

Concussion Safety in Children's Sports: A Central Role for the "Power of the Permit"

Douglas E. Abrams

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/jbtl>

Recommended Citation

Douglas E. Abrams, *Concussion Safety in Children's Sports: A Central Role for the "Power of the Permit"*, 10 J. Bus. & Tech. L. 1 (2015)
Available at: <http://digitalcommons.law.umaryland.edu/jbtl/vol10/iss1/2>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Douglas E. Abrams*

Concussion Safety in Children’s Sports: A Central Role for the “Power of the Permit”

I. INTRODUCTION

“WE WANT OUR KIDS PARTICIPATING IN SPORTS,” SAYS PRESIDENT OBAMA.¹ “As parents, though, we want to keep them safe, and that means we have to have better information.”² The President spoke as he opened the first White House Healthy Kids and Safe Sports Concussions Summit on May 29, 2014.³ He cited the need for “better research, better data, better safety equipment, [and] better protocols” to reduce the incidence of concussions in youth sports and to improve diagnosis and treatment of competitors who suffer them.⁴

The one-day Summit assembled more than 200 attendees, including professional sports league representatives, medical professionals, coaches, parents, and youth athletes.⁵ The President used the “bully pulpit,” not only to promote public

© 2015 Douglas E. Abrams

The facts and opinions expressed in the articles published in this Journal are solely those of the authors and do not represent the views of the editors, the editorial board, or the University of Maryland Francis King Carey School of Law.

* B.A. 1973, Wesleyan University; J.D. 1976, Columbia University School of Law. In 2013, Prof. Abrams received the Excellence in Safety Award presented by USA Hockey, the sport’s national governing body. Thank you to the editors and staff of the *Journal of Business & Technology Law* for conducting a thoughtful symposium on this important public issue. For his excellent research assistance, thank you to Steven W. Lambson, the University of Missouri Law Library’s Senior Research Librarian and Coordinator of Reference Services.

1. President Barack Obama, Remarks by the President at the Healthy Kids and Safe Sports Concussion Summit (May 29, 2014), <http://www.whitehouse.gov/the-press-office/2014/05/29/remarks-president-healthy-kids-and-safe-sports-concussion-summit> [hereinafter *Remarks by the President*]; Juliet Eilperin, *First-Ever Summit on Sports Concussions Held at the White House*, WASH. POST (May 29, 2014), http://www.washingtonpost.com/politics/first-ever-summit-on-sports-concussions-held-at-the-white-house/2014/05/29/bec19bec-e74d-11e3-a86b-362fd5443d19_story.html).

2. *Remarks by the President*, *supra* note 1.

3. *Id.*; David Jackson, *Obama: We Need “Better Data” on Sports Concussions*, USA TODAY (May 29, 2014), <http://www.usatoday.com/story/news/2014/05/29/obama-concussions-football-soccer-healthy-kids—safe-sports-concussion-summit/9716717/>.

4. *Remarks by the President*, *supra* note 1; Jackson, *supra* note 3.

5. Juliet Eilperin, *Obama To Host a White House Summit on Growing Concerns Over Sports Head Injuries*, WASH. POST (May 28, 2014), http://www.washingtonpost.com/politics/obama-to-host-a-white-house-summit-on-growing-concerns-over-sports-head-injuries/2014/05/28/d49e48ae-e5ac-11e3-afc6-a1dd9407abcf_story.html.

CONCUSSION SAFETY IN CHILDREN'S SPORTS

education about traumatic brain injuries, but also to announce financial pledges to help fund continued research and safety initiatives.⁶

The bully pulpit's influence reaches only so far, however, because neither the President nor Congress can directly regulate interscholastic sports (middle school and high school competition, for example).⁷ Nor can these federal authorities directly regulate leagues conducted by private youth sports organizations such as Little League baseball or Pop Warner football.⁸ Direct public regulation seeking to advance concussion safety must come from the states, whose initial legislative responses to rising public concern show promise.⁹

Since 2009, all fifty states and the District of Columbia have enacted statutes to improve prevention and treatment of concussions in youth sports.¹⁰ In partisan times typically marked by red-state-blue-state divisions, this legislative flurry moves against the current.¹¹ The passage of time will determine the efficacy of this new legislation and the desirability of further amendments, but one shortcoming already appears in many states.

As Part II of this Article discusses, many of the state concussion statutes regulate only interscholastic sports. The statutes do not regulate private leagues, clubs and associations that use fields, gymnasiums, and other public property that is managed by local governmental bodies—usually the city council, the parks and recreation department, or the public school district.¹² Most private youth sports organizations are public users because they do not own and operate their own facilities.¹³

By exempting private sports organizations that use publicly managed property, lawmakers in many states have left a bulk of youth athletes outside public

6. See, e.g., Darlene Superville, *Obama Says Concussions Need More Attention*, ASSOCIATED PRESS (May 29, 2014, 6:39 PM), <http://bigstory.ap.org/article/youth-sports-concussions-draws-obamas-attention> (announcing a "\$30 million joint research effort by the NCAA and Defense Department and an NFL commitment of \$25 million over the next three years to promote youth sports safety").

7. See, e.g., *Horne v. Flores*, 557 U.S. 433, 448 (2009) (calling public education "a core state responsibility").

8. See, e.g., ROBERT GRAHAM ET AL., INST. OF MEDICINE & NAT'L RES. COUNCIL, SPORTS-RELATED CONCUSSIONS IN YOUTH: IMPROVING THE SCIENCE, CHANGING THE CULTURE 45–46 (2014) (discussing recent federal bills, not passed by Congress, to enact guidelines or provide funding).

9. See *id.* at 269–70 (discussing Washington state, Oklahoma, and Connecticut's early success educating parents and coaches about concussions).

10. See *Traumatic Brain Injury Legislation*, NAT'L CONF. STATE LEGIS., <http://www.ncsl.org/research/health/traumatic-brain-injury-legislation.aspx> (last updated July 2014); H.B. 48, 2014 Leg., Reg. Sess. (Miss. 2014); see also Kerri McGowan Lowrey, *State Laws Addressing Youth Sports-Related Traumatic Brain Injury and the Future of Concussion Law and Policy*, 10 J. BUS. & TECH. L. 61 (2015).

11. See, e.g., NAT'L CONF. STATE LEGIS., *supra* note 10 (providing descriptions of statutes from Alabama, California, and Ohio, all requiring any student-athlete showing concussion-type symptoms be removed from the field and not allowed to return to competition without medical clearance).

12. GRAHAM ET AL., *supra* note 8, at 269.

13. See, e.g., Joseph P. Smith, *Midget Football May Be Banned*, DAILY J. (Vineland, N.J.), May 10, 2014, at A1 (describing the Vineland Midget Football League's status as an independent organization that rents field space from the town).

regulation that, according to every state legislature, reasonably balances the needs of concussion victims with the capacities of organized sports programs to implement reasonable health and safety protocols.¹⁴ About 35 million children play organized sports in the United States each year, including about 60% who play in private organizations outside of school.¹⁵ Football alone enrolls about 3 million players in private organizations, but only about 1.1 million players on interscholastic teams.¹⁶

A legislature “may take one step at a time, addressing itself to the phase of the problem which seems most acute,” before deciding whether to proceed further.¹⁷ In states whose concussion statutes exempt private youth sports organizations that use public facilities, local governments should anticipate the “next step” by applying the existing statewide mandates to these organizations as a condition for private use.¹⁸

This local “power of the permit” derives from delegation of the state’s police power,¹⁹ the acknowledged “broad authority to enact legislation for the public good”²⁰ by “protect[ing] the health and safety of its citizens,”²¹ including “the health and safety of minors.”²² As Part III discusses, the power of the permit authorizes local government to set reasonable terms and conditions under which private applicants may use property (including athletic facilities) that statutes, charters, or ordinances commit to public management.²³

“The power of the permit is a valuable, but underused, way to provide playing conditions that are as safe as possible.”²⁴ In states whose new concussion statutes do

14. See GRAHAM ET AL., *supra* note 8, at 271 (describing factors necessary for successful implementation of concussion legislation, including the “involvement of a wide range of stakeholders”).

15. Minn. Amateur Sports Comm’n et al., *Youth Sports Statistics*, STATISTIC BRAIN (Sept. 10, 2013), <http://statisticbrain.com/youth-sports-statistics/>.

16. Elizabeth Landau, *High Schools Tackle Football Concussions*, CNN (Sept. 2, 2013, 10:32 AM), <http://www.cnn.com/2013/08/30/health/high-school-football-safety/index.html>.

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

18. See *infra* Part II.

19. See *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 439 (2002); see also *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 296 (2000) (“[The city’s] efforts to protect public health and safety are clearly within the city’s police powers.”).

20. *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014).

21. *Hill v. Colorado*, 530 U.S. 703, 715 (2000).

22. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 591 (2001) (Stevens, J., concurring in part, dissenting in part).

23. EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 28:45, at 169 (3d ed., rev. vol. 2009) (“Municipal authorities, acting in the interests of the public health, safety, morals, or general welfare have wide discretion to permit, or to refuse to permit, particular uses of” public property within their management); SANDRA M. STEVENSON, 2 *ANTIEAU ON LOCAL GOV’T LAW* § 27.02, at 27-6 (2d ed. 2008) (“Local enactments requiring licenses, permits and certificates are expressions of the local government’s police power and will be valid and constitutional if they are reasonable and have a reasonable relationship to the public health, safety, or the general welfare.”); CHARLES J. RUSSO, *REUTTER’S THE LAW OF PUBLIC EDUCATION* 367–70 (8th ed. 2012) (“Uses of school property.”).

24. Tom Farrey, *A Permit For Youth Football Safety?*, ESPN (Feb. 9, 2014, 9:24 AM), http://espn.go.com/espn/otl/story/_/id/10420535/new-york-city-council-member-wants-law-require-doc-tor-every-youth-football-game-trainer-practices (quoting Prof. Douglas E. Abrams).

CONCUSSION SAFETY IN CHILDREN'S SPORTS

not reach private youth sports organizations that conduct their programs on public facilities, robust local use of the power can help bolster efforts by parents, national youth sports governing bodies, coaches, league administrators, and other private decision makers to promote concussion safety for the millions of children who play each year.²⁵

II. STATEWIDE YOUTH SPORTS CONCUSSION STATUTES

In our federal system, states frequently create “laboratories” by confronting a common problem with similar but not identical legislation.²⁶ Any state assessing its own performance and weighing future legislative amendments can learn from other states’ experiences, enacting perceived strengths and avoiding perceived weaknesses. By addressing the youth sports concussions crisis²⁷ in unison with statutes whose language varies from jurisdiction to jurisdiction, the fifty states and the District of Columbia have each established a laboratory conducive to experimentation and response.²⁸

Most of the statewide concussion statutes follow a common pattern by enacting three core mandates.²⁹ First, leagues and teams must provide parents, coaches, administrators, and players with pre-season information and education about the dangers of concussions, how to recognize their symptoms, and how to help promote healthy recovery.³⁰ Second, coaches must immediately remove from a practice session or game any player who is suspected to have suffered a concussion.³¹ Third, 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.³²

25. Douglas E. Abrams, *Confronting the Youth Sports Concussions Crisis: A Central Role for Responsible Local Enforcement of Playing Rules*, 2 MISS. SPORTS L. REV. 75, 88–89 (2013) [hereinafter *Confronting the Youth Sports Concussions Crisis*]; Douglas E. Abrams, *Player Safety in Youth Sports: Sportsmanship and Respect as an Injury-Prevention Strategy*, 39 SETON HALL J. SPORTS & ENT. L. 1, 12–13 (2012).

26. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

27. Lyle J. Micheli, *Foreword*, in WILLIAM PAUL MEEHAN III, KIDS, SPORTS, AND CONCUSSION: A GUIDE FOR COACHES AND PARENTS, at xi (2011) (“True health crisis.”).

28. See NAT’L CONF. STATE LEGIS., *supra* note 10.

29. GRAHAM ET AL., *supra* note 8, at 266; NAT’L CONF. STATE LEGIS., *supra* note 10.

30. See, e.g., Act of May 27, 2011, ch. 12 § 2, 2011 Alaska Sess. Laws 1, 2 (“The governing body of a school district shall consult with the Alaska School Activities Association to develop and publish guidelines and other information to educate coaches, student athletes, and parents of student athletes regarding the nature and risks of concussions,” including “a description of the risks of return to play and standards for return to play.”).

31. See, e.g., Act of Mar. 29, 2011, ch. 67 § 1, 2011 Colo. Sess. Laws 176, 177 (“If a coach . . . suspects that a youth athlete has sustained a concussion following an observed or suspected blow to the head or body in a game, competition, or practice, the coach shall immediately remove the athlete from the game, competition, or practice.”).

32. See, e.g., Act of May 27, 2011 ch. 90 § 1, 2011 Minn. Laws 372, 373 (“When a coach or official removes a youth athlete from participating in a youth athletic activity because of a concussion, the youth athlete may not

The three core mandates show considerable promise, awaiting good faith local implementation. Many states blunt this promise, however, by regulating only interscholastic sports, and not private youth sports organizations.³³ Oklahoma, for example, requires “[e]ach school district board of education [to] work in cooperation with the Oklahoma Secondary School Activities Association.”³⁴

The Arkansas concussion statute is typical of ones that maximize pediatric protection by regulating both interscholastic play and private youth sports organizations.³⁵ The state Department of Health must “develop concussion protocols substantially similar to those developed and implemented by the Arkansas Activities Association [which regulates interscholastic sports] to protect all youth athletes engaged in youth athletic activities” in the state.³⁶

*‘[Y]outh athletic activity’ means an organized athletic activity in which the participants, a majority of whom are under nineteen (19) years of age, are engaged in an athletic game or competition against another team, club, or entity, or in practice or preparation for an organized athletic game or competition against another team, club, or entity.*³⁷

III. THE POWER OF THE PERMIT

In states where concussion legislation does not reach private youth sports organizations that use public facilities, local government should approve private use only by organizations that agree to adhere to the three statewide core mandates. When an organization applies to use a field, gymnasium, or other public facility for the first time, this power of the permit authorizes the local public decision maker to condition grant on adherence to specified measures designed to promote public health and safety.³⁸ The decision maker may then determine future renewal

again participate in the activity until the youth athlete . . . is evaluated by a provider trained and experienced in evaluating and managing concussions and the provider gives the youth athlete written permission to again participate in the activity.”).

33. See Nat’l Conf. State Legis., *supra* note 10.

34. Act of May 13, 2010, Ch. 264, § 1, 2010 Okla. Sess. Laws 973, 974; see also Act of July 3, 2012, No. 197, § 1, 2012 Haw. Sess. Laws 717, 717 (“The purpose of this Act is to require the department of education and the Hawaii High School Athletic Association to develop a concussion educational program for students and student athletes who are fourteen to eighteen years old.”).

35. See, e.g., Louisiana Youth Concussion Act, No. 314, § B, 2011 La. Acts 1749, 1751 (applying mandates to interscholastic competition, and to “[e]ach private club or public recreation facility and each athletic league which sponsors youth athletic activities”).

36. The Arkansas Concussion Protocol Act, No. 1435, § 1(c), 2013 Ark. Acts 6216, 6218.

37. *Id.* at 6216.

38. See Landau, *supra* note 16; see also Douglas E. Abrams, *Achieving Equal Opportunity in Youth Sports: Roles for the “Power of the Permit” and the “Child Impact Statement,”* LEARNING CULTURE THROUGH SPORTS: PERSPECTIVES ON SOCIETY AND ORGANIZED SPORTS 32, 34–36 (Sandra Spickard Prettyman & Brian Lampman eds., 2d ed. 2011) (urging that local government agencies use the power of the permit to assure equal opportunity for all children who wish to play in the community’s travel teams and house league programs).

CONCUSSION SAFETY IN CHILDREN'S SPORTS

applications based on the organization's prior performance, as the Vineland, New Jersey City Council recently seemed poised to do after it reviewed the local midget football league's record concerning concussion safety, which the council found inadequate.³⁹

A. "We Can Suspend the League"

On May 10, 2014, the Vineland, New Jersey *Daily Journal* ran a story under the headline, "Midget Football May Be Banned."⁴⁰ The Vineland City Council said that the Vineland Midget Football League, which enrolls players between five and fourteen, reported only two of at least eight players who suffered concussions the prior season.⁴¹ The private league also allegedly issued some older players helmets that were designed and recommended for younger, smaller and lighter players.⁴² The city council threatened to close the fields to the midget football league this autumn because, according to the council's vice president, "nobody followed any protocols" about concussions.⁴³

The Vineland Midget Football League does not own its own fields, but uses public fields pursuant to renewable annual agreements with the city council.⁴⁴ The *Daily Journal* reported that under New Jersey law, a player who suffers a possible concussion may not return to action in practices or games without written medical clearance.⁴⁵ At a city council meeting, the council's vice president said that unless the league commits itself to adherence to concussion safety protocols, "we can suspend the league by telling them they can't use the fields."⁴⁶

B. *The Breadth of Local Authority*

In the exercise of its broad police power to manage athletic fields and other public property, a local decision maker such as the Vineland City Council may condition grant of a permit or license on a private applicant's adherence to reasonable conditions that advance public health and safety without working forfeiture of a constitutional right.⁴⁷ Where a locality's police power to grant or deny permits to

39. See Smith, *supra* note 13.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. See, e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 1, 8 (2013) (holding that the government may condition a grant when the property and the government's demands are connected).

use public facilities is otherwise established, constitutional challenges to extension of the three statewide core concussion mandates would be unavailing.⁴⁸

In *USA Baseball v. City of New York*,⁴⁹ the federal district court upheld a 2007 New York City Council ordinance that exercised the power of the permit to prohibit the use of metal bats in competitive high school baseball games sponsored by public or private schools in the City.⁵⁰ After receiving about 3,500 pages of testimony, statements, reports and other documents from supporters and opponents of the proposed ordinance, the city council found that “the use of non-wood bats poses an unacceptable risk of injury to children, particularly those who play competitive high school baseball.”⁵¹

The federal district court granted summary judgment for the City in a suit brought by a group of plaintiffs that included high school coaches and parents, metal bat manufacturers, and others.⁵² The court rejected the plaintiffs’ claims that the ordinance exceeded the city’s police powers and violated the equal protection and due process clauses of the federal and New York state constitutions.⁵³

The breadth of local regulatory authority determined the outcome.⁵⁴ The court held that “[p]rotecting persons of high school age from baseball injuries plainly falls within the City’s police power to protect its residents’ health and safety.”⁵⁵ The equal protection and due process claims failed because the plaintiffs did not, and indeed could not, allege any fundamental right or suspect classification that would have triggered strict scrutiny.⁵⁶ In the absence of such allegations, the court found that “a rational basis exists for legislatively determining that metal and composite bats could . . . result in an increased risk of injury to infielders from hard-struck balls.”⁵⁷

Grounded in children’s health and safety, local extension of the three statewide concussion mandates to private sports organizations that seek to use public facilities would similarly overcome a federal or state equal protection or due process challenge.⁵⁸ The challenge would implicate no fundamental right or suspect

48. *Id.* at 6–7.

49. 509 F. Supp. 2d 285 (S.D.N.Y. 2007).

50. *Id.* at 288.

51. *Id.* at 289–90.

52. *Id.* at 288.

53. *Id.* at 289.

54. *Id.* (“Moreover, as the City points out, the cases on which the plaintiffs rely to suggest that outright prohibitions are not authorized under the City’s police powers do not support such a broad rule on closer inspection. Many of the decisions relate to zoning and implicate the considerable body of law related to the regulation of real property, and they are therefore plainly distinguishable from the kind of regulation imposed by the Bat Ordinance.”).

55. *USA Baseball v. City of New York*, 509 F. Supp. 2d 285, 298 (S.D.N.Y. 2007); *see also* Landau, *supra* note 16 (discussing the implementation of similar protective measures in football).

56. *USA Baseball*, 509 F. Supp. 2d at 293–94.

57. *Id.* at 294.

58. *Id.* at 303 (holding that “health and safety” is a “weighty” factor).

CONCUSSION SAFETY IN CHILDREN'S SPORTS

classification, and the rational basis test upholds legislative or executive action “if any state of facts reasonably may be conceived to justify it.”⁵⁹

Conditioning local permits on adherence to statewide concussion legislation would be rational because exempting private sports organizations from public regulation holds no medical justification grounded in health or safety.⁶⁰ A concussion is a concussion, regardless of whether a boy or girl sustains it in interscholastic play or in a private youth league. A growing body of medical research suggests that children are more susceptible to concussions than adults, can suffer greater adverse effects than adults, and may need a longer recovery period.⁶¹ Unrecognized or improperly treated pediatric concussions can leave their victims less able to learn in school,⁶² perform functions of everyday life,⁶³ and perhaps even enjoy adulthood free from chronic pain and cognitive dysfunction.⁶⁴ Without distinguishing between interscholastic competition and private youth league play, Canadian Paediatric Society president Dr. Richard Stanwick says, “[t]he concern about concussion is that not only can you get concussed out of the game; you can get concussed out of life.”⁶⁵

Thanks to the highest rates of youth sports concussions, football tends to attract the lion’s share of attention from parents, coaches, and others concerned about the health and safety of young athletes.⁶⁶ President Obama is right, however, that

59. *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961).

60. *USA Baseball*, 509 F. Supp. 2d at 303.

61. See, e.g., *Concussions and the Marketing of Sports Equipment: Hearing Before the Comm. on Commerce, Sci., and Transp.*, 112th Cong. 29–36, at 35 (2011) [hereinafter *Concussions and the Marketing of Sports Equip.*] (statement of Dr. Ann McKee, Prof. of Neurology and Pathology, Bos. Univ. Sch. of Med.) (“The youth or immature brain is more susceptible to concussive injuries than the mature adult brain. Children and young adults recover more slowly from a concussion. Youth athletes are also more at risk for concussion due to their disproportionately large head size compared to body size and the weakness of their neck musculature.”); see also *id.* at 30 (statement of Dr. Jeffrey S. Kutcher, Assoc. Prof. of Neurology, Univ. of Michigan) (“[T]he pediatric population . . . may be at even greater risk given the ongoing development of the pediatric brain.”); ROBERT CANTU & MARK HYMAN, *CONCUSSIONS AND OUR KIDS* 29 (2012); Roy McGregor, *Bodychecking in Kids’ Leagues Takes a Hit in a Survey*, *GLOBE & MAIL* (Canada), Mar. 4, 2013, at S1 (“[T]he scientific evidence is mounting that the young brain is more vulnerable to concussion than the older brain. The evidence is now pointing to the adolescent brain as being most vulnerable.”) (quoting Dr. Charles Tator).

62. Cantu & Hyman, *supra* note 61, at 72–74; Naomi J. Brown et al., *Effect of Cognitive Activity Level on Duration of Post-Concussion Symptoms*, 133 *PEDIATRICS* 299, 302 (Jan. 2014); Mark E. Halstead et al., *Returning to Learning Following a Concussion*, 132 *PEDIATRICS* 948, 950 (Oct. 2013).

63. Frederick P. Rivara et al., *Disability 3, 12, and 24 Months After Traumatic Brain Injury Among Children and Adolescents*, 128 *PEDIATRICS* 1129, 1130 (Oct. 2011).

64. Paul McCrory et al., *Can We Manage Sport Related Concussion in Children the Same as in Adults?*, 38 *BRIT. J. SPORTS MED.* 516, 517 (2004); Meehan, *supra* note 27, at 11–28; Hadas Ofek & Ruth Defrin, *The Characteristics of Chronic Central Pain After Traumatic Brain Injury*, 131 *PAIN* 330, 330 (2011).

65. See Smith, *supra* note 13, at S1.

66. David Buzas et al., *Concussions from 9 Organized Youth Sports: Results from NEISS Hospitals over an 11-Year Frame, 2002-2012*, *ORTHOPAEDIC J. SPORTS MEDICINE* 1, 1 (Apr. 2, 2014); Daniel McGinn, *Should You Let Your Child Play Football?: How Parents and Coaches are Grappling With the Escalating Fears of Concussion Risks*, *BOS. GLOBE*, Mar. 2, 2014.

“concussions are not just a football issue.”⁶⁷ In states that maintain a statutory exemption for private sports organizations, the exemption cuts a wide swath because a “concussion is a risk in almost any sport,”⁶⁸ and “a common problem for children and adolescents.”⁶⁹ 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.”⁷⁰

The statutory exemption for private sports organizations compromises the health and safety of both boys and girls. The concussion rate in girls’ soccer is almost as high as 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.⁷¹ In 2013, the American Academy of Neurology found that in high school basketball, girls suffer concussions at rates more than five times those of boys.⁷²

The nationwide numbers remain uncomfortably high. One clinical report estimates that concussions represent nearly 9% of all high school athletic injuries.⁷³ Americans of all ages suffer about 300,000 reported sports-related concussions each year, and most of the injured are interscholastic and youth league players.⁷⁴ The reports are almost certainly underestimates,⁷⁵ however, not only because many families may not recognize concussion symptoms,⁷⁶ but also because a “culture of

67. Remarks by the President, *supra* note 1.

68. Meehan, *supra* note 27, at 37; Michael W. Kirkwood et al., *Pediatric Sports-Related Concussion: A Review of Clinical Management of an Off-Neglected Population*, 117 PEDIATRICS 1359, 1360 (Apr. 2006) (“Nearly all athletic endeavors pose some risk of concussive injury.”).

69. William P. Meehan III & Richard G. Bachur, *Sports-Related Concussion*, 123 PEDIATRICS 114, 119 (2009); see also Cantu & Hyman, *supra* note 61, at 3 (“Concussions happen to all types of athletes – young, and old, boys and girls, and in every conceivable sport.”).

70. Kirkwood et al., *supra* note 68, at 1360; see also *The Impact of Concussions on High School Athletes: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. 7–13 (2010) (statement of Gerard Gioia, Chief, Div. of Pediatric Neuropsychology, Children’s Nat’l Med. Ctr.) (stating that children can suffer concussions in any sport that has high risk of direct collision, including wrestling, cheerleading, and gymnastics); GAY CULVERHOUSE, *THROWAWAY PLAYERS: CONCUSSION CRISIS FROM PEE WEE FOOTBALL TO THE NFL* 77–78 (2011) (discussing concussions in sports other than football).

71. Cantu & Hyman, *supra* note 61, at 111–12; Mark E. Halstead et al., *Clinical Report—Sport-Related Concussion in Children and Adolescents*, 126 PEDIATRICS 597, 599 (2010); Chris G. Koutures, Andrew J. M. Gregory & The Council on Sports Medicine and Fitness, *Clinical Report—Injuries in Youth Soccer*, 125 PEDIATRICS 410, 411 (2010); Randall W. Dick, *Is There a Gender Difference in Concussion Incidence and Outcomes?*, 43 BRIT. J. SPORTS MED. i46, i49 (2009); Anahad O’Connor, *Concussions May Be More Severe in Girls and Young Athletes, Study Says*, N.Y. TIMES, May 11, 2012, at B12.

72. James Barragan, *Seeing Red*, L.A. TIMES, Feb. 23, 2014, § Sports, at 1.

73. Halstead et al., *supra* note 71, at 599.

74. *Id.* at 598–99.

75. GRAHAM ET AL., *supra* note 8, at 27, 44, 100, 260, 265–66, 269, 289; Buzas et al., *supra* note 66, at 2 (estimating that as many as 50% of sports concussions go unreported).

76. See, e.g., Halstead et al., *supra* note 71, at 597, 599; Jack Kelly, *What Dangers Await the Young Athlete?*, PITTSBURGH POST-GAZETTE, June 4, 2012, at C1; GRAHAM ET AL., *supra* note 8, at 260–63.

CONCUSSION SAFETY IN CHILDREN'S SPORTS

resistance”⁷⁷ leads many youth athletes to hide their head injuries from their parents and coaches to avoid letting down the team,⁷⁸ or to avoid removal from the roster or the starting lineup.⁷⁹ At the White House Summit, President Obama hit the target when he called for changing “a culture that says you suck it up,” and encourages children to remain in the lineup regardless of the cost in present distress and potential future disability.⁸⁰

C. Cost

In early 2014, a New York City (“NYC”) Council member introduced the Youth Football Safety Act, which would require that school football and private youth games played on city fields have a physician in attendance.⁸¹ The act would also require that a certified athletic trainer attend every full-contact practice.⁸² A commitment to regular attendance would be a condition to securing a NYC Parks permit to use the fields.⁸³

If the City Council passes the act as a public health and safety measure after holding public hearings, the holdings and rationales of *USA Baseball* would dispose of challenges grounded in the police power, equal protection, or due process.⁸⁴ The City Council would need to show only the “conceivable rational relationship” with “the legitimate purpose of public safety,” the finding that carried the day in the earlier baseball bat decision, and is well supported by the concussion research discussed above.⁸⁵

The Youth Football Safety Act’s critics have told the media, however, that interscholastic sports leagues and private organizations could not afford the

77. GRAHAM ET AL., *supra* note 8, at 7; *see also* Cantu & Hyman, *supra* note 61, at 1 (“We still have this culture where it’s hard to convince people that a concussion is a very serious brain injury.”).

78. GRAHAM ET AL., *supra* note 8, at 7, 44, 290.

79. *See* CHRISTOPHER NOWINKSI, HEAD GAMES: FOOTBALL’S CONCUSSION CRISIS FROM THE NFL TO YOUTH LEAGUES 129–31 (2006); *Concussions and the Marketing of Sports Equip.*, *supra* note 61, at 24 (quoting Alexis Ball, former women’s collegiate soccer player: “[T]he mentality to return to play as quickly as possible is very prevalent in the world of athletics. There is a lot of pressure on athletes to just deal with their injuries, or they will be in jeopardy of losing their starting position or playing time. This cultures an environment in which it is really easy to lie about your symptoms, especially when it comes to concussions”).

80. *Remarks by the President*, *supra* note 1.

81. *Stephen Levin to Introduce Youth Football Safety Act*, BROOKLYN DAILY EAGLE (Jan. 29, 2014, 5:51 PM), <http://www.brooklyneagle.com/articles/stephen-levin-introduce-youth-football-safety-act-2014-01-29-224900> [hereinafter *Stephen Levin*].

82. *Id.*; *see also* Farrey, *supra* note 24.

83. *Stephen Levin*, *supra* note 81; Barbara Mader, *NYC Council Member Introduces Youth Football Safety Act*, EXAMINER.COM (Jan. 30, 2014, 10:01 AM), <http://www.examiner.com/article/nyc-council-member-introduces-youth-football-safety-act>.

84. *See USA Baseball v. City of New York*, 509 F. Supp. 2d 285, 288, 295–98 (S.D.N.Y. 2007) (holding that the ordinance prohibiting metal bats in competitive baseball games (1) did not constitute a constitutional delegation of power simply because it incorporated some baseball league rules, protected high school baseball players’ safety, and (2) had a rational relationship to the legitimate purpose of protecting public safety).

85. *Id.* at 295 n.3.

required blanket medical coverage that the act would mandate.⁸⁶ The National Athletic Trainers' Association reports, for example, that budgetary constraints leave more than half the nation's public high schools without access to a full-time certified athletic trainer; 30% of high schools have no trainer at all, even though such medical coverage is common in collegiate and professional football.⁸⁷

Local authorities anticipating possible legal challenges, however, need not grapple with similar fiscal concerns before exercising the power of the permit to extend the three existing statewide concussion mandates—education, removal from the lineup, and medical clearance—to private youth sports organizations that seek to use public facilities. In their present form, the three are unlikely to impose significant fiscal constraints.⁸⁸

For eleven years (1990-2001), I served as president of a private youth hockey association that played in an ice rink operated by the city parks and recreation department. Before preseason practice opened each year, the association and the city signed an agreement that recited the terms and conditions of use. The states' three concussion mandates were still years away, but none would have burdened the youth hockey association's resources.

With minimal additional costs, if any, the first mandate—education—could easily have been incorporated into instruction, videos, and printed materials that the association already provided parents and coaches at preseason meetings.⁸⁹ The second mandate—removal from the lineup—depends on prudent, cost-free responses from coaches and parents, even ones who would have to err on the side of removal in the absence of medical training.⁹⁰ The third mandate—medical clearance—would typically impose costs on a player's parents for medical treatment and examination, but these costs are no different than the costs imposed on parents of a concussed interscholastic player.

86. Farrey, *supra* note 24.

87. Sean Gregory, 'It Didn't Cross My Mind that I Wouldn't See Him Come off that Field', TIME, Sept. 29, 2014, at 32, 36, 38.

88. Farrey, *supra* note 24; see also Kyle Neddenriep, *Coaches Would Need Training on Concussions*, INDIANAPOLIS STAR, Mar. 2, 2014, at A1 (discussing a bill that only requires that high school coaches pay \$25 every two years to take a concussion awareness test; and that youth coaches pay \$5 to complete a concussion education course); *Youth Concussion FAQ*, NFLEEVOLUTION.COM (Aug. 9, 2013), <http://www.nflevolution.com/article/youth-concussion-faq?ref=0ap1000000228346> (noting that the cost of implementing a concussion prevention and awareness bill is zero).

89. See Carolyn Thornton, *Mandatory Concussion Course*, PROVIDENCE J. BULL. (Providence, R.I.), Feb. 27, 2011, at C.

90. See Tracey Covassin et al., *Educating Coaches About Concussion in Sports: Evaluation of the CDC's "Heads Up: Concussion in Youth Sports" Initiative*, 82 J. SCH. HEALTH 233, 233 (2012) ("[A]t younger competitive levels, there is often limited medical coverage, which often places increased responsibility on coaches for addressing any medical issues that may arise.").

IV. CONCLUSION

Thanks to the sheer quantity and quality of published medical research that continues to energize public discussion, Americans are much more sensitive today about the perils of pediatric sports-related concussions than they were even a few years ago.⁹¹ A comprehensive, well-researched 576-page history of professional football and the National Football League, published in 2004, makes no mention whatsoever of these traumatic brain injuries as a concern for professional football or its players anytime in the prior seventy years and more.⁹² Public education has changed times for the better, however, and one of this Symposium's national experts aptly calls concussions "the predominant youth sports safety issue of the 21st century."⁹³

State concussion legislation and the local power of the permit each recognize that sports inevitably brings risk of injury at any age and any level of competition, and that many sports depend on controlled aggression within the rules.⁹⁴ As children continue to play competitive sports central to American culture, however, these dual exercises of discretionary public authority also recognize that the nation's tolerance level for concussions should be much lower in youth sports than in professional sports.⁹⁵

Children are not miniature adults. The pros are multi-millionaires who, if they receive full and fair information,⁹⁶ presumably can make their own risk-taking decisions in the billion-dollar business enterprises that employ them.⁹⁷ The law generally grants competent adults considerable autonomy to make decisions about

91. See, e.g., Cantu & Hyman, *supra* note 61, at 13 ("If you played competitive sports as a child, you know that concussions were thought to be not that serious.")

92. MICHAEL MACCAMBRIDGE, *AMERICAN'S GAME: THE EPIC STORY OF HOW PRO FOOTBALL CAPTURED A NATION* (2d ed. 2004).

93. Brook de Lench, *Praise for MomsTEAM Is Nice, but the Fight to Make Youth Sports Safer isn't over*, MOMSTEAM BLOG (May 23, 2012, 3:14 PM), <http://www.momsteam.com/blog/brooke-de-lench/praise-moms-team-nice-but-fight-make-youth-sports-safer-not-yet-over>.

94. See Paul McCrory et al., *Consensus Statement on Concussion in Sport: The 4th International Conference on Concussion in Sport Held in Zurich, November 2012*, 47 BRIT. J. SPORTS MED. 250 (2013); Chezhiyan Shanmugam & Nicola Maffulli, *Sports Injuries in Children*, 86 BRIT. MED. BULL. 33, 51–52 (2008).

95. See Press Release, Senator Dick Durbin, Durbin: We Must Step Up Our Game to Protect Student Athletes from Concussion Risks (May 28, 2014, <http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=aa73a2e1-e786-4b2f-9358-61c03633a681>); Dave D'Alessandro, *Kid Stuff Turns Serious Sobering Questions Raised as Participation Declines*, STAR-LEDGER, Nov. 24, 2013, at 1.

96. See Sam Farmer, *Players, Local Firm Sue [National Football] League over Painkillers*, BALTIMORE SUN, May 21, 2014, at 3D (reporting on a class action lawsuit by former NFL players who allege that the league "has supported a drug culture that has provided dangerous painkillers and anti-inflammatories for free to players for years with no warnings as to their side effects"); Childs Walker, *Goodell: Settlement Is Great for All*, BALTIMORE SUN, Sept. 5, 2013, at 4D (reporting on a tentative \$765 million settlement of suit brought by retired players who "accused the NFL of suppressing information on head trauma and allowing them to compete without knowing the long-term risks").

97. *Remarks by the President, supra* note 1 (discussing how players in the NFL are "grown men who choose to accept some risk to play" football); *Confronting the Youth Sports Concussion Crisis, supra* note 25, at 88–89.

their own health care and safety in the absence of potential or actual harm to others.⁹⁸

Youth leaguers are children and adolescents who play games for their upbringing, and not for lucrative compensation or to provide mass public entertainment. Only a minuscule few will ever reach the professional ranks, but all deserve futures as free as possible from the chronic effects of early athletic injuries.⁹⁹ With the knowledge and perspectives that concussion researchers have already provided, says neurosurgeon and CNN chief medical correspondent 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.”¹⁰⁰

“Sports is . . . fundamental to who we are as Americans and our culture,” President Obama told the White House Summit.¹⁰¹ “We’re competitive. We’re driven. And sports teach us about teamwork and hard work and what it takes to succeed not just on the field but in life.”¹⁰² “[S]ports are vital to this country,” but the nation needs to assure that children “are able to participate as safely as possible.”¹⁰³

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

99. *Confronting the Youth Sports Concussion Crisis*, *supra* note 25, at 89.

100. Stephanie Cary, *Tackling the Dangers of Concussions: Documentary Raises Severity of Injury, How to Prevent It*, L.A. DAILY NEWS, Jan. 26, 2012, at L1 (quoting Dr. Sanjay Gupta).

101. *Remarks by the President*, *supra* note 1.

102. *Id.*

103. *Id.*
