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CAVEAT

FOR THE LOVE OF THE GAME: THE CASE FOR STATE BANS ON YOUTH TACKLE FOOTBALL

Adam Bulkley*

INTRODUCTION

This football season, millions of Americans enjoying their favorite pastime might feel pangs of a guilty conscience. Years of scientific research into the long-term neurological effects of tackle football and a recent settlement between the National Football League (NFL) and thousands of retired NFL players¹ have made football-related traumatic brain injuries (TBI) a topic of national conversation. Current and former NFL players² and even President Obama³ have participated in the conversation, saying that they would hesitate to let their sons play the game for fear of possible brain injury. Because research has uncovered signs of permanent brain damage in players as young as eighteen-years-old, and has suggested that everyday subconcussive blows⁴ during football

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1. Gary Mihoces, *NFL Reaches Concussion Settlement*, USA TODAY (Aug. 29, 2013, 7:08 PM), <http://www.usatoday.com/story/sports/nfl/2013/08/29/nfl-concussion-settlement-judge-anita-brody-tony-dorsett-jim-mcmahon-junior-seau/2727483/>.

2. See, e.g., Brian McIntyre, *Terry Bradshaw Wouldn't Let Son Play Football Now*, NFL.COM, (Jun. 14, 2012, 12:40 PM), <http://www.nfl.com/news/story/09000d5d829d33b9/article/terry-bradshaw-wouldnt-let-son-play-football-now>; Gary Myers, *NY Jets Linebacker Bart Scott Does Not Want Son to Play Football as NFL Continues to Battle with Concussion Issue*, N.Y. DAILY NEWS (May 26, 2012, 2:13 PM), <http://www.nydailynews.com/sports/football/jets/ny-jets-linebacker-bart-scott-son-play-football-nfl-continues-battle-concussion-issue-article-1.1085074>.

3. Franklin Foer & Chris Hughes, *Barack Obama Is Not Pleased: The President on his Enemies, the Media, and the Future of Football*, NEW REPUBLIC (Jan. 27, 2013), <http://www.newrepublic.com/article/112190/obama-interview-2013-sit-down-president>.

4. Subconcussive blows are those that do not produce clinically-observable signs of concussion, but nonetheless result in neurocognitive and neurophysiological impairments. See Thomas M. Talavage et al., *Functionally-Detected Impairment in High School Football Players without Clinically-Diagnosed Concussion*, 31 J. NEUROTRAUMA 327, 328 (2014).

practice could be the cause of such brain damage,⁵ one scientist has called for a ban on tackle football at the youth level.⁶ In light of these findings, current state laws are inadequate to address the very real risks associated with youth tackle football. In general, these laws do not attempt to prevent concussions, but rather address treatment for concussions following the injury. Furthermore, state laws entirely fail to address the daily, subconcussive blows suffered by youth players. To fully protect their youngest football players from the devastating effects of football-related TBIs, state legislators should ban tackle football for children under fourteen-years-old.

PART I: BACKGROUND ON TBIs AND YOUTH FOOTBALL

Much of the national conversation on football brain injuries stems from the Boston University School of Medicine's Center for the Study of Traumatic Encephalopathy (Center). Chronic Traumatic Encephalopathy (CTE) is "a progressive degenerative disease of the brain found in athletes . . . with a history of repetitive brain trauma, including symptomatic concussions as well as asymptomatic subconcussive hits to the head."⁷ This degeneration may not begin until years after a football player's career ends, and can result in memory loss, confusion, impaired judgment, impulse control problems, aggression, depression, and progressive dementia.⁸

In 2008, Center researchers examined the brain of Eric Pelly, a high school football player who died just ten days after suffering a concussion during a rugby game. Eric was eighteen, and this was the fourth concussion of his athletic career.⁹ Researchers were surprised that his brain, which should have been in perfect

5. *Frontline: League of Denial: The NFL's Concussion Crisis* (PBS television broadcast Oct. 8, 2013) [hereinafter *League of Denial*], available at <http://www.pbs.org/wgbh/pages/frontline/league-of-denial/>.

6. See Robert C. Cantu, Co-Director, Bos. Univ. Ctr. for the Study of Chronic Traumatic Encephalopathy, Remarks at the Aspen Institute Roundtable Discussion: Playing Safely: The Future of Youth Football? (Nov. 9, 2012), available at http://www.aspeninstitute.org/sites/default/files/content/docs/sports/playing_safety_110912_transcript.pdf.

7. *What is CTE?*, BOSTON UNIVERSITY CENTER FOR THE STUDY OF TRAUMATIC ENCEPHALOPATHY, <http://www.bu.edu/cste/about/what-is-cte/> (last visited Nov. 3, 2013). Asymptomatic sub concussive hits are those that cause no concussion symptoms.

8. *Id.*

9. *League of Denial*, *supra* note 5.

condition given his age, was already demonstrating the effects of CTE.¹⁰ In April 2010, Owen Thomas, a twenty-one-year-old lineman at the University of Pennsylvania with no history of depression, hanged himself in the shower of his off-campus apartment following what his family and friends called a “sudden and uncharacteristic emotional collapse.”¹¹ The following September, the Center announced it found evidence of CTE in his brain.¹² It was, in fact, the most advanced case they had seen in a football player of any age, which was especially notable given that Owen had never been diagnosed with a single concussion.¹³ The discovery led researchers to believe that CTE can result not just from concussion-inducing contact, but also from the many subconcussive blows that football players experience every day they play the game.¹⁴

Though any sport involving contact—whether advertent or inadvertent—is potentially dangerous, football is responsible for 96.9 percent of all catastrophic sports injuries in the United States.¹⁵ Potential head injuries are a huge concern, particularly among very young football players. Because children’s brains are not yet fully myelinated, brain fibers connecting nerve cells are not as well supported as they are in adults.¹⁶ Children are also more susceptible to the cytotoxic shock of concussions and recover more slowly once they have been concussed.¹⁷ From a more basic anatomical perspective, “[y]oungsters have big heads on weak necks,” creating a “bobble head doll’ effect” that puts them at greater risk than adults for experiencing head injuries while playing football.¹⁸ These findings have prompted Dr. Robert Cantu, Co-Director of the Center, to suggest banning tackle football among children under the age of fourteen.¹⁹

10. *Id.*

11. Alan Schwarz, *Suicide Reveals Signs of a Disease Seen in N.F.L.*, N.Y. TIMES, Sept. 14, 2010, at A1, available at <http://www.nytimes.com/2010/09/14/sports/14football.html?pagewanted=all>.

12. *Id.*

13. *League of Denial*, *supra* note 5.

14. *Id.*

15. Cantu, *supra* note 6, at 2.

16. *Id.* at 3. Myelin is an insulating layer of protein and fatty substances that forms around nerves in the brain. *Myelin Definition* MEDLINE PLUS, <http://www.nlm.nih.gov/medlineplus/ency/article/002261.htm> (last visited Aug. 6, 2014).

17. Cantu, *supra* note 6, at 3. When tissue is in cytotoxic shock, cells are unable to utilize the oxygen being delivered to them. TRAUMA: CRITICAL CARE, VOLUME 2 313 (William C. Wilson et al. eds., 2007).

18. Cantu, *supra* note 6, at 3

19. *Id.*

PART II: CURRENT STATE OF THE LAW AND THE NEED FOR REFORM

State legislation dealing with traumatic brain injuries in youth sports is widespread, but focuses on managing suspected concussions once they occur. Every state and the District of Columbia have passed laws relating to TBIs in youth sports.²⁰ Forty-eight of those states require that student-athletes with suspected TBI be removed from play, and forty-eight specify return-to-play requirements (which, in all of those states, require written clearance).²¹ Twenty-seven states require mandatory, TBI-specific training for coaches, and forty-three require distribution of a TBI information sheet to players, coaches, and parents.²²

This current legal framework is ineffective for two reasons. First, it allows tackles to continue in youth football and attempts to manage (or, more precisely, to train others—who often have no formal medical education—to manage) suspected concussions after they occur. For example, in Michigan, a coach or other adult acting on behalf of an entity organizing a youth athletic event must remove any athlete “who is suspected of sustaining a concussion.”²³ That athlete “shall not return to physical activity until he or she has been evaluated by an appropriate health professional and receives written clearance from that health professional authorizing the youth athlete’s return to physical participation in the athletic activity.”²⁴ By the time such action is taken, however, a child’s developing brain may have already sustained lasting damage, and once CTE develops in the human brain, the damage cannot be cured.²⁵

The second reason state laws such as Michigan’s are ineffective is that they focus only on concussions. However, because research suggests that CTE can develop in children entirely by subconcussive blows, it seems that managing concussions will not go nearly far enough in stemming football-related traumatic brain injuries in youngsters.

In response to the Center’s research and the increasing media

20. *Youth Sports TBI Laws Map*, LAWATLAS, <http://www.lawatlas.org/preview?dataset=sc-reboot> (last visited Aug. 14, 2014).

21. *Id.*

22. *Id.*

23. MICH. COMP. LAWS ANN. § 333.9156 (West 2013).

24. *Id.*

25. See *Legal Issues Relating to Football Head Injuries (Parts I & II): Hearings Before the H. Comm. On the Judiciary*, 111th Cong. 197 (2009) (statement of Joseph Maroon, M.D., Vice Chair, Department of Neurosurgery, University of Pittsburgh).

focus on football-related brain injuries, the House Judiciary Committee convened a hearing on October 28, 2009 to examine “Legal Issues Relating to Football Head Injuries.”²⁶ Though the Committee took primary aim at the NFL because of its jurisdiction over the League,²⁷ many committee members and witnesses who spoke were more eager to address the neurological health implications of tackle football for the three million children playing in youth leagues across the country.²⁸ The Committee noted several witnesses’ suggestions for dealing with concussions after they have already occurred,²⁹ but Congress did not make any plans for near-term action, and the status quo in state safety legislation was preserved.

PART III: THE PATH TO REFORM: STATE LEGISLATION

The House Judiciary Committee member who noted that ensuring the safety of millions of youth football players at risk of CTE “raises [sic] to the level of a Congressional response”³⁰ was correct in terms of the problem’s magnitude. As a practical matter, however, legislating in this area should be left to the states. During the hearing, Representative Bob Goodlatte correctly noted that “it would be difficult for the Congress to extend the long arm of the Federal Government” to legislate safety in youth football.³¹ However, his reasoning that “the considerations of the Commerce Clause of the U.S. Constitution” would cause this difficulty³² was not necessarily correct. Pop Warner Little Scholars Inc. (Pop Warner), a 501(c)3 non-profit organization that claims to run the largest youth football program in the world, operates in forty-two

26. *Id.* at 1.

27. *See id.* at 102–03 (statement of Rep. William D. Delahunt, Member, H. Comm. on the Judiciary).

28. *See, e.g., id.* at 18 (statement of Rep. Henry C. Johnson, Member, H. Comm. on the Judiciary); *id.* at 27 (statement of Rep. Mike Quigley, Member, H. Comm. on the Judiciary); *id.* at 83 (statement of Merrill Hoge, Retired NFL Player); *id.* at 92 (statement of DeMaurice Smith, Executive Director, NFL Players Association); *id.* at 102 (statement of Rep. William D. Delahunt, Member, H. Comm. on the Judiciary); *id.* at 133–34 (statement of Christopher Nowinski, Co-Director, Center for the Study of Traumatic Encephalopathy, Boston University School of Medicine).

29. *See, e.g., id.* at 126 (statement of Tiki Barber, Retired NFL Player); *id.* at 127 (statement of Dick Benson, High School Football Safety Advocate).

30. *Id.* at 235 (statement of Rep. Sheila Jackson Lee, Member, H. Comm. on the Judiciary).

31. *Id.* at 229 (statement of Rep. Bob Goodlatte).

32. *Id.*

states³³ and boasts 250,000 players between the ages of five and fifteen.³⁴ Each participant or his family pays a Pop Warner member team between seventy-five and two hundred dollars annually to play,³⁵ ultimately generating a large amount of fee income across the country despite the organization's non-profit status. Given the Supreme Court's previous assertion that there is "no reason why the nonprofit character of an enterprise should exclude it from the coverage . . . of the Commerce Clause,"³⁶ Congress should be able to regulate Pop Warner's activities: the fact that the organization generates such great revenues across a vast majority of U.S. states should bring it squarely within Congress's Commerce Clause powers.

Furthermore, Pop Warner participants represent one subset of the roughly three million Americans between the ages of six and fourteen who play youth football,³⁷ suggesting that many participate in leagues that do not affiliate with a national enterprise. The Supreme Court has found that intrastate activity with substantial effect on interstate commerce may be regulated by Congress under the Commerce Clause.³⁸ Because these smaller leagues draw participants away from national enterprises like Pop Warner, there is a strong constitutional argument that Congress may regulate them under its Commerce Clause power. It is very likely, therefore, that a court would find that Congress may constitutionally ban youth tackle football.

As a practical matter, however, there are several reasons why states, rather than the federal government, should regulate youth football. As discussed above, regulation of youth sports with respect to traumatic brain injuries has historically been left to the states, the vast majority of which have entered this arena out of concern for the safety of their youngest citizens.³⁹ More importantly, it

33. *About Us*, POP WARNER LITTLE SCHOLARS, http://www.popwarner.com/About_Us.htm (last visited Nov. 3, 2013).

34. *See Football*, POP WARNER LITTLE SCHOLARS, <http://www.popwarner.com/football.htm> (last visited Nov. 3, 2013); *Ages and Weights*, POP WARNER LITTLE SCHOLARS, <http://www.popwarner.com/football/footballstructure.htm> (last visited Nov. 3, 2013).

35. *Frequently Asked Questions*, POP WARNER LITTLE SCHOLARS, http://www.popwarner.com/contact/Frequently_Asked_Questions.htm#cost (last visited Nov. 3, 2013).

36. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 584 (1997).

37. USA FOOTBALL, 2010 ANNUAL REPORT 5 (2010), *available at* http://usafootball.com/sites/default/files/usa_football_2010_annual_report.pdf.

38. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 17 (2005); *Wickard v. Filburn*, 317 U.S. 111, 127 (1942).

39. *See supra* notes 20–25 and accompanying text.

would likely prove difficult to find political will for such a drastic—albeit necessary—measure at the federal level, especially given the current state and composition of Congress. Since the 2009 Judicial Committee hearing on this subject, Republicans have gained and maintained control of the House of Representatives,⁴⁰ and the Tea Party caucus has become a powerful voice in the conservative majority.⁴¹ Federal safety legislation in the area of children’s football has been described by conservative pundit Rush Limbaugh as an attack from liberal “pantywaists who want to try to take the risk out of everything in life,”⁴² and a number of conservative members of Congress are likely to share his opinion. This sets up a potential attack on the proposed legislation by conservative members of Congress who recently demonstrated their ability to force a federal government shutdown in an attempt to stall already-passed legislation they felt intruded on personal liberties.⁴³ The ban is thus best left to the states, who can engage in any requisite political battles on a smaller scale, hopefully with greater success. As discussed below, state legislators could learn that many more of their constituents are in favor of a ban on youth tackle than might have been in years past. Furthermore, a great majority of Pop Warner youth football programs are currently located in so called “blue states,” where a majority of voters are more likely to favor government imposition of health and safety regulations. The political will to pass legislation of this sort will therefore be greater in these states.⁴⁴ Banning youth tackle in a majority of states where

40. See, e.g., Richard Cowan, *House Stays Under Republican Control*, REUTERS (Nov. 7, 2012, 6:45 AM), <http://www.reuters.com/article/2012/11/07/us-usa-campaign-house-idUSBRE8A608Y20121107>.

41. See, e.g., Jennifer Steinhauer, *G.O.P. Senators Fail to Head Off Primary Challenges by Tea Party Rivals*, N.Y. TIMES, Aug. 31, 2013, at A11, available at <http://www.nytimes.com/2013/08/31/us/politics/gop-senators-fail-to-head-off-tea-party-rivals.html>.

42. Paul Brownfield, *A Town’s Passion for Football, a Retired Doctor’s Concern*, N.Y. TIMES, Oct. 24, 2012, at B13, available at <http://www.nytimes.com/2012/10/24/sports/football/a-towns-passion-for-football-a-retired-doctors-concern.html>.

43. See Jonathan Weisman & Ashley Parker, *Shutdown is Over*, N.Y. TIMES, Oct. 17, 2013, at A1, available at <http://www.nytimes.com/2013/10/17/us/congress-budget-debate.html>.

44. See *League Finder*, POP WARNER LITTLE SCHOLARS, http://www.popwarner.com/League_Finder.htm (last visited Nov. 3, 2013); *U.S. Election Maps: 2012 Presidential Election*, POLITICO, <http://www.politico.com/2012-election/map/#/President/2012/> (last updated Nov. 29, 2012, 3:59 PM). Viewing the number of Pop Warner leagues by state (and counting only those leagues with active teams listed), it appears that seventy-five active leagues are located in states that voted Democratic in the 2012 presidential election, while only thirty-two are located in states that voted Republican in 2012. While the presence of Pop Warner leagues is only a proxy for the presence of all youth football leagues (for which data is not accessible), it is likely a good

it is currently played would be an imperfect solution, as it might leave players in “red states” unprotected. However, on the theory that protecting a majority of affected children is better than protecting none, it is still a solution worth pursuing.

It is important for states to enact a total ban on tackle football for America’s youth, rather than ameliorative measures that research suggests are ineffective. CTE cannot be cured once it appears in the brain,⁴⁵ and as discussed above, there is strong evidence that it develops over time by subconcussive blows sustained by children in the ordinary course of playing tackle football.⁴⁶ With this information in mind, legislation that attempts to educate young athletes, their coaches and their parents about managing concussions that have already occurred is not likely to stem the larger epidemic of brain damage in youth football.

Dr. Cantu has stated publicly that he is not wedded to the fourteen-year-old age cutoff, but that fourteen is roughly the appropriate age in terms of physical development and skeletal maturity for the sport.⁴⁷ However, any allowance for case-by-case exceptions would make legislation far too difficult to enforce. Hence, state legislation should adhere to a strict cut-off of age fourteen, which for most children is also a convenient marker of entry into high school. Even if this results in a small percentage of children participating in tackle football before reaching appropriate physical maturity, youth football players as a whole would likely be much safer than they are under the current state frameworks.

Admittedly, state legislators could face tough battles from some constituents in trying to pass this safety legislation. Football at any level is an American pastime and a cultural linchpin in communities across the country. Some will likely suggest that removing tackling from the sport when it is played by children would be too great an affront to a long American tradition, or too great an intrusion by state governments into daily life. When New York State Assemblyman Michael Benedetto introduced legislation in early 2013 to ban children younger than eleven from playing tackle football—apparently the first such proposal in the country—

indication of where youth tackle football is most popular.

45. See *Legal Issues Relating to Football Head Injuries (Parts I & II): Hearings Before the H. Comm. On the Judiciary*, 111th Cong. 197 (2009) (statement of Joseph Maroon, M.D., Vice Chair, Department of Neurosurgery, University of Pittsburgh).

46. *League of Denial*, *supra* note 5.

47. Cantu, *supra* note 6, at 4.

he met strong opposition from coaches of youth leagues and conservative political opponents who opined that “[s]omebody always wants to regulate something and regulating 6- or 7-year-olds playing football is not the place to do it.”⁴⁸ A retired surgeon on the Dover, N.H. school board who suggested a ban on tackling at the high school level also met strong opposition.⁴⁹

However, the tide of public opinion may be changing with respect to the safety of youth football. USA Football—the official youth football development partner of the NFL⁵⁰—estimates that 2012 youth football participation dropped to 2.82 million players from three million in 2011,⁵¹ and some league organizers anecdotally corroborate that statistic.⁵² A recent Washington Post poll showed that eighty percent of those surveyed who disapproved of youth and high school football did so out of concern for safety.⁵³ These figures could support Dr. Cantu’s thesis that a move to exclusively flag football⁵⁴ at the youth level might, in fact, help the sport by attracting children whose parents have historically had them play soccer for safety reasons.⁵⁵ As knowledge of the devastating effects of CTE and other TBIs sustained from youth football spreads through popular media, state legislators may have an easier time garnering support for a ban on youth tackle football

48. Glenn Blain, *I want to protect the children: Politicians Push to Ban Tackle in Youth Football Leagues*, N.Y. DAILY NEWS (Feb. 9, 2013, 2:00 AM), <http://www.nydailynews.com/new-york/politicians-push-ban-youth-football-leagues-article-1.1259327>. Benedetto—supported by Dr. Cantu—subsequently amended his bill to ban children under 14 from playing tackle football, though it still lacks a Senate sponsor. Jordan Carleo-Evangelist, *Lawmaker proposes ban on tackle football for kids under 14*, ALBANY TIMES UNION (Nov. 14, 2013, 12:57 PM), <http://blog.timesunion.com/capitol/archives/199414/proposed-new-york-youth-tackle-football-ban-upped-to-age-14/>.

49. Brownfield, *supra* note 42. The school board subsequently denied that it had any plans to end the Dover High School football program.

50. *About*, USA FOOTBALL, <http://usafootball.com/about-us> (last visited Aug. 8, 2014).

51. Gary Mihoces, *Heads Up: Good Play or Good Ploy?*, USA TODAY (Aug. 28, 2013, 10:40 AM), <http://www.usatoday.com/story/sports/nfl/2013/08/27/heads-up-youth-football-nfl-roger-goodell/2711317/>.

52. *See, e.g.*, Rick Maese, *Football Safety Concerns Affect Youth Leagues, Causing NFL to Take Notice*, WASH. POST (Oct. 24, 2012), http://articles.washingtonpost.com/2012-10-24/sports/35498322_1_youth-football-usa-football-roger-goodell;Mihoces, supra note 50.

53. *See Pro Football Survives Off-Season Criticism as Nation’s Favorite Spectator Sport*, WASH. POST (Sept. 5, 2012), http://www.washingtonpost.com/politics/polling/pro-football-survives-offseason-criticism-nations/2012/09/05/d69be6ea-f74f-11e1-a93b7185e3f88849_page.html.

54. “[A] form of American football in which the player with the ball is not tackled but instead must stop when another player removes a piece of cloth that is attached to the player’s waist.” *Flag Football Definition*, THE FREE MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/flag%20football> (last visited Aug. 14, 2014).

55. *See* Cantu, *supra* note 6, at 3.

than in the past.

CONCLUSION

Though tough battles over banning youth tackle football are sure to result, they will be well worth the political risk. Research from the Center and other organizations⁵⁶ suggests that drastic measures are necessary to protect children from the hazards of playing tackle football at too young an age. State bans on tackle would not cut young children off completely from participating in this American pastime: flag football would provide all the benefits (both aerobic and less tangible, like teamwork and leadership) of team play, and tackling technique could be taught for future reference without actually being practiced. If we are to continue the rich tradition of football in America while keeping our children as safe as possible, state bans on tackle football for children under fourteen are the best way forward.

56. See, e.g., Ray W. Daniel, Steven Rowson & Stefan M. Duma, *Head Impact Exposure in Youth Football*, 40 ANNALS OF BIOMEDICAL ENGINEERING 976 (2012).