

LEADERS AND LAGGARDS: TACKLING STATE LEGISLATIVE RESPONSES TO THE YOUTH SPORTS CONCUSSION EPIDEMIC

Chris Lau*

In 2009, state legislatures began to enact concussion safety laws to protect youth athletes suffering from traumatic brain injuries sustained during the course of play. By 2014, all fifty states and the District of Columbia had enacted some form of youth sports concussion legislation. Yet these statutes vary widely across states in terms of the protections offered to youth athletes. This Note provides an analysis of state legislation by classifying all fifty-one statutes among distinct tiers ranging from least to most protective.

These laws have generally targeted the secondary risks of concussions, which emerge after a youth athlete has suffered a traumatic brain injury. While the prevention of secondary risks is an important element of concussion management, future legislators should also consider the primary risks of concussions by focusing on reducing the risk of injury before it occurs. This Note advocates that, to ensure the adequate protection of all youth athletes, future legislators must continue to prevent secondary risks by expanding coverage and strengthening enforcement mechanisms. In addition, legislators must address the primary risks of concussions by mandating certain rule changes, which, over time, may begin to transform societal attitudes toward the seriousness of sports-related concussions. While many youth sports organizations and even professional sports leagues have begun to implement certain rule changes to increase player safety, these changes would gain greater efficacy if backed by the force of law. This Note lays out recommendations for a model statute to provide guidance for future legislators.

* J.D. Candidate, 2018, Fordham University School of Law; B.S., 2013, University of Pennsylvania. I would like to thank Professor Jed Shugerman for his guidance and my friends and family for their continued support.

INTRODUCTION.....	2881
I. YOUTH SPORTS CONCUSSIONS AND STATE LEGISLATION: AN OVERVIEW.....	2882
A. <i>Concussions: Definitions, Diagnoses, and Scope</i>	2883
B. <i>History of State Legislation</i>	2885
C. <i>The Current Benchmark: Washington's Lystedt Law</i>	2886
1. The Statute.....	2886
2. Lystedt as a Barometer.....	2887
II. ADDRESSING THE ISSUE AT THE STATE AND FEDERAL LEVELS.....	2888
A. <i>Comparing State Statutes: Leaders and Laggards</i>	2889
1. A Tiered Approach.....	2889
2. Strengths of State Legislation.....	2891
3. Weaknesses of State Legislation.....	2892
B. <i>Enforcement of State Legislation</i>	2893
1. Statutory Sanctions.....	2894
2. The Unsettled Role of Tort Law.....	2895
a. <i>Common Law Negligence</i>	2895
b. <i>Immunity Provisions</i>	2896
c. <i>Fourteenth Amendment Claims</i>	2896
d. <i>Case Law Is Far from Crystallized</i>	2897
3. Enforcement Is a Major Area of Weakness.....	2898
C. <i>Federal Law Lags: Failed Attempts at Reform</i>	2899
D. <i>Academic Perspectives</i>	2901
III. FUTURE POLICYMAKING: CONFRONTING TRAUMATIC BRAIN INJURY BOTH BEFORE AND AFTER IMPACT.....	2904
A. <i>Addressing Secondary Risks: Confronting the Issue After Impact</i>	2905
1. Expanding Coverage and Strengthening Enforcement....	2905
2. Reporting and Feedback Procedures.....	2906
B. <i>Addressing Primary Risks: Confronting the Issue Before Impact</i>	2908
1. Rule Changes.....	2908
2. Changes in Attitudes and Behaviors.....	2910
C. <i>The Model Statute: A New Benchmark</i>	2910
D. <i>The Next Step: Incentivizing State Legislatures to Adopt the New Benchmark</i>	2911
CONCLUSION.....	2912
APPENDIX: A TIERED APPROACH.....	2913

INTRODUCTION

In October of 2006, Zackery Lystedt was thirteen years old and a gifted athlete who played on his junior high school football team.¹ During a game, Zackery struck the ground headfirst after tackling an opponent.² A video of the game shows Zackery lying on the ground with his hands clutching both sides of his helmet.³ Despite the injury, Zackery was allowed back into the game just fifteen minutes later.⁴

Late in the second half of the game, Zackery collapsed on the field and was airlifted to a nearby hospital.⁵ Doctors removed parts of his skull to relieve pressure from his hemorrhaging brain.⁶ Zackery spent the next three months in a coma.⁷ It took nine months before he could speak his first word, thirteen months before he could move a limb, and almost two years before he could eat without the assistance of a feeding tube.⁸

In May of 2009, the Washington State Legislature enacted the Zackery Lystedt Law⁹ (“the Lystedt Law”), the nation’s first comprehensive youth sports concussion safety act.¹⁰ The statute required any youth athlete showing signs of a concussion to be examined and cleared by a licensed health-care provider before being permitted to return to play.¹¹ Today, over ten years after his injury, Zackery has embraced his eponymous role as the face of youth sports concussion legislation; however, he walks with a limp, wears thick glasses specially designed to aid his peripheral vision, and struggles to remember his daily schedule.¹² Had the Washington law been in place in October of 2006, it is likely that Zackery would not have been permitted to reenter the game; his life-altering injury may have been avoided.¹³

1. See *The Lystedt Law: A Concussion Survivor’s Journey*, CENTERS FOR DISEASE CONTROL & PREVENTION (Mar. 12, 2010) [hereinafter *The Lystedt Law*], <http://www.cdc.gov/media/subtopic/matte/pdf/031210-Zack-story.pdf> [https://perma.cc/5L7S-4XYN].

2. See Sheila Mickool, *Taking Brain Injuries out of Sports*, SEATTLE MAG. (Apr. 9, 2013), <http://www.seattlemag.com/article/taking-brain-injuries-out-sports> [https://perma.cc/FER4-BJ62].

3. See *The Lystedt Law*, *supra* note 1.

4. See Chantal Anderson, *State Lawmakers Approve Concussion Bills for Young Athletes*, SEATTLE TIMES (Mar. 11, 2009), <http://www.seattletimes.com/seattle-news/politics/state-lawmakers-approve-concussion-bills-for-young-athletes> [https://perma.cc/46PW-78Z5].

5. See *The Lystedt Law*, *supra* note 1.

6. See *id.*

7. See *id.*

8. See *id.*

9. WASH. REV. CODE § 28A.600.190 (2009).

10. See Mickool, *supra* note 2.

11. See WASH. REV. CODE § 28A.600.190.

12. See Patricia Guthrie, *Ex Youth Football Player: You Could End Up Like Me*, WEBMD (Oct. 21, 2015), <http://www.webmd.com/brain/news/20151021/concussion-zack-lystedt> [https://perma.cc/2QWM-2FVW].

13. See *id.*

Still, there is no guarantee that the law would have prevented Zackery's injury.¹⁴ The "macho culture" that has persisted in sports for decades has, at least in part, weakened the application of the law and, thus, its effectiveness.¹⁵ While state legislation has helped to increase awareness of this public health issue,¹⁶ there remains a "culture of resistance" in terms of reporting injuries within both youth and professional sports.¹⁷ Moreover, even where the laws of different states are virtually identical, there is tremendous variation in enforcement.¹⁸

This Note examines the disparities among state legislation and analyzes whether such legislation alone is sufficient to quell the "concussion epidemic."¹⁹ While many states have adopted ample precautions to protect children like Zackery and the millions of other youth athletes that are put at risk each year,²⁰ others provide inadequate safeguards. Part I of this Note provides background information necessary to understand the stakes of this legislation by exploring the long-term effects of traumatic brain injury (TBI) and the broad spectrum of protections offered across different states. Then, Part II classifies where certain state statutes lie along this spectrum, analyzes the strengths and weaknesses of state legislation, examines enforcement mechanisms, and assesses the actions taken by the federal government. Finally, Part III recommends provisions for an updated model code and proposes an increased emphasis on primary prevention.

I. YOUTH SPORTS CONCUSSIONS AND STATE LEGISLATION: AN OVERVIEW

Before assessing the effectiveness of existing legislation, it is necessary to understand the two key issues at hand: (1) the lasting impact of a TBI and

14. See, e.g., Hosea H. Harvey, *Refereeing the Public Health*, 14 YALE J. HEALTH POL'Y L. & ETHICS 66, 113–14 (2014); Marie-France Wilson, *Youth Athletes at Risk: Preventing and Managing Consequences of Sports Concussions in Young Athletes and the Related Legal Issues*, 21 MARQ. SPORTS L. REV. 241, 288 (2010) (noting that existing state legislation "may not go far enough").

15. See LINDA CARROLL & DAVID ROSNER, *THE CONCUSSION CRISIS: ANATOMY OF A SILENT EPIDEMIC* 35–67 (2011) (discussing the "macho culture" that exists in football, even at the youth level).

16. See *infra* notes 44 and 217 and accompanying text.

17. See COMM. ON SPORTS-RELATED CONCUSSIONS IN YOUTH, INST. OF MED. & NAT'L RES. COUNCIL, NAT'L ACADS., *SPORTS-RELATED CONCUSSIONS IN YOUTH: IMPROVING THE SCIENCE, CHANGING THE CULTURE* 7, 43–44 (Robert Graham et al. eds., 2014), http://www.ncbi.nlm.nih.gov/books/NBK169016/pdf/Bookshelf_NBK169016.pdf [https://perma.cc/9NWC-S7XT].

18. Kerri McGowan Lowrey & Stephanie R. Morain, *State Experiences Implementing Youth Sports Concussion Laws: Challenges, Successes, and Lessons for Evaluating Impact*, 42 J.L. MED. & ETHICS 290, 294 (2014).

19. See NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., *REPORT TO CONGRESS ON MILD TRAUMATIC BRAIN INJURY IN THE UNITED STATES: STEPS TO PREVENT A SERIOUS PUBLIC HEALTH PROBLEM* (2003) [hereinafter CDC, 2003 REPORT], <http://www.cdc.gov/traumaticbraininjury/pdf/mtbireport-a.pdf> ("Traumatic brain injury is frequently referred to as the silent epidemic because the problems that result from it (e.g., impaired memory) often are not visible.") [https://perma.cc/SH7Q-H8G8].

20. See *infra* note 39 and accompanying text.

(2) the current laws in place to limit such effects. Part I.A provides an overview of concussions and the consequences—especially among children—that can result from missed diagnoses. Next, Part I.B discusses the arc of state legislative responses. Then, Part I.C analyzes Washington State’s Lystedt Law and evaluates the laws of other states using the Lystedt Law as a benchmark.

A. Concussions: Definitions, Diagnoses, and Scope

To evaluate the role that legislation should play within the concussion epidemic, it is useful to examine the types of TBI that such legislation is designed to address. A TBI is defined by the Centers for Disease Control and Prevention (CDC) as “an injury that disrupts the normal function of the brain.”²¹ It can be caused by a bump, blow, or jolt to the head or a penetrating head injury.²² TBIs range from mild to severe.²³ A mild TBI is characterized by any period of transient confusion, disorientation, or impaired consciousness, dysfunction of memory around the time of injury, or loss of consciousness lasting less than thirty minutes.²⁴ Severe TBIs involve extended periods of unconsciousness lasting longer than thirty minutes, posttraumatic amnesia lasting longer than twenty-four hours, or penetrating skull injury.²⁵

Concussions are classified as a type of mild TBI because they are not usually life threatening.²⁶ While a single concussion will typically not cause death, suffering repeated concussions increases the risk of second impact syndrome, a potentially fatal condition that occurs when a second concussion is sustained before the symptoms of the first concussion have cleared.²⁷ One severe effect of second impact syndrome is chronic traumatic encephalopathy (CTE).²⁸ CTE is a progressive degenerative disease of the brain, common in

21. NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS ON TRAUMATIC BRAIN INJURY IN THE UNITED STATES: EPIDEMIOLOGY AND REHABILITATION (2015) [hereinafter CDC, 2015 REPORT], http://www.cdc.gov/traumaticbraininjury/pdf/tbi_report_to_congress_epi_and_rehab-a.pdf [https://perma.cc/JJ65-DDJP].

22. *See id.*

23. *See* CDC, 2003 REPORT, *supra* note 19.

24. *See id.*

25. *See id.*

26. *See* NAT’L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., GET A HEADS UP ON CONCUSSIONS IN SPORTS POLICIES: INFORMATION FOR PARENTS, COACHES, AND SCHOOL & SPORTS PROFESSIONALS (2013) [hereinafter CDC, HEADS UP], <http://www.cdc.gov/headsup/pdfs/policy/headsuponconcussioninsportspolicies-a.pdf> [https://perma.cc/LTN7-BFAA]; *What Is a Concussion?*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/headsup/basics/concussion_what.html (last updated Jan. 31, 2017) [https://perma.cc/DN7S-N5PK].

27. *See* Scott D. Bender et al., *Historical Perspectives*, in *TRAUMATIC BRAIN INJURY IN SPORTS: AN INTERNATIONAL NEUROPSYCHOLOGICAL PERSPECTIVE* 3, 11 (Mark R. Lovell et al. eds., 2004).

28. *See* Ann C. McKee et al., *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy After Repetitive Head Injury*, 68 *J. NEUROPATHOLOGY & EXPERIMENTAL NEUROLOGY* 709, 709 (2009).

individuals who have suffered multiple TBIs.²⁹ CTE symptoms generally begin with memory loss, followed by progressive deterioration, often leading to dementia, Alzheimer's disease, or parkinsonism.³⁰

In light of CTE's severe consequences, it is especially important to recognize concussion symptoms among youth athletes, whose age and continuing neurological development render them more susceptible to concussions with longer recovery times.³¹ The brains of adolescent children are still undergoing neurological reorganization.³² For example, in adolescents, the frontal lobe—an area of the brain that is particularly vulnerable to the effects of concussions—is especially fragile because it develops in spurts.³³ Given that the frontal regions of the brain are responsible for decision making and information management,³⁴ early diagnosis in young athletes is incredibly valuable.

Yet identifying a sports-related concussion is one of the most difficult tasks for sports medicine professionals because there is no biological marker for an accurate diagnosis.³⁵ Symptoms of concussions generally include confusion, headache, lack of balance, dizziness, and disorientation.³⁶ These latent symptoms are often easier to overlook than more outwardly visible signs, such as nausea, vomiting, or sensitivity to noise or light.³⁷ This issue is exacerbated by the tendency of young athletes to underreport signs of concussions, so that, among other reasons, they can return to play more quickly.³⁸

The scope of this issue is extensive: the CDC estimates that between 1.6 and 3.8 million sports-related TBIs occur every year in the United States.³⁹

29. *See id.*

30. *See id.* at 710. Parkinsonism shares symptoms found in Parkinson's disease, but parkinsonism is a symptom complex and differs from Parkinson's disease, which is a specific neurodegenerative illness. Paul J. Tuite & Kimberly Krawczewski, *Parkinsonism: A Review-of-Systems Approach to Diagnosis*, 27 SEMINARS NEUROLOGY 113, 113–14 (2007). Parkinson's disease is just one of the many potential causes of parkinsonism. *Id.*

31. *See* Sergio R. Russo Buzzini & Kevin M. Guskiewicz, *Sport-Related Concussion in the Young Athlete*, 18 CURRENT OPINION PEDIATRICS 376, 377 (2006).

32. *See* Steven Reinberg, *Teens May Fare Worse After Concussion Than Children or Adults*, U.S. NEWS & WORLD REP. (Feb. 28, 2012), <http://health.usnews.com/health-news/news/articles/2012/02/28/teens-may-fare-worse-after-concussion-than-children-or-adults> [<https://perma.cc/2DFG-C23G>].

33. *See id.*

34. *See* Antoine Bechara et al., *Emotion, Decision Making and the Orbitofrontal Cortex*, 10 CEREBRAL CORTEX 295, 295 (2000).

35. *See* Michael McCrea et al., *Unreported Concussion in High School Football Players: Implications for Prevention*, 14 CLINICAL J. SPORT MED. 13, 13 (2004) (“The diagnosis of sports-related concussion is perhaps the most elusive challenge facing sports medicine clinicians.”); *see also* Harvey, *supra* note 14, at 75 (noting that best practices in the identification of TBIs now involve precompetition baseline measurements and computerized testing, provided by companies such as ImPACT); *infra* Part III.A.2.

36. *See* CARROLL & ROSNER, *supra* note 15, at 10–11.

37. *See id.* at 10 (“It’s hard to take seriously an invisible injury with subtle symptoms that often seem to pass quickly.”).

38. *See* McCrea et al., *supra* note 35, at 13–14.

39. Jean A. Langlois et al., *The Epidemiology and Impact of Traumatic Brain Injury: A Brief Overview*, 21 J. HEAD TRAUMA REHABILITATION 375, 375–76 (2006) (“Although a previous [CDC] study estimated that approximately 300,000 such injuries occur each year, it

This estimate is conservative due to the unknown number of concussions that are treated at home or simply go unrecognized.⁴⁰ Moreover, the potential impact on youth athletes is significant: among youth ages fifteen to twenty-four, sports are a leading cause of TBI, second only to motor vehicle accidents.⁴¹ This issue is aggravated by the risk of second impact syndrome and the rising popularity of youth sports. Once an athlete suffers one concussion, the risk of a second concussion increases three to six times.⁴² In addition, according to the National Federation of State High School Associations, nearly 7.9 million student athletes participated in high school sports in 2015 to 2016, a number which is on the rise for the twenty-seventh consecutive year.⁴³

B. History of State Legislation

Over the past decade, the public has gained a greater appreciation of the connection between sports and brain injuries as well as the general issues associated with such injuries.⁴⁴ This increased public awareness has led to state legislative reforms, the first of which was enacted in Washington State.⁴⁵ Washington's Lystedt Law, which most other states have emulated, contains three primary components.⁴⁶ First, it requires all public school districts to provide annual educational programs and materials that inform coaches, parents, and student athletes about the nature and risks of concussions.⁴⁷ Second, the law specifies that any athlete suspected of sustaining a concussion during sports activity must be immediately removed from play.⁴⁸ Third, any such athlete may not return to action until she has been evaluated by a licensed health-care provider who has been trained in the

included only TBIs for which the person reported a loss of consciousness. . . . [A] more accurate approximation may be that 1.6 million to 3.8 million sports-related TBIs occur each year, including those for which no medical care is sought. This estimate might still be low because many of these injuries go unrecognized and thus uncounted.”).

40. *Id.* at 375.

41. Luke M. Gessel et al., *Concussions Among United States High School and Collegiate Athletes*, 42 J. ATHLETIC TRAINING 495, 495 (2007).

42. Robert C. Cantu, *Posttraumatic Retrograde and Anterograde Amnesia: Pathophysiology and Implications in Grading and Safe Return to Play*, 36 J. ATHLETIC TRAINING 244, 246 (2001).

43. NAT'L FED'N OF STATE HIGH SCH. ASS'NS, NFHS HANDBOOK 2016–17, at 55 (2016), <http://www.nfhs.org/media/1017531/2016-17-nfhs-handbook.pdf> [<https://perma.cc/FJ6S-YZL2>].

44. *See, e.g.*, *State v. McKague*, 246 P.3d 558, 575 (Wash. Ct. App.) (Quinn-Brintnall, J., concurring in part and dissenting in part) (noting that public awareness of brain injuries has increased in recent years in part due to greater media coverage of such injuries and the increased use of product warning labels), *aff'd*, 262 P.3d 1225 (Wash. 2011).

45. *See* Alex Marvez, *Lystedt Lays Down Law on Concussions*, FOX SPORTS (May 20, 2012), <http://www.foxsports.com/nfl/story/zack-lystedt-bring-awareness-nfl-concussion-issue-lystedt-law-052012> [<https://perma.cc/8QZ3-W9K6>].

46. *See* Lee Green, *Legal Perspectives, Recommendations on State Concussion Laws*, NAT'L FED'N ST. HIGH SCH. ASSOCIATIONS (Nov. 21, 2014), <http://www.nfhs.org/articles/legal-perspectives-recommendations-on-state-concussion-laws> [<https://perma.cc/CL96-G3FZ>].

47. *See* WASH. REV. CODE § 28A.600.190(2) (2016).

48. *See id.* § 28A.600.190(3).

evaluation and management of concussions and has received written clearance from that provider.⁴⁹

Since the enactment of the Lystedt Law, all fifty states and the District of Columbia have enacted youth sports concussion legislation.⁵⁰ Both the National Football League (NFL) and National Collegiate Athletic Association have lobbied extensively for this legislation.⁵¹ On January 30, 2014, Mississippi Governor Phil Bryant signed into law the Mississippi Youth Concussion Act, making Mississippi the fiftieth state to pass youth sports concussion legislation.⁵² While the Mississippi Legislature clearly used the Lystedt Law as a guide, it deviated from the Washington model in that it requires neither annual education programs nor written medical clearance.⁵³

C. *The Current Benchmark: Washington's Lystedt Law*

Since the Lystedt Law was enacted, most state legislatures have emulated this statute in their own legislation.⁵⁴ Therefore, the disparities that exist across state statutes can be objectively measured by using Washington's Lystedt Law as a benchmark. To facilitate the comparison of various state concussion laws, this Note provides relevant language from the Washington statute below.

1. The Statute

Section 28A.600.190 of Washington's Revised Code is entitled, "Youth Sports—Concussion and Head Injury Guidelines—Injured Athlete Restrictions."⁵⁵ Section 28A.600.190(1)(c) defines the problem that the statute seeks to address: "some affected youth athletes are prematurely returned to play resulting in actual or potential physical injury or death to youth athletes in the state of Washington."⁵⁶ The statute then identifies three primary tools to confront this issue.

First, the statute establishes a guideline that this Note refers to as the "education tenet."⁵⁷ Section 28A.600.190(2) provides:

49. *See id.* § 28A.600.190(4).

50. *See* Green, *supra* note 46.

51. *See* NFL, *NCAA Lobby for Concussion Laws*, ESPN (Jan. 12, 2012), http://www.espn.com/nfl/story/_/id/7454729/nfl-ncaa-urge-states-pass-concussion-laws [<https://perma.cc/VT9L-NBUC>].

52. *See* Joe Frolo, *Mississippi Becomes 50th State to Pass Youth Sports Concussion Law*, USA FOOTBALL (Jan. 30, 2014), <http://web.usafootball.com/blogs/zackery-lystedt/post/8044/mississippi-becomes-50th-state-to-pass-youth-sports-concussion-law> [<https://perma.cc/9KW2-GXJY>].

53. *See* MISS. CODE ANN. § 37-24-5 (2017).

54. *See* Kerri McGowan Lowrey, *Summary Matrix of State Laws Addressing Concussions in Youth Sports*, NETWORK PUB. HEALTH L. (Mar. 31, 2016), http://www.networkforphl.org/_asset/7xwh09/Sports-Concussion-Table.pdf (summarizing the legislative steps taken by each state) [<https://perma.cc/DX68-SVP8>].

55. WASH. REV. CODE § 28A.600.190 (2016).

56. *Id.* § 28A.600.190(1)(c).

57. *See id.* § 28A.600.190(2).

Each school district's board of directors shall work in concert with the Washington interscholastic activities association to develop the guidelines and other pertinent information and forms to inform and educate coaches, youth athletes, and their parents and/or guardians of the nature and risk of concussion and head injury including continuing to play after concussion or head injury. On a yearly basis, a concussion and head injury information sheet shall be signed and returned by the youth athlete and the athlete's parent and/or guardian prior to the youth athlete's initiating practice or competition.⁵⁸

Second, the statute establishes a guideline that this Note labels as the "removal from play tenet."⁵⁹ Section 28A.600.190(3) provides: "A youth athlete who is suspected of sustaining a concussion or head injury in a practice or game shall be removed from competition at that time."⁶⁰

Third, the statute establishes a guideline that this Note refers to as the "medical clearance tenet."⁶¹ Section 28A.600.190(4) provides:

A youth athlete who has been removed from play may not return to play until the athlete is evaluated by a licensed health care provider trained in the evaluation and management of concussion and receives written clearance to return to play from that health care provider. The health care provider may be a volunteer. A volunteer who authorizes a youth athlete to return to play is not liable for civil damages resulting from any act or omission in the rendering of such care, other than acts or omissions constituting gross negligence or willful or wanton misconduct.⁶²

These three pillars have served as the foundation for most state youth concussion laws.⁶³ It is important to note, however, that while the Washington statute applies only to student athletes in public schools, other state statutes often extend application to both public and private recreational leagues.⁶⁴ The following subsection broadly canvases the scope of state legislation as a whole, in terms of the tenets that have been adopted and the extent to which other state statutes reach private leagues.

2. Lystedt as a Barometer

While the Lystedt Law emphasizes three primary tenets—educational programs, removal from play guidelines, and medical clearance before returning to play—not all state concussion laws address each of these issues, and, therefore, significant variations exist between the legal requirements set forth by each state.⁶⁵ According to a study conducted by the Network for

58. *Id.*

59. *See id.* § 28A.600.190(3).

60. *Id.*

61. *See id.* § 28A.600.190(4).

62. *Id.*

63. *See supra* note 46 and accompanying text.

64. *See* Douglas E. Abrams, *Concussion Safety in Children's Sports: A Central Role for the "Power of the Permit,"* 10 J. BUS. & TECH. L. 1, 5 (2015) (citing the Arkansas concussion statute as one that maximizes protection "by regulating both interscholastic play and private youth sports organizations").

65. *See* Lowrey, *supra* note 54.

Public Health Law, only thirty statutes mandate concussion education for coaches, and just twenty-one statutes extend the scope of the law's coverage beyond school athletics to nonschool-sponsored youth sports.⁶⁶ To be sure, each state has the authority to implement its own variations; this Note does not suggest otherwise. However, less protective states leave youth athletes more vulnerable to both the short- and long-term effects of TBI.⁶⁷

In assessing the relative strength of state laws, it is helpful to use Washington's Lystedt Law as a barometer, given that many laws now include all three Lystedt tenets in some variation.⁶⁸ In terms of the education tenet, forty-one states and the District of Columbia require that some form of TBI-education material be distributed to parents and student athletes.⁶⁹ Regarding removal from play, every jurisdiction now requires immediate removal from play following an actual or suspected concussion.⁷⁰ As to medical clearance, forty-six states and the District of Columbia have provisions requiring written clearance.⁷¹ However, the type of medical professional that is required to provide such clearance varies widely based on the state: some states require that a medical doctor provide the clearance, whereas other states rely on athletic trainers and nurses.⁷² Finally, even where there may be facial uniformity as to these three tenets, there often is tremendous variation across states in the application of these laws.⁷³ Part II addresses these discrepancies in more detail.

II. ADDRESSING THE ISSUE AT THE STATE AND FEDERAL LEVELS

While every American child is now protected to some degree, children in certain states, like Washington, have been afforded greater protections than children in other states, like Mississippi.⁷⁴ In addition, states have received limited guidance from Congress with regard to how best to protect youth athletes.⁷⁵

This part surveys state and, to a lesser extent, federal responses to the concussion epidemic. Part II.A assesses the different levels of protection that exist across state youth concussion laws. Next, Part II.B evaluates how these statutes are enforced both in terms of sanctions and tort liability. Part II.C

66. *See id.*

67. *See* Kimberly G. Harmon et al., *American Medical Society for Sports Medicine Position Statement: Concussion in Sport*, 23 *CLINICAL J. SPORTS MED.* 1, 11–12 (2013) (discussing the short- and long-term risks associated with premature return to play).

68. *See* Harvey, *supra* note 14, at 89.

69. *See* Lowrey, *supra* note 54.

70. *See id.*

71. *See id.*

72. *See id.*; *see also* Amanda Cook et al., *Where Do We Go from Here?: An Inside Look into the Development of Georgia's Youth Concussion Law*, 42 *J.L. MED. & ETHICS* 284, 287 (2014) (“[T]he question of who is allowed to evaluate, treat, and provide medical clearance is an area of big debate when it comes to concussion laws.”).

73. *See* Lowrey & Morain, *supra* note 18, at 291 (noting that, particularly in the case of youth sports concussion laws, “‘law on the streets’ may diverge from ‘law on the books’”).

74. *See* Green, *supra* note 46.

75. *See* Kevin Brandwein, *Goals and Obstacles in Legislating Concussion Management in Youth Sports*, 10 *WILLAMETTE SPORTS L.J.* 28, 53 (2013); *infra* Part II.C.

examines the congressional response and Congress's failure to provide a uniform national standard. Finally, Part II.D surveys the perspectives of three academic commentators in terms of how to best increase protection for youth athletes.

A. Comparing State Statutes: Leaders and Laggards

Using the Lystedt Law as a reference point, this Note sorts state statutes into five distinct tiers: "Laggards," "Loafers," "Lystedters," "Lystedters-Plus," and "Leaders." These tiers range from least to most protective, respectively, in terms of the strength of protections offered to youth athletes.⁷⁶ All state statutes match the Lystedt Law's second tenet of required removal from play.⁷⁷ However, beyond that, state laws include varying levels of protection and differ with regard to the strength of the medical clearance tenet, the education tenet, whether the training of coaches is encouraged or required, and whether the statute reaches private recreational athletics. Each of these differences results in varying levels of protections offered to youth athletes, which allows this Note to place each state statute into a distinct tier, as presented below.

1. A Tiered Approach

The Laggards tier includes Georgia,⁷⁸ Idaho,⁷⁹ Mississippi,⁸⁰ and Wyoming.⁸¹ These states offer the least protective youth concussion statutes.⁸² While these jurisdictions all require medical clearance of some sort before an athlete can return to play, they do not require written clearance.⁸³ This distinction may seem trivial, but written clearance by a licensed health-care professional offers an added layer of protection for youth athletes: it ensures that the considerations on which the return-to-play decisions are made are restricted to medical ones, as opposed to decisions motivated by a desire to win the game.⁸⁴ Moreover, requiring the documentation of medical clearance increases accountability among health-care professionals and reduces the risk of premature return to play, thereby decreasing the risk of TBI.⁸⁵

76. A summary of these tiers is provided below in the appendix.

77. See *supra* note 70 and accompanying text.

78. GA. CODE ANN. § 20-2-324.1 (2017).

79. IDAHO CODE § 33-1625 (2017).

80. MISS. CODE ANN. § 37-24-5 (2017).

81. WYO. STAT. ANN. §§ 21-2-202(a)(xxxiii), 21-3-110(a)(xxxii) (2017).

82. See Lowrey, *supra* note 54.

83. See *id.*

84. See Wilson, *supra* note 14, at 286 (noting that the requirement of written clearance aims to relieve coaches, athletic trainers, and parents of having to make the return-to-play decision).

85. See Elisabeth Koloup, Comment, *Get Your Head in the Game: Legislation Addressing Concussions in Youth Sports and Its Development in Maryland*, 42 U. BALT. L.F. 207, 223–24 (2012).

The Loafers tier includes Colorado,⁸⁶ Minnesota,⁸⁷ Missouri,⁸⁸ New Hampshire,⁸⁹ New York,⁹⁰ South Carolina,⁹¹ and Utah.⁹² These states provide greater protection than states in the Laggards tier, given that they require written medical clearance, but they fail to match the full protections offered by Washington's Lystedt Law, particularly concerning the education tenet.⁹³ For example, Missouri, New Hampshire, South Carolina, and Utah do not require coaches to undergo formal education or training in the recognition and management of concussions.⁹⁴ In addition, these four states do not require a student's acknowledgement of having received educational materials before the student's participation in school-sponsored athletics.⁹⁵ While Minnesota and New York both require the training of coaches and the development and publication or distribution of educational materials regarding TBI safety, these states do not require acknowledgment of receipt or informed consent from either parents or students before a youth athlete's participation.⁹⁶ Colorado offers even fewer protections than Minnesota and New York, given that its statute does not expressly require the development of educational materials.⁹⁷

The Lystedters tier includes thirteen states, plus the District of Columbia, which satisfy the three basic tenets of the Lystedt Law.⁹⁸ All of these states require education for both parents and student athletes, mandatory removal from play following a suspected concussion, and written medical clearance before returning to physical activity.⁹⁹ These states do not offer any innovation beyond the protections offered by the three tenets.

The Lystedters-Plus tier includes sixteen states that match the Lystedt Law's three basic tenets and require the training of coaches, as opposed to merely suggesting this.¹⁰⁰ For example, while the Lystedt Law requires

86. COLO. REV. STAT. § 25-43-103 (2017).

87. MINN. STAT. §§ 121A.37–38 (2017).

88. MO. REV. STAT. § 167.765 (2016).

89. N.H. REV. STAT. ANN. §§ 200:49–:52 (2017).

90. N.Y. EDUC. LAW § 305(42) (McKinney 2017).

91. S.C. CODE ANN. § 59-63-75 (2016).

92. UTAH CODE ANN. §§ 26-53-101 to -102, -201, -301, -401 (West 2016).

93. *See* Lowrey, *supra* note 54, at 3, 11–14, 18–19.

94. *See id.* at 12–13, 18–19.

95. *See id.*

96. *See id.* at 22 n.2.

97. *See id.* at 3.

98. ALASKA STAT. §§ 14.30.142–143 (2016); ARIZ. REV. STAT. ANN. § 15-341(24)(b) (2016); CAL. EDUC. CODE § 49475 (West 2016); D.C. CODE §§ 7-2871.01–.05 (2017); FLA. STAT. § 1006.20 (2017); IOWA CODE § 280.13C (2016); KAN. STAT. ANN. § 72-135 (2017); NEB. REV. STAT. §§ 71-9101 to -9106 (2016); NEV. REV. STAT. § 385B.080 (2016); N.C. GEN. STAT. § 115C-12.23 (2016); OKLA. STAT. tit. 70, § 24-155 (2017); VA. CODE ANN. § 22.1-271.5 (2017); WASH. REV. CODE § 28A.600.190 (2016); WIS. STAT. § 118.293 (2017).

99. *See* Lowrey, *supra* note 54, at 1–2, 5, 8, 12–15, 20–21.

100. CONN. GEN. STAT. §§ 10-149b to -149c (2017); DEL. CODE ANN. tit. 14, § 303 (2017); KY. REV. STAT. ANN. § 160.445 (West 2017); MASS. GEN. LAWS ch. 111, § 222 (2017); MONT. CODE ANN. §§ 20-7-1301 to -1304 (2017); N.J. STAT. ANN. §§ 18A:40-41.1 to -41.7 (West 2017); N.M. STAT. ANN. § 22-13-31 (2017); N.D. CENT. CODE § 15.1-18.2-04 (2017); 24 PA. CONS. STAT. §§ 5322–5323 (2016); 16 R.I. GEN. LAWS §§ 16-91-1 to -4 (2016); S.D. CODIFIED LAWS §§ 13-36-4 to -14 (2017); TEX. EDUC. CODE ANN. §§ 38.151–.160 (West 2015); VT.

coaches to receive an annual concussion and head injury information sheet, it does not require coaches to complete concussion-specific education or training.¹⁰¹ By contrast, Texas requires that each coach complete the state's "safety training program" developed by the commissioner of education.¹⁰² This safety training program requires coaches to receive training in emergency action planning and in the recognition of "head and neck injuries, concussions, [and] injuries related to second impact syndrome."¹⁰³ The nature of a concussion requires those charged with supervising players to recognize external symptoms.¹⁰⁴ This suggests that states that require holistic and inclusive training programs for coaches are more effective than those where the education tenet merely requires the distribution of an information sheet.

Finally, the Leaders tier includes Alabama,¹⁰⁵ Arkansas,¹⁰⁶ Illinois,¹⁰⁷ Indiana,¹⁰⁸ Louisiana,¹⁰⁹ Maryland,¹¹⁰ Michigan,¹¹¹ Ohio,¹¹² Oregon,¹¹³ and Tennessee.¹¹⁴ These states satisfy the Lystedt Law's three basic tenets, require training for coaches and add an extra layer of protection by extending to both public school athletics and private recreational sports.¹¹⁵ For example, Arkansas's law expressly applies to any organized athletic activity in which the participants, a majority of whom are under nineteen years of age, are engaged in an athletic game or competition "against another team, club, or entity," or in practice or preparation for such a game.¹¹⁶ By expanding the scope of the law's reach beyond public schools, states in the Leaders tier are able to protect more of their youth athletes.¹¹⁷

2. Strengths of State Legislation

Because of the grave effects of concussions on our youth, current state laws merely represent a starting point for youth concussion reforms.¹¹⁸

STAT. ANN. tit. 16, § 1431 (2016); W. VA. CODE § 18-2-25a (2016); *see also* 2012 Haw. Sess. Laws 197; 2012 Me. Laws 688.

101. *See* WASH. REV. CODE § 28A.600.190(2).

102. *See* TEX. EDUC. CODE ANN. § 33.202(a)-(b). The title of the statute, "Safety Training Required," makes clear that the training requirement for coaches is mandatory. *Id.*

103. *See id.* § 33.202(c)(2)(D).

104. *See supra* Part I.A.

105. ALA. CODE § 22-11E-2 (2017).

106. ARK. CODE ANN. §§ 6-18-708, -710 (2017).

107. 105 ILL. COMP. STAT. 5/22-80 (2016).

108. IND. CODE §§ 20-34-7-1 to -6 (2016).

109. LA. STAT. ANN. §§ 40:1089.1-5 (2016).

110. MD. CODE ANN., EDUC. § 7-433 (West 2017).

111. MICH. COMP. LAWS §§ 333.9155-9156 (2016).

112. OHIO REV. CODE ANN. § 3313.539 (West 2016).

113. OR. REV. STAT. §§ 336.485, 417.875 (2016).

114. TENN. CODE ANN. §§ 68-55-501 to -503 (2016).

115. *See* Lowrey, *supra* note 54, at 1-2, 7-10, 15-16, 19.

116. *See* ARK. CODE ANN. § 6-18-710(a)(1) (2017).

117. *See* Abrams, *supra* note 64, at 8 ("A concussion is a concussion, regardless of whether a boy or girl sustains it in interscholastic play or in a private youth league.").

118. *See* Howard Fendrich & Eddie Pells, *AP Analysis: Youth Concussion Laws Pushed by NFL Lack Bite*, AP (Jan. 28, 2015), <http://pro32.ap.org/article/ap-analysis-youth->

Therefore, to improve future legislation, it is vital to evaluate the strengths and weaknesses across the spectrum of state legislation. Washington's Lystedt Law and laws that emulate it have succeeded in requiring that any athlete suspected of having sustained a TBI must be immediately removed from action and cannot be returned to play until receiving clearance from a medical professional.¹¹⁹ While this may seem relatively modest, this mandate expressly removes the return-to-play decision from coaches, players, and parents—actors who may be driven primarily by a desire to win—and instead assigns the decision to a medical professional, whose interests are more likely to be aligned with the safety of the youth athlete.¹²⁰ This medical clearance mandate also reduces the risk of second impact syndrome.¹²¹ In addition, state laws have succeeded in increasing awareness among coaches, players, and parents through the use of informed consent and training requirements.¹²² While state statutes vary in terms of how informed consent is obtained and how educational trainings are conducted, there can be no doubt that these laws have made key decision makers more knowledgeable regarding the risks of TBI.¹²³

3. Weaknesses of State Legislation

While the Lystedt Law and its progeny have provided greater protections to student athletes, these laws have generally been marked by four primary shortcomings. First, many state concussion laws are vaguely worded, particularly regarding the informed consent and education requirements.¹²⁴ This has allowed some states, particularly those in the Laggards¹²⁵ and Loafers¹²⁶ tiers, to follow the letter of the law without achieving their

concussion-laws-pushed-nfl-lack-bite-0 [https://perma.cc/R82C-ZXU6]. In reference to the shortcomings of particular state statutes, NFL Senior Vice President of Health and Safety Policy Jeff Miller stated, "We did make compromises Better to get something good, and get something in place, as opposed to shoot for something fantastic in all places—and fail." *Id.*

119. See WASH. REV. CODE § 28A.600.190(3)–(4) (2016); Harvey, *supra* note 14, at 92–93.

120. See Brandwein, *supra* note 75, at 49 (noting that medical professionals are likely to err on the side of caution, given that these professionals are generally motivated by an "oath, respect for the risks inherent in a head injury, genuine concern for the student, or fear of a malpractice suit").

121. See *id.* at 53.

122. See Harvey, *supra* note 14, at 93.

123. See Brandwein, *supra* note 75, at 49 ("These types of rule changes demonstrate awareness surrounding head injuries, which have led to a reduction in the concussion risks associated with competition.").

124. See Lesley Lueke, Comment, *High School Athletes and Concussions*, 32 J. LEGAL MED. 483, 495 (2011).

125. See *supra* notes 78–81 and accompanying text.

126. For example, the laws in Minnesota and New York require that educational information or materials be developed, distributed, or made accessible, but these laws do not require acknowledgment of receipt or informed consent prior to a youth athlete's participation in sports. See *supra* note 96 and accompanying text. While such information might be posted on a school district's website, it does not necessarily mean that the information has actually been read by youth athletes.

statutes' intended purpose.¹²⁷ Second, many state statutes apply only to public school districts and organizations that utilize public school facilities.¹²⁸ As a result, children enrolled in private schools and children who play for private recreational teams, such as Pop Warner football teams¹²⁹ and travel soccer clubs, are often unprotected.¹³⁰ When states choose to protect only youth athletes in public schools, it signals that the state legislature is more concerned with the cost of enforcement than any justification grounded in health or safety.¹³¹ Third, state statutes have failed to provide strong enforcement mechanisms.¹³² Specifically, few states impose penalties on coaches or school districts that fail to comply with the statute.¹³³ Fourth, and perhaps most importantly, existing youth sports TBI laws focus primarily on reducing the secondary effects of concussions as opposed to attacking their primary causes, such as in-sport maneuvers.¹³⁴ While it is important to protect children after they have sustained TBIs, it is equally if not more important to prevent the TBI from occurring in the first instance. Each of these issues is exacerbated by the failure of almost all states to develop a system to track individual athletes and thereby evaluate the effectiveness of their laws.¹³⁵ A better understanding of these weaknesses, particularly in terms of quantifiable data,¹³⁶ would help state legislatures strengthen youth concussion legislation.

B. Enforcement of State Legislation

While there are significant variations across states in terms of the basic adopted tenets, there is also a wide gap in how these laws are enforced.¹³⁷ This is due, in part, to the fact that Washington's Lystedt Law is largely silent on the issue of enforcement.¹³⁸ In fact, the only language relevant to enforcement is a provision seeking to immunize volunteers from civil

127. See Lueke, *supra* note 124, at 495.

128. Compare ARIZ. REV. STAT. ANN. § 15-341(24)(b) (2016) (limiting coverage to organizations that utilize public school facilities), with ARK. CODE ANN. § 6-18-710(a) (2017) (extending statutory coverage to all youth athletic activities).

129. Pop Warner is a national nonprofit organization that provides youth football, cheerleading, and dance programs.

130. See Wilson, *supra* note 14, at 285.

131. But see Abrams, *supra* note 64, at 8–11 (noting that when legislatures extend protections to private youth organizations that use public facilities, the change is “unlikely to impose significant fiscal constraints”).

132. See Phoebe Anne Amberg, Comment, *Protecting Kids' Melons: Potential Liability and Enforcement Issues with Youth Concussion Laws*, 23 MARQ. SPORTS L. REV. 171, 183 (2012).

133. See *id.*; see also *infra* Part II.B.

134. See Wilson, *supra* note 14, at 248, 255; see also Harmon et al., *supra* note 67, at 2–3, 13 (differentiating between “primary” and “secondary” prevention).

135. See Harvey, *supra* note 14, at 104–05.

136. See *id.* at 97 (citing Rhode Island as a state that has introduced successful policy experimentation in the form of baseline testing before the beginning of every sports season, which will provide useful data metrics and clarify areas of scientific ambiguity).

137. See Lowrey & Morain, *supra* note 18, at 296 (noting that many states have established “little to no formal enforcement mechanisms to ensure compliance”).

138. See WASH. REV. CODE § 28A.600.190 (2016).

liability.¹³⁹ Thus, although most states have followed the Lystedt Law's three primary tenets, state enforcement mechanisms—an area where the Lystedt Law is restrained—have generally lacked uniformity. Today, when a youth athlete suffers a TBI, there are two primary modes of recourse against coaches and school districts held to be in violation of the statute: (1) express statutory sanctions, where applicable, and (2) tort liability.¹⁴⁰

1. Statutory Sanctions

In an effort to improve enforcement, some state legislatures have expressly imposed sanctions on coaches and school districts that fail to adhere to the statutory mandate.¹⁴¹ These provisions aim to limit any incentive that a coach may have to keep a youth athlete in the game after suffering a TBI.¹⁴² Currently, such sanctions exist in only a handful of states. In Connecticut, for instance, the State Board of Education may revoke a coaching permit from “any coach found to be in violation” of the statute.¹⁴³ In Massachusetts, a school that fails to comply with the statute, as determined by the Massachusetts Department of Public Health, “shall be subject to penalties as determined by the department.”¹⁴⁴

The Pennsylvania state statute provides the most specific statutory sanctions of any state. In Pennsylvania, the governing body of a school is required to suspend a coach for the remainder of the season if the coach fails to properly remove a student athlete from play.¹⁴⁵ Upon a second violation, the coach will be suspended for the remainder of the current season and for the following season.¹⁴⁶ And if a coach violates the statute a third time, she will receive a “permanent suspension from coaching any athletic activity.”¹⁴⁷ Given that these sanctions incentivize coaches to take added precautions when a youth athlete appears to suffer a TBI, it is unclear why the vast majority of states have failed to implement similar provisions.¹⁴⁸ The best explanation, perhaps, is that such a provision would overexpose coaches to punishment and lead to unwarranted lawsuits.¹⁴⁹ This hypothesis is supported by the fact that many states expressly immunize their coaches from liability.¹⁵⁰ For example, concussion legislation in Texas provides express

139. *See id.* § 28A.600.190(4) (“A volunteer who authorizes a youth athlete to return to play is not liable for civil damages resulting from any act or omission in the rendering of such care, other than acts or omissions constituting gross negligence or willful or wanton misconduct.”).

140. *See Harvey, supra* note 14, at 97–98.

141. *See, e.g.,* CONN. GEN. STAT. § 10-149b(f) (2017); 24 PA. CONS. STAT. § 5323(f) (2016).

142. *See Harvey, supra* note 14, at 97.

143. CONN. GEN. STAT. § 10-149b(f).

144. MASS. GEN. LAWS ch. 111, § 222(e) (2017).

145. 24 PA. CONS. STAT. § 5323(f)(1).

146. *Id.* § 5323(f)(2).

147. *Id.* § 5323(f)(3).

148. *See Harvey, supra* note 14, at 97.

149. *See Koloup, supra* note 85, at 224 (noting that such a provision, if enacted, could have a potentially “chilling effect on coaching”).

150. *See infra* Part II.B.2.b.

immunity to school district officials or employees, emergency responders, and members of the concussion oversight team.¹⁵¹ Given that relatively few states expressly impose penalties on coaches who fail to adhere to the letter of the law, many parents of injured youth athletes have turned to tort liability as a means of civil recourse.¹⁵²

2. The Unsettled Role of Tort Law

When a youth athlete who has suffered a TBI is prematurely permitted to return to play, parents of the injured player may bring a civil lawsuit against the player's coaches and the school district as the coaches' employer.¹⁵³ However, most state concussion statutes do not expressly provide a cause of action.¹⁵⁴ For example, Washington's Lystedt Law does not,¹⁵⁵ and Washington state courts have held that, in light of this silence, there is no implied cause of action.¹⁵⁶ Moreover, other state statutes expressly dictate that a cause of action is not provided.¹⁵⁷ As a result, when a parent initiates a suit against a coach or school district, it tends to be based on common law negligence.¹⁵⁸

a. Common Law Negligence

Return-to-play lawsuits, primarily premised on a tort claim of negligence, often allege that the coaches have failed to either properly identify or manage a concussion.¹⁵⁹ To prevail, a plaintiff must prove the basic elements of common law negligence: the defendant owed the plaintiff a duty of care, the defendant breached that duty of care and exposed the plaintiff to the risk of a substantial loss or damages, the breach was both the actual and proximate cause of the harm, and the plaintiff suffered a pecuniary loss or injury as a consequence.¹⁶⁰ In cases where a youth athlete has suffered a TBI, a breach of the duty of care may arise when a coach prematurely allows the athlete to return to play.¹⁶¹ In addition, plaintiffs often claim that school districts are vicariously liable for the negligence of a coach under their supervision.¹⁶² However, as discussed below, there are certain roadblocks that often obstruct common law negligence suits.

151. See TEX. EDUC. CODE ANN. § 38.159 (West 2015).

152. See Perry A. Zirkel, *Court Decisions Specific to Public School Responses to Student Concussions*, 35 PHYSICAL DISABILITIES, no. 1, 2016, at 3.

153. See Wilson, *supra* note 14, at 268.

154. See Dionne L. Koller, *Putting Public Law into "Private" Sport*, 43 PEPP. L. REV. 681, 718 (2016).

155. See *supra* notes 138–39 and accompanying text.

156. See *Swank v. Valley Christian Sch.*, 374 P.3d 245 (Wash. Ct. App. 2016) (holding that Washington's Lystedt Law does not create an implied cause of action).

157. See, e.g., WIS. STAT. § 118.293(6) (2017) ("This section does not create any liability for, or a cause of action against, any person.").

158. See Wilson, *supra* note 14, at 259–60.

159. See *id.*

160. See *id.* at 260.

161. See *id.*

162. See *id.* at 261.

b. Immunity Provisions

Under the doctrine of qualified immunity, a public school board, as a state agent, may be immunized from vicarious liability for the negligence of its employees.¹⁶³ In addition, coaches, as employees of a state agent, may also receive qualified immunity.¹⁶⁴ This immunity defense varies from state to state and depends on the provisions in the relevant concussion statute.¹⁶⁵ In fact, twenty-five jurisdictions have enacted youth sports legislation attempting to limit liability for school districts, coaches, volunteers, or health-care providers who might face lawsuits in the wake of a TBI-related event.¹⁶⁶ Like the Lystedt Law, many of these state statutes provide exemptions from liability, except in cases of gross negligence or willful or wanton misconduct.¹⁶⁷ A typical statute provides that, so long as a school employee or coach can prove that her conduct was made in good faith and in compliance with the law and “local school board policies relative to the management of concussions and head injuries,” she will receive immunity from liability.¹⁶⁸

c. Fourteenth Amendment Claims

Due to this varying pattern of immunity across states,¹⁶⁹ and because an immunity defense often blocks claims of common law negligence, the parents of injured youth athletes often assert claims under the Fourteenth Amendment’s Due Process Clause.¹⁷⁰ Specifically, these plaintiffs allege that public actors created a danger to the bodily integrity or physical safety of a student in their charge.¹⁷¹ This standard is frequently referred to as the “state-created danger theory.”¹⁷² To succeed on this claim against a coach, a plaintiff must show that the coach’s conduct was at least deliberately indifferent to the student’s safety such that it “shocks the conscience.”¹⁷³ To succeed on a claim against a school district, a plaintiff must show that a certain practice or custom, ratified by the school district, causally connects to the coach’s deliberately indifferent conduct.¹⁷⁴ In these types of return-to-

163. See Zirkel, *supra* note 152, at 3.

164. Qualified immunity “balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

165. See Koller, *supra* note 154, at 718.

166. See Harvey, *supra* note 14, at 97.

167. See, e.g., WIS. STAT. § 118.293 (2017) (“Any athletic coach, official involved in an athletic activity, or volunteer who fails to remove a person from a youth athletic activity . . . is immune from civil liability for any injury resulting from that omission unless it constitutes gross negligence or willful or wanton misconduct.”).

168. N.H. REV. STAT. ANN. § 200:51 (2017).

169. See *supra* note 165 and accompanying text.

170. See Zirkel, *supra* note 152, at 3.

171. See *id.*

172. See *id.* at 6–7.

173. See *id.* (noting that this standard “poses a rather steep slope to establish liability”).

174. See *id.* at 6.

play cases, court decisions across states have largely favored school district defendants; however, case law on this issue is unsettled.¹⁷⁵

d. Case Law Is Far from Crystallized

Given that return-to-play cases have only begun to emerge in recent years, it is still not entirely clear, even within a single state, when a civil lawsuit will result in liability, no liability, or a settlement agreement.¹⁷⁶ Pennsylvania—particularly its federal courts—has served as a forum for several return-to-play cases and provides an illuminating example of this uncertainty.¹⁷⁷

In *M.U. v. Downingtown High School East*,¹⁷⁸ the Eastern District of Pennsylvania found for the defendant-coach and defendant-school district where the parents of an injured high school soccer player brought claims against the coach and school district, alleging violations of both common law negligence and the Fourteenth Amendment's Due Process Clause.¹⁷⁹ The parents alleged that the coach negligently failed to remove their daughter from the game after she was struck on the head by another player.¹⁸⁰ The parents also alleged that the school district failed to implement proper policies regarding concussion evaluation and that this failure amounted to a violation of their daughter's constitutional rights.¹⁸¹ The court dismissed the negligence claims against the coach based on Pennsylvania's provision of governmental immunity.¹⁸² The negligence claim did not fit within any of the limited exceptions to the immunity provision.¹⁸³ Further, the court granted the defendant's motion to dismiss the Fourteenth Amendment due process claim, holding that the plaintiffs had failed to allege facts sufficient to show deliberate indifference by the coach.¹⁸⁴

The decision in *Mann v. Palmerton Area School District*,¹⁸⁵ in which the Middle District of Pennsylvania sided with the plaintiff-parents, presents a

175. *See id.* at 14.

176. *Compare* *M.U. v. Downingtown High Sch. E.*, 103 F. Supp. 3d 612, 634 (E.D. Pa. 2015) (granting the coach's motion to dismiss the Fourteenth Amendment due process claim and also granting the coach's motion to dismiss the common law negligence claim, where a youth athlete suffered a TBI), *with* *Mann v. Palmerton Area Sch. Dist.*, 33 F. Supp. 3d 530, 543 (M.D. Pa. 2014) (denying the district's motion to dismiss the Fourteenth Amendment due process claim, where a youth athlete suffered a TBI).

177. Pennsylvania is a popular forum for these types of cases due to its applicable immunity provisions, its emphasis on interscholastic athletics, and its relatively high rate of education litigation. Zirkel, *supra* note 152, at 6.

178. 103 F. Supp. 3d 612 (E.D. Pa. 2015).

179. *Id.* at 616–18.

180. *Id.* at 617. The parents further alleged that the coach ignored the advice of their daughter's teammate and the opposing coach, who both advised that the player should be removed from the game for medical evaluation. *Id.*

181. *Id.* at 616–17.

182. *Id.* at 630; *see supra* note 164 and accompanying text.

183. *See* Zirkel, *supra* note 152, at 5.

184. *See Downingtown*, 103 F. Supp. 3d at 624.

185. 33 F. Supp. 3d 530 (M.D. Pa. 2014).

different outcome.¹⁸⁶ In *Mann*, the parents of an injured high school football player brought a claim against the coaches and school district, alleging violations of the Fourteenth Amendment's Due Process Clause under the state-created danger theory.¹⁸⁷ The parents alleged that the coaches told their son to continue practicing after their son collided with a teammate, without first providing proper medical evaluation.¹⁸⁸ The parents claimed that the school district failed to implement proper policies regarding concussion evaluation and that this failure constituted a state-created danger.¹⁸⁹ Here, the court denied the defendant's motion to dismiss the Fourteenth Amendment claim.¹⁹⁰ In contrast with *Downingtown*, the court held that the plaintiffs successfully alleged facts that showed the coaches' deliberate indifference and that the school district failed to train coaches on proper safety protocol.¹⁹¹ In each case, at least one member of the coaching staff was aware of the hit suffered by the player but failed to remove the player from participation.¹⁹² Yet, with regard to the Fourteenth Amendment claims, the respective courts adopted different views.¹⁹³ This difference in outcomes is indicative of the inconsistencies that exist across jurisdictions in the enforcement of youth sports concussion legislation.¹⁹⁴

3. Enforcement Is a Major Area of Weakness

As discussed above, state youth concussion laws have established relatively few enforcement mechanisms to ensure compliance with the

186. *Id.* at 530.

187. *Id.* at 535. The parents argued that their claim against the coaches satisfied the four elements required to state a claim under § 1983 for a state-created danger that violated their child's Fourteenth Amendment due process rights. *Id.* at 537 (“(1) [T]he harm ultimately caused was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.” (quoting *Sanford v. Stiles*, 456 F.3d 298, 304–05 (3d Cir. 2006))). Consistent with these four elements, the parents alleged that the coaches (1) should have known that traumatic brain injuries were a common hazard of football; (2) told the player to continue practicing despite the fact that the player sustained substantial hits to the head in the open view of trainers and coaches; (3) shared such a relationship with the player; and (4) “personally observed [the player's] disoriented disposition yet acted in deliberate indifference to his health, safety and welfare by placing him back into practice.” *Id.* at 537–41.

188. *Id.* at 534.

189. *Id.* at 535.

190. *Id.* at 540.

191. *Id.* at 541–42.

192. *M.U. v. Downingtown High Sch. E.*, 103 F. Supp. 3d, 612, 617 (E.D. Pa. 2015); *Mann*, 33 F. Supp. 3d at 534.

193. See *supra* notes 184, 190 and accompanying text.

194. Compare *Croce v. W. Chester Area Sch. Dist.*, No. 13-6831, 2015 WL 1565834 (E.D. Pa. Apr. 8, 2015) (holding in favor of the defendant-school district), and *Ripple v. Marble Falls Indep. Sch. Dist.*, 99 F. Supp. 3d 662 (W.D. Tex. 2015) (holding in favor of the defendant-school district), with *Alt v. Shirey*, No. 11-468, 2012 WL 726593 (W.D. Pa. Mar. 1, 2012) (holding in favor of the plaintiff-parents with regard to the due process claim).

statutory mandate.¹⁹⁵ As a result, many of these state statutes lack sufficient teeth.¹⁹⁶ Because many statutes are silent concerning enforcement procedures, and some even include immunity provisions for coaches and health-care professionals, there is little accountability for failing to manage youth concussions as required.¹⁹⁷ This concern is not new. When Washington's Lystedt Law was enacted in 2009, one Washington senator voted against it citing concerns about who would be held liable for deciding whether to remove athletes from play.¹⁹⁸ One reason, perhaps, why state legislatures have failed to enact tighter enforcement mechanisms may be the longstanding notion of minimal government involvement in sports.¹⁹⁹ In addition, there remains a concern of overexposing coaches and health-care providers to liability; if enforcement measures are too harsh, they may deter adults from entering these important roles.²⁰⁰ However, to ensure adequate protections moving forward, many commentators believe that state legislatures should begin to strike a balance between protecting against unwarranted lawsuits while also establishing accountability for proper concussion management.²⁰¹

C. Federal Law Lags: Failed Attempts at Reform

As discussed in Parts II.A and II.B, the primary focus of this Note is state legislation and the disparity that exists across states in terms of the protections afforded to youth athletes. With that in mind, it is important to briefly address Congress's failed attempts at developing and implementing comprehensive youth concussion legislation. By understanding why certain federal bills have failed, state legislators can add to their evolving knowledge of concussion care and management.

Since the enactment of the Lystedt Law, the federal government has failed to enact each concussion bill that has come to the floor.²⁰² In 2010 alone, two federal bills were introduced but failed to pass.²⁰³ The first bill, the Concussion Treatment and Care Tools Act of 2010 (ConTACT), passed in

195. See *supra* note 137.

196. See Koller, *supra* note 154, at 718 (noting that existing concussion statutes have been described as "legally ineffective").

197. See Lueke, *supra* note 124, at 494–96.

198. See Anderson, *supra* note 4 (noting State Senator Bob Morton's concern that the proposed law did not adequately address consequences for those who disobeyed the rule).

199. See Koller, *supra* note 154, at 719.

200. See Kevin Grier & Tyler Cowen, *What Would the End of Football Look Like?*, GRANTLAND (Feb. 13, 2012), <http://grantland.com/features/cte-concussion-crisis-economic-look-end-football> ("If ex-players start winning judgments, . . . [c]oaches, team physicians, and referees would become increasingly nervous about their financial exposure in our litigious society.") [<https://perma.cc/27SU-DCPE>].

201. See, e.g., Koller, *supra* note 154, at 730–31; Lueke, *supra* note 124, at 499–500; Wilson, *supra* note 14, at 288–91.

202. See Koller, *supra* note 154, at 713–15 (noting that, as of 2016, federal legislation has been proposed but not yet enacted); Lueke, *supra* note 124, at 491.

203. See Lueke, *supra* note 124, at 491–92.

the House of Representatives but never reached the Senate floor.²⁰⁴ With the stated goal of establishing a national standard, ConTACT would have required computerized baseline and postinjury testing for school-aged children, an aspect that most state laws lack.²⁰⁵ This initiative would have been funded with federal grants.²⁰⁶

The second bill that similarly failed, the Protecting Student Athletes from Concussions Act of 2010 (PSACA I), would have required state agencies to issue regulations concerning concussion prevention and treatment.²⁰⁷ Under the act, these agencies would have received federal funding for enacting certain benchmark rules.²⁰⁸ PSACA I also would have included provisions requiring academic accommodations for students suffering from recent concussions.²⁰⁹ However, PSACA I never left committee, and when it was reintroduced in 2011 as PSACA II, it again failed to move beyond the committee stage.²¹⁰

In 2013, Congress made another attempt at national reform with the introduction of the Youth Sports Concussion Act of 2013.²¹¹ This act targeted the safety of sporting equipment by providing oversight of equipment manufacturers.²¹² More specifically, it authorized the Consumer Products Safety Commission to set standards for certain products, particularly sports-related protective equipment.²¹³ Violations of these standards were to be treated as unfair or deceptive practices under the Federal Trade Commission Act.²¹⁴ However, like its predecessors, the bill died in committee.²¹⁵ The act was reintroduced in February of 2016 but died at the end of the 114th Congress's term in January of 2017.²¹⁶

204. *H.R. 1347 (111th): Concussion Treatment and Care Tools Act of 2010*, GOVTRACK, <http://www.govtrack.us/congress/bills/111/hr1347> (last visited Apr. 14, 2017) [https://perma.cc/K96A-D9SK].

205. Concussion Treatment and Care Tools Act of 2010, H.R. 1347, 111th Cong. § 317U(b)(1)(C) (2010).

206. *See id.* § 317U(b)(2).

207. Protecting Student Athletes from Concussions Act of 2010, H.R. 6172, 111th Cong. § 3 (2010).

208. *See id.*

209. *See id.* § 3(1)(B).

210. *H.R. 469 (112th): Protecting Student Athletes from Concussions Act of 2011*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/hr469> (last visited Apr. 14, 2017) [https://perma.cc/AMV8-BGQV]; *H.R. 6172 (111th): Protecting Student Athletes from Concussions Act of 2010*, GOVTRACK, <http://www.govtrack.us/congress/bills/111/hr6172> (last visited Apr. 14, 2017) [https://perma.cc/6GU7-JKF7].

211. H.R. 2118, 113th Cong. (2013).

212. *See id.* § 3(a)(2).

213. *See id.*

214. *See id.* § 4(b)(1).

215. *H.R. 2118 (113th): Youth Sports Concussion Act of 2013*, GOVTRACK, <http://www.govtrack.us/congress/bills/113/hr2118> (last visited Apr. 14, 2017) [https://perma.cc/MQ7L-ZDC6].

216. *H.R. 4460 (114th): Youth Sports Concussion Act*, GOVTRACK, <http://www.govtrack.us/congress/bills/114/hr4460> (last visited Apr. 14, 2017) [https://perma.cc/SFX9-TBQS].

D. Academic Perspectives

Given that the Lystedt Law was not enacted until 2009 and federal concussion legislation is still in its infancy, youth sports concussion law represents an emerging area of law. Moreover, because this issue involves the health and safety of children, this area has attracted an increasing amount of attention from both lawmakers and academic commentators.²¹⁷ The previous sections of Part II examined the legislative response to the concussion epidemic. Part II.D assesses the issue from an academic perspective. In particular, Part II.D surveys the perspectives of three leading commentators: Marie-France Wilson, Hosea H. Harvey, and Kerri McGowan Lowrey. It is important to differentiate between primary risks, the root *causes* of TBI, and secondary risks, the *effects* after TBI.²¹⁸ This is a distinction that Wilson, Harvey, and Lowrey each emphasize in their analyses of existing youth concussion legislation.

Marie-France Wilson contends that while state youth concussion legislation is a positive development, it is not a complete answer to the problem, because, at best, such measures can only reduce, not eliminate, sports-related TBIs.²¹⁹ In response to the ongoing issue, Wilson encourages a “trickle-down effect,” where policies adopted at professional levels influence those intended to protect young athletes.²²⁰ For example, Wilson points to rule changes—specifically rules regarding body checking in ice hockey—as preventative measures that can potentially reduce the incidence of concussions.²²¹ In 2010, in response to growing concerns about TBIs, the National Hockey League (NHL) implemented new rules that prohibited hits to the head.²²² Subsequently, due to growing concerns on the part of the NHL and new scientific studies that pointed to the dangers of body checking at a young age, the Canadian Academy of Sports Medicine and the American Academy of Pediatrics recommended limits on body checking at the youth level.²²³ Therefore, changes in behavior and attitudes toward concussions at the youth level may be fostered by similar changes at the professional level.²²⁴

While Wilson focuses mainly on the primary prevention of TBIs through rule changes and subsequent behavioral changes, she also recommends certain secondary measures aimed at protecting youth athletes after they have suffered a concussion.²²⁵ In light of the “patch-work quilt” of reforms that

217. See, e.g., Wilson, *supra* note 14, at 248 (“There is an increased public awareness respecting the threat posed by sports-related concussions, particularly in young athletes. The resulting concern of the general public and, perhaps more important, of parents has put increasing pressure on governments, sport organizations, and their governing bodies to take preventative steps . . .”).

218. See *supra* note 134 and accompanying text.

219. Wilson, *supra* note 14, at 242.

220. *Id.* at 243.

221. *Id.* at 250–51.

222. *Id.* at 252.

223. *Id.*

224. *Id.* at 253–55.

225. *Id.* at 256–60, 283–87.

have been set forth across state lines, Wilson calls for a uniform set of guidelines—proposed by a panel of medical experts—mandated by federal and state legislation.²²⁶ The absence of such guidelines, to date, is representative of the failure of legislatures and national sports governing bodies to adequately address the threats posed by sports-related TBIs.²²⁷ Moving forward, a uniform set of guidelines would raise the standard of care provided to youth athletes,²²⁸ help medical professionals avoid liability,²²⁹ and heighten awareness concerning the risk of youth concussions.²³⁰ In turn, professional sports leagues should endorse these uniform guidelines to encourage their adoption.²³¹

Like Wilson, Hosea H. Harvey also distinguishes between primary and secondary risks. Harvey argues that existing youth concussion legislation has been shaped by a dominant interest group with questionable motives, the NFL; thus, existing youth TBI laws overemphasize prevention of secondary rather than primary prevention.²³² As a result, Harvey believes that current state laws will likely fail to significantly reduce the overall rate of TBIs in youth sports.²³³ According to Harvey, alternative policy and public health measures may offer more meaningful solutions.²³⁴ Specifically, Harvey calls for direct interventions in particular sports—including equipment improvements and rule changes—and emphasizes the importance of policies created by professional and independent associations.²³⁵ Despite his criticism of the NFL, Harvey points to specific rule changes implemented by the league in 2011 and 2013 that were specifically intended to reduce TBIs.²³⁶ Pop Warner subsequently crafted new policies to limit contact during football practices and increase concussion awareness among participants.²³⁷ According to Harvey, state legislatures should not ignore the policies created by independent associations like Pop Warner.²³⁸

226. *Id.* at 257, 291; *see also* Taylor Adams, Comment, *The Repercussions of Concussions in Youth Football Leagues: An Analysis of Texas's Concussion Law and Why Reform Is Necessary*, 18 SCHOLAR 285, 291 (2016) (“[A] uniform standard applicable to every child would ensure all youth athletes receive the same protection under the law.”).

227. Wilson, *supra* note 14, at 257.

228. *Id.* at 275.

229. *Id.* at 280.

230. *Id.* at 268.

231. *Id.* at 290.

232. Harvey, *supra* note 14, at 71, 89–90.

233. *Id.* at 104–05.

234. *Id.*

235. *Id.* at 111–12.

236. *Id.* at 108, 111. In 2011, the NFL began requiring that a certified athletic trainer be present at every game to more effectively monitor the incidence of concussions. *Memo Explains Policy to Have Trainers Monitor for Concussions*, NFL (July 26, 2012, 8:52 PM), <http://www.nfl.com/news/story/09000d5d82547e65/article/memo-explains-policy-to-have-trainersmonitor-for-concussions> [<https://perma.cc/TU8Q-9BXX>]. Further, in 2013, the league began penalizing players who engaged in tackling by leading with the crowns of their helmets. Harvey, *supra* note 14, at 108 n.166.

237. Harvey, *supra* note 14, at 111–12.

238. *Id.* at 112; *see also* Josh Hunsucker, Comment, *Buckle Your Chinstrap: Why Youth, High School, and College Football Should Adopt the NFL's Concussion Management Policies*

In addition to implementing primary prevention measures, Harvey also calls for improved procedures to reduce the secondary risks of TBI. Here, Harvey encourages states to implement measures to allow them to better evaluate the effectiveness of their laws: baseline testing, mandatory tracking of individual students, and aggregate reporting of data.²³⁹ Harvey acknowledges that, absent partnerships with the CDC and universities, the financial burden of these reforms is daunting for increasingly cost-conscious states.²⁴⁰ Thus, Harvey suggests two alternative measures. First, states should adopt anonymous reporting systems so that parents, athletes, and other officials can blow the whistle when TBI-prevention mandates are not being followed.²⁴¹ Second, and perhaps most crucially, states must break free from the NFL's regulatory capture and engage in independent legislative debates.²⁴²

Like Harvey, Kerri McGowan Lowrey asserts that state legislatures should continue to expand the protections offered to youth athletes by strengthening existing legislation. Lowrey emphasizes that many states have revised their laws since initial passage and that these amendments are leading indicators of future policymaking.²⁴³ Lowrey argues that as policymaking continues the trend of increasing protections, state legislatures should take aim at improving both primary and secondary prevention.²⁴⁴ Changes to existing laws have focused on expanding coverage to private recreational sports and tightening existing requirements according to best practices.²⁴⁵ Moving forward, states that have not already undertaken these measures will likely expand the reach of their laws to include recreational youth sports and school-based athletics in middle and elementary schools.²⁴⁶ In addition, as state legislatures learn lessons from implementation and new research developments, many states will likely strengthen the specific protections within their existing statutes.²⁴⁷

While these measures will help reduce the secondary risks of TBI, Lowrey argues that "perhaps the most promising development is the emphasis on primary prevention" through safer rules of play, mandated limits on physical

and Procedures, 45 MCGEORGE L. REV. 801, 832 (2014) (noting that high schools should follow the example set by Pop Warner of limiting contact at the lower levels of youth football).

239. Harvey, *supra* note 14, at 105–07.

240. *Id.* at 105–06.

241. *Id.* at 110; *see also* Andrew B. Carrabis, *Head Hunters: The Rise of Neurological Concussions in American Football and Its Legal Implications*, 2 HARV. J. SPORTS & ENT. L. 371, 386 (2011) (“[T]here needs to be a policy which allows a whistleblower to report anonymously when staff or doctors pressure players to play and violate policy.”).

242. *See* Harvey, *supra* note 14, at 113.

243. Kerri M. Lowrey, *State Laws Addressing Youth Sports-Related Traumatic Brain Injury and the Future of Concussion Law and Policy*, 10 J. BUS. & TECH. L. 61, 66–67 (2015).

244. *Id.* at 67–68.

245. *Id.* at 66.

246. *Id.*; *see also* Christine M. Baugh et al., *Requiring Athletes to Acknowledge Receipt of Concussion-Related Information and Responsibility to Report Symptoms: A Study of the Prevalence, Variation, and Possible Improvements*, 42 J.L. MED. & ETHICS 297, 299, 303–04 (2014) (discussing which state laws apply to elementary school children and which state laws apply to nonschool sports leagues).

247. Lowrey, *supra* note 243, at 67.

contact, and further regulating sporting equipment.²⁴⁸ For instance, Massachusetts law prohibits coaches from encouraging or allowing a youth athlete to engage in unreasonably dangerous techniques, such as helmet-to-helmet hits in football.²⁴⁹ In addition, the California State Legislature has limited full-contact football practices to twice per week and has stipulated that the full-contact portion of a practice cannot exceed ninety minutes in a given day.²⁵⁰ Finally, Texas laws now establish age and reconditioning standards for helmets in school football programs.²⁵¹ With respect to these primary prevention initiatives, Lowrey encourages other states to follow suit.²⁵²

III. FUTURE POLICYMAKING: CONFRONTING TRAUMATIC BRAIN INJURY BOTH BEFORE AND AFTER IMPACT

As Part II discussed, existing youth sports concussion legislation tends to focus on reducing the secondary effects of concussions after the injury has already occurred rather than addressing the primary risks, the root causes of the injury.²⁵³ This has occurred, in part, due to lobbying and regulatory capture by the NFL.²⁵⁴ To adequately protect youth athletes, legislation must target both risks. Primary prevention of at least some injuries is possible via the modification of existing rules of play and subsequent changes in attitudes and behaviors.²⁵⁵ Improved secondary prevention, on the other hand, is attainable through enhanced TBI assessment and management.²⁵⁶

This part argues that state legislatures have provided a useful framework to begin addressing the concussion epidemic, but the existing framework does not represent the end goal. Part III.A asserts that to enhance protections for all children, legislation in all states requires increased policy innovation, stronger enforcement mechanisms, and more evaluative metrics at the state level. Next, Part III.B concludes that beyond just addressing the *ex post* effects of TBI, additional legislative mandates are required to address the problem *ex ante*: future efforts should place greater emphasis on preventing the initial injury. Based on these recommendations, Part III.C suggests provisions to be included in a new model statute. Finally, Part III.D briefly notes that the adoption of a new model statute will require incentivizing state legislatures to act.

248. *Id.*

249. *Id.* at 67–68 (citing MASS. GEN. LAWS ch. 111, § 222 (2014)).

250. *Id.* at 68 (citing CAL. EDUC. CODE § 49475 (West 2014)).

251. *Id.* (citing TEX. EDUC. CODE ANN. § 33.094 (West 2012)).

252. *Id.* at 71–72.

253. *See supra* note 134 and accompanying text.

254. *See supra* note 232 and accompanying text.

255. *See supra* notes 224, 234–36 and accompanying text.

256. *See* Harmon et al., *supra* note 67, at 2–3.

*A. Addressing Secondary Risks:
Confronting the Issue After Impact*

The Lystedt Law defined the problem of youth concussions in a very narrow manner. The statute emphasized return-to-play guidelines only after a concussion occurs.²⁵⁷ As a result, the basic tenets of the law underscored the importance of secondary prevention measures but remained silent on the issue of primary prevention.²⁵⁸ Moving forward, state legislatures must begin to address these primary risks. However, it is also important that state laws continue to expand the scope of secondary measures.²⁵⁹ More specifically, future lawmaking should broaden the scope of coverage to include all youth athletes, strengthen enforcement mechanisms, and enact feedback procedures for states to assess the effectiveness of their statutes.

1. Expanding Coverage and Strengthening Enforcement

By merely emulating the Lystedt Law, many state legislatures have failed to innovate in the protections they provide to youth athletes.²⁶⁰ However, in the post-Lystedt Law era of reform, all youth athletes should be protected, not just those in public high schools.²⁶¹ States should explicitly expand the reach of their laws to cover recreational (nonschool-based) youth sports and athletics in both middle and elementary schools.²⁶² Some states have already begun to expand their coverage. For example, California has expanded coverage to charter and private schools,²⁶³ Indiana and Virginia to sports organizations using school property,²⁶⁴ and Arkansas to all recreational youth sports.²⁶⁵ Other states should continue to follow this trend.

In addition to expanding coverage, states must begin to strengthen enforcement mechanisms.²⁶⁶ Even the most well-written statute is meaningless if it is not enforced.²⁶⁷ In this sense, state statutes should specify sanctions that will be imposed for school districts and coaches that fail to comply with state laws.²⁶⁸ Cost-efficient yet effective sanctions could include forfeiture of games, reduction of practice time, or suspension of programs.²⁶⁹ In addition, an extra layer of enforcement should be added in the form of anonymous reporting systems, modeled after whistleblower provisions in other laws.²⁷⁰ This provision would allow parents, athletes, and

257. *See supra* Part I.C.1.

258. *See supra* Part I.C.1.

259. *See supra* Part II.A.2.

260. *See supra* Part II.A.3.

261. *See supra* notes 128–30 and accompanying text.

262. *See supra* note 246 and accompanying text.

263. CAL. EDUC. CODE § 49475 (West 2016).

264. IND. CODE § 20-34-7-1.5 (2016); VA. CODE ANN. § 22.1-271.5 (2017).

265. ARK. CODE ANN. § 6-18-710 (2017).

266. *See supra* Part II.B.

267. *See supra* note 132 and accompanying text.

268. *See supra* Part II.B.1.

269. *See, e.g.*, Wilson, *supra* note 14, at 288.

270. *See, e.g.*, 15 U.S.C. § 78u-6 (2012); 18 U.S.C. § 1514A. Each provision—the former appearing in the Dodd-Frank Wall Street Reform and Consumer Protection Act and the latter

other interested parties to share information when coaches or health-care providers do not adhere to the state's TBI-prevention mandate.²⁷¹

2. Reporting and Feedback Procedures

Once state legislatures expand their laws to give them teeth through enforcement mechanisms, it is essential that states have tools in place to evaluate the laws' effectiveness.²⁷² To determine whether the law is actually effective, states must track the concussion history of individual athletes and analyze this data;²⁷³ this type of analysis is imperative in any broad public health initiative. The Vermont General Assembly has provided a model by requiring the Vermont Traumatic Brain Injury Advisory Board to obtain information necessary to create an annual report on the incidences of concussions sustained by student athletes in Vermont in the previous school year.²⁷⁴ Yet most other states have not taken this initiative, likely due to the high costs associated with implementing such a procedure.²⁷⁵ Assuming that cost is a barrier for many states,²⁷⁶ the CDC, which has begun to implement similar tracking measures at the national level,²⁷⁷ should be tasked with developing and implementing a national surveillance system. According to the CDC, improved tracking can help establish more precise methods for TBI diagnosis, improve outcome assessment, and compare the effectiveness and costs of tests, treatments, and services.²⁷⁸

States should also develop procedures that require all youth athletes to undergo baseline testing before the start of a new season.²⁷⁹ The individual baseline produced by such testing would be used during the season to determine whether a player's cognitive functioning deviates from the preseason norm.²⁸⁰ Thus, youth athletes would not be permitted to return to play until their cognitive functioning returns to their preseason baseline; if used properly, the risk of second impact syndrome would be greatly reduced.²⁸¹

The obvious drawback of baseline testing is its cost.²⁸² The Federal ConTACT Act,²⁸³ if it had passed, would have required computerized testing, similar to ImPACT testing,²⁸⁴ for school-aged children, which would have

appearing in the Sarbanes-Oxley Act of 2002—grants certain protections and incentives to whistleblowers within the financial sector.

271. See *supra* note 241 and accompanying text.

272. See *supra* note 239 and accompanying text.

273. See Harvey, *supra* note 14, at 105–06.

274. 2013 Vt. Acts & Resolves 68.

275. See *supra* note 240 and accompanying text.

276. See Lueke, *supra* note 124, at 497–98.

277. See CDC, 2015 REPORT, *supra* note 21, at 29.

278. See *id.*

279. See Brandwein, *supra* note 75, at 47.

280. See *id.*

281. See *id.* at 54.

282. See *id.* at 44.

283. See *supra* notes 204–06 and accompanying text.

284. Some schools have begun to use a system of baseline testing called ImPACT. See Lueke, *supra* note 124, at 488. ImPACT is a computerized system which provides a twenty-

been funded with federal grants.²⁸⁵ In light of this bill's failure, wealthier schools have begun to fund baseline initiatives;²⁸⁶ however, in many other school districts, especially those in rural areas where funding is severely limited, there are no such initiatives.²⁸⁷ This is where Congress and state legislatures should step in. The federal government, particularly executive agencies like Health and Human Services or the Department of Education, should demand increased funding to ensure the safety of youth athletes,²⁸⁸ a relatively nonpartisan issue. In addition, state legislators can pursue alternative sources of capital, such as partnerships with universities and corporate donors.²⁸⁹ New Jersey, for example, has developed a particularly innovative statutory solution.²⁹⁰ The statute applies a small surcharge (fifty cents) to car registration fees, which is used to pay for the baseline testing of high school athletes.²⁹¹ Overall, while the cost of baseline testing is certainly a concern, it is outweighed when viewed in comparison to the lifelong injuries that the testing is designed to prevent.²⁹²

Finally, state legislatures should more clearly define when tort liability is an available remedy because silence on this issue creates confusion among courts, parents, and coaches.²⁹³ Such confusion is problematic because it has potentially devastating consequences for youth athletes.²⁹⁴ States should be left to choose the level of protection offered to various actors. While some may choose a more liberal approach in allowing negligence claims, others may decline to allow suit absent willful misconduct or gross negligence.²⁹⁵ At a minimum, state legislatures should expressly address this issue.²⁹⁶ Moreover, the issue of liability also arises when teams compete against other teams in a different state.²⁹⁷ In this scenario, to prevent confusion, Congress should provide a straightforward solution: teams should be required to abide by the laws of their home state without regard to the state in which the teams are competing.²⁹⁸

minute test to measure an athlete's verbal and visual memory, reaction time, and processing speed. *Id.* It can be used throughout the season to conduct subsequent tests that are then compared to the injured athlete's baseline data. *Id.*

285. *See supra* note 206 and accompanying text.

286. *See* Brandwein, *supra* note 75, at 53–55.

287. *See* Lueke, *supra* note 124, at 498.

288. *See* Brandwein, *supra* note 75, at 30.

289. *See* Harvey, *supra* note 14, at 107.

290. N.J. STAT. ANN. § 18A:40-41.7 (West 2017).

291. *Id.* § 39:3-8.2(1)(b).

292. *See* Lueke, *supra* note 124, at 489–90.

293. *See supra* notes 155–56 and accompanying text.

294. *See supra* Part II.B.2–3.

295. *See* Lueke, *supra* note 124, at 501.

296. *See id.*

297. *See id.* at 500.

298. *See id.*

*B. Addressing Primary Risks:
Confronting the Issue Before Impact*

The most important goal that legislators should address is the prevention of initial injury. For example, legislative mandates about how certain sports must be played would almost certainly drive down concussion rates.²⁹⁹ To date, legislators have largely avoided this form of intervention due, in part, to lobbying by the NFL and the potential public backlash that might accompany an alteration of a sport's core nature.³⁰⁰ Moreover, certain obstacles have continued to obstruct comprehensive reform. First, there is a longstanding culture within sports that promotes playing through injury.³⁰¹ Second, there is a widely held view that the traditional rules of sports are essential and must remain unchanged.³⁰² Third, there is an enduring belief that governments should maintain a "hands-off" approach to regulating sports.³⁰³ Through the enactment of laws in all fifty states and the District of Columbia, states have begun to overcome this third hurdle, particularly with regard to youth sports.³⁰⁴ Yet the first two hurdles remain. As a result, future laws should emphasize specific rule changes and aim to change existing attitudes and behaviors.

1. Rule Changes

While professional sports leagues have begun penalizing certain head-impacting maneuvers,³⁰⁵ there are still other interventions that would likely reduce the risks of TBI.³⁰⁶ For instance, certain rule changes based on epidemiologic data "have reduced concussion and neck injury in some sports:

299. See CDC, HEADS UP, *supra* note 26.

300. See *supra* notes 134, 232 and accompanying text.

301. See Koller, *supra* note 154, at 723.

302. See *id.* at 729–30.

303. See *id.* at 687–88.

304. See *id.* at 738–39 (noting that "schools should receive the least insulation from government involvement").

305. In 2010, the NFL implemented two new rules: First, any player who launches himself off the ground and uses his helmet to strike a player in a defenseless posture in the head or neck will be penalized. Second, when a player loses his helmet during the course of a play, the play will be immediately whistled dead. *New NFL Rules Designed to Limit Head Injuries*, NFL (July 26, 2012, 8:52 PM), <http://www.nfl.com/news/story/09000d5d81990bdf/article/new-nfl-rules-designed-to-limit-head-injuries> [https://perma.cc/S9Y6-A74R]. The following year, the NFL implemented further measures, including changes that have reduced the number of kickoff returns, because athletes involved in these plays have a four times greater risk of sustaining concussions than athletes involved in a running or passing play. See Harmon et al., *supra* note 67, at 5; Jarrett Bell, *New NFL Kickoff Rule Could Be Game-Changer*, USA TODAY (Sept. 8, 2011, 9:40 PM), http://usatoday30.usatoday.com/SPORTS/usaedition/2011-09-09-Cover-NFL-kickoff-rule_CV_U.htm [https://perma.cc/3PFV-945U]. Similarly, in 2011, the NHL introduced a new rule that aimed to curtail blows to the head. See Jeff Z. Klein, *With Stricter Rule on Hits to the Head, Some N.H.L. Stars Are Split on a Full Ban*, N.Y. TIMES (Sept. 19, 2011), <http://www.nytimes.com/2011/09/20/sports/hockey/nhls-top-stars-weigh-in-on-hits-to-the-head.html> [https://perma.cc/8GGJ-UA5X]. The new rule gave referees wider discretion to call penalties for hits to the head—regardless of the direction from which the hit was delivered—and afforded the league greater authority to mete out stiffer suspensions for egregious violations. *Id.*

306. See *supra* Part II.D.

1) banning ‘spear tackling’ in American football, 2) enforcing no ‘checking from behind’ in ice hockey, and 3) limiting ‘elbow to head’ contact in soccer.”³⁰⁷ However, it remains an “unfortunate fact” that rule changes at the amateur sports level often follow changes first made at the professional level.³⁰⁸ Moreover, it has been easier for lawmakers to focus on secondary interventions where the “core nature” of sports themselves is not directly threatened.³⁰⁹

Moving forward, state legislatures should not wait for professional sports leagues to act; rather, they should directly intervene in particular youth sports, including football, ice hockey, and soccer.³¹⁰ This type of legislation would not require legislatures to reinvent the wheel, as many rule changes have already been proposed by national sports governing bodies.³¹¹ Specifically, state legislatures should adopt the rule changes set forth by USA Football, USA Hockey, and U.S. Soccer—where they have not been adopted already—so that they gain the force of law.³¹² In addition, state legislatures should place limits on full-contact practices, both in terms of the techniques utilized and permissible time limits.³¹³ For instance, state legislatures can follow California’s lead by limiting full-contact practices and placing time restrictions on the full-contact portion of daily practice.³¹⁴ Here too, state legislatures can rely on other governing bodies as a guide. In 2012, Pop Warner created standards to limit contact during football practices.³¹⁵ Furthermore, in 2016, Ivy League football coaches decided to eliminate all full-contact hitting practices during the regular season.³¹⁶ While further studies are needed to evaluate the effects of reducing physical contact at

307. Harmon et al., *supra* note 67, at 13 (footnote omitted).

308. See Wilson, *supra* note 14, at 251 (“Unfortunate in the sense that the rules governing the conduct of sports at the professional level are not necessarily an appropriate model for the rules that should govern sports at the amateur level, particularly where young athletes are the participants.”).

309. Harvey, *supra* note 14, at 110.

310. See *id.* at 107.

311. In 2015, U.S. Soccer placed a ban on heading the ball for players ten years of age and under. *U.S. Soccer Provides Additional Information About Upcoming Player Safety Campaign*, U.S. SOCCER (Nov. 9, 2015), <http://www.ussoccer.com/stories/2015/11/09/22/57/151109-ussoccer-provides-additional-information-about-upcoming-player-safety-campaign> [<https://perma.cc/T9HC-7Q49>]. In 2011, USA Hockey banned body checking for players twelve years of age and under. See Lindsey Barton Straus, *Body Checking Banned at Pee Wee Level*, MOMSTEAM (Mar. 5, 2013), <http://www.momsteam.com/usa-hockey/usa-hockey-consider-ban-body-checking-at-pee-wee-level> [<https://perma.cc/K64B-QHPH>].

312. See, e.g., MASS. GEN. LAWS ch. 111, § 222(d) (2017) (prohibiting coaches, trainers, and others from encouraging or permitting a student to engage in any “unreasonably dangerous athletic technique that unnecessarily endangers the health of a student, including using a helmet or any other sports equipment as a weapon” such as a helmet-to-helmet hit).

313. See CDC, HEADS UP, *supra* note 26.

314. See Lowrey, *supra* note 243, at 68.

315. See *supra* note 237 and accompanying text. These regulations limit contact drills to one-third of practice time and ban full head-on blocking and tackling drills in which players line up more than three yards apart. *Limited Contact in Practice*, POP WARNER (June 13, 2012), http://www.popwarner.com/safety/practice_contact.htm [<https://perma.cc/6H2N-7GB8>].

316. See Ken Belson, *Ivy League Moves to Eliminate Tackling at Football Practices*, N.Y. TIMES (Mar. 1, 2016), <http://www.nytimes.com/2016/03/02/sports/ncaafootball/ivy-league-moves-to-eliminate-tackling-at-practices.html> [<https://perma.cc/29QG-V74Q>].

practice,³¹⁷ one study has already suggested that such rules have succeeded in reducing concussion rates among youth athletes.³¹⁸

2. Changes in Attitudes and Behaviors

While state legislatures have the power to propose and enact legislation relatively quickly, changing societal attitudes and behaviors is a more gradual process.³¹⁹ President Barack Obama addressed this issue: “[W]e need more athletes to understand how important it is to do what we can to prevent injuries and to admit them when they do happen. We have to change a culture that says you suck it up.”³²⁰ Much of this change should be driven by state legislation, which aims to educate coaches and youth athletes on the dangers of TBI.³²¹ However, professional sports leagues can also fuel this cultural shift.³²² If professional leagues and athletes become more proactive and candid about the seriousness of TBI, this may facilitate a change in behavior among amateur leagues and youth athletes, given that changes by professional leagues tend to be followed at amateur levels.³²³ A more in-depth discussion of actions to be taken by professional sports leagues is beyond the scope of this Note. However, short-term changes—in the form of state legislation—will likely lead to longer-term and more permanent changes in attitudes and behaviors.³²⁴

C. *The Model Statute: A New Benchmark*

The burden is on state legislatures to adequately address both the primary and secondary risks of TBI among youth athletes.³²⁵ Up to this point, most states have looked to Washington’s Lystedt Law as a model statute.³²⁶ However, moving forward, state legislatures should amend their youth

317. See, e.g., 2014 Conn. Acts 14-66 (Reg. Sess.) (tabling an enacted version of the bill pending further study of this issue before signing the bill into law).

318. See Timothy A. McGuine et al., *Effect of New Rule Limiting Full Contact Practice on Incidence of Sport Related Concussion in High School Football Players*, AM. ACAD. PEDIATRICS (Oct. 24, 2015, 2:50 PM), <http://aap.confex.com/aap/2015/webprogram/Paper31701.html> [https://perma.cc/9STE-8387].

319. See Wilson, *supra* note 14, at 253–54.

320. See President Barack Obama, Remarks by the President at the Healthy Kids and Safe Sports Concussion Summit (May 29, 2014, 11:19 AM), <http://www.whitehouse.gov/the-press-office/2014/05/29/remarks-president-healthy-kids-and-safe-sports-concussion-summit> [https://perma.cc/T89H-93Y9].

321. See Koller, *supra* note 154, at 721–23.

322. For example, in 2013, the “Heads Up Football” initiative was introduced, with financial backing from the NFL and oversight provided by USA Football. See Alan Schwarz, *N.F.L.-Backed Youth Program Says It Reduced Concussions. The Data Disagrees.*, N.Y. TIMES (July 27, 2016), <http://www.nytimes.com/2016/07/28/sports/football/nfl-concussions-youth-program-heads-up-football.html> [https://perma.cc/XB3Z-L5HA]. The program provides a series of in-person and online courses for coaches to learn better safety procedures and proper tackling drills. *Id.*

323. See Wilson, *supra* note 14, at 251.

324. See Koller, *supra* note 154, at 722.

325. See *supra* Part III.A–B.

326. See *supra* note 46 and accompanying text.

concussion statutes to incorporate the following provisions. Each state statute should

- (1) clearly define the statute's purpose—to protect all youth athletes both before and after an injury occurs;³²⁷
- (2) expressly expand coverage to include private recreational sports;³²⁸
- (3) strengthen the education tenet by requiring all coaches to complete annual concussion-specific training;³²⁹
- (4) require written medical clearance from a licensed health-care provider trained in the evaluation and management of concussions before a youth athlete can return to play;³³⁰
- (5) require the state's department of health, or a subdivision thereof, to establish an anonymous hotline that allows interested stakeholders to report instances where they believe the statute has been violated;³³¹
- (6) require the state's department of health, or a subdivision thereof, to provide baseline testing to all youth athletes on an annual basis;³³²
- (7) apply a small surcharge to car registration fees, whereby 100 percent of the proceeds are used to fund baseline testing;³³³
- (8) impose sanctions—specifically the penalties that have been implemented in Pennsylvania—on coaches who fail to satisfy the statutory mandate;³³⁴ and
- (9) expressly address the issue of civil liability, specifically that coaches, officials, and volunteers are immune from civil liability unless their action or inaction constitutes gross negligence or willful misconduct.³³⁵

*D. The Next Step: Incentivizing State Legislatures
to Adopt the New Benchmark*

Now that all fifty states and the District of Columbia have adopted some form of youth sports concussion legislation,³³⁶ state legislatures should examine whether these laws offer adequate protections to youth athletes. Most state statutes, as currently constituted, are inadequate.³³⁷ However, rather than depending on state legislatures to act of their own accord, large institutional actors—such as the CDC and sports governing bodies—should incentivize states to update and strengthen their laws. The intricacies of these incentives or lobbying efforts are beyond the purview of this Note. Nonetheless, it is important to acknowledge the fact that, while this Note provides an analysis of existing state laws and recommends provisions that should be included in all state statutes, this is by no means the end of the

327. *See supra* Part III.A–B.

328. *See supra* notes 115, 117 and accompanying text.

329. *See supra* notes 100–04 and accompanying text.

330. *See supra* notes 83–85 and accompanying text.

331. *See supra* notes 241, 270 and accompanying text.

332. *See supra* notes 279–81 and accompanying text.

333. *See supra* notes 290–92 and accompanying text.

334. *See supra* notes 145–47 and accompanying text.

335. *See supra* notes 295–96 and accompanying text.

336. *See supra* note 50 and accompanying text.

337. *See supra* Part III.A–B.

discussion. Further research, analysis, and commentary are needed to ensure that all youth athletes are adequately protected.

CONCLUSION

Increasing awareness of the causes and effects of youth TBI presents a dual responsibility for legislators and regulators: on the one hand, it creates the need to assess and manage TBIs after they have occurred, and on the other, the epidemic demands a solution for preventing TBI in the first instance. Although state legislatures have begun to address the former, they have failed to address the latter. In light of this epidemic, this Note surveys the current landscape of state legislation and categorizes the existing state laws into tiers based on the strength of protections that each tier offers to youth athletes. While Washington State has provided a decent starting point, other state legislatures must continue to innovate in terms of the safeguards they provide. By placing states into tiers, this Note challenges state legislatures that currently lag behind leading states to draw inspiration from statutes within the Leaders tier. Moreover, by recommending certain statutory provisions within an updated model statute, this Note also provides states within the Leaders tier with a concrete goal to which they should aspire.

In response to current inadequate legislation, states should adopt the model statutory provisions discussed in Part III.C, which target both the primary and secondary risks of youth concussions. The provisions of this new model offer greater protections than the existing benchmark, Washington's Lystedt Law, in that they expand coverage and require specific feedback mechanisms. State legislatures should amend their youth sports concussion laws to match the provisions of the updated benchmark. State legislatures should also expand the scope of their youth sports concussion laws to ensure that all children receive adequate protections.

Once Zackery Lystedt began to clutch the sides of his helmet, writhing in pain, he should have been removed from the game and prevented from reentering until he received written medical clearance from a trained health-care professional. But that alone is not a solution. A more comprehensive resolution, such as the one advanced by this Note, provides greater protections for children like Zackery, both before and after they run onto the playing surface.

APPENDIX: A TIERED APPROACH

Tier (# of Statutes)	Characterization	Statutes
Laggards (4)	No requirement of written clearance	GA, ID, MS, WY
Loafers (7)	Weak education tenets	CO, MN, MO, NH, NY, SC, UT
Lystedters (14)	Match the three basic Lystedt tenets, but fail to innovate beyond these three requirements	AK, AZ, CA, DC, FL, IA, KS, NC, NE, NV, OK, VA, WA, WI
Lystedters-Plus (16)	Training of coaches is expressly required, rather than suggested	CT, DE, HI, KY, MA, ME, MT, ND, NJ, NM, PA, RI, SD, TX, VT, WV
Leaders (10)	Reach youth athletes in both public schools and private recreational sports	AL, AR, IL, IN, LA, MD, MI, OH, OR, TN