATRICS* e954, e958-59 (2008) ("Prevention of gymnastics-related injuries depends on the establishment and universal enforcement of uniform rules and regulations for gymnasts, coaches, and spotters. . . . [A] set of uniform rules and regulations has not been developed or implemented. Whereas some high school gymnastics programs and private gyms require safety training for their gymnasts and coaches, many fail to implement such training programs").

¹⁷⁴ See, e.g., CANTU & HYMAN, *supra* note 26, at 125 ("Every high school in America should have a full-time athletic trainer"); Brooke de Lench, *Athletic Trainers: Every High School Should Have One*, *MOMSTEAM* (May 23, 2012),

Youth sports programs should perceive the new statutes as invitations to take proactive measures not explicitly mandated in the legislation, including the hiring of certified trainers.¹⁷⁵ In the absence of certified trainers, youth leagues and high school teams alike should enlist medically trained volunteers to serve on the staff at practices and games, with the authority to overrule the coaches' decision not to remove an apparently injured player from the lineup.¹⁷⁶ When I was president, our youth hockey program had a medical committee of parents, who were physicians, nurses, or emergency medical technicians. At least one such volunteer was assigned to each practice and game, frequently when their own children were playing so that the volunteer would be on the premises anyway.

The youth hockey program instructed coaches to err on the side of caution when a player took a hit and came to the bench disoriented. "You can play with a big bruise or hip flexor," explains Dr. Cantu, but "[t]here is never a scenario in which playing with a head or spinal injury, or a suspicion of such an injury, should be condoned."¹⁷⁷ Our hockey program's bywords were, "When in doubt, sit them out." Feelings of disorientation can be "after-shocks of brain trauma"¹⁷⁸ and, as the National Institutes of Health recognizes, children "have many decades of life ahead."¹⁷⁹

B. Litigation

The law's prescriptions frequently help shape personal behavior, but we should not exaggerate the current role of tort litigation in preventing concussions and other avoidable youth sports injuries. The specter of lawsuits by injured players might

<http://www.momsteam.com/team-of-experts/athletic-trainer-AT-every-school-should-have-one>.

¹⁷⁵ CANTU & HYMAN, *supra* note 26.

¹⁷⁶ Brooke de Lench, *Coaches: Part of Concussion Solution or Problem?*, MOMSTEAM (May 21, 2012), <http://www.momsteam.com/team-of-experts/coaches-part-of-concussion-problem-or-solution> (reporting 2012 survey in which "fully half of parents with children age 12 to 17 playing school sports admitted knowing of a coach who would have a player return to sports too soon after a concussion") (emphasis in original).

¹⁷⁷ CANTU & HYMAN, *supra* note 26, at 146.

¹⁷⁸ CULVERHOUSE, *supra* note 78, at 62.

¹⁷⁹ NIH CONSENSUS DEV. PROGRAM, *supra* note 25, at 9.

accelerate safety initiatives by stimulating the sensibilities of rule makers and other concerned adults, by jeopardizing the availability of insurance at favorable rates, or by leaving individual parents reluctant to enroll their children. Any such potential long-term influence on prevention efforts has only residual effects on a player injured today.

Regardless of whether lax rules enforcement may have contributed to the underlying injury, a negligence suit against governing bodies, leagues, or coaches can only compensate a youth leaguer for injuries that have already occurred. A third or more of the recovery after settlement or trial may go to the plaintiff's lawyer under the contingent-fee retainers common in personal injury suits.¹⁸⁰ Compensation can react to damage and is no small matter to a family facing medical expenses, but compensation does nothing to reverse the player's immediate and sometimes permanent injury.

With the sufficiency of USA Hockey's national safety standards not in issue,¹⁸¹ tort law reacted to Chicago-area hockey player's Neal Goss' quadriplegia as best it could. Facing lifetime costs for medical bills and around-the-clock personal care, the Goss family filed a multimillion-dollar civil damage action alleging that five defendants negligently failed to control the game – the Glenbrook North opponent; the Glenbrook North coach; the Illinois Hockey Officials Association; the Northbrook Hockey League, which sponsored the Glenbrook North team; and the Amateur Hockey Association of Illinois.¹⁸² The parties reached private settlements in some of the civil suits, and USA Hockey's insurance helped meet the bedridden Neal Goss' expenses for lifelong care.¹⁸³

CONCLUSION

Discussion about the serious consequences of sports-related concussions “can no longer really be called a debate,” because

¹⁸⁰ See ABA MODEL RULES OF PROF. CONDUCT 1.5(c), (d) (2011).

¹⁸¹ Abrams, *supra* note 137, at 10.

¹⁸² O'Matz, *supra* note 135.

¹⁸³ Lisa Black & Susan Berger, *Turning Tragedy Into Victory*, CHI. TRIB., Jan. 4, 2007, at 1.

seriousness has become “a widely accepted fact.”¹⁸⁴ Former Montreal Canadiens’ hockey goaltender Ken Dryden writes, “[h]ead injuries have become an overwhelming fact of life in sports” because of “[t]he immensity of the number, the prominence of the names, the life-altering impact on their lives, and, more disturbingly, if that’s possible, the now sheer *routineness* of their occurrence.”¹⁸⁵ Evidently, from swelling youth sports enrollments and greater willingness to report traumatic brain injury, reported concussions in high school sports have been rising at a fifteen percent annual rate.¹⁸⁶ Experts predict even higher pediatric sports-related concussion rates in the foreseeable future.¹⁸⁷

“[T]he concussion problem in football and other contact sports is far more serious than any of us want to believe, and it is time to do something about it,” says former football player, professional wrestler and Minnesota Governor Jesse Ventura.¹⁸⁸ Two researchers report that, “[e]ven 10 years ago, a young athlete with a ‘ding’ or low-grade concussion would have been allowed to return to sports as soon as 15 minutes after his or her symptoms had cleared.”¹⁸⁹ Former Tampa Bay Buccaneers president Gay Culverhouse reports that as late as 2006, rushing a player back from a concussion was “standard operating procedure in the NFL. Concussions were not taken seriously. . . . This was the culture of

¹⁸⁴ Simpson, *supra* note 65.

¹⁸⁵ Ken Dryden, *Time for the NHL to Get Head Smart*, GRANTLAND (Sept 30, 2011), http://www.grantland.com/story/_id/7036426/time-nhl-get-head-smart (emphasis in original); see also, Rosemarie S. Moser et al., *Neuropsychological Evaluation in the Diagnosis and Management of Sports-Related Concussions*, 22 ARCHS. CLIN. NEUROPSYCHOLOGY 909, 910 (2007) (“Concussions are common injuries in athletics” at the professional and amateur levels).

¹⁸⁶ Lindsay Barton, *Concussions in High School Sports Rising at 15% Annual Rate, Study Finds*, MOMSTEAM (Aug. 22, 2011), <http://www.momsteam.com/softball/concussion-in-high-school-sports-rising-fifteen-percent-new-study-finds#ixzz22VP80y8B>.

¹⁸⁷ Halstead & Walter, *supra* note 75, at 599.

¹⁸⁸ Jesse Ventura, Introduction, in NOWINSKI, *supra* note 57, at ix.

¹⁸⁹ Halstead & Walter, *supra* note 75, at 597; see also DAVE MEGGYESY, OUT OF THEIR LEAGUE 125 (1970) (writing that a former NFL outside linebacker; “Getting ‘dinged’ means getting hit in the head so hard that your memory is affected, although you can still walk around, and sometimes even continue playing. You don’t feel pain, and the only way other players or the coaches know you’ve been ‘dinged’ is when they realize you can’t remember plays.”).

the time. Your teammates expected you to play, and your coaches expected you on the field on game day.”¹⁹⁰

Today, more adults and children¹⁹¹ are coming to respect concussions for what they are – traumatic brain injuries that can leave their young victims less able to learn in school, perform functions of everyday life, and perhaps enjoy adulthood free from chronic pain, cognitive dysfunction and possible mental deterioration.¹⁹²

“Unlike other anatomical areas such as our bones, muscles, ligaments, and tendons, our brain tissue has relatively little ability to heal and repair itself.”¹⁹³ “While today many parts of the body can be replaced either by artificial hardware or transplantation, the brain cannot be replaced.”¹⁹⁴ With the stakes so high, says CNN chief medical correspondent and neurosurgeon Sanjay Gupta, “we owe it to our . . . kids . . . to make them as safe as we know how to do, and we can do a lot better than we have been doing.”¹⁹⁵

The primary focus belongs on prevention, which begins with parents, medical professionals, journalists, and legislators who influence national youth sports governing bodies and state high school activities associations to continue evaluating playing rules to maintain the essence of particular sports while also making play as safe as possible.¹⁹⁶ Proposals for further safety-based rules changes warrant careful attention.¹⁹⁷ Reacting favorably to Pop Warner’s recent changes, for example, the *Boston Globe* urged the organization to “consider further limits, including those that affect

¹⁹⁰ CULVERHOUSE, *supra* note 78, at 64.

¹⁹¹ Roy McGregor, *The Crosby Effect*, *GLOBE AND MAIL* (Canada), Feb 28, 2011, at S1.

¹⁹² Paul McCrory et al., *supra* note 87, at 517; MEEHAN III, *supra* note 28, at 11-28.

¹⁹³ Lyle J. Micheli, *Foreword*, in MEEHAN III, *supra* note 24, at xi.

¹⁹⁴ Robert C. Cantu, *Foreword*, in NOWINSKI, *supra* note 57, at vii.

¹⁹⁵ *Tackling the Dangers of Concussions*, *DAILY NEWS OF L.A.*, Jan. 26, 2012, at L1 (quoting Dr. Gupta).

¹⁹⁶ NOWINSKI, *supra* note 57, at 168-69 (“change will be difficult without pressure from the grassroots level”).

¹⁹⁷ See, e.g., *Policy Statement: Baseball and Softball*, 129 *PEDIATRICS* e842, e852-53 (2012) (making recommendations for further safety measures); Charles Randazzo et al., *Basketball-Related Injuries in School-Aged Children and Adolescents in 1997-2007*, 126 *PEDIATRICS* 727, 732 (2010) (“For young children, age-appropriate basketballs should be used, which may decrease the rates of concussions . . . , and rough play should be discouraged, to minimize collisions.”).

games, not just practices. Wisely, the organization hasn't ruled out a ban on the three-point stance, which puts linemen in the position of starting plays with heads out front."¹⁹⁸

Prominent neurosurgeon Robert Cantu would go even further. He recommends postponement of tackling in football, body checking in hockey, and heading the ball in soccer until players have turned fourteen.¹⁹⁹ Other voices support Dr. Cantu's well-articulated position.²⁰⁰

"Consistent and diligent enforcement of the rules and regulations of the game," says Dr. William P. Meehan, "may be one of the most effective ways of reducing the risk of sport-related concussions."²⁰¹ Ultimate responsibility for enforcement resides at the local level with coaches, league administrators, game officials and parents, even ones whose children play clean and cause no trouble. The player lying prone on the ice at the end of the 1999 Chicago junior varsity hockey game could have been any parent's child. Neal Goss happened to be in the wrong place at the wrong time, the victim of impulsive violence outside the rules of the game. If the adults had maintained their self-control from the start, he would likely have walked out of the rink because players trained and supervised by responsible adults do not race several yards to drive opponents' faces into the ground at the end of a game.

As our nation confronts an epidemic of pediatric obesity,²⁰² we serve children best when we encourage participation in sports by reassuring them and their families that they can play vigorously yet safely. As the law continues responding to the youth sports concussion crisis, the response does not displace the need for ongoing review and responsible local enforcement of

¹⁹⁸ *Football Must Limit Hits*, BOSTON GLOBE, July 1, 2012, at K8 (editorial).

¹⁹⁹ CANTU & HYMAN, *supra* note 26, at 144-49, 152-53.

²⁰⁰ *See, e.g.*, Joe Nocera, *supra* note 102, at A21 (quoting former Dallas Cowboy tight end Jean Fugett, now a Baltimore lawyer living in constant pain from his playing days, who says that youngsters should not play tackle football before high school because their bodies are not ready).

²⁰¹ MEEHAN III, *supra* note 28, at 121.

²⁰² *See, e.g.*, *Obesity Rates Among All Children in the United States*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 28, 2012), <http://www.cdc.gov/obesity/data/childhood.html>; The Surgeon General's Call To Action To Prevent and Decrease Overweight and Obesity, U.S. DEPT. OF HEALTH & HUMAN SERVS., at xiii, 19 (2001).

playing rules. The recent preventive rule changes made by USA Hockey and Pop Warner football demonstrate how medical research and advocacy for greater safety can prevail over charges that rule changes seek to “sissify” collision and contact sports. Speaking in support of Pop Warner’s rules changes, University of Alabama football coach Nick Saban explained, “Anytime you change something, people will say no, they’ve done it this way for a long time. But there’s always a better way.”²⁰³

Two years after the 1905 White House intercollegiate football summit that opened this Article, President Theodore Roosevelt addressed youth sports in a message to the Washington Playground Association:

City streets are unsatisfactory playgrounds for children because of the danger, because most good games are against the law, because they are too hot in summer, and because in crowded sections of the city they are apt to be schools of crime. Neither do small back yards nor ornamental grass plots meet the needs of any but the very small children. Older children who would play vigorous games must have places especially set aside for them; and, since play is a fundamental need, playgrounds should be provided for every child as much as schools. This means that they must be distributed over the cities in such a way as to be within walking distance of every boy and girl, as most children can not afford to pay carfare.²⁰⁴

The face of youth sports has changed dramatically since Roosevelt’s time. Until a few decades ago, American children generally conducted many of their own games on local playgrounds or sandlots without adult involvement.²⁰⁵ Today adults conduct most youth sports in private associations, public agencies such as parks and recreation departments and high school activities associations.²⁰⁶ Roosevelt’s message to the Washington Playground Association suggests that he would

²⁰³ Farrey, *supra* note 108 (quoting Saban).

²⁰⁴ Letter to Cuno H. Rudolph, Washington Playground Association, Presidential Addresses and State Papers VI, 1163, THEODORE ROOSEVELT ASS’N, <http://www.theodoreroosevelt.org/life/quotes.htm>.

²⁰⁵ Abrams, *supra* note 33, at 264.

²⁰⁶ Am. Acad. of Pediatrics, *Organized Sports for Children and Adolescents*, 107 PEDIATRICS 1459 (2001).

applaud efforts to provide children the safe competition and personal growth that remain the promises of youth sports.