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### The Legal Design for Parenting Concussion Risk

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# The Legal Design for Parenting Concussion Risk

Katharine Silbaugh\*

*This Article addresses a question as yet unexplored in the emerging concussion risk literature: how does the statutorily assigned parental role in concussion risk management conceptualize the legal significance of the parent, and does it align with other areas of law that authorize and limit parental risk decision-making? Parents are the centerpiece of the “Lystedt” youth concussion legislation in all fifty states, and yet the extensive legal literature about that legislation contains no discussion of parents as legal actors and makes no effort to situate their statutory role into the larger legal framework of parental authority. This Article considers the Lystedt framework from the perspective of other law engaging parental authority and parental decision-making, placing Lystedt’s parental role in that larger family law framework. That lens reveals that the Lystedt legislation may be using the cultural capital of parental authority to shield youth athletic leagues from having to fully grapple with concussion risk. Under the Lystedt framework, parents are unwittingly functioning as an impediment to safety improvements, shielding athletic associations from conventional pressures to improve. The operation of Lystedt is in this way a departure from related areas of law that set boundaries on parental authority to accept risk of injury on behalf of a child, including limitations on the enforcement of parental waivers of liability. Finally, Lystedt unrealistically elevates parental responsibility without adequately providing parents the capacity and opportunity to be effective protectors of their children’s welfare. I argue that in a time of intense cultural ambivalence about concussion risk in athletics, the rich concept of parental authority is expropriated in the Lystedt concussion statutes to avoid threats to the structure of youth sports that would otherwise be vulnerable to pressures to change in order to reduce*

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*concussion risk. The NFL lobbied states to adopt this legislation, under which parents function to preserve the status quo.*

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#### INTRODUCTION

A concussion is a traumatic brain injury caused by a blow, bump, or jolt to the head or body.<sup>1</sup> Over the past decade, all fifty states have enacted “Lystedt” legislation to address an expanded understanding of concussion frequency and of the long-term negative outcomes associated with concussions (more accurately termed traumatic brain injuries).<sup>2</sup> Lystedt laws focus on educating athletes, coaches, and parents about the signs that an athlete may have suffered a concussion and the need to keep a concussed athlete out of play until she is cleared by a medical professional. A legal literature has emerged evaluating the limitations and efficacy of these laws in reducing the risk to athletes, as well as the array of litigation in professional and collegiate sports over harms already incurred.<sup>3</sup>

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<sup>1</sup> *TBI: Get the Facts*, CTRS. DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/traumaticbraininjury/get\\_the\\_facts.html](https://www.cdc.gov/traumaticbraininjury/get_the_facts.html) (last visited Mar. 11, 2019).

<sup>2</sup> See Patricia Guthrie, *Ex Youth Football Player: You Could End Up Like Me*, WEBMD (Oct. 21, 2015), <https://www.webmd.com/brain/news/20151021/concussion-zack-lystedt#1> (explaining that Washington State resident Zachary Lystedt suffered two football concussions at age 13 that even ten years later leave him walking with a cane and suffering with debilitating short-term memory loss and speech impediment).

<sup>3</sup> See, e.g., 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); 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. ST. MARY’S L. REV. & SOC. JUST. 285, 344 (2016); Erin P. Andrews, Note, *Avoiding the Technical Knockout: Tackling the Inadequacies of Youth Concussion Legislation*, 58 N.Y.L. SCH. L. REV. 417, 421-22 (2013/2014); Roy G. Beran, *Concussion - A Question of Negligence*, 36 MED. & L. 121,

From many quarters in our political economy, we have experienced a reallocation of risk from institutions to individuals and families, ranging from the defined contribution insurance plan to the shift in social welfare benefits under Temporary Assistance for Needy Families

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128 (2017); Jayce Born, Note, *National Protection of Student-Athlete Mental Health: The Case for Federal Regulation over the National Collegiate Athletic Association*, 92 IND. L.J. 1221, 1245 (2017); Kevin Brandwein, *Goals and Obstacles in Legislating Concussion Management in Youth Sports*, 10 WILLAMETTE SPORTS L.J. 28, 53 (2013); Andrew W. Breck, Note, *Keeping Your Head on Straight: Protecting Indiana Youth Athletes from Traumatic Brain Injuries Through "Return-to-Play" Legislation*, 9 IND. HEALTH L. REV. 215 (2012); Kirstie Brenson, Comment, *Head to Head: The NFL Concussion Scandal and an Argument for OSHA Regulation*, 2017 U. CHI. LEGAL F. 595, 626 (2017); Tracey B. Carter, *It Is a Mindboggling Dilemma: To Play or Not to Play Youth Sports Due to Concussion Risks*, 67 CATH. U. L. REV. 1, 65 (2018); P. Chrisman et al., *Implementation of Concussion Legislation and Extent of Concussion Education for Athletes, Parents, and Coaches in Washington State*, 42 AM. J. SPORTS MED. 1190, 1195 (2014); Sam C. Ehrlich, *Gratuitous Promises: Overseeing Athletic Organizations and the Duty to Care*, 25 JEFFREY S. MOORAD SPORTS L.J. 1, 48-49 (2018); Hosea H. Harvey, *Refereeing the Public Health*, 14 YALE J. HEALTH POL'Y L. & ETHICS 66, 105 (2014); Samuel D. Hodge Jr. & Jack E. Hubbard, *Depression: The Often Overlooked Sequela of Head Trauma*, 66 CLEV. ST. L. REV. 31, 67-68 (2017); Theresa S. Kim, *Tackling Head Injuries in Youth and Interscholastic Football with NFL Contract Reform*, 24 SPORTS LAW. J. 71, 93 (2017); Sungwon Kim et al., *Legislative Efforts to Reduce Concussions in Youth Sports: An Analysis of State Concussion Statutes*, 27 J. LEGAL ASPECTS SPORTS 162 (2017); Chris Lau, Note, *Leaders and Laggards: Tackling State Legislative Responses to the Youth Sports Concussion Epidemic*, 85 FORDHAM L. REV. 2879, 2912 (2017); Bryant Lee, Note, *Knocked Unconscionable: College Football Scholarships and Traumatic Brain Injury*, 85 GEO. WASH. L. REV. 613, 643-44 (2017); Kerri M. Lowrey et al., *Do Ethics Demand Evaluation of Public Health Laws? Shifting Scientific Sands and the Case of Youth Sports-Related Traumatic Brain Injury Laws*, 19 J. HEALTH CARE L. & POL'Y 99 (2016); Kerry M. Lowrey & Stephanie R. Morain, *State Experiences Implementing Youth Sports Concussion Laws: Challenges, Successes, and Lessons for Evaluating Impact*, 42 J.L. MED. & ETHICS 290, 290-96 (2014); Michael Meyers, Note, *Utilizing Alternative Dispute Resolution to Foster Comprehensive Traumatic Brain Injury Research*, 18 CARDOZO J. CONFLICT RESOL. 905, 929 (2017); David E. Missirian, *Student Athlete Concussions: The Often Overlooked Legal and Ethical Minefield*, 6 BERKELEY J. ENT. & SPORTS L. 23, 47 (2017); Stephanie A. Murray, Note, *The Misnomer of the NFL's "Concussion Crisis": Don't Count on the NFL to Solve Football's Biggest Problem - and OSHA Regulation May Not Save the Game Either*, 56 WASHBURN L.J. 181, 214-15 (2017); Francis X. Shen, *Are Youth Sports Concussion Statutes Working?*, 56 DUQ. L. REV. 8, 9 (2018); Lance K. Spaude, Comment, *Time to Act: Correcting the Inadequacy of Youth Concussion Legislation Through a Federal Act*, 100 MARQ. L. REV. 1094 (2017); 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); see also Adam M. Finkel et al., *The NFL as a Workplace: The Prospect of Applying Occupational Health and Safety Law to Protect NFL Workers*, 60 ARIZ. L. REV. 291, 367-68 (2018).

to the risks associated with educational debt.<sup>4</sup> One legal scholar observes:

Western society has not only embraced risk as a useful conceptual framework, but has also embraced risk as a matter of social policy. Governments, large employers, and other big institutions that used to spread risks are encouraging and sometimes requiring individuals to embrace the actual risks that they encounter in their lives. Across Western society, governments and other big institutions are to a degree cutting people loose from social structures that spread risk, exposing individuals to more risk, making them more individually responsible — all in the name of creating a more dynamic, entrepreneurial, and creative society.<sup>5</sup>

The structure of concussion legislation reflects this trend. This Article is the first to offer scrutiny of the implicit theory by which it operates: that parents can become informed about the shifting scientific landscape around concussion and use that information to make effective and legitimate risk decisions on behalf of their children. This Article addresses a question unexplored in the concussion law literature: how does the parental role assigned under the Lystedt framework conceptualize the legal significance of the parent, and does that concept align with other areas of law that authorize and limit parental risk decision-making? I conclude that the Lystedt framework shifts more authority to parents to assume risk on behalf of a child than is typical under existing legal justifications, and further, that parents' temperament and skills in the youth sports context are particularly ill-suited to their elevated authority. Judging from its structure and operation, Lystedt legislation does not appear to elevate parental authority out of respect for parents' efficacy, but instead because parents are the essential tool in the transfer of risk away from organizations and to children.

In engineering for safety, the hierarchy is design, guard, and then warn.<sup>6</sup> We try first to develop an alternative design that reduces risk.

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<sup>4</sup> Tom Baker, *Embracing Risk, Sharing Responsibility*, 56 *DRAKE L. REV.* 561, 562 (2008); Jonathan Glater, *Student Debt and Higher Education Risk*, 103 *CALIF. L. REV.* 1561, 1563 (2015).

<sup>5</sup> Baker, *supra* note 4, at 562.

<sup>6</sup> Kenneth R. Laughery & Michael S. Wogalter, *The Safety Hierarchy and Its Role in Safety Decisions*, in *ADVANCES IN HUMAN FACTORS, ERGONOMICS, AND SAFETY IN MANUFACTURING AND SERVICE INDUSTRIES 1010, 1010* (Karwowski & Salvendy eds., 2010) (“The safety hierarchy, or hazard control hierarchy, is a priority scheme for dealing with

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When that is not feasible, we guard against the risk through physical barriers. When that is not feasible, we warn users and rely on human behavior modification or personal risk preference. Feasibility drives the movement down the hierarchy.<sup>7</sup>

When regulating, we deem some risks so serious that they cannot be left to warnings alone. Individuals may not prescribe themselves oxycodone. In many states, individuals must protect their heads with a helmet when riding a motorcycle, regardless of personal risk preference.<sup>8</sup> Although no state requires adults to wear a helmet when riding a bicycle, in many states, a child must wear a helmet when riding a bicycle, regardless of her parent's risk preferences.<sup>9</sup> Employers may not employ ten-year-olds, even with parental consent.<sup>10</sup>

In regulation, as distinct from engineering and design, whether we choose to prohibit or warn doesn't always appear to be based on the risk-reward calculation, or feasibility. Instead, warning in place of re-design can sometimes result from other forces. For example, economic power and the distribution of benefits from risk allocation can influence whether we redesign or simply warn. Consider tobacco: as a result of an industry's economic strength and path dependence, we regulate by warning even though design thinking alone would likely point us in a different direction.

Economic power isn't the only thing that shapes or diverts regulation. Cultural ambivalence can as well. At times of awkward cultural contradiction, where the intangible values in the risk balance are unstable, we sometimes begin regulating with warnings and information rather than with redesign, leaving risk choice to the warned and informed individual.<sup>11</sup> We might endeavor to improve the decision-making of the individual by providing both information and awareness

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product hazards. It is often referred to as the design, guard and warn sequence.”); see also Marc Green, *Safety Hierarchy: Design vs. Warnings*, VISUAL EXPERT, <http://www.visualexpert.com/Resources/safetyhierarchy.html> (last visited Feb. 8, 2019).

<sup>7</sup> See sources cited *supra* note 6.

<sup>8</sup> *Motorcycle Helmet Use Laws*, INS. INST. FOR HIGHWAY SAFETY, HIGHWAY LOSS DATA INST., <https://www.iihs.org/iihs/topics/laws/helmetuse/mapmotorcyclehelmets> (last visited Feb. 8, 2019).

<sup>9</sup> *Pedestrians and Bicyclists*, INS. INST. FOR HIGHWAY SAFETY, HIGHWAY LOSS DATA INST., <https://www.iihs.org/iihs/topics/t/pedestrians-and-bicyclists/topicoverview> (last visited Feb. 8, 2019); *State-by-State Helmet Laws Guide to Motorcycle Helmet Laws*, CONSUMER REPS., <https://www.consumerreports.org/cro/news/2011/06/state-by-state-guide-to-motorcycle-helmet-laws/index.htm> (last updated July 4, 2014).

<sup>10</sup> See *Youth & Labor*, U.S. DEP'T OF LABOR, <https://www.dol.gov/general/topic/youthlabor> (last visited Feb. 8, 2019).

<sup>11</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 4-7 (2008) (calling this “libertarian paternalism”).

of decision moments that might otherwise be governed by inertia,<sup>12</sup> but the awkward cultural contradiction will be resolved by individuals until greater stability in the relevant social values emerges.

With respect to concussion risk in youth sports, our times have yielded just that strategy: provide information but do *not* prohibit risks. We live in an era of cultural disagreement about concussion risk in youth sports — about weighing the relative health, enjoyment, and character values of risky sports to a child against the risk of serious, sometimes lifelong, and sometimes fatal brain injury.<sup>13</sup> While the science is still evolving, the negative side of this balance is coming into sharper focus with improved understanding of the gravity of traumatic brain injury (concussion). Assigning weight to the positive side is relatively more open to debate. We also see significant economic interests in professional sports that may influence regulators toward the status quo.

How well does well-informed consent resolve the concussion risk exposure when the players are minors? Surely the potential devastation of a brain injury must warrant as much focused informed, meaningful consent for youth players as it does for adults, especially since the risk of permanent harm is *greater* when concussion occurs in younger athletes.<sup>14</sup> In other contexts of this type of cultural ambivalence, the way we treat minors is instructive. We sometimes prohibit risky behaviors for youth — drinking, smoking, riding a bicycle without a helmet, participating in the workforce, sexual conduct — even when we allow adults to exercise choice about those risks for themselves. We deem minors too immature to reason properly about health and safety risks in those contexts, and parental judgment inadequate to cover for either childhood immaturity or third party pressures when the risks at stake are to a child's long-term health and safety. When the value of a risk is in dispute, it is not uncommon to allow adults to choose a risk for themselves, while prohibiting parents from choosing the risk for their children.

But at this time, we are still framing youth sports concussion risk as a freedom or a permissible choice. One recent example of this framing within the legal academy captures perfectly the rhetorical power of

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<sup>12</sup> *Id.*; see also Baker, *supra* note 4.

<sup>13</sup> See, e.g., Albert Samaha, Opinion, *The Kids Who Still Need Football*, N.Y. TIMES (Sept. 8, 2018), <https://www.nytimes.com/2018/09/08/opinion/sunday/football-kids-brain-damage.html>.

<sup>14</sup> See Ramadevi Pullela et al., *Traumatic Injury to the Immature Brain Results in Progressive Neuronal Loss, Hyperactivity and Delayed Cognitive Impairments*, 28 DEV. NEUROSCIENCE 396, 396-97 (2006).

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information and choice as a mechanism for managing cultural contradiction around concussion:

Such contrasting views make it difficult for policymakers to know what, exactly, to do. The policy challenge going forward is thus to facilitate accurate communication of risks and benefits to allow for informed athlete and parent decision-making.<sup>15</sup>

The author of this statement aims to evaluate the efficacy of the Lystedt laws *at conveying information*. But in order to evaluate that policy framework, we need to consider not only the efficacy of parental education, but the *rationale* for parental judgment in this context. Moreover, we need to compare risk communication to more direct incentive for design improvements, before we can decide that parental consent and the Lystedt structure is an adequate method of safeguarding children's brains. When we view Lystedt as an effort to reduce the worst risks caused by concussions, which is exposure to a subsequent concussion before a first concussion is healed, the rationale for its structure may be defensible. But when we view Lystedt in comparison to the background law limiting parental ability to choose health and safety risks for a child, Lystedt is much harder to defend. Indeed, Lystedt's conception of parental authority departs from existing law in related areas, and in so doing, reduces incentives toward safer design.

This Article expands the Lystedt literature to situate Lystedt in the existing law governing parental waiver of liability in particular. A substantial majority of states refuse to enforce pre-injury waivers of liability signed by parents on behalf of their children. The rationale underlying the law of parental waivers constructs parental judgment as too flawed to address both a minor's interests in appropriately managed risk, and third parties' efforts to commandeer parental authority for the purpose of shifting risk from institutions to children. Yet the Lystedt infrastructure is substantially dependent on that same nexus of judgment and interests in a context that is particularly mismatched to parental skill.

For a number of reasons, parents make bad decision-makers about children's concussion risk. Parents struggle with the technical difficulty of comprehending concussion prevalence, symptoms, and consequences. The Lystedt's focus on post-concussion instructions obscures the underlying decision to confront a primary risk of incurring the first concussion. The information mandates do not include

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<sup>15</sup> Shen, *supra* note 3.

conveying the likelihood of a first concussion or the fact that many Lystedt statutes provide coaches and schools with immunity from ordinary negligence liability.<sup>16</sup> The focus on the need to remove an athlete from play immediately if signs of concussion appear are particularly ineffective when directed toward parents, as distinct from coaches, because parents are not necessarily present when the injury occurs. Finally, parents are not at their best in the youth sports context. Both research and common experience indicate that parents have a propensity toward strong personal emotions in the youth sports context that impair their skill at making a decision *on behalf of* another person.<sup>17</sup> Research demonstrates that parents are susceptible to the unique cultural force of sport in society; they are too much a part of it to serve as a check on it.<sup>18</sup> Where that kind of emotion or role confusion is seen in other contexts, the legal system ordinarily responds by constraining parental authority. The gravity of consenting to the risk of a nebulous lifelong injury *for another person* deserves our attention. The concept of the parent, I argue, is deployed to protect the status quo, and to postpone more systematic and expert design thinking that could reduce overall risk.

Part I explores the cultural contradictions surrounding football, to clarify the characteristics of our risk ambivalence. Part II describes the problem of traumatic brain injury (concussion), sorting through estimates of its prevalence in youth athletes and then describing its consequences. Part III describes the Lystedt legislation, and then recasts it as an imitation of an informed consent framework. Part IV explores the law of parental authority and its rationales, with a particular focus on parental waivers of liability for negligence, and explores the interaction between waiver law and the Lystedt statutes. Part V considers the special attributes of the youth sports parent, and then critiques the Lystedt's information framework in light of the problem of youth sports parents. It concludes that unless risky contact sports are

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<sup>16</sup> See, e.g., WIS. STAT. § 118.293 (2013) (“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.”).

<sup>17</sup> See discussion *infra* Part V.

<sup>18</sup> See discussion *infra* Part V; see, e.g., Michael S. Rosenwald, *Are Parents Ruining Youth Sports? Fewer Kids Play Amid Pressure*, WASH. POST (Oct. 4, 2015), [https://www.washingtonpost.com/local/are-parents-ruining-youth-sports-fewer-kids-play-amid-pressure/2015/10/04/eb1460dc-686e-11e5-9ef3-fde182507eac\\_story.html?utm\\_term=.d21eb93477e6](https://www.washingtonpost.com/local/are-parents-ruining-youth-sports-fewer-kids-play-amid-pressure/2015/10/04/eb1460dc-686e-11e5-9ef3-fde182507eac_story.html?utm_term=.d21eb93477e6).

prohibited entirely for minors,<sup>19</sup> the choice architecture needs substantial improvement to adequately inform parents and youth athletes of the consequences of exposure to heightened concussion risk. In addition, the Article suggests that the current legislative structure actually impedes overall risk reduction by reducing redesign pressure from insurers on sports and disarming parents from effective participation in that redesign process.

I. CULTURAL CONUNDRUM: FOOTBALL, DESTRUCTION,  
ENTERTAINMENT

On September 28, 2018, 16-year-old Dylan Thomas of Zebulon, Georgia, fell in the third quarter of a high school football game. Though he needed help standing up, he was able to respond to questions, but later lost consciousness.<sup>20</sup> He died two days later from traumatic brain injury, or what we commonly call concussion.<sup>21</sup> In October of 2017, 16-year-old Carlos Sanchez of Phoenix, Arizona died after suffering a concussion trying to complete a block in a football game.<sup>22</sup> A few years earlier, 16-year-old Chad Stover lost his life to concussion playing in a high school football game on Halloween night in Tipton, Missouri.<sup>23</sup> On September 11, 2015, 16-year-old Ben Hamm went for a tackle on a kickoff return, taking a hit that was described as not unusual and not bigger than others.<sup>24</sup> He died several days later. In October of 2015, 17-

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<sup>19</sup> Bennett Omalu, *Don't Let Kids Play Football*, N.Y. TIMES (Dec. 7, 2015), <https://www.nytimes.com/2015/12/07/opinion/dont-let-kids-play-football.html>. (arguing that child welfare requires the prohibition of contact football for minors); see also Chris Hemond, *Hockey Concussion: Is it Child Abuse?* 184 CAN. MED. ASS'N J. 861 (2012) (raising the same argument for hockey).

<sup>20</sup> Justin Baxley, 'An anomaly.' Reports Detail Pike County Football Player Dylan Thomas' Cause of Death, TELEGRAPH (Oct. 9, 2018, 9:56 PM), <https://www.macon.com/news/local/community/houston-peach/article219742730.html>; Adrienne Haney & Michael King, *High School Football Player in Georgia Dies Sunday From Injuries Sustained in Friday Game*, USA TODAY (Oct. 1, 2018, 10:28 AM), <https://www.usatoday.com/story/sports/highschool/2018/10/01/georgia-high-school-football-player-dylan-thomas-dies/1485428002/>.

<sup>21</sup> Baxley, *supra* note 20.

<sup>22</sup> Joshua R. Miller, *Arizona High School Football Player Died Blocking on Play*, N.Y. POST (Oct. 31, 2017, 10:55 AM), <https://nypost.com/2017/10/31/arizona-high-school-football-player-died-blocking-on-play/>.

<sup>23</sup> Sean Gregory, *Football's Ultimate Cost: The Chad Stover Story*, TIME (Sept. 18, 2014), <http://time.com/3394893/football-brain-injury-chad-stover/>.

<sup>24</sup> Paighen Harkins, *Wesleyan Christian School High School Football Player Dies After Injury*, TULSA WORLD (Sept. 20, 2015), [https://www.tulsaworld.com/communities/bartlesville/wesleyan-christian-school-high-school-football-player-dies-after-injury/article\\_604c55cf-26f0-5fba-8c18-f4f3f1e93521.html](https://www.tulsaworld.com/communities/bartlesville/wesleyan-christian-school-high-school-football-player-dies-after-injury/article_604c55cf-26f0-5fba-8c18-f4f3f1e93521.html); Kalyn Kahler & Dan Greene, *The Game's*

year-old Kenney Bui of Seattle died of a traumatic brain injury after stepping off of the football field seeming dazed.<sup>25</sup> In Chicago, 17-year-old Andre Smith died from a hit to the head in a high school game later that same month.<sup>26</sup> In November of 2015, 17-year-old Luke Schemm died of a traumatic brain injury from a shoulder-to-shoulder hit taken as he was scoring a conversion.<sup>27</sup> In that particularly bad year of 2015 alone, thirteen high school students died playing football, at least six due to traumatic brain injury (concussion).<sup>28</sup> This is not a comprehensive list of recent high school football deaths. According to the Centers for Disease Control (“CDC”), in 2017, 2.5 million high school students experienced concussions, a number significantly higher than previous reports that had been based on emergency room visits or based on only students who had lost consciousness.<sup>29</sup> The CDC reports that an average of 2.4 high school students die each season from football-induced traumatic brain injury.<sup>30</sup> Death is a rare concussion outcome, but the 2.5 million high school students who suffer a concussion each year experience a range of other cognitive, physical, and emotional deficits, and for many these will be long-term and lead to depression, cognitive impairment, and premature Alzheimer’s disease, Parkinson’s disease, and multiple sclerosis.<sup>31</sup>

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*Tragic Toll*, SPORTS ILLUSTRATED (Nov. 24, 2015), <https://www.si.com/mmqb/2015/11/24/high-school-football-deaths-2015>.

<sup>25</sup> Les Carpenter, *Kenney Bui: The Life and Death of a High School Football Player*, GUARDIAN (Oct. 14, 2015, 5:00 PM), <https://www.theguardian.com/sport/2015/oct/14/kenney-bui-high-school-football> (explaining that in Bui’s case, his parents attempted to prevent him from playing football, particularly as he was cleared 13 days after a first concussion in the same season that he died).

<sup>26</sup> Dana Ford & Ray Sanchez, *High School Football Player Andre Smith Dies in Illinois*, CNN (Oct. 26, 2015, 1:45 PM), <https://www.cnn.com/2015/10/25/us/illinois-high-school-football-player-death>.

<sup>27</sup> Kahler & Greene, *supra* note 24; see also Cam Smith, *Parents of Kansas Teen Luke Schemm Believe Death Was a ‘Fluke Accident’*, USA TODAY (Nov. 5, 2015), <https://usatodayhss.com/2015/parents-of-late-kansas-teen-luke-schemm-believe-death-was-a-fluke-accident>.

<sup>28</sup> See Diane Herbst, *Experts Alarmed Over 13 High School Football Deaths This Season*, PEOPLE (Dec. 3, 2015, 3:00 PM), <https://people.com/sports/experts-alarmed-over-13-high-school-football-deaths-this-season/> (explaining that heat stroke, spinal injury, and brain injury were the primary causes of death).

<sup>29</sup> Lara DePadilla et al., *Self-Reported Concussions from Playing a Sport or Being Physically Active Among High School Students - United States, 2017*, 67 MORBIDITY & MORTALITY WKLY. REP. 682 (2018).

<sup>30</sup> Kristen L. Kucera et al., *Traumatic Brain and Spinal Cord Fatalities Among High School and College Football Players - United States, 2005–2014*, 65 MORBIDITY & MORTALITY WKLY. REP. 1465 (2017).

<sup>31</sup> See *infra* Part II.B.

Concussion in professional sports has attracted substantial attention in the past decade. At the professional level, football, ice hockey, and soccer have been the targets of both legal actions and saturated media coverage of head injury and team and league responses to it. In 2017, the National Football League (“NFL”) reported 281 concussions, an all-time high.<sup>32</sup> The interest in concussion in professional football is particularly intense. In September 2014, the NFL acknowledged, in documents intended to help them to calculate liability payments, that approximately one-third of retired football players will develop dementia, Alzheimer’s, Parkinson’s, amyotrophic lateral sclerosis (“ALS”), or similarly debilitating cognitive disorders, at premature ages.<sup>33</sup> Defendants in lawsuits aren’t known to overestimate their exposure during settlement negotiations, so if there’s any controversy in this estimate, it would be whether it is high enough, not too high. A study in 2017 reported head pain or migraine symptoms consistent with post-concussion sequelae in fully 92% of retired football players.<sup>34</sup> This stark prognosis for NFL players increases the heat of the question, “how much is too much?”, or as a cover of Time Magazine put it, “*Is Football Worth It?*”<sup>35</sup>

Yet Americans love football. For now, the fundamental safety threshold for professional football is balanced on the other side by the more than 18 million viewers who tune in to watch Sunday night football each weekend.<sup>36</sup> Football is the most popular sport to watch in the United States, and despite a modest drop in the past year, it remains near the height of its popularity.<sup>37</sup> The conversation around concussion in football incorporates this glaring contradiction: the sport is at once beloved by the public and devastating to the players and to their

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<sup>32</sup> Kevin Seifert, *NFL Concussions Continue to Rise*, ESPN (Jan. 26, 2018), [http://www.espn.com/nfl/story/\\_/id/22226487/nfl-concussions-rise-highest-level-league-began-sharing-data](http://www.espn.com/nfl/story/_/id/22226487/nfl-concussions-rise-highest-level-league-began-sharing-data).

<sup>33</sup> Ken Belson, *Brain Trauma to Affect One in Three Players, N.F.L. Agrees*, N.Y. TIMES (Sept. 12, 2014), <https://www.nytimes.com/2014/09/13/sports/football/actuarial-reports-in-nfl-concussion-deal-are-released.html>.

<sup>34</sup> Randolph W. Evans, *The Prevalence of Migraine and Other Neurological Conditions Among Retired National Football League Players: A Pilot Study*, PRACTICAL NEUROLOGY, Nov./Dec. 2017, at 23.

<sup>35</sup> Sean Gregory, *The Tragic Risks of American Football*, TIME (Sept. 18, 2014), <https://time.com/magazine/us/3397061/september-29th-2014-vol-184-no-12-u-s/>.

<sup>36</sup> Rani Molla, ‘*Sunday Night Football*’ was the Highest-Rated TV Show This Year, but its Audience Is Smaller Than Last Year, RECODE (Dec. 18, 2017, 1:11 PM): <https://www.recode.net/2017/12/18/16791198/sunday-night-football-tv-nielsen-2017-most-watched>.

<sup>37</sup> *Id.*

families. Without the intense love of football from the fans, it is difficult to imagine the tolerance of this amount of acceptable destruction to the brains of the players. As a thought experiment, imagine a new game were invented, in which players ran through obstacle courses, and one-third would break their backs or hit their heads in a way that caused permanent brain damage. It likely would fail from the start, no matter how entertaining. Like tobacco, football is a special case, and the love of football is the regulatory complication. Understanding the cultural force of adult football is essential to understanding the state of traumatic brain injury prevention protocols in both youth football and in the array of other youth sports struggling with the problem in the shadow of football. The way we resolve the adult risk landscape may not entirely control the youth risk landscape, but I would argue that it's impossible to ignore the significant influence of the adult resolution on the youth landscape.

Football has always been dangerous. Forty-five football players died between 1900 and 1905, when Teddy Roosevelt convened Ivy League leaders at the White House to save football by “reducing the element of brutality in play,” leading to a series of reforms such as forward passing of the ball, which spread players out and reduced contact.<sup>38</sup> Even with these reforms, in the year 1931, “football killed 40 boys and young men.”<sup>39</sup> Danger has been as much a feature as a bug in the history of the football. But the contours of that danger are gaining greater clarity from a mix of substantially improved medical research, lawsuits, and media coverage. Knowing something is generally dangerous is different from understanding exactly which dangers are present, the specific and long-term consequences of those dangers, and participants' likelihood of suffering those consequences.

Meaningful consent requires information; this is the premise of fairly allocating risk calculations to individual participants. While many research questions remain, there is substantially more information about these dangers than there was a decade ago. Some in the football industry, like legendary broadcaster Bob Costas, have repeatedly questioned whether football can survive our improved medical understanding, and are working to improve sports broadcast coverage to reduce the amount of placating euphemism and to replace it with

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<sup>38</sup> Katie Zezima, *How Teddy Roosevelt Helped Save Football*, WASH. POST (May 29, 2014, 5:00 AM), <https://www.washingtonpost.com/news/the-fix/wp/2014/05/29/teddy-roosevelt-helped-save-football-with-a-white-house-meeting-in-1905/>.

<sup>39</sup> *Medicine: Varsity*, TIME (Dec. 14, 1931), <http://content.time.com/time/magazine/article/0,9171,930056,00.html>.

more accurate and sober language and information.<sup>40</sup> Costas has basically left football, concluding that the game “destroys people’s brains.”<sup>41</sup>

In the United States today, 1.1 million high school students play football at school.<sup>42</sup> Another 3 million youth play non-school, organized contact football using full protective gear, such as middle and elementary school Pop Warner play.<sup>43</sup> By contrast, only 100,000 play in collegiate or professional or semi-professional post-high school settings.<sup>44</sup> Framing the discussion around the relatively small number of adult players has the capacity to influence a far larger group of players whose risks of concussion are *higher* and whose capacity to consent is *lower*. We are spending a great deal of cultural energy contemplating the destruction/entertainment/consent conundrum in professional sports, without enough attention to the interplay between professional sports and youth concussion risk.<sup>45</sup>

## II. THE PROBLEM OF TRAUMATIC BRAIN INJURY (CONCUSSIONS)

The symptoms of a concussion can be challenging to observe and to distinguish from psychological or emotional states like fatigue and heat

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<sup>40</sup> Jacob Feldman, *Bob Costas Supports CLF Initiative to Educate Media Members on Concussions*, SPORTS ILLUSTRATED (Nov. 9, 2018), <https://www.si.com/tech-media/2018/11/09/bob-costas-concussion-legacy-foundation-education>; see also John Branch, *ESPN Football Analyst Walks Away, Disturbed By Brain Trauma On Field*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/sports/espn-ed-cunningham-football-concussions.html> (narrating that Ed Cunningham, a prominent ESPN commentator, has also walked away from a promising football media career over the issue).

<sup>41</sup> Feldman, *supra* note 40.

<sup>42</sup> AJ Willingham, *Deaths on College and High School Football Fields Are a Rare – But Reliable – Tragedy*, CNN (Oct. 1, 2018, 12:19 PM), <https://www.cnn.com/2018/09/21/health/football-deaths-season-injuries-high-school-college-trnd/index.html>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> An egregious example of the interplay came in a 2012 Public Service Announcement (“PSA”) starring New England’s beloved Tom Brady, in which he directly encourages parents to trust the safety of the game. A joke is embedded in the PSA: the worried parent who Brady reassures is revealed in the end not to be her minor child, as you’ve assumed, but her adult professional player, Baltimore Ravens’ Ray Lewis, thereby directly flattening out the distinction between handling NFL risk and handling youth risk. BillR2009, *Newest NFL Evolution commercial.mp4*, YOUTUBE (Oct. 7, 2012), <https://www.youtube.com/watch?v=m3iE6Jnh8jU> (providing a PSA as part of the NFL “Play Smart, Play Safe” campaign); see TEDxYouth, *Head Games: Duncan Jurayj and Kate Silbaugh at TEDxYouth@BeaconStreet*, YOUTUBE (Dec. 28, 2013), <https://www.youtube.com/watch?v=mcoHs6m25UQ>.

illness.<sup>46</sup> There is no physiological screen for a brain injury, much less a rapid screen that can be administered on the sidelines. Headache, difficulty focusing, sluggishness, moodiness, fatigue, and nausea are common in concussed athletes. But these symptoms are common in youth without a concussion as well. The athlete herself becomes the crucial source of information about her condition, yet she may not be in a state to accurately pinpoint and describe symptoms due to the concussion itself, the general limits of her young age, her desire to conceal or minimize her symptoms to speed her return to play, or in response to the vagueness of the experience of being concussed.

Researchers have understood for some time that children are more vulnerable to concussion than adults in three ways. Children and teenagers are more likely to be concussed by an impact, more likely to suffer serious long-term consequences from a concussion, and take longer to recover from a concussion than adults.<sup>47</sup> All three differences between youth and adult concussion point toward a higher need to protect the under-aged brain *independent* of differences in the maturity needed to assess the risk decision.

#### A. *Finding Concussion Rates in Youth Sports*

Researchers do not agree on the incident rate of concussions in youth sports. In the past, concussions were graded by presumed severity based on whether a concussed person lost consciousness (and for how long), or exhibited amnesia (and for how long). The use of that grading system has diminished with evidence that it did not predict the longevity and intensity of concussion symptoms: relatively mild initial symptoms could intensify and be prolonged, while relatively intense immediate symptoms could abate quickly.<sup>48</sup>

Sports are not the primary cause of serious traumatic brain injury; falls and car accidents, for example, cause more traumatic brain injury

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<sup>46</sup> Keith A. Scorza et al., *Current Concepts in Concussion: Evaluation and Management*, 85 AM. FAM. PHYSICIAN 123, 124 (2012).

<sup>47</sup> See CTRS. DISEASE CONTROL & PREVENTION, A FACT SHEET FOR YOUTH SPORTS PARENTS (2019), [https://www.cdc.gov/headsup/pdfs/youthsports/parents\\_eng.pdf](https://www.cdc.gov/headsup/pdfs/youthsports/parents_eng.pdf).

<sup>48</sup> See Christopher C. Giza et al., *Summary of Evidence-Based Guideline Update: Evaluation and Management of Concussion in Sports: Report of the Guideline Development Subcommittee of The American Academy of Neurology*, 80 AM. ACAD. NEUROLOGY 2250, 2252-53 (2013); Gary Mihoces, *Group Issues Updated Concussion Guidelines*, USA TODAY (Mar. 18, 2013, 8:06 PM), <https://www.usatoday.com/story/news/nation/2013/03/18/sports-possible-concussions/1997797/>.

than sports.<sup>49</sup> Nevertheless, the incidence of sports-related concussion is routinely underreported due to an obvious error of classification in early foundational study of the subject that only included patients who had lost consciousness due to their concussions.<sup>50</sup> In addition, some public health work has suggested that among athletes more than 50% of concussions go unreported.<sup>51</sup> According to the CDC, during each of the years between 2001 and 2010, more than 2.5 million people were either hospitalized or went to the emergency room with a traumatic brain injury.<sup>52</sup> Since many concussions do not come through hospitals, *the number of annual concussions is not known definitively.*<sup>53</sup> The problem of ascertaining the number has been clearly surfaced in the literature. One meta-survey of over 100 studies concluded that:

[i]n 2013, the researchers calculated an incidence rate of between 14 and 24 sports- and recreation-related concussions per 1,000 children.<sup>54</sup>

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<sup>49</sup> Julie Winstanley et al., *Early Indicators and Contributors to Psychological Distress in Relatives During Rehabilitation Following Severe Traumatic Brain Injury: Findings from the Brain Injury Outcomes Study*, 21 J. HEAD TRAUMA REHAB. 453, 458 (2006).

<sup>50</sup> That study found 300,000 recreation and sports-related concussions annually, and it has long informed thinking about concussion in recreational sports. But another study indicates that as few as 8% of concussed individuals lose consciousness. Mark R. Schulz et al., *Incidence and Risk Factors for Concussion in High School Athletes, North Carolina, 1996–1999*, 160 AM. J. EPIDEMIOLOGY 937, 940 (2004). If it's appropriate to extrapolate from those two CDC numbers, this would mean between 1.6 million and 3.8 million concussions each year due to sports and recreational activities alone, combining adults and youth. Scorza et al., *supra* note 46.

<sup>51</sup> Zachary Y. Kerr et al., *Disclosure and Non-Disclosure of Concussion and Concussion Symptoms in Athletes: Review and Application of the Socio-Ecological Framework*, 28 BRAIN INJ. 1009, 1011-14 (2014); Timothy B. Meier et al., *The Underreporting of Self-Reported Symptoms Following Sports-Related Concussion*, 18 J. SCI. & MED. SPORT 507, 510 (2014) (pointing out that athletes underreport post-concussive symptoms to team medical staff).

<sup>52</sup> *Rates of TBI-Related Emergency Department Visits, Hospitalizations, and Deaths — United States, 2001–2010*, CTRS. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/traumaticbraininjury/data/rates.html> (last visited Oct. 14, 2019).

<sup>53</sup> The prior method of counting concussions reflected the prior medical understanding that a concussion that involved the loss of consciousness or an emergency room visit defined the injury. The medical community has more recently concluded that the correlation between the immediate result of a hit and the long term sequela is weaker than previously believed and seen the need for a different metric to establish the prevalence of concussion overall, and youth athletic concussion in particular.

<sup>54</sup> Carly Rasmussen et al., *How Dangerous Are Youth Sports for the Brain? A Review of the Evidence*, 7 BERKELEY J. ENT. & SPORTS L. 67, 91 (2018).

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This thorough survey of the existing literature is bounded by its sources, most of which continue to rely on emergency room visits.<sup>55</sup>

Since that survey was completed, a new source of information has indicated a higher rate of high school concussion than previously understood, fully ten times higher than the meta-survey described above. In 2017, the CDC added a question about concussion for the first time to its highly valued Youth Risk Behavior Survey (“YRBS”). The CDC administers this survey every other year to a large cross-section of high school students. The anonymous survey had a sample size in 2017 of 14,765, and an 81% response rate among the students randomly selected to participate. Among high school students alone, the self-reports indicate 2.5 million students experienced a concussion from sports or similar activities in 2017.<sup>56</sup> In addition, the survey question asked whether students had experienced a concussion “from playing a sport or being physically active?” This framing of the question eliminates another source of noise in the prior data introduced by car accidents or falls, which are the number one cause of traumatic brain injury. In other words, asking teenagers whether they’d experienced a concussion from *playing sports* or being physically active, and not requiring an emergency room visit, caused the number of concussions reported to skyrocket.

When the new CDC figures are expressed in percentages, a full 15.1% of high school students had experienced a sports- or activity-related concussion in the past twelve months alone. Among students who played on two sports teams in the past twelve months, 22.9% had experienced a sports- or activity-related concussion during that period. For those who played on three sports teams during that period, the figure is 30.3%. As a rough estimate of the risks associated with youth athletics, these figures become concerning because of the improved understanding of the potential long-term consequences for these children. In addition, there is wide variation in prevalence by sport, and while some of that variation is obvious (football and ice hockey are

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<sup>55</sup> See *id.* at 122-91. Nevertheless, this work advances our sport-specific estimates of risk greatly. For estimates of unreported concussions and those that do not include emergency room visits, this survey extrapolated from two surveys that attempted to measure unreported concussions, one focused on female middle school soccer players and the other on a sample of 1,500 high school football players in Wisconsin. *Id.* at 91 n.103. Nonetheless, the incidence this survey produces is slightly lower than many other surveys, confusing a number of working hypotheses.

<sup>56</sup> DePadilla et al., *supra* note 29.

higher frequency), some is less obvious in the absence of good information campaigns (e.g., girls' soccer is high frequency).<sup>57</sup>

B. *Consequences of Traumatic Brain Injury (Concussion)*

The medical understanding of concussion outcomes has evolved dramatically in recent years. According to the CDC, traumatic brain injury can lead to temporary or long-term functional deficits to cognitive, physical, and emotional health. These changes can be to thinking (including memory and reasoning); sensation (including sight and balance); language (including communication, expression, and understanding); and emotion (including, depression, anxiety, personality changes, aggression, acting out, and social inappropriateness).<sup>58</sup> In addition to these functional changes, concussion can cause epilepsy and it appears to increase the risk of brain disorders such as Alzheimer's disease and Parkinson's disease.<sup>59</sup> An adolescent concussion increases the risk of developing multiple sclerosis as an adult.<sup>60</sup> The evidence of these links has become stronger in recent years, though the long-term consequences are not yet expressed in the format that would be relevant to a parent: What's the likelihood that my child will suffer these long-term consequences if she suffers a concussion?

There were significant battles between researchers and the NFL over the development of Chronic Traumatic Encephalopathy ("CTE") studies, both by Dr. Omalu and by the Boston University CTE Center; these have been chronicled at length elsewhere.<sup>61</sup> When neuropathologist Ann McKee dissected 111 brains of former NFL players donated to Boston University's brain bank, she found that 110 of 111 had CTE.<sup>62</sup> The sample of 111 brains is skewed because those suffering neurodegenerative symptoms are most likely to donate their

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<sup>57</sup> See Rasmussen et al., *supra* note 54, at 92.

<sup>58</sup> Hodge & Hubbard, *supra* note 3, at 31; *Potential Effects*, CTRS. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/traumaticbraininjury/outcomes.html> [hereinafter *Potential Effects*] (last reviewed Feb. 25, 2019).

<sup>59</sup> Sources cited *supra* note 58; INST. MED. & NAT'L RESEARCH COUNCIL, SPORTS-RELATED CONCUSSIONS IN YOUTH 222 (2014).

<sup>60</sup> Scott Montgomery et al., *Concussion in Adolescence and Risk of Multiple Sclerosis*, 82 ANNALS NEUROLOGY 554, 556-57 (2017).

<sup>61</sup> See, e.g., MARK FAINARU-WADA & STEVE FAINARU, LEAGUE OF DENIAL: THE NFL, CONCUSSIONS, AND THE BATTLE FOR TRUTH (2013); JEANNE M. LASKAS, CONCUSSION (2015).

<sup>62</sup> Joe Ward et al., *110 N.F.L. Brains*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/interactive/2017/07/25/sports/football/nfl-cte.html>.

brains to the bank, but even so, the finding is remarkable. For the first time, a physiological correlate to the symptoms of post-concussive neurodegenerative phenomena could be seen across an enormous sample, and to a near-perfect prevalence. CTE is not the only measure of harm from traumatic brain injury, but it is demonstrated with pathology evidence among a population with a clear history of head trauma, and so it anchors one end of the concussion inquiry. A 2017 study found that 92% of retired NFL players suffered head pain or migraine.<sup>63</sup> In addition, the NFL's long-term effort to bury information about the dangers of head trauma leave a culture of distrust in the information ecology around concussion risk for the population as a whole.<sup>64</sup> Once the public learns that an intentional effort to conceal risk has been undertaken by a powerful entity, it is difficult to know when the disinformation has ended and it is safe to trust the updates.

Against the backdrop of this skepticism, the concrete evidence surrounding youth and concussion outcomes is a combination of concerning and incomplete. But the evidence points toward the conclusion that *youth concussion is more dangerous than adult concussion* along every relevant measure.

Youth are more likely to sustain concussions than adults.<sup>65</sup> Youth are also slower to recover from concussion than adults; they are more likely to be in the prolonged recovery group.<sup>66</sup> Symptoms tend to be more acute and to last longer in minors.<sup>67</sup> While concussion symptoms abate for most people within a week, they last longer for approximately 10% of people, and among that prolonged recovery group, symptoms are still

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<sup>63</sup> Evans, *supra* note 34.

<sup>64</sup> See Matt Vasilogambros, *The NFL's Concussion Cover-Up*, ATLANTIC (May 23, 2016), <https://www.theatlantic.com/entertainment/archive/2016/05/nfls-concussion-cover-up/484016/>.

<sup>65</sup> Annie Baillargeon et al., *Neuropsychological and Neurophysiological Assessment of Sport Concussion in Children, Adolescents and Adults*, 26 BRAIN INJ. 211, 212 (2012); RACHEL RAMSDEN ET AL., B.C. INJ. RES. & PREVENTION UNIT, CONCUSSION AMONG CHILDREN AND YOUTH IN BRITISH COLUMBIA, at ii (2016), [http://www.injuryresearch.bc.ca/wp-content/uploads/2016/01/Concussion-in-Interior-Health-Jan\\_27\\_2016-FINAL.pdf](http://www.injuryresearch.bc.ca/wp-content/uploads/2016/01/Concussion-in-Interior-Health-Jan_27_2016-FINAL.pdf); see Tracey Covassin et al., *The Role of Age and Sex in Symptoms, Neurocognitive Performance, and Postural Stability in Athletes After Concussion*, 40 AM. J. SPORTS MED. 1303, 1304, 1310 (2012) (discussing the increased severity of concussion symptoms in high school versus collegiate athletes).

<sup>66</sup> Grant L. Iverson et al., *Predictors of Clinical Recovery from Concussion: A Systematic Review*, 51 BRIT. J. SPORTS MED. 941, 942 (2017).

<sup>67</sup> Paul McCrory et al., *Summary and Agreement Statement of the 2nd International Conference on Concussion in Sport, Prague 2004*, 39 BRIT. J. SPORTS MED. 196, 197 (2005); see also Baillargeon et al., *supra* note 65, at 212.

reported up to 45-90 days post-concussion.<sup>68</sup> Loss of consciousness correlates with prolonged recovery, but the correlation is not as strong as was once believed.<sup>69</sup> Youth who have already experienced and recovered from one concussion are more likely to experience prolonged symptoms if they experience a second concussion.<sup>70</sup>

The CDC explains that repeated concussions can lead to cumulative deficits, while repeated concussions close together in time can be fatal:

Repeated mild TBIs occurring over an extended period of time can result in cumulative neurological and cognitive deficits. Repeated mild TBIs occurring within a short period of time (i.e., hours, days, or weeks) can be catastrophic or fatal.<sup>71</sup>

Two concussions occurring close together in time can lead to a phenomenon sometimes referred to as *second-impact syndrome*, which can lead to fatal swelling in the brain.<sup>72</sup> This phenomenon is likely implicated in most or all of the deaths of the high school football players described earlier. The risk that this will occur is low, but the consequence is dire. In addition, the fatality can be surprising relative to the hit. While parents may know that their child can die from a catastrophic traumatic brain injury in an automobile accident, they do not appreciate that two moderate, or even mild, blows to the head within the same game or practice could carry that extraordinary consequence. In addition, second-impact syndrome is avoidable if athletes are removed from play after experiencing the first concussion.<sup>73</sup> Second-impact syndrome is a good target for an information campaign

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<sup>68</sup> Michael McCrea et al., *Incidence, Clinical Course, and Predictors of Prolonged Recovery Time Following Sport-Related Concussion in High School and College Athletes*, 19 J. INT'L NEUROPSYCHOLOGICAL SOC'Y 22, 30 (2013).

<sup>69</sup> Annette Sterr et al., *Are Mild Head Injuries as Mild as We Think? Neurobehavioral Concomitants of Chronic Post-Concussion Syndrome*, BMC NEUROLOGY, at 5-6 (2006).

<sup>70</sup> Lianne Castile et al., *The Epidemiology of New Versus Recurrent Sports Concussions Among High School Athletes, 2005–2010*, 46 BRIT. J. SPORTS MED. 603, 606-07 (2011); Matthew A. Eisenberg et al., *Time Interval Between Concussions and Symptom Duration*, 132 PEDIATRICS 8, 11 (2013).

<sup>71</sup> *Potential Effects*, supra note 58.

<sup>72</sup> See *id.*; see also Eisenberg et al., supra note 70; Teisaburo Mori et al., *Acute Hemispheric Swelling Associated With Thin Subdural Hematomas: Pathophysiology of Repetitive Head Injury in Sports*, 96 ACTA NEUROCHIRURGICA 40, 41 (2006); David Xavier Cifu et al., *Repetitive Head Injury Syndrome: Background, Epidemiology, Functional Anatomy*, MEDSCAPE (Feb. 8, 2017), <https://emedicine.medscape.com/article/92189-overview>.

<sup>73</sup> See *Responding to a Concussion and Action Plan for Coaches*, CTRS. DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/headsup/basics/concussion\\_respondingto.html](https://www.cdc.gov/headsup/basics/concussion_respondingto.html) (last visited Oct. 14, 2019).

both because the phenomenon is not obvious and because information can lead to actions that avoid the harm. At the same time, it is only one of the risks of concussion, and not the most prevalent of either the short- or the long-term consequences risked when exposed to traumatic brain injury.<sup>74</sup>

The unanswered question is this: How many apparently mild concussions will have long-term consequences?<sup>75</sup> Some evidence from soccer suggests that cognitive harm can result from multiple sub-concussive hits, including from heading the ball.<sup>76</sup> But what is the *rate* of long-term consequences? There is evidence that one-quarter of youth concussions include some amnesia.<sup>77</sup> One study found that those who experience amnesia are more likely to suffer memory and attention issues two decades later.<sup>78</sup> The strength of the association between prolonged recovery and long-term consequences is unclear. Evidence suggests that approximately 15% of those experiencing concussion “suffer from deficits one year after injury.”<sup>79</sup> One study compared a group of adult athletes who had suffered their last concussion thirty years ago to a control group of adult athletes who had no history of concussion. Those with no concussion history had superior cognitive functioning across a variety of tasks, compared to those who had a concussion 30 years ago.<sup>80</sup> It appears that the plasticity of the youth brain makes it more vulnerable to long-term cognitive impairment.<sup>81</sup>

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<sup>74</sup> Charles H. Tator, *Concussions and Their Consequences: Current Diagnosis, Management, and Prevention*, 185 CAN. MED. ASS'N J. 975, 975 (2013); *Potential Effects*, *supra* note 58.

<sup>75</sup> Giza et al., *supra* note 48, at 2252 (“No studies were found relevant to prediction of sports-related neurologic catastrophe or chronic neurobehavioral impairment.”).

<sup>76</sup> Walter F. Stewart et al., *Heading Frequency Is More Strongly Related to Cognitive Performance Than Unintentional Head Impacts in Amateur Soccer Players*, 9 FRONTIERS NEUROLOGY 1, 5, 7 (2018); Gretchen Reynolds, *Heading the Soccer Ball May Be Bad for Young Brains*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/well/heading-soccer-ball-children-kids-concussion-brain.html>.

<sup>77</sup> William P. Meehan III et al., *High School Concussions in the 2008-2009 Academic Year: Mechanism, Symptoms, and Management*, 38 AM. J. SPORTS MED. 2405, 2406-07 (2010).

<sup>78</sup> Erik Hessen et al., *Neuropsychological Function in a Group of Patients 25 Years After Sustaining Minor Head Injuries as Children and Adolescents*, 47 SCANDINAVIAN J. PSYCHOL. 245, 248 (2006).

<sup>79</sup> DANIEL H. DANESHVAR ET AL., NAT'L INST. OF HEALTH, LONG TERM CONSEQUENCES: EFFECTS ON NORMAL DEVELOPMENT PROFILE AFTER CONCUSSION 3 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3208826/pdf/nihms-316875.pdf>.

<sup>80</sup> Louis De Beaumont et al., *Brain Function Decline in Healthy Retired Athletes Who Sustained Their Last Sports Concussion in Early Adulthood*, 132 BRAIN 695, 704 (2009).

<sup>81</sup> Pullela et al., *supra* note 14, at 407.

These findings do not present a clear overall risk magnitude, but neither are they reassuring. They indicate that some significant proportion of youth athletes — 15%? more? less? — will experience a concussion each year, 10–15% of those will have a prolonged recovery, and either group runs a heightened risk of cognitive deficits in the present and of neurodegenerative disease decades later. When the incomplete state of the research was combined with the revelation that concussion risk had been minimized and concealed by professional athletic leagues, pressure built to intervene on behalf of youth athletes.

Taken together, all of the new information about youth risk led to pressure on state legislatures to take action to protect children from traumatic brain injury. From this pressure, catalyzed by one concussion victim in Washington State, the Lystedt structure emerged.

### III. LYSTEDT LAWS

In 2009, Washington State became the first to pass a concussion return to play law, commonly called the Lystedt law. By 2015, all fifty states and the District of Columbia had followed suit,<sup>82</sup> a remarkably quick legislative timetable for change.<sup>83</sup> As a number of commentators have observed, the rapid pace of legislative adoption did not allow for time to research the efficacy of the Lystedt model, yet the model became the blueprint for nationwide standards.<sup>84</sup> Indeed, in 2010, NFL Commissioner Roger Goodell wrote a letter to governors urging them to pass legislation modeled on the Lystedt elements.<sup>85</sup> With the NFL backing and the urgency of the issue increasing in the public dialogue, the Lystedt model became the default nationwide, even though its efficacy had not been tested and its underlying theory not subject to thorough critical evaluation.

#### A. *Lystedt's Return to Play Framework*

Lystedt laws are not aimed at preventing mild or moderate long-term consequences of concussion. Instead, they are aimed almost exclusively

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<sup>82</sup> *Traumatic Brain Injury Legislation*, NAT'L CONFERENCE STATE LEGISLATURE (Oct. 11, 2018), <http://www.ncsl.org/research/health/traumatic-brain-injury-legislation.aspx>.

<sup>83</sup> *See id.* (providing most up to date status of state legislation and tracking legislative activity and provides access to statutory language by state).

<sup>84</sup> Lowrey & Morain, *supra* note 3, at 298; *see also* Hosea H. Harvey, *Reducing Traumatic Brain Injuries in Youth Sports: Youth Sports Traumatic Brain Injury State Laws, January 2009–December 2012*, 103 AM. J. PUB. HEALTH 1249, 1250 (2013).

<sup>85</sup> *Goodell Sends Letter to 44 Governors*, ESPN (May 23, 2010), <http://www.espn.com/nfl/news/story?id=5212326> [hereafter *Goodell Sends Letter*].

at preventing concussed youth players from returning to play and thereby finding themselves at risk for catastrophic second-impact syndrome. To accomplish this goal, the laws generally consist of three components. First, the strongest laws usually call for the education or training of coaches, athletes, and parents, so that they will recognize the signs of a concussion. Second, the laws generally contain a requirement that an athlete showing signs of concussion must be removed from play for evaluation. Finally, the laws usually include a requirement that such athletes may not return to play until a designated health care provider, ranging from a physician to a school trainer, depending on the state, clears the student for play.<sup>86</sup> These laws aim to reduce the number of youth players who experience life-threatening second hits after they have already been concussed. To reduce that risk, coaches, players, and parents need the skill to recognize that a concussion may have occurred, and they need to know what to do: remove the child from play and do not allow her to return until she is healed in the view of a designated expert.

#### 1. Information for Whom?

The educational components of the laws vary from state to state. In general, though, these laws require coaches, parents, and/or student athletes to receive information about concussion, ordinarily through dissemination of printed information. Half of the states do not require coaches to receive any training for how to deal with an apparently concussed athlete, ostensibly the heart of second-impact prevention.<sup>87</sup> Only twenty-nine states require coaches to even receive passive information about concussion risk, short of training. Only seven states require referees to receive concussion training, though they would seem to be essential to a legislative scheme designed to respond effectively to second-impact risk.<sup>88</sup> Only forty-four states require the athlete themselves to receive even passive information. Yet forty-nine states require parents to receive concussion information. Parents are the most consistent target of the information across the state statutory schemes. They are the organizing feature of that information campaign.

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<sup>86</sup> NAT'L CTR. INJURY PREVENTION & CONTROL, IMPLEMENTING RETURN TO PLAY 8-9, [https://www.cdc.gov/headsup/pdfs/policy/rtp\\_implementation-a.pdf](https://www.cdc.gov/headsup/pdfs/policy/rtp_implementation-a.pdf) (last visited July 24, 2019).

<sup>87</sup> Lau, *supra* note 3, at 2889-91.

<sup>88</sup> Kim et al., *supra* note 3, at 174.

## 2. Efficacy

There has been little study of the efficacy of the legislation,<sup>89</sup> and what there is shows mixed results. On the one hand, coaches in particular appear to be better educated on the risk and harms of concussion than they were prior to enactment of the laws, while athletes show less improvement.<sup>90</sup> A recent survey of the research on the efficacy of Lystedt describes the study design of each evaluation, and remarkably, parents have not been surveyed or studied. The efficacy studies have focused instead on the impressions of health care providers, coaches, athletes, and others in the league and school orbits.<sup>91</sup> Perhaps unsurprisingly, coaches and schools identify parents as an impediment to effective enforcement of the legislation.<sup>92</sup> We can only speculate about whether parents would say the same of them, because it appears no study has considered them a key data source when evaluating the efficacy of the legislation. This is a noteworthy oversight given that parents are the *consensus* target of information across state variation for other constituencies.

The Lystedt laws contain a return to play protocol, and in forty-seven states, a healthcare provider needs to decide that an athlete is cleared for play. Only twenty-five states require such healthcare providers to be trained in concussion, either by virtue of their profession or through a specific training.<sup>93</sup>

## 3. Post-concussion Focus

Parent information provided under the Lystedt statutes is generally limited to post-concussion related information: What are the signs of a concussion, and what are the return to play protocols? If risk information is conveyed, it tends to be about returning to play, not about the underlying primary concussion risk in that sport or in youth sports in general.<sup>94</sup> Indeed, the CDC parent information sheet, which is

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<sup>89</sup> See Kathryn Coxe et al., *Consistency and Variation in School-Level Youth Sports Traumatic Brain Injury Policy Content*, 62 J. ADOLESCENT HEALTH 255, 256 (2017); Shen, *supra* note 3, at 8. *But see* Lowrey & Morain, *supra* note 3, at 290-91.

<sup>90</sup> Chrisman, *supra* note 3, at 1192-93.

<sup>91</sup> See Shen, *supra* note 3.

<sup>92</sup> *Id.* at 19 (stating that the author is conducting a survey that has not yet been published that includes parents).

<sup>93</sup> Kim et al., *supra* note 3, at 175.

<sup>94</sup> See, e.g., CITY OF KIRKLAND PARKS & CMTY. SERVS. DEP'T YOUTH SPORTS, ZACKERY LYSTEDT LAW – CONCUSSION / HEAD INJURY AND SUDDEN CARDIAC ARREST POLICIES (2014), [https://www.kirklandwa.gov/Assets/Parks/Parks+PDFs/Parks\\_Features/Lystedt+Law+Agreement.pdf](https://www.kirklandwa.gov/Assets/Parks/Parks+PDFs/Parks_Features/Lystedt+Law+Agreement.pdf).

designed to assist states in putting together information to comply with these statutes, contains information only about recognizing a concussion, seeking medical treatment, and following return to play protocols, but no information about the background risk of primary concussion or its potential long-term consequences.<sup>95</sup> The information provided does not invite parents to make an overall pre-participation risk assessment using appropriate information to that task. To make that assessment, parents would need to learn about their child's overall risk of concussion and the long-term consequences of concussion.<sup>96</sup>

#### 4. Immunity from Tort Liability

While these laws place a burden on school districts and coaches, twenty-four of them offer in exchange complete immunity from lawsuit to actors within the system, such as coaches, schools, trainers, or physicians, who properly followed the specific return to play protocols set out in the statute.<sup>97</sup> This immunity is a powerful rollback of the underlying tort law in the area, which would ordinarily hold school districts and coaches responsible for the exercise of due care in running athletic programs, not just in the narrow return to play protocols covered by the Lystedt framework.

##### B. Deficiencies in the Lystedt Law

Many scholars have criticized aspects of the Lystedt laws, particularly in states that enacted weaker versions.<sup>98</sup>

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<sup>95</sup> CTRS. DISEASE CONTROL & PREVENTION, PARENT & ATHLETE CONCUSSION INFORMATION SHEET, [https://www.cdc.gov/headsup/pdfs/custom/headsupconcussion\\_parent\\_athlete\\_info.pdf](https://www.cdc.gov/headsup/pdfs/custom/headsupconcussion_parent_athlete_info.pdf) (last visited Feb. 10, 2019) (inviting coaches and schools to customize the handouts with their team logo); *see also* CTRS. DISEASE CONTROL & PREVENTION, A FACT SHEET FOR PARENTS, [https://www.cdc.gov/headsup/pdfs/schools/tbi\\_factsheets\\_parents-508-a.pdf](https://www.cdc.gov/headsup/pdfs/schools/tbi_factsheets_parents-508-a.pdf) (last visited Feb. 10, 2019).

<sup>96</sup> *See* Rasmussen et al., *supra* note 54, at 71 (arguing that this primary risk information should be assessed and provided prior to participation to improve risk decision-making).

<sup>97</sup> *See, e.g.*, 24 PA. CONS. STAT. § 5323(i) (2012); OHIO REV. CODE ANN. § 3313.539(G)(2) (2014); WIS. STAT. § 118.293(5)(a) (2013); *see also*, Kim et al., *supra* note 3 (pointing out that twenty-four states provide immunity to those that comply with the statute's return to play protocols).

<sup>98</sup> Spaude, *supra* note 3, at 1113-14.

### 1. Minimal Coverage, Thin Operations

While state law varies widely on the way each of these elements are handled, several general aspects of these laws have come under scrutiny. For example, many laws don't cover enough athletes, as many are limited to public high school athletes only and fail to address private school, middle school, or youth league athletes. In addition, many laws don't require sufficient baseline cognitive testing that would allow for more accurate post-hit concussion diagnosis. Some would like to see laws that require sideline health care providers, despite the difficulty of providing them in rural areas in particular. Some of the laws allow return to play sign-off from medical care para-professionals who may not have adequate concussion knowledge.<sup>99</sup> In addition, most laws don't adequately address issues concussed students have in returning to the classroom, as distinct from the playing field. Moreover, the laws treat a "cleared" player as completely cured, rather than tightening removal or return to play protocols for players who have suffered one or more prior concussions, and are therefore at an even higher risk of second-impact syndrome and of prolonged recovery periods. The legal literature has also raised questions about the adequacy of the information given to coaches, athletes, and parents, and about the ability of a concussed athlete to make a meaningful decision in a state of cognitive impairment.<sup>100</sup>

### 2. No Primary Prevention

While each of these critiques is significant, by far the most significant failure of the Lystedt legislative structure is that it does nothing to minimize the risks of suffering a first concussion, as it contains no *primary prevention strategy*. Given the enormous infrastructure of parental, coach, and athlete information generated by these laws across fifty states, it seems a glaring omission to skip straight to the second concussion and entirely ignore health, awareness, and prevention of the first. But that's precisely what the Lystedt framework does. It structures a landscape where first concussions are inevitable and are day one of the risk, such that a child's first concussion initiates the call to action, rather than the child's participation in contact sports. Lystedt contains no primary prevention incentives. Arguably, by focusing on post-

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<sup>99</sup> See William P. Meehan III, *Assessment and Management of Sport-Related Concussions in United States High Schools*, 39 AM. J. SPORTS MED. 2304, 2308 (2011).

<sup>100</sup> See generally sources cited *supra* note 3.

concussion protocols, Lystedt draws the attention of athletes and parents away from the question of primary prevention.

The CDC describes the appropriate response to sports concussion risk as follows:

To minimize TBI in sports and recreation activities, primary and secondary prevention strategies should be implemented. *Primary prevention strategies include:* 1) *using protective equipment* (e.g., a bicycle helmet) that is appropriate for the activity or position, fits correctly, is well maintained, and is used consistently and correctly; 2) *coaching appropriate sport-specific skills with an emphasis on safe practices and proper technique*; 3) *adhering to rules of play with good sportsmanship and strict officiating*; and 4) *attention to strength and conditioning*. Secondary prevention strategies include increasing awareness of the signs and symptoms of TBI and recognizing and responding quickly and appropriately to suspected TBI.<sup>101</sup>

These are clear medical recommendations to focus on primary prevention strategies as well as to improve return to play protocols.<sup>102</sup> Yet Lystedt legislation fails to capture or address any of the thorny questions around the optimal design and usage practices of protective equipment,<sup>103</sup> the crucial role of officiating in preventing concussion,<sup>104</sup> and whether required strength training could play a preventive role in concussion.<sup>105</sup> These CDC-recommended practices pose very little

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<sup>101</sup> *Nonfatal Traumatic Brain Injuries Related to Sports and Recreation Activities Among Persons Aged ≤ 19 Years — United States, 2001-2009*, CTRS. DISEASE CONTROL & PREVENTION, 60 MORBIDITY & MORTALITY WKLY. REP. 1337 (2011) (emphasis added).

<sup>102</sup> L. Syd M. Johnson, *Return to Play Guidelines Cannot Solve the Football-Related Concussion Problem*, 82 J. SCH. HEALTH 180, 180-85 (2012).

<sup>103</sup> Jason Navia, Note, *Sitting on the Bench: The Failure of Youth Football Helmet Regulation and the Necessity of Government Intervention*, 64 ADMIN. L. REV. 265, 268 (2012).

<sup>104</sup> R. Dawn Comstock et al., *An Evidence-Based Discussion of Heading the Ball And Concussions In High School Soccer*, 169 JAMA PEDIATRICS 830, 836 (2015); Ken Belson, *A 5-Concussion Pee Wee Game Leads to Penalties for the Adults*, N.Y. TIMES (Oct. 23, 2012), <https://www.nytimes.com/2012/10/23/sports/football/pee-wee-football-game-with-concussions-brings-penalties-for-adults.html>.

<sup>105</sup> James T. Eckner et al., *Effect of Neck Muscle Strength and Anticipatory Cervical Muscle Activation on the Kinematic Response of the Head to Impulsive Loads*, 42 AM. J. SPORTS MED. 566, 566-76 (2014). See generally Abrams *supra* note 3, at 12-13 (discussing state and local power to curb youth concussion injuries); Douglas E. Abrams, *Confronting the Youth Sports Concussions Crisis: A Central Role for Responsible Local Enforcement of Playing Rules*, 2 MISS. SPORTS L. REV. 75, 88-89 (2013) (modifications to rules of play are only effective when properly enforced); Douglas E.

harm to sports as currently conceived, and have the potential to prevent that first concussion. Yet Lystedt legislation across the country, passed to protect youth athletes from the negative effects of concussion, gives no attention to these potential interventions, and develops no framework for ensuring that they are considered.

### 3. Tackling Changes to the Practices and Rules of the Game

Given that even these relatively minor interventions are not incentivized or required by Lystedt, it should be no surprise that nothing in the Lystedt structure nudges athletic leagues or schools toward the more difficult problem of adjusting rules of play. Some organizations up and down the age scale are slowly moving in this direction on their own. For example, the NFL has eliminated two-a-day padded practices,<sup>106</sup> and the National Collegiate Athletic Association (“NCAA”) recently followed suit.<sup>107</sup> The Ivy League recently eliminated all full-contact hitting practices.<sup>108</sup> Some youth leagues are also experimenting with adjustments, such as postponing heading of the ball in soccer until age ten and limiting it until age fourteen, and postponing checking in hockey. Leagues are reducing the type and amount of contact in practices in Pop Warner football,<sup>109</sup> and experimenting with rule changes to games, such as eliminating special teams and requiring players to match up against similarly sized opponents.<sup>110</sup> The NFL recently moved the kickoff line from the thirty to the thirty-five yard line, and ESPN has reported that the NFL is considering eliminating the

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Abrams, *Player Safety in Youth Sports: Sportsmanship and Respect as an Injury-Prevention Strategy*, 22 SETON HALL J. SPORTS & ENT. L. 1, 12-13 (2012) (achieving the protective purpose of playing rules depends on parents, coaches, officials, and league administrators who can enforce standards of sportsmanship and respect).

<sup>106</sup> D. Orlando Ledbetter, *Look at NFL's New Practice Rules*, ATLANTA J.-CONST. (July 31, 2011), <https://www.ajc.com/sports/football/look-nfl-new-practice-rules/ZLKINsjADuSDy8uHzsvYoN/>.

<sup>107</sup> Richard Johnson, *NCAA Bans 2-a-Day Football Practices, and it Was a Long Time Coming*, SB NATION (Apr. 14, 2017, 2:50 PM), <https://www.sbnation.com/college-football/2017/4/14/15304464/ncaa-bans-2-a-day-practices>.

<sup>108</sup> Ken Belson, *Ivy League Moves to Eliminate Tackling at Football Practices*, N.Y. TIMES (Mar. 1, 2016), <https://www.nytimes.com/2016/03/02/sports/ncaafootball/ivy-league-moves-to-eliminate-tackling-at-practices.html>.

<sup>109</sup> Tom Farrey, *Pop Warner to Limit Practice Contact*, ESPN (June 15, 2012), [http://www.espn.com/espn/story/\\_/id/8046203/pop-warner-toughens-safety-measures-limiting-contact-practice](http://www.espn.com/espn/story/_/id/8046203/pop-warner-toughens-safety-measures-limiting-contact-practice).

<sup>110</sup> Javonte Anderson, *Youth Football Changes Set to Head Off Concussion Rate*, CHI. TRIB. (Feb. 3, 2017, 4:07 PM), <https://www.chicagotribune.com/suburbs/post-tribune/news/ct-ptb-state-of-football-st-0202-20170203-story.html>.

kickoff entirely because the play produces so many injuries.<sup>111</sup> The Ivy League moved the kickoff line from the 35-yard line to the 40-yard line, and concussions fell from 11 per 1,000 kicks to 2 per 1,000 kicks.<sup>112</sup>

Leagues weigh rule changes at their own pace, but *nothing in the Lystedt laws incentivizes focus on these issues*. The Lystedt laws bypass regulating anything that would pressure leagues to prevent first concussions, turning instead to the most deadly risk — second-impact — implicitly assuming that a first impact is natural or unavoidable. It's almost as if the Lystedt law is deliberately designed to optimize an inverse balance between a show of concern around the issue and effective exploration of or incentive toward reduction and prevention of overall youth concussion rates. Indeed, by granting immunity from tort suits, Lystedt reduces pressure to focus on these safety adjustments that might be expected from insurance companies. The leagues are responding to public relations pressures and genuine concern for player health and the ethical concerns of volunteer adults in the system, but the concussed individuals will need to rely on these indirect pressures rather than the state legislatures or private insurers to apply pressure toward achieving the optimal safety measures.

This attribute of the Lystedt Laws — that they address only second-impact, return to play rules — is remarkably consistent across the fifty states, even as other aspects of the laws vary. Massachusetts is the only jurisdiction that appears to address primary prevention. Its 2010 legislation provides:

A coach, trainer or volunteer for an extracurricular athletic activity shall not encourage or permit a student participating in the activity 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.<sup>113</sup>

In every other state, the really difficult question is expertly deflected by the Lystedt structure: What level of sports risk to the brain is

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<sup>111</sup> Kevin Seifert, *Competition Committee to Recommend Cutting Kickoffs if Injury Rates Don't Drop*, ESPN (Mar. 28, 2018), [http://www.espn.com/nfl/story/\\_id/22944176/nfl-competition-committee-says-kickoffs-made-safer-recommend-eliminating-it](http://www.espn.com/nfl/story/_id/22944176/nfl-competition-committee-says-kickoffs-made-safer-recommend-eliminating-it).

<sup>112</sup> Lindsey Tanner, *Concussions Drop in Ivy League Football With Kickoff Change*, AP NEWS (Oct. 1, 2018), <https://www.apnews.com/80fabd3fa99b476d98ea46460ebd25be>.

<sup>113</sup> MA. GEN. LAWS ch. 111 § 222(d) (2010). See generally CONN. GEN. STAT. § 10-149b (2014); VT. STAT. ANN. tit. 16, § 1431(c) (2013) (explaining that Connecticut and Vermont require training of coaches on how to make play safer, without requiring that play be made safer).

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appropriate for children? We are dancing around the outside of this difficult question culturally in the media and in communities as parents and local youth sports organizations absorb the waves of information on both the prevalence and the long-term consequences of concussions. When a question is difficult culturally, we have several outlets where we might place decisions against a backdrop of uncertainty. We might regulate. We might let the tort system and insurance companies manage a risk calculus and the development of a standard, without a legislative grant of immunity. Or we might provide information and leave the decision-making to individuals. But in the case of youth sports, the individuals to whom we entrust the decisions are not the ones at risk. This is not how we treat other culturally contested risks to youth, such as alcohol or tobacco.

### C. *Lawsuits Before and After Lystedt*

It was already difficult to sue school districts for sports injuries before the Lystedt laws. Sports injuries are a known risk, to some extent, in every sport, and concussed athletes need to overcome an assumption of risk defense. While assumption of risk is disfavored in most areas of tort law because of the emergence of comparative fault, sports participation continues to be one realm where assumption of risk survives.<sup>114</sup> We are inclined to think that sports injuries result from inherent risks of the sport and not from the negligent conduct of school authorities. But the process of concluding that a risk is “inherent” rather than the result of negligence can be conclusory, particularly when the idea that a risk is inherent incorporates rules of play as though they have been and will continue to be constant over time. In addition, many government entities were already partially insulated from large judgments either by damage caps or complete immunities for schools under certain conditions.

Whatever the difficulties of suit were before, the Lystedt laws narrowed the possibility of suit by extending immunity in many states to those coaches and schools that comply with the return to play protocol. In so doing, the Lystedt laws frame, define, and narrow the duty to prevent injury, such that second-impact syndrome is the risk that coaches, and insurers, must concern themselves with, to the exclusion of other risks. Game or practice drills or strategies that

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<sup>114</sup> Timothy Davis, *Avila v. Citrus Community College District: Shaping the Contours of Immunity and Primary Assumption of the Risk*, 17 MARQ. SPORTS L. REV. 259, 268 (2006); Keya Denner, Comment, *Taking One for the Team: The Role of Assumption of the Risk in Sports Tort Cases*, 14 SETON HALL J. SPORTS & ENT. L. 209, 209 (2004).

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increase the likelihood of an initial injury escape scrutiny under the Lystedt framework, and are immunized from tort law. In focusing energy on the admittedly crucial return to play decision, the Lystedt laws cut off ordinary development of legal pressures on other aspects of sports decision-making.

The NFL actively promoted Lystedt laws in state legislatures.<sup>115</sup> One study of the Lystedt policy-making process between 2009-2012 concludes:

that the NFL, through its unique role as a dominant interest group, established the content of states' youth sports TBI laws. The NFL's vigorous advocacy caused state legislatures to act swiftly, which minimized the role of scientific evidence and policy experimentation in the youth sports TBI lawmaking process.<sup>116</sup>

Whether by design or result, these laws protect the continuation of contact high school football programs by focusing on post-concussion response rather than primary prevention and by immunizing athletic programs from the lawsuits that might drive safety-enhancing change in game rules. By framing the youth concussion risk as one of second-impact prevention, Lystedt draws the attention of athletic leagues and schools away from primary prevention, while lifting the common law tort litigation risk that might have pressured those same actors to consider primary prevention before the Lystedt structure was in place. In their assigned role under the Lystedt laws, parents play an underappreciated but essential part in furtherance of Lystedt's status quo protective operation, one that stretches rather than reflects the conception of parents in other areas of law.

#### D. *Lystedt as a Consent Law*

Lystedt arms families with information that will help them to avoid second-impact syndrome in their child. This seems like a prevention framework. Yet I am arguing that we can treat the Lystedt laws as an *inform-and-consent* framework, albeit a particularly weak and incomplete one. This characterization requires some unpacking. Arguably, Lystedt laws are more proactive than simple consents to concussion risk, as they are designed to prevent return to play of a concussed athlete. Second-impact syndrome is not the only way people suffer from traumatic brain injury, but it has been identified as a

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<sup>115</sup> Goodell Sends Letter, *supra* note 85.

<sup>116</sup> Harvey, *supra* note 3, at 85.

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particularly serious risk. On this view, the most important goal of educating parents, coaches, and athletes is not to improve the quality of their consent, but to make sure that they act appropriately after signs of a first concussion. By contrast, the information in a typical waiver, for example, includes an exhaustive list of risks, with no goal of reducing many of those risks, but rather a legal aim of perfecting the waiver of future liability for what comes to pass. Lystedt conveys risk ostensibly for the purpose of enabling relevant actors to recognize a concussion toward a different end: keeping an athlete off the field after one has happened to prevent further injury. This distinguishes Lystedt from the more typical consent to risk found in waivers. An examination of the structure of Lystedt, however, indicates that it may formally be a prevention statute, but its design points to an informal *waiver of liability* or *assumption of risk* function.

In most states, parents in particular are signing statements that indicate that they've received risk information about concussion.<sup>117</sup> This information sheet comes home in the same way other densely packed waivers arrive on a parent's table: this needs a signature or the child can't play. The form of the communication of information is the same one used to execute a waiver of liability; indeed, almost all sports programs require that a waiver is signed before participation, and the two papers can come together and seem indistinguishable.

In addition, recall that forty-nine states require parents to receive this information, more than the number of states that require the same of athletes or coaches. The parent information requirement is the most consistent across all of the Lystedt "inform" provisions. Yet the parent is the only one of the three who may not be present when the injury occurs and a removal from play decision needs to be made. If prevention is the heart of Lystedt, coaches and referees would be the primary focus. The universal focus on the parent begs some examination of the *function* of Lystedt: parents contribute legitimacy to children's risk more than they bring an ability to prevent harm.

To underscore the ambiguity about why we inform parents under the Lystedt framework, in fully eighteen states, the statute seems to require the parent to return the concussion information to the school along with the signature. That is to say, the information is not available to the parent for reference throughout the season, ostensibly the time it would

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<sup>117</sup> E.g., WASH. REV. CODE § 28A.600.190(2) (2019) ("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.").

be most useful.<sup>118</sup> Consider the following examples of language in versions of Lystedt legislation:

**Oklahoma:** On an annual basis, a concussion and head injury information sheet shall be completed and returned to the school district by the youth athlete and the athlete's parent or guardian prior to the youth athlete's participation in practice or competition.<sup>119</sup>

**Indiana:** Each year, before beginning practice for an interscholastic or intramural sport, a student athlete and the student athlete's parent:

(1) must be given the information sheet and form described in section 2 of this chapter; and

(2) shall sign and return the form acknowledging the receipt of the information to the student athlete's coach. The coach shall maintain a file of the completed forms.<sup>120</sup>

**Montana:** A form documenting that educational materials referred to in subsection (1) have been provided to and viewed by each youth athlete and the youth athlete's parent or guardian must be signed by each youth athlete and the youth athlete's parent or guardian and returned to an official designated by the school district, nonpublic school, or youth athletic organization prior to the youth athlete's participation in organized youth athletic activities.<sup>121</sup>

**Pennsylvania:** A student participating in or desiring to participate in an athletic activity and the student's parent or guardian shall each school year, prior to participation by the student in an athletic activity, sign and return to the student's school an acknowledgment of receipt and review of a concussion and traumatic brain injury information sheet developed under this subsection.<sup>122</sup>

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<sup>118</sup> See 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, 299-302 (2014).

<sup>119</sup> S.B. 1700, Gen. Assemb., Reg. Sess. (Okla. 2010) (noting that though in a 2016 version of the bill the statute was revised, but not particularly improved on this issue: "On an annual basis, information regarding concussion and head injuries shall be disseminated to the athlete and his or her parent or guardian. Acknowledgment and understanding of the information shall be completed by the athlete and the athlete's parent or guardian and maintained by the school or the youth sports organization or association prior to the athlete's participation in practice or competition.") (citing OKLA. STAT. tit. 70, § 24-155(C)(1)-(2) (2016)).

<sup>120</sup> IND. CODE ANN. § 20-34-7-3 (2019).

<sup>121</sup> MONT. CODE ANN. § 7-1303 (2017).

<sup>122</sup> S.B. 200, Gen. Assemb., Reg. Sess. (Pa. 2011).

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In some of these statutes, the instruction to return seems absolute, while in others it leaves room conceptually for the development of a tear-off sheet. Yet, the return of the signature is the statutory requirement, and we might expect therefore that school systems will focus on the aspect of the mandate that proves compliance. Their best defensive strategy, and the most straightforward, is to put the signature on the information sheet itself. A study of how this kind of statutory language is implemented indicates that in these states, the entire educational content is returned with the signature.<sup>123</sup>

For the concussion information to assist a parent who is trying to make a decision about whether to seek medical attention for her child or to discourage her child's participation in practice or games after a hit to the head, it would seem that the symptom list would be most useful *after* the child has been permitted to participate in sports. This is arguably a simple design flaw in the legislation. Forms that require parental signatures in other contexts sometimes include a tear-off portion that lets a family keep critical field trip details on a kitchen counter, for example, while returning the permission signature. Lystedt laws and structure should certainly correct this design flaw. But I surface the flaw not solely to correct it, but because it reveals the informed consent and waiver-like ethos behind the Lystedt structure and operation.

Imagine, for example, a first aid instruction course that required students to return all information upon completion. It's unthinkable that you'd try to create agency in amateur emergency first responders by giving them first aid information and then take that information away from them. The transparent incoherence of such a design suggests that the structure of Lystedt is too substantially and too obviously different from a first aid instruction to indicate that its core function is first aid (or post-hit prevention of second-impact syndrome). The best case statement of the purpose of Lystedt is to arm parents with an action plan in the event of a concussion, but the *function* of Lystedt is to gain parents' informed acknowledgement of the risks and symptoms of youth sports concussion. I return again to a quote by a prominent scholar from the introduction to this Article, which says of Lystedt:

Such contrasting views [about risk] make it difficult for policymakers to know what, exactly, to do. The policy challenge going forward is thus to facilitate accurate communication of

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<sup>123</sup> See Baugh et al., *supra* note 118, at 301-02.

risks and benefits to allow for informed athlete and parent decision-making.<sup>124</sup>

In addition, the statutory requirements in some Lystedt information packets are not limited to signs and symptoms of brain injury and instructions to seek medical attention and follow return to play protocols. They sometimes contain requirements that parents and athletes receive explicit basic information about brain injuries in sports, the kind of information that does not help families to prevent second concussions and second-impact syndrome, but instead ensures that they approach the activity with knowledge of its injury risk.<sup>125</sup> This additional information is of course essential if the parent signature is *de facto* a waiver of liability. But the parent is not invited to view the information provided as a decision point, in the way a parent is invited to view waivers. The parts are there — risk information, and a fork in the road — but in the case of a parental waiver, the parent is explicitly invited to assume the relevant risk. Even though waivers of liability are more direct in their purpose, courts are skeptical of enforcement given the choice architecture in parental waivers of liability.<sup>126</sup> The Lystedt information is offered for more ambiguous purposes than a waiver of liability, and its inferior design should lead to even more skeptical reception. Instead, it leads to immunity from liability, a unique safe haven for concussion harms not extended to other youth injuries.

Moreover, some implementing agencies use the term “informed consent” in discussing the required Lystedt compliance documents. For example, the original Zachary Lystedt law itself doesn’t use the words “informed consent” because it is ostensibly aimed at second-impact prevention. But the statute is implemented by the Washington State Department of Health, where a five-point bullet list of compliance requirements includes this language:

Informed consent must be signed by parents and youth athletes about the dangers of sports-related head injuries.<sup>127</sup>

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<sup>124</sup> Shen, *supra* note 3, at 9.

<sup>125</sup> E.g., FLA. STAT. § 943.0438(2)(e) (2018) (“An independent sanctioning authority shall: (e) Adopt guidelines to educate athletic coaches, officials, administrators, and youth athletes and their parents or guardians of the nature and risk of concussion and head injury.”).

<sup>126</sup> See *infra* Part IV.B.

<sup>127</sup> *Concussion Management for Schools*, WASH. ST. DEP’T HEALTH, <https://www.doh.wa.gov/CommunityandEnvironment/Schools/EnvironmentalHealth/ConcussionManagement> (last visited Feb. 11, 2019).

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The statutory structure provides more benefit than just setting families up for truly informed consent, of course, because the information about second-impact risk and removal from play can save lives. But even the removal from play and return to play protocol reflects the format of informed consent: parents are urged to remove their child from participation in the activity for the child's benefit, but hand in glove, parents will share the responsibility for any failure to do so or any premature return to play, despite significant flaws in their capacity to execute effectively in this area.<sup>128</sup> It's difficult to tease out the difference between information that reduces injury and information that implicates parents in the risks that their children face.

Consider one of the more in-depth statutory requirements for the four pieces of information that a parent should receive:

- (a) the nature and risk of brain injuries associated with athletic activity;
- (b) the signs, symptoms, and behaviors consistent with a brain injury;
- (c) the need to alert a licensed health care professional for urgent recognition and treatment when a youth athlete exhibits signs, symptoms, or behaviors consistent with a concussion; and
- (d) the need to follow proper medical direction and protocols for treatment and returning to play after a youth athlete sustains a concussion.<sup>129</sup>

This is all useful information, depending on the background ecology in which it is offered. If risk is to be born entirely by athletes, better that a parent is armed with this information than not, if the family is to have a fighting chance at addressing the youth sports landscape effectively. But the immunity from suit in the Lystedt structure hints at an effort to decentralize responsibility for youth concussion risk, and in that scheme, parents play not just a functional role but an ideological one, for the benefit of anyone with a stake in the game.<sup>130</sup> Parents are the fig leaf, armed with information but not with the power to modify the primary risk landscape. If a child is injured in sports, sports programs

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<sup>128</sup> See *infra* Part V.C.2.

<sup>129</sup> MONT. CODE ANN. § 20-7-1303 (2017).

<sup>130</sup> Those with a stake in the game range from other athletes, their families, adults invested in youth sports, and those professionally engaged in collegiate or professional sports who need the pipeline to be well-supported.

can point to Lystedt disclosures and signatures as evidence that risks were knowingly undertaken, which is a core element of an assumption of risk defense. Families cannot say they weren't warned. At least in this way, the Lystedt disclosures are the worst of all worlds. They defend school systems and sports programs against the claim that parents were not informed of risk, but they do not invite parents to explicitly consent to concussion risk. Rather, parents are told they are preparing themselves to take action after one has occurred. Nothing in the structure of the disclosures invites families to make a conscious choice about primary risk, but the structure allows us to feel later that they've made one. The Lystedt paperwork returned by parents is inferior to a waiver because it does not focus on the possibility of primary prevention, nor does it explicitly invite a parental decision to accept or reject that primary risk by using the formal language of waiver of liability. Worse, the forms parents see do not put parents on notice that ordinary negligence liability has been removed *by statute* solely for concussion injury. While the Lystedt format is inferior to parental waivers in these ways, the paperwork ritual is more consequential than a formal parental waiver, because so many jurisdictions refuse to enforce such waivers, while so many jurisdictions have nonetheless insulated sports and medical entities from liability for the consequences of a concussion.

#### IV. MEET THE PARENTS: THE FOUNDATION OF THE LYSTEDT FRAMEWORK

This Part begins with a brief overview of the law of parental decision-making with respect to important health and risk choices on behalf of their children. As many commentators have noted, it is exceedingly difficult to make order out of the law of children's capacity to make decisions; wide variation across different contexts is difficult to explain.<sup>131</sup> Making matters worse, almost no legal scholarship working to sort out children's maturity and capacity independently elaborates a full theory of the parent *as decision-maker*, except in contrast to the child as decision-maker. Theory of parent law is less developed than theory of child law *with respect to decision-making legitimacy and*

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<sup>131</sup> See, e.g., Larry Cunningham, *A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status Under Law*, 10 UC DAVIS J. JUV. L. & POL'Y 275 (2006); Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265 (2000); Cheryl B. Preston & Brandon T. Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines, the Infancy Doctrine, and the Restatement (Third) of Restitution and Unjust Enrichment*, 61 KAN. L. REV. 343 (2012).

capacity.<sup>132</sup> At this point, we can make only the claim that parents are empowered to make highly significant decisions for children in some contexts, but are constrained from doing so in other contexts. Parental authority is strong but situational. I argue that a weak understanding of parents in their legal role masks the risk of exploitation of their role by external actors. Often, gaining parental consent protects third parties as much if not more than it protects children. The Part then examines the legal regime governing parental waivers of liability on behalf of children, as the waiver framework is important to evaluating the Lystedt structure.

### A. *The Rights of Parents to Make Decisions*

The right of the parent to make child-rearing decisions is said to be superior to anyone else's rights. Parents have the right to direct their child's education,<sup>133</sup> remove their children from state schools, choose religious training for their children,<sup>134</sup> impart parental moral values regardless of their conformity to larger societal values, medicate their child, determine the appropriate medical therapies for their child<sup>135</sup> and at times withhold medical treatment from their child,<sup>136</sup> put their child to paid or unpaid work at an appropriate age,<sup>137</sup> discipline their child,<sup>138</sup>

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<sup>132</sup> See, e.g., KAREN WORTHINGTON, *WHAT IS RIGHT FOR CHILDREN: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS* (Martha A. Fineman & Karen Worthington eds., 2009). But see MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 1* (1995); LINDA C. McCLAIN & DANIEL CERE, *WHAT IS PARENTHOOD?: CONTEMPORARY DEBATES ABOUT THE FAMILY 41* (Linda McClain & Daniel Cere eds., 2013).

<sup>133</sup> See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (holding that the Act at issue unreasonably interfered with the liberty of parents to direct the education of their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the 14th Amendment protects the right of parents to engage with the teacher in educating their children).

<sup>134</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>135</sup> *Parham v. J.R.*, 442 U.S. 584, 604 (1979) ("The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.")

<sup>136</sup> *In re Phillip B.*, 156 Cal. Rptr. 48, 50 (Ct. App. 1979); see also *Bellotti v. Baird*, 443 U.S. 622, 651 (1979); *In re Cabrera*, 552 A.2d 1114, 1114 (Pa. Super. Ct. 1989) (explaining that in life threatening situations, the state does at times override parental authority over medical decisions).

<sup>137</sup> E.g., *Exemptions to the FLSA*, DEP'T OF LABOR, <https://www.dol.gov/general/topic/youthlabor/exemptionsflsa> ("Minors under age 16 working in a business solely owned or operated by their parents or by persons standing in place of their parents, can work any time of day and for any number of hours.") (last visited July 8, 2019).

<sup>138</sup> MODEL PENAL CODE § 3.08(1) (AM. LAW INST. 2018) (stating that parent's use of force is not criminal if it is used to promote the child's welfare and is not designed or

institutionalize their child,<sup>139</sup> decide and limit with whom their child may socialize and develop relationships,<sup>140</sup> consent to the marriage of a child,<sup>141</sup> and control their child's use of time.<sup>142</sup>

### 1. Rationales for Parental Prerogatives

Though these parental decision-making rights have deep roots, there is not a clear consensus over the reasons for that delegation that operates consistently across contexts. In particular, it is not clear what weight the child's welfare is to be given in that delegation as against the parent's independent rights. At times the two are conflated, and at times the law sees a distinction between the two, despite their vast overlap. Both ideas can be seen informing the decision-making authority that parents are given.

#### a. *Parenting on Behalf of the Child*

From the child-welfare perspective, the parent is viewed as the one closest to the child, whose interests most align with those of the child, especially when compared with more detrimental actors such as the state.<sup>143</sup> Giving parents decision-making authority works to strengthen the responsibility for care that operates hand in hand with the rights. On this view, parents act as fiduciaries, as proxies for the child's own choice. I view this as a *transitive relation principle*: giving the benefit of rights to parents gives the true benefit to the child.

There are many ways to say and explain this. According to the highly influential work of Joseph Goldstein, Anna Freud, and Albert Solnit, this is best expressed in the pure psychological form. Under that framing, children's *needs* include the assurance of a single consistent authority:

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known to create a substantial risk of death or serious bodily injury or extreme pain or mental distress or gross degradation); *see also* RESTATEMENT (SECOND) OF TORTS § 147(1) (AM. LAW INST. 2019).

<sup>139</sup> *See Parham*, 442 U.S. at 584.

<sup>140</sup> *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

<sup>141</sup> *See* Fraidy Reiss, *Despite Progress, Child Marriage Is Still Legal in All 50 States*, N.Y. TIMES: ON THE GROUND (July 26, 2017, 10:00 AM), <https://kristof.blogs.nytimes.com/2017/07/26/despite-progress-child-marriage-is-still-legal-in-all-50-states/>.

<sup>142</sup> *See generally Troxel*, 530 U.S. at 65 (“[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

<sup>143</sup> *See, e.g., Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (“The child is not the mere creature of the state.”); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

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To safeguard the right of parents to raise their children as they see fit, free of government intrusion, except in cases of neglect and abandonment, is to safeguard each child's need for continuity.<sup>144</sup>

In this particularly clear formulation of the transitive relation principle, there is no pretense that a parent's decision-making authority rests on a peculiar skill or knowledge. Instead, it is self-justifying in terms of the child's need for a singular and continuous authority figure.

Sometimes parents are instead presumed to possess an alignment of interests due to both their love for the child and their knowledge of her unique attributes that make them peculiarly skilled at decision-making:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.<sup>145</sup>

*b. Parenting as Self-determination*

Yet in contrast to child-centered decision-making, the decision-making authority is sometimes described as a fundamental right of the parents for their own sake. In the words of Charles Fried:

[T]he right to form one's child's values, one's child's life plan and the right to lavish attention on that child are extensions of the basic right not to be interfered with in doing these things for oneself.<sup>146</sup>

Fried identifies an important thread in parental decision-making authority: "The liberty asserted by parents is not an aspect of self-determination, but rather a liberty to determine someone else's."<sup>147</sup> In *Wisconsin v. Yoder*, the U.S. Supreme Court validated parents' independent interests in child-rearing *over* assertions of the child's own competing interest:

[O]ur holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the

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<sup>144</sup> JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 7 (1973).

<sup>145</sup> *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

<sup>146</sup> CHARLES FRIED, *RIGHT AND WRONG* 150-52 (1978).

<sup>147</sup> *Id.*

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parents. It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right of free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent . . . [T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children.<sup>148</sup>

This strand of decision-making can be restated from a child-welfare perspective, by indulging a fiction that what's good for parents is good for children. But it's difficult to ignore that a part of the legal authority given to parents includes rights for the parents' benefit, because parents "are entitled to maintain their offspring and *seek meaning with and through them*."<sup>149</sup> Indeed, the Supreme Court cases that struggled with parental consent to terminate a pregnancy noted that parents might counsel a pregnant child toward the child's best interest, or might have independent parental interests that statutes empowering a veto to abortion were designed to protect. That potential independent statutory interest troubles the Court, but only because the interests of the child in reproductive control enjoy a strong counterbalancing constitutional weight. So in *Planned Parent v. Danforth*,<sup>150</sup> in striking down a provision that gave parents the right to veto a child's decision to terminate a pregnancy, the court considered the nature of the interest in parental decision-making:

One suggested interest is the safeguarding of the family unit and of parental authority . . . It is difficult, however, to conclude that providing a parent with absolute power to overrule a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit. Neither is it likely that such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure. *Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty*

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<sup>148</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 230-31 (1972).

<sup>149</sup> Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 *ETHICS* 6, 17 (1980) (emphasis added).

<sup>150</sup> *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976).

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*than the right of privacy of the competent minor mature enough to have become pregnant.*<sup>151</sup>

The court explicitly recognizes the awkward reality that parents do make decisions to help their children, and they also make decisions for their own independent reasons. That the court gives more weight to the child's interests in *Planned Parenthood v. Danforth*, and more weight to the parents' interests in *Wisconsin v. Yoder*, shouldn't obscure the clarity with which the court is able to separate the two interests and identify a unique parental stake in childrearing that is not dependent on child welfare and the transitive principle.<sup>152</sup>

Among the clearest, most troubling, and most controversial examples of parental authority that engages parents' independent interests is the ability to consent on behalf of a child to marriage. Marriage is a monumentally significant decision, often legalizing sexual relations below an age of statutory consent, functionally authorizing teen reproduction, and fundamentally altering the life course of a minor child. Parental consent to marriage is considered necessary for minors because they lack capacity to make this decision themselves, and in most states parents are able to consent to the marriage of a minor child, often at very young ages.<sup>153</sup> The typical case of under-aged marriage in the United States involves the pregnancy of a girl.<sup>154</sup> It is difficult to tease out the parental motivations for responding to a child pregnancy by encouraging a child marriage. But a plausible explanation is that child pregnancy triggers the independent experience of shame in the parents. Those who do consent to the marriage of a minor girl sometimes cite avoiding embarrassment as one reason for the marriage, without distinguishing their own embarrassment from their daughter's.<sup>155</sup> Yet a child's sense of shame is rarely independent of a

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<sup>151</sup> *Id.* (emphasis added).

<sup>152</sup> See generally Martha Albertson Fineman & George B. Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57 (2016).

<sup>153</sup> See, e.g., *Kirkpatrick v. Eighth Jud. Dist. Ct.*, 64 P.3d 1056 (Nev. 2003).

<sup>154</sup> See, e.g., Nicholas Kristof, *11 Years Old, a Mom, and Pushed to Marry Her Rapist in Florida*, N.Y. TIMES (May 26, 2017), <https://www.nytimes.com/2017/05/26/opinion/sunday/it-was-forced-on-me-child-marriage-in-the-us.html> [hereinafter *11 Years Old*]; see also MD. CODE ANN., FAM. LAW § 2-301(b) (2019) (allowing marriage at 15-years-old if "the woman to be married . . . is pregnant or has given birth to a child"); N.C. GEN. STAT. ANN. § 51-2.1(a) (2018) (allowing marriage at 14-years-old in cases of pregnancy); State Dep't of Human Resources v. Lott, 16 So. 3d 104, 107-08 (Ala. Civ. App. 2009) (explaining that pregnancy of a 13-year-old satisfies exception to minimum age restrictions, approving her marriage to a 19-year-old).

<sup>155</sup> Nicholas Kristof, *An American 13-Year-Old, Pregnant and Married to Her Rapist*, N.Y. TIMES (June 1, 2018), <https://www.nytimes.com/2018/06/01/opinion/sunday/>

parent's, because children are too immature to evaluate what's shameful. In the familiar effort to cover shame, courts and legislatures are not asking whose embarrassment is at stake, as the parental authority to make decisions in this realm is longstanding. But this practice is under increased scrutiny. In the words of Nicholas Kristof, "thousands of underage American girls . . . are married each year, often sacrificing their futures to reduce embarrassment to their parents."<sup>156</sup> With respect to some types of decisions, parental authority is remarkably strong, but in the context of parental consent to child marriage, it has few defenders.

While contemporary discussions seem to embrace the conclusion that it's best to state the parent's decision-making interest in child-centered terms, this is hardly a triumph over adult interests. For example, parents are able to consent to a blood, marrow, or organ donation by their child for the benefit of that child's sibling or half-sibling, as long as the parent can say that the donation benefits the donor.<sup>157</sup> Courts and other actors in the legal system, though, are satisfied with "psychological benefit" to the donor, and that is the routine formal explanation for deciding to authorize the living transplant.<sup>158</sup> It is difficult to imagine, however, that in fact a parent is driven to consent to organ donation from her child to her other child by the benefits to the donor, rather than the benefits to the recipient child paired with an assessment that the harm to the donor is less than that benefit. We may state her parental decision-making in entirely child-centered terms, but we do not need to be blind to the role of rhetoric in casting the parental authority in that particular light, rather than acknowledging that we authorize parents to pursue their own needs and interests through their children.

There are legal scenarios that put the divergence of child and parent interests into stark contrast, such as the parent who takes a child actor or athlete's earnings for themselves.<sup>159</sup> But most of the time it's difficult

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child-marriage-delaware.html [hereinafter *13-Year-Old*]; see Kristof, *11 Years Old*, *supra* note 154 (discussing how parents may pressure their underage children into marriage).

<sup>156</sup> Kristof, *13-Year-Old*, *supra* note 155; see Kristof, *11 Years Old*, *supra* note 154.

<sup>157</sup> See, e.g., *Hart v. Brown*, 289 A.2d 386 (Conn. Super. Ct. 1972); *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990); *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. Ct. App. 1969); *Little v. Little*, 576 S.W.2d 493 (Tex. Civ. App. 1979).

<sup>158</sup> See cases cited *supra* note 157.

<sup>159</sup> See generally Danielle Ayalon, Note, *Minor Changes: Altering Current Coogan Law to Better Protect Children Working in Entertainment*, 35 HASTINGS COMM. & ENT. L.J. 351, 353 (2013) (discussing the history and need for Coogan Laws that protect child entertainers from financial exploitation by parents, and the need to update those laws to strengthen protections and close loopholes); Jessica Krieg, Comment, *There's No*

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to make the distinction at play in this discussion between a parent acting on a child's behalf and acting on her own behalf, not because some set of parents hide their self-interests so effectively, but because the identity of child and parent are so intertwined, and the nature of intention in this context so slippery, that the distinction doesn't convey a meaningful or useable category much of the time. Still, legislative delegations of authority to parents, where they do become controversial, need to be vetted for possible divergence between the interests of a child and the interests of the parent.

## 2. Established Limitations on Parental Decision-making with Rationales

Parents make many decisions for their children, without a serious evaluation of the rationale (be it a child-centered transitive relation, or a parent's prerogative), and whether the rationale is salient under the given circumstances. Yet a substantial amount of child-protective law is difficult to explain without the supposition that parents are *not* always an adequate safeguard of children's welfare. This is not necessarily because parents are selfish and mean, but because they are embedded in social and economic conditions, and they cannot be an expert in everything.

Consider laws that require us to put our children in rearward facing car seats in the back.<sup>160</sup> If this is necessary to save my child's life in an accident, why on earth would I need a legal requirement to do so? No parent wants to see their infant injured in a car accident, and one might think parents are ideally situated to render a car seat law superfluous. But something about parental decision-making is deemed faulty in that context. Perhaps it is that the risk of injury is too great, meaning the risk calculation weighs too heavily in one direction, or the risk balance requires an engineering expertise that cannot be adequately taught to parents in shorthand. But it may be that parents are systematically flawed for this decision. They may predictably underestimate the risk that this one trip will include an accident (optimism bias). Or the well-intentioned temptation of parents to soothe a child's immediate and sometimes urgently expressed need to be seen and heard and held can be expected to overcome the regulatory cost-benefit analysis of long-

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*Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429, 432 (2004).

<sup>160</sup> *What Does Your State Law Say About Car Seats?*, SAFE RIDE 4 KIDS, <https://saferide4kids.com/car-seat-laws-by-state/> (last visited Oct. 17, 2019).

term risk underlying the car seat requirement. Slate Magazine reminds us that a screaming baby is a powerful motivator:

Little — possibly no — research has been done on how much more difficult it is to drive a car safely with a child shrieking out the torments of the damned immediately behind the driver’s seat, but anecdotally I can say that it doesn’t actually help. Unless you’re really invested in car seat safety — which is to say, unless you understand the dangers and respect the recommendations and those who are making them — it’s tempting to let car seats slide (or turn them around) in the name of convenience and peace.<sup>161</sup>

For the parent of the screaming baby who wants to pick the child up, or install the car seat facing forward so that the child can see the parent, we think a legal mandate that runs contrary to parental impulse is necessary to protect the child, and so we override the parent’s authority to make risk assessments.<sup>162</sup> Parents are imperfect decision-makers even when compelled by a desire to help their child, and they may need more than information to make a “right” choice in that context. Parents may even appreciate being tied to the mast, so that they must resist their baby’s siren song.

### 3. Limits on Parental Authority When That Authority Functionally Serves Third Parties

The entire universe of articulated reasons for legal deference to parental decision-making authority, however, lies between the child’s benefit and the parent’s benefit. There is no visible legal theory supporting parental authority to benefit third party institutions, whether they are schools, employers, hospitals, or recreational organizations. What emerges if we organize limits on parental authority by the intended beneficiary of a parent’s consent? When the intended beneficiary is *either* the child or the parent, the law is situational in adjusting the limits of parental authority. But when the functional beneficiary appears to be a third party, the legal system should be more

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<sup>161</sup> KJ Dell Antonia, *Safe, Sound, and Screaming Her Head Off*, SLATE (Mar. 22, 2011, 1:26 PM), <https://slate.com/human-interest/2011/03/safe-sound-and-screaming-her-head-off.html>.

<sup>162</sup> See, e.g., Lenore Skenazy, *Thanks, New Jersey, For the Child Protection Laws That Are Driving Me CRAZY*, FREE-RANGE KIDS (May 13, 2015), <http://www.freerangekids.com/thanks-new-jersey-for-the-child-protection-laws-that-are-driving-me-crazy/> (mentioning that a group of parents engage in an interesting online discussion of whether car seat safety has gone too far in constraining their parental freedom).

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skeptical of relying on parental authority, and ordinarily is more skeptical.

For example, no parent tries to enforce a waiver of liability against a recreational operator. Only the recreational operator seeks enforcement of that parental waiver, and a majority of courts refuse to enforce parental waivers despite purported parental authority.<sup>163</sup> Courts and legislatures should be, and arguably are, attentive to whether the concept of parental authority is exploited to achieve the transfer of risk from institutions to individuals more generally.

Consider child labor laws, which responded to a widespread problem of children leaving school at young ages to toil in unsafe factory conditions dangerous to their health and to their educational development. Why on earth would a caring parent have allowed it? We recognize that it's an unfair question: economic conditions demanded it, wage structures were developed in reliance on it, and as long as the choice to put a child in the workforce was available, it was also very difficult to avoid by even the most child-centered parent. The choice architecture, put your child to work or starve, hardly sets the stage for safe childhood, and few believed that parental consent to labor could operate adequately to protect children. In the context of child labor, parents are not inadequate because they are emotionally compelled to respond to urgent need, as with the car seat, but because they are embedded in the social and economic conditions of a race to the bottom. Their freedom to put their children to work may be replacing the better choice they wish they had. Child labor is understood to be benefitting the employer, not the child or the parent, and parental consent should not be deployed for that functional purpose.

If, as others have argued, paternalism can increase rather than decrease real world options,<sup>164</sup> child labor laws would be a good example. The paternalistic removal of an option from the table in the context of child labor laws added a different option that had not been

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<sup>163</sup> See *infra* Part V.B.

<sup>164</sup> See, e.g., ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER 541 (1952) (discussing how government, by its nature, involves some control of the freedom of individuals in order to provide liberty for all); Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982). A refusal to enforce a parental waiver or bend to parental consent is functionally the same as requiring by statute a warranty of habitability — both limit the hypothetical freedom to contract of the parties, but as a result, they enhance the sphere of entitlements, rights, or benefits of those with no practical bargaining power.

available before: remove your child from the workforce and earn an adequate wage yourself to cover family expenses. Each time we attempt to waive our child's right to sue for personal injury so that the child can participate in a physical activity, we can be said to be choosing the activity over protection against negligence. What we'd really like is the option that is not on the table: participation in activities *with* protection from negligence. When we decide to let our children play youth football and waive the child's right to sue for personal injury, including traumatic brain injury, we are not presented with the third option of youth football redesigned to reduce primary injury risk, which might be the most desirable option overall.

Sometimes, we see a legal practice that may be said to *operate* by using parental authority for the benefit of outside actors or institutions. Where we do, third parties are exploiting parental authority for their own gain, expropriating its power without legitimately invoking its underlying justifications. I would argue we can highlight that function and cite it as a reason to question the legal allocation of parental authority. The Lystedt Laws, I argue, are such a legal practice.

Parents do not enjoy absolute authority to do whatever they would like to their children for a range of reasons, from their own selfishness or aggression (consider child abuse laws), to their ignorance or cognitive failures (consider the ability to properly calculate the car seat risk for just this one trip), to their adaptive preference to the narrow choice set in front of them (e.g., the child works or the family starves), to their independent self-interests (e.g., a desire to become a grandparent when a child is pregnant or to resolve moral questions in favor of a parent's morality), to the unjustified expropriation of their legal power by institutional actors.

### B. *Parental Waiver of Liability*

To assess where parental decisions around concussion risk fit into the framework of parental decision-making more broadly, we need to examine the law around parental waiver of liability to a minor, because courts are skeptical of enforcing those parental releases and the Lystedt framework bears a strong resemblance to parental waiver.

When adults sign a waiver releasing liability for negligence before *their own* participation in a risky recreational activity, the vast majority of states will enforce the waiver if it is well-written and the underlying activity is not essential.<sup>165</sup> State law varies in the scrutiny given to these

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<sup>165</sup> Only three states refuse to enforce any pre-injury releases of liability for negligent injury to anyone. *See, e.g.*, LA. CIV. CODE ANN. art. 2004 (2018); MONT. CODE ANN. § 27-

agreements and conditions placed on the types of behavior that may be released and in what contexts, but enforceability is the general rule.

But a parental waiver involves attempting to use parental authority to contractually bind a third party, the child, and so the freedom of contract concept of an agreement between the relevant parties to accept a risk is not so easily applied. To complicate the matter further, if the child herself signed the release, we would deny enforcement because she lacks the capacity to contract as a minor.<sup>166</sup> That inability to contract arises out of both her immaturity and fears that immaturity will be exploited by a third party, and we may read parental authority as the proxy for that maturity. Yet making a decision for a child is one thing, making a decision *as if you* are that child is another. There is no meeting of the minds if judgment is substituted; in many contexts we engage a legal fiction about the substituted judgment of parents, but in this nitty gritty of contractual enforcement, courts do not think the parent can bind the child to the agreement.

This means that we need to find the right to parental waiver of liability somewhere other than in “as if” substitution for the child. Substituted judgment may make more sense when a parent assumes a financial liability for a child, by co-signing a loan, but injury to body is not a transferrable interest. Rather, we need a justification anchored in the independent judgment of the parent, and that justification has not been easy for the courts to find.

Parents might be forgiven for assuming parental waivers are important based on the amount of time they spend executing them, but they are not ordinarily enforceable. The majority of courts that have considered the issue have refused to enforce a parent’s pre-injury waiver of a child’s negligence claim.<sup>167</sup> The law is not universal. In 1990,

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1-702 (2019); *see also* Johnson’s Adm’x v. Richmond & D.R. Co., 86 Va. 975, 978 (1890). Several other states enforce agreements in theory but apply exceptionally high standards to the conditions and types of businesses that may successfully use waivers that they might be characterized as almost prohibiting enforcement altogether. *See, e.g.*, Hanks v. Powder Ridge Rest. Corp., 885 A.2d 734, 738 (Conn. 2005); Dalury v. S-K-I, Ltd., 670 A.2d 795, 797-98 (Vt. 1995).

<sup>166</sup> *See* TIMOTHY MURRAY, 7 CORBIN ON CONTRACTS § 27.2 (2019).

<sup>167</sup> *See, e.g.*, Mavreshko v. Resorts USA, Inc. 299 F. App’x 120 (3rd Cir. 2008); Chicago, R.I. & P. Ry. Co. v. Lee, 92 F. 318, 321 (8th Cir. 1899); Kindermann v. LFT Club Operations, Co., No. 16-11749, 2017 WL 2868542, at \*3 (E.D. Mich. July 5, 2017); Thode v. Monster Mountain, LLC, 754 F. Supp. 2d 1323, 1328 (M.D. Ala. 2010); Apicella v. Valley Forge Military Acad. & Junior Coll., 630 F. Supp. 2d 20, 24 (E.D. Pa. 1985); Fedor v. Mauwehu Council, Boy Scouts of America, Inc., 143 A.2d 466, 468 (Conn. Super. Ct. 1958); Kirton v. Fields, 997 So. 2d 349, 358 (Fla. 2008); Meyer v. Naperville Manner, Inc., 634 N.E.2d 411, 414 (Ill. App. Ct. 1994); Galloway v. State, 790 N.W.2d 252, 257 (Iowa 2010); Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 (Me.

California became the first state to enforce a parent's pre-injury waiver of liability,<sup>168</sup> and since then several other state courts have followed suit. In addition, a few state legislatures have overturned state court decisions refusing to enforce waivers, most notably Colorado.<sup>169</sup> On some counts, since that 1990 California decision, up to a dozen states have allowed enforcement of parental releases under some circumstances. But this seriously overstates the norm, as most of these changes were created by statute, and some are explicitly limited to a single activity. For example, risk only from equine activities may be released in six states by statute, and only from motorsport activities in two states.<sup>170</sup> A few states put such conditions on the release that its enforceability is theoretical only. The Florida legislature, for example, passed a statute that appeared to allow for enforcement of parental waivers only by nonprofit operators, but not commercial entities, but that in effect refuses enforcement of all negligence waivers; the statute limits commercial releases to injury resulting from inherent risks of the activity, expressly excluding injuries that arise from negligence, and reverts nonprofit waivers to the common law, which had already refused to enforce them.<sup>171</sup> Since there shouldn't be liability for injuries

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1979); *Woodman v. Kera LLC*, 785 N.W.2d 1, 9 (Mich. 2010); *Khoury v. Saik*, 33 So. 2d 616, 618 (Miss. 1948); *Perry v. SNH Dev.*, No. 2015-CV-00678, 2017 N.H. Super. LEXIS 32, at \*13 (Sept. 13, 2017); *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 389-90 (N.J. 2006); *Fitzgerald v. Newark Morning Ledger Co.*, 267 A.2d 557, 558 (N.J. Super. Ct. Law Div. 1970); *Valdimer v. Mount Vernon Hebrew Camps, Inc.*, 172 N.E.2d 283, 284-85 (N.Y. 1961); *Ohio Cas. Ins. Co. v. Mallison*, 354 P.2d 800, 804 (Or. 1960); *Shaner v. State Sys. of Higher Educ.*, 40 Pa. D. & C.4th 308, 313-14 (Dauphin C.P. 1998), *aff'd without opinion*, 738 A.2d 535 (Pa. Commw. Ct. 1999); *Blackwell v. Sky High Sports Nashville Operations, LLC*, 523 S.W.3d 624, 652 (Tenn. Ct. App. 2017); *Rogers v. Donelson-Hermitage Chamber of Commerce*, 807 S.W.2d 242, 245, 247 (Tenn. Ct. App. 1990); *Munoz v. II Jaz Inc.*, 863 S.W.2d 207, 209-10 (Tex. App. 1993); *Hawkins v. Peart*, 37 P.3d 1062, 1066 (Utah 2001); *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 10 (Wash. 1992).

<sup>168</sup> See *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647, 649-50 (Ct. App. 1990).

<sup>169</sup> See *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1236 (Colo. 2002); see also COLO. REV. STAT. ANN. § 13-22-107 (2019).

<sup>170</sup> See ARIZ. REV. STAT. ANN. § 12-553 (2019) (equine activities); GA. CODE ANN. § 4-12-4 (2019) (equine activities); HAW. REV. STAT. ANN. § 663-10.95 (2019) (motorsports); 745 ILL. COMP. STAT. ANN. 47/15 (2019) (equine activities); IND. CODE ANN. § 34-28-3 (2019) (automobile and motorcycle racing); KY. REV. STAT. ANN. § 247.4027(2)(a) (2019) (equine activities); UTAH CODE ANN. § 78B-4-203(2)(b) (2019) (equine and livestock activities); VA. CODE ANN. § 3.2-6202 (2018) (equine activities).

<sup>171</sup> FLA. STAT. ANN. § 744.301(3) (2019); *Kirton v Fields*, 997 So. 2d 349, 358 (Fla. 2008).

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without negligence in any case, the Florida legislature has made no meaningful concession to tort defendants.

Reasons for refusal to enforce these parental waivers are instructive as we consider their relevance to the Lystedt structure. I would characterize one set of objections to these releases as grounded in safety incentives, a concern that influences non-enforcement of releases for adults as well: if recreational operators can be released from their own negligence, they will lack incentives toward safe operation, and for some types of accidents, they are the cheapest or only cost-avoider.<sup>172</sup> They may, for example, control completely the premises and the conduct of the activity, akin to the rules of play in sports. Therefore, removing the incentive to safety imposed by tort law from the outfitter and placing it on the participant functionally reduces safety.

But other types of arguments for not enforcing parental waivers of liability are grounded in the parent-child relationship and the difficulty of a person consenting to risk on behalf of another person, and thereby binding that person to a contract to suffer the losses as an individual. The parent-child relationship, and the extensive authority granted to parents in family law, do not extend to this risk contract.

### 1. Children's Legal Affairs

Common law courts continue to scrutinize parental management of children's legal affairs in an explicit effort to police the risk of parental mismanagement. For example, generally, parents lack the authority to waive a legal right to child support on behalf of their children without judicial approval. In the pre-injury waiver context, some courts reason that waivers cannot be enforced because of the limited authority of parents over their children's legal affairs, referencing the independent legal protection for children from parental decisions.<sup>173</sup> With respect to personal injury, adults may settle their own post-injury tort claims and waive liability without court approval, but if a parent seeks to settle a claim for injury to her child, that settlement must be approved by a

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<sup>172</sup> See, e.g., *Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 744-45 (Conn. 2005).

<sup>173</sup> See, e.g., *Galloway v. State*, 790 N.W.2d 252, 256 (Iowa 2010); see also 39 AM. JUR. 2D *Guardian & Ward* § 115 (2019); 42 AM. JUR. 2D *Infants* § 40 (2019).

court.<sup>174</sup> This has been a longstanding and relatively explicit limitation on the legal authority of parents.<sup>175</sup>

A version of the rationale grounded in established limits on authority in contractual contexts notices that the parental signature may function on behalf of the party in opposition to the child, and inappropriately use the child's interests in that process. On this reasoning, parental authority to waive liability would not be in the child's interest, and the parent has no right to strike a legal bargain for that actor's benefit at the expense of her child:

[W]hen a parent decides to execute a pre-injury release on behalf of a minor child, the parent is not protecting the welfare of the child, but is instead protecting the interests of the activity provider.<sup>176</sup>

The possibility that a third party is deploying parental authority or parental autonomy — and will always be the party doing so in court under the contractual structure of a parental waiver of liability — appears to be adequate justification for refusal to enforce it.<sup>177</sup>

## 2. Comparing Pre- and Post-injury Releases

For many courts, the baseline then is whether there is a difference between pre- and post-injury releases that would justify different treatment. Courts who use the post-injury release as a baseline of comparison often find it difficult to explain why a pre-injury release

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<sup>174</sup> 59 AM. JUR. 2D PARENT AND CHILD § 41 (2019) (stating that a parent has no right, in the absence of authorization from a court, to release or compromise causes of action belonging to a minor); *see, e.g.*, ALASKA STAT. ANN. § 90.2 (2019); D.C. CODE ANN. § 21-120(a) (2019); FLA. STAT. ANN. §§ 744.301, 744.387, 744.3025 (2019); FLA. STAT. ANN. 5.636 (2019); GA. CODE ANN. § 29-3-3 (2019); KY. REV. STAT. ANN. § 387.280 (2019); MD. CODE ANN., Capacity § 3-202 (2019); MASS. GEN. LAWS ch. 231, § 140C 1/2 (2019); MICH. COMP. LAWS ANN. § 2.420 (2019); WIS. STAT. ANN. §§ 803.01, 807.10 (2019); Gillikin v. Gillikin, 113 S.E.2d 38, 44 (N.C. 1960) (explaining that a minor cannot be bound by proposed compromise and settlement of a minor's personal injury claim unless it is properly approved by a judge); *see also* Wreglesworth v. Arctco, Inc., 738 N.E.2d 964, 968 (Ill. App. Ct. 2000); Ott v. Little Co. of Mary Hosp., 652 N.E.2d 1051, 1055 (Ill. App. Ct. 1995) (affirming lower court's decision to appoint a guardian in parents place when the parents refused to accept a pre-trial settlement on behalf of their child for damages associated with cerebral palsy because the lower court judge could not "let anybody, no matter how well-intentioned or sincere in their convictions, gamble for this child").

<sup>175</sup> *See* 59 AM. JUR. 2D PARENT AND CHILD § 41 (2019).

<sup>176</sup> Kirton, 997 So. 2d at 357.

<sup>177</sup> *See id.*

should be enforceable when a post-injury release is not. The Utah court's reasoning on this issue is fairly typical:

[W]e see little reason to base the validity of a parent's contractual release of a minor's claim on the timing of an injury. Indeed, the law generally treats preinjury releases or indemnity provisions with greater suspicion than postinjury releases. An exculpatory clause that relieves a party from future liability may remove an important incentive to act with reasonable care. These clauses are also routinely imposed in a unilateral manner without any genuine bargaining or opportunity to pay a fee for insurance. The party demanding adherence to an exculpatory clause simply evades the necessity of liability coverage and then shifts the full burden of risk of harm to the other party. Compromise of an existing claim, however, relates to negligence that has already taken place and is subject to measurable damages. Such releases involve actual negotiations concerning ascertained rights and liabilities. Thus, if anything, the policies relating to restrictions on a parent's right to compromise an existing claim apply with even greater force in the preinjury, exculpatory clause scenario.<sup>178</sup>

The Utah court blends substantive reasons for denying enforcement of waivers altogether, such as dis-incentivizing safety, with a head-to-head comparison of the different bargaining environments pre- and post-injury.<sup>179</sup> Yet the underlying principle that both agreements test the ability of parents to extinguish legal claims remains for courts in most states.

### 3. Lack of Alignment Between Parent and Child Interests

Some courts that reject enforcement of parental waivers reason simply that we shouldn't assume parental interests are aligned with their children's, because it "cannot be presumed that a parent who has decided to voluntarily risk a minor child's physical well-being is acting in the child's best interest."<sup>180</sup> This framing seems to anticipate an actual

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<sup>178</sup> *Hawkins v. Peart*, 37 P.3d 1062, 1066 (Utah 2001) (citation omitted).

<sup>179</sup> Admittedly, post-injury settlements require judicial scrutiny in part for fear that parental interest in money will override their interest in child welfare, and the pre-injury context is different because there is no concrete monetary figure evidently at stake in the moment of agreement.

<sup>180</sup> *Kirton*, 997 So.2d at 357.

split of interests between parent and child. One New York court put the question of divergence of parental and child interests this way:

[W]e are extremely wary of a transaction that puts parent and child at cross-purposes and, in the main, normally tends to quiet the legitimate complaint of the minor child.<sup>181</sup>

#### 4. Parental Incompetence

A more measured version of this kind of blunt assessment on the merits is reflected in the reasoning of a number of the courts that have rejected enforcement not because parents are self-interested, but because their sometimes poor judgment cannot come at the expense of the child. Acknowledging that a parent can make a bad decision on behalf of a child, who would be unjustifiably harmed as a result, one court posited, “children still must be protected against parental actions — perhaps rash and imprudent ones — that foreclose all of the minor’s potential claims for injuries caused by another’s negligence.”<sup>182</sup>

These opinions expressly contemplate the possibility of well-intentioned but poor parental judgment in signing waivers, and assert the authority to override that judgment on behalf of the minor child:

These limitations on parents’ authority to make legally enforceable transactions affecting the property and financial interests of their minor children are derived from a well-established public policy that children must be accorded a measure of protection against improvident decisions of their parents.<sup>183</sup>

Three courts that *have* allowed enforcement of parental waivers have done so on the theory that respect for fundamental parental rights and authority compel respecting a parent’s decision to waive her child’s ability to sue for negligence before it has occurred. These courts deploy parental rights language on behalf of the commercial actors with whom the parents contracted.<sup>184</sup> The Colorado legislature overturned a state

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<sup>181</sup> *Valdimer v. Mount Vernon Hebrew Camps, Inc.*, 172 N.E.2d 283, 285 (N.Y. 1961).

<sup>182</sup> *Cooper v. Aspen Skiing Co.*, 48 P.3d 1229, 1234 (Colo. 2002), *superseded by statute*, COLO. REV. STAT. ANN. § 13-22-107(1)(b) (2019).

<sup>183</sup> *Galloway v. State*, 790 N.W.2d 252, 257 (Iowa 2010).

<sup>184</sup> *See Saccente v. LaFlamme*, No. CV0100756730, 2003 WL 21716586, at \*5 (Conn. Super. Ct. July 11, 2003); *BJ’s Wholesale Club, Inc. v. Rosen*, 80 A.3d 345, 353 (Md. 2013); *Sharon v. City of Newton*, 769 N.E.2d 738, 746 (Mass. 2002).

court opinion holding parental waivers were unenforceable,<sup>185</sup> and the statutory text uses the same parental rights language:

(IV) Parents make conscious choices every day on behalf of their children concerning the risks and benefits of participation in activities that may involve risk;

(V) These are proper parental choices on behalf of children that should not be ignored. So long as the decision is voluntary and informed, the decision should be given the same dignity as decisions regarding schooling, medical treatment, and religious education.<sup>186</sup>

While the Colorado legislature and a few courts do use the elevated parental rights language, most courts that will enforce parental waiver do not premise enforcement on parental rights, but rather on the practical regulatory burden of tort law.

##### 5. Concern About Reducing Access to Recreational Opportunities

By far the most common reason cited in the literature and in cases for allowing enforcement of these agreements is not fundamental parental rights, but practical incentives.<sup>187</sup> The few courts that do enforce parental waivers reason that without them, recreational opportunities will be eliminated or diminished. It appears not only in the cases, but in discussion of releases among lawyers and in the business community. An Ohio court, in choosing to enforce a parental waiver, makes the argument clearly:

Therefore, we conclude that although Bryan, like many children before him, gave up his right to sue for the negligent acts of others, the public as a whole received the benefit of these exculpatory agreements. *Because of this agreement, the Club was able to offer affordable recreation and to continue to do so without the risks and overwhelming costs of litigation.* Bryan's parents agreed to shoulder the risk. Public policy does not forbid such an agreement. In fact, public policy supports it. Accordingly, we believe that public policy justifies giving parents authority to enter into these types of binding agreements on behalf of their

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<sup>185</sup> COLO. REV. STAT. ANN. § 13-22-107(1)(b) (2019).

<sup>186</sup> *Id.* at § 13-22-107(1)(a)(IV)-(V).

<sup>187</sup> See Joshua D. Arters & Ben M. Rose, *Kindly Remove My Child from the Bubble Wrap — Analyzing Childress v. Madison County and Why Tennessee Courts Should Enforce Parental Pre-Injury Liability Waivers*, 11 TENN. J.L. & POL'Y 8, 57 (2016).

minor children. We also believe that the enforcement of these agreements may well promote more active involvement by participants and their families, which, in turn, promotes the overall quality and safety of these activities.<sup>188</sup>

The court views the risk transfer as being from the Club to Bryan's parents, rather than to Bryan himself, treating the substituted judgment as equivalent to substituted pain. This claim from regulatory overburden is on the one hand intuitive to any lawyer arguing from basic incentives, and yet intuitively inaccurate to any non-lawyer parent who sees a proliferation of recreational activities for youth in those majority of states that refuse to enforce waivers. This potentially important argument for enforcing agreements loses force if recreational opportunities remain robust and wide-ranging in states that do not enforce parental waivers. It's difficult to detect the marginal increase in opportunities that the theory hypothesizes.

I could not find any empirical study of the question of whether there was in fact any difference in recreational opportunities between states that do and do not enforce these agreements. Given that most states do enforce them for adults and don't enforce them for children, we might expect to see most states having a substantial number of recreational outfits that have limited their operations to adults capable of signing an effective waiver of liability. I could find one activity, sky-diving, that tends to be limited to adults, but this is regardless of state. The governing safety rating association for the industry has determined that it is unsafe to jump under the age of eighteen, and will not license instructors who would teach a minor,<sup>189</sup> so it doesn't seem appropriate to attribute that age restriction to the state of waiver law without more evidence.

While direct study of the question is unavailable, indirect evidence does not appear to support the concern. There is no detectable pattern of recreational, athletic, or wilderness opportunity disparity between states that do and do not enforce parental waivers, and all states that do not enforce them appear to have a wide array of these opportunities.<sup>190</sup>

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<sup>188</sup> *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 205 (Ohio 1998) (emphasis added).

<sup>189</sup> See U.S. PARACHUTE ASS'N, SKYDIVER'S INFORMATION MANUAL 5 (2018), [https://uspa.org/Portals/0/files/Man\\_SIM.pdf](https://uspa.org/Portals/0/files/Man_SIM.pdf).

<sup>190</sup> In two states that do not enforce either parental or adult waivers, Montana and Louisiana, we find that they do not have the lowest high school athletic participation rates. The national average of high school athletic participation is 60%. In comparison, in Louisiana 55% of high school students participated in athletics, and Montana 76%. *Compare Table 203.30. Public School Enrollment in Grades 9 Through 12, by Region, State, and Jurisdiction:*

Additionally, non-enforcement states do not appear to have lower youth athletic opportunities than comparable states that have not declared their unwillingness to enforce waivers.<sup>191</sup> Finally, there does not seem to be a decrease in outdoor recreational activities in states that do not enforce adult waivers.<sup>192</sup> The circumstantial evidence tends to

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*Selected Years, Fall 1990 through fall 2028*, NAT'L CTR. EDU. STATS., [https://nces.ed.gov/programs/digest/d18/tables/dt18\\_203.30.asp](https://nces.ed.gov/programs/digest/d18/tables/dt18_203.30.asp) (last visited Feb. 14, 2019) (containing the number of high school students per state in 2015-16) with *2016-17 High School Athletics Participation Survey*, NAT'L FED'N OF STATE HIGH SCH. ASS'N, [http://www.nfhs.org/ParticipationStatistics/PDF/201617\\_Participation\\_Survey\\_Results.pdf](http://www.nfhs.org/ParticipationStatistics/PDF/201617_Participation_Survey_Results.pdf) (last visited Feb. 14, 2019) (listing the 2016-17 high school athletic participation rate, including individuals who participated in two sports counted twice, three sports counted three times, etc.).

<sup>191</sup> For example, when comparing USA Football Leagues per state, Montana, which does not enforce waivers, has fifty-nine USA Football affiliated leagues; Idaho, a comparable state that has taken no position on parental waivers, has fifty leagues; Louisiana has ninety-six leagues and does not enforce parental waivers; Virginia has 179 and does not enforce parental waivers; while Delaware, which leans toward enforcing waivers, has thirty. *Find a Heads Up League*, USA FOOTBALL, <https://usafootball.com/resources-tools/heads-up-football-finder/> (last visited July 9, 2019). Adjusting these figures for variation in population size doesn't produce a more conclusive pattern. For example, Idaho has a larger population than Montana, and a theoretically friendlier legal climate on parental waivers, but has fewer football opportunities either absolutely or per capita. The Delaware and Virginia comparisons are about equal proportionally to the population differences. The number of leagues isn't a direct product of the number of players, but it's the most reliable figure available to capture any feared reduction in opportunity. Similarly, there do not appear to be fewer youth soccer opportunities in declared non-enforcing states. In Montana, where waivers are not enforced, there are thirty-five youth soccer leagues affiliated with the state's soccer association and in Idaho, which is undeclared on parental waivers, there are twelve. In Virginia, where there is no enforcement, there are 116, and in Delaware, which leans toward waiver enforcement, there are thirteen, a ratio directly proportional to their population differences. See *Hong v. Hockessin Athletic Club*, No. N12C-05-004 PLA, 2012 WL 2948186, at \*3 (Del. Super. Ct. July 18, 2012) (enforcing a waiver). In Louisiana, there are forty-two and in Mississippi there are fifty-one, though parental waivers are not enforced in either. LA. CIV. CODE ANN. art. 2004 (1985); *Burt v. Burt*, 841 So. 2d 108, 115 (Miss. 2001) (McRae, J., concurring in part and dissenting in part) (citing *Khoury v. Saik*, 33 So. 2d 616, 618 (Miss. 1948)).

<sup>192</sup> For example, in 2017, 81% of Montana residents and 70% of Minnesota residents participated in outdoor recreational activities. *Montana*, OUTDOOR RECREATION ECON. REP. (Outdoor Indus. Ass'n, Boulder, Colo.), July 2017; *Minnesota*, OUTDOOR RECREATION ECON. REP. (Outdoor Indus. Ass'n, Boulder, Colo.), July 2017. However, unlike Montana, Minnesota does enforce adult liability waivers. See MINN. STAT. ANN. § 604.055 (2019). Similarly, 57% of Virginia residents and 52% of New York residents participated in outdoor recreational activities. *Virginia*, OUTDOOR RECREATION ECON. REP. (Outdoor Indus. Ass'n, Boulder, Colo.), July 2017; *New York*, OUTDOOR RECREATION ECON. REP. (Outdoor Indus. Ass'n, Boulder, Colo.), July 2017. Virginia and New York are similar states and they have comparable percentages; however, New York enforces liability waivers and Virginia does not. See *Lago v. Krollage*, 575 N.E.2d 107, 110 (N.Y.

undermine the claim that youth opportunities to participate in athletic leagues will decline in states that have held that they will not enforce parental liability waivers.<sup>193</sup>

A sample of information yields no evidence that the enforceability of pre-injury waivers impacts overall recreational opportunities. Looking at the number of youth athletic leagues and participation and looking at overall outdoor recreational participation surfaced no evidence that residents of states that do not enforce liability waivers have a decreased opportunity to participate in recreational activities.

We use the term canard to indicate that an idea is both popular and unfounded. There's a sound economic theory that would indicate that we need parental waivers to be enforced in order to ensure that we have adequate, or optimal, levels of recreational opportunity. Lack of evidence that the widespread failure to enforce parental waivers is having such an effect undermines the intuitive economic claim. As the Supreme Court of Iowa said in 2010:

We believe the fear of dire consequences from our adoption of the majority rule is speculative and overstated. We find no reason to believe opportunities for recreational, cultural, and educational activities for youths have been significantly compromised in the many jurisdictions following the majority rule. In the final analysis, we conclude the strong public policy favoring the protection of children's legal rights must prevail over speculative fears about their continuing access to activities.<sup>194</sup>

If parental consent to waive liability for injury to a child cannot be explained by efforts to produce a more optimal level of recreational activities, the argument against enforcement, given the problem of substituted judgment, is greatly strengthened. Though some courts have moved toward enforcement of parental liability waivers, the majority continue to see little benefit to revising the common law rule against giving parents that authority.

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1991). Also, Montana is the state with the second highest proportion of recreational workers in the country, yet does not enforce liability waivers for either adults or children participating in recreational activities. *Occupational Employment and Wages, May 2018*, BUREAU LABOR STATISTICS (Mar. 29, 2019), <https://www.bls.gov/oes/current/oes399032.htm>.

<sup>193</sup> This is an anecdotal tour of opportunities for recreational activity and the underlying state law of waivers; it is not a study.

<sup>194</sup> *Galloway v. State*, 790 N.W.2d 252, 259 (Iowa 2010).

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Indeed, the failure to enforce waivers is a paternalism that enhances functional choice of parents even as it impairs theoretical choice. As between amusement rides with a waiver of negligence claims and no amusement rides at all, parents seem to choose the amusement ride time and again. But the choice they'd prefer is the amusement ride without a waiver of the protections of negligence law, and the formal choice limitation is functionally choice-enhancing in just the way child labor laws and warranties of habitability are. That is the state of law surrounding parental waivers of liability.

### C. *Parallels Between Waivers and Lystedt*

If parents lack the capacity to waive liability before a child can participate in a recreational activity, what is the premise of the Lystedt framework, and is it consistent with waiver law? In Part III.D, I argued that Lystedt is a worst-of-both-worlds hybrid between a waiver and a first aid/prevention provision.

On one reading of waiver law, parents lack the capacity to make a decision for their child because their judgment isn't adequately protective in that risk balancing context. Lystedt requires that risk information be conveyed to parents, which would improve their decision-making. At the same time, it's already a staple of waiver law that waivers need to convey detailed risk information. Lystedt's information component isn't an improvement over the kinds of information conveyed in a well-drafted waiver form.

In other ways, the Lystedt structure compares unfavorably to parental waivers of liability in terms of ensuring a good decision-making structure and adequate protection of child welfare. First, parents do not, under the Lystedt structure, actually sign a waiver of liability. They ordinarily sign an independent waiver of liability for all sports injuries, one that is ordinarily not enforceable but may nonetheless influence a parent's litigation behavior. But the information provided with Lystedt doesn't flag for the parent that the parent and child are assuming the risks enumerated, the way a waiver does. This is particularly problematic because so many states include immunity from tort in their Lystedt statutes so long as coaches follow return to play rules, so that participation itself triggers an actual waiver of liability. Yet there is no moment when the parent recognizes that statutory immunity has been granted. More important, Lystedt information does not explicitly invite a parent to decline participation altogether, even though implicitly every parent must realize that withdrawing is an option. Instead, Lystedt is focused on what to do after a concussion occurs, which has

the potential to lead parents to believe that second-impact syndrome is the primary threat to their children's welfare.

This does not prove that there is something nefarious behind the Lystedt legislation. Rather, it is to say that taken together, the structure of the information and the decision-making prompts are inferior to the typical waiver of liability. Given that courts tend to assess parental waivers of liability with great skepticism, Lystedt represents a noteworthy departure from the typically circumscribed parental role in this setting. That it is achieved legislatively, as an intervention on common law decision-making, means that the immunity from tort extended here functions as an exception to the general ability of parents to sue for negligently caused sports-related injuries to their children.

Is something else afoot with the Lystedt legislation? Legal and cultural commentary around the concussion issues is infused with deference: where the issue becomes knotty, defer to the parents. Consent becomes a remedy for the cultural tensions around sports and threats to children's health. That Lystedt delivers a tort immunity to athletic organizations without notifying families that it has done so raises questions about who the legislation is designed to protect, and how parents are utilized in that process.

#### V. CONSENT AND THE YOUTH SPORTS PARENT

Many NFL and college football viewers feel conflicted about the concussion situation in football today. The New York Times Magazine asked the concussion-driven question on many viewers' minds in an essay entitled, "Is It Immoral to Watch the Super Bowl?"<sup>195</sup> Viewers appreciate a pathway "out" from the destruction/entertainment conundrum — a narrative that absolves the viewer of implication in harm to the players. That "out" might be somewhere between a psychological convenience and a psychological imperative for the viewer. It can be located in the consent of the players themselves. Without belief in player consent to their own destruction, the immorality of football feels inescapable.

The significance of player consent to the industry's destruction/entertainment conundrum becomes visible in the concussion litigation by former NFL players against the league and in

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<sup>195</sup> See Steve Almond, *Is It Immoral to Watch the Super Bowl?*, N.Y. TIMES (Jan. 24, 2014), <http://www.nytimes.com/2014/01/26/magazine/is-it-immoral-to-watch-the-super-bowl.html>.

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the widely discussed book and documentary “League of Denial.”<sup>196</sup> Both League of Denial and the NFL concussion litigation focus on NFL conduct in concealing the true risk of concussion from players even when league officials either knew or should have known that the risk was greater than they were conveying. The NFL efforts to minimize the risk are explicitly likened to the efforts of the tobacco industry to hide the risks of their products from their consumers.

On this framing, the NFL’s misconduct is *not* in exposing players to a one in three risk of brain damage, or a 90% risk of headaches, but in exposing them to that risk *without their informed consent*. The NFL concussion settlement only covers retired players, who claimed that the NFL concealed information that is now widely available to current players who presumably consent to risk in the face of more widespread information.<sup>197</sup> In keeping with this theory of the wrong, the NFL changed course in its messaging, from directly denying the harm to its players prior to 2009, to investing in concussion research, changing game rules and return to play protocol, and generally endeavoring to stay in front of the issue for current players. The NFL’s new position is to gather and share as much information as possible with players and the public, shoring up the quality of player consent with better information. Implicitly, viewers are invited to resolve the destruction/entertainment conundrum the same way: today’s NFL players are more aware of what they are risking, and have chosen to play for money and the glory of the game; it would be raw paternalism for the viewer to second-guess that choice. The conundrum is resolved by libertarianism, deployed to reduce viewer responsibility for football’s harms. While football is the epicenter of this narrative, it can arise in other spectator sports, as was apparent during the World Cup in the

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<sup>196</sup> MARK FAINARU-WADA & STEVE FAINARU, *LEAGUE OF DENIAL* (2013); *LEAGUE OF DENIAL: THE NFL’S CONCUSSION CRISIS* (Frontline 2013).

<sup>197</sup> *Claims in NFL Concussion Settlement Hit \$500 Million In Less Than 2 Years*, CBS NEWS (July 30, 2018, 7:10 PM), <https://www.cbsnews.com/news/nfl-concussion-claims-hit-500-million-less-than-2-years/>; Patrick Hruby, *The NFL Dodges on Brain Injuries*, ATLANTIC (Sept. 4, 2014), <https://www.theatlantic.com/entertainment/archive/2014/09/the-nfls-concussion-settlement-not-acceptable/379557/>.

summer of 2014,<sup>198</sup> and reflected in the much smaller National Hockey League settlement with a class of retired players in 2018.<sup>199</sup>

The NFL's framework of informed consent and assumption of risk are not unique to professional athletes. They are a blueprint for understanding the response to youth concussion as well. The current structure of intervention in youth sports seems to translate those same cultural ideas around consent to youth sports.

#### A. *Who Is the Youth Sports Parent?*

Popular characterization of sports parents tell us that they are competitive, aggressive, and care way too much about their child's placement on the most competitive team and then about seeing that team win.<sup>200</sup> The problem of the youth sports parent is well-ensconced in the discourse and practice of youth sports. Media reporting, pleas from coaches on sports blogs, and formal parental codes of conduct all reflect a sense that there is an issue to be addressed. Unpacking the cliché and examining what we do know about the sports parent phenomenon may help us to evaluate whether there is anything distinctive about parents in the sports context that would influence their role in the Lystedt structure.

Research suggests a divide between child athletes and their parents with respect to the value of youth sports, with the children less focused on competition, winning, and status, and more focused on fun, while parents are focused on seeking the most competitive environment the child can attain. Scholars are digging into what children say about the attributes of fun, and competition and winning are very far down their list.<sup>201</sup> Much has been made in recent years of a study finding that 70% of youth athletes have quit their sport by age thirteen,<sup>202</sup> citing lack of fun as the main driver of their decisions. Studies suggest children experience unwanted pressure to play and to perform as athletes from

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<sup>198</sup> See Marissa Payne, *Brazilian Soccer Star Bellini Has CTE Diagnosed, Just as FIFA Revamps Concussion Protocol*, WASH. POST. (Sept. 23, 2014), <http://www.washingtonpost.com/news/early-lead/wp/2014/09/23/brazilian-soccer-star-bellini-has-cte-diagnosed-just-as-fifa-revamps-concussion-protocol/>.

<sup>199</sup> See Stephen Whyno, *Retired Players, NHL Reach Settlement in Concussion Lawsuit in Minnesota*, INS. J. (Nov. 13, 2018), <https://www.insurancejournal.com/news/midwest/2018/11/13/507374.htm>.

<sup>200</sup> Rosenwald, *supra* note 18.

<sup>201</sup> Amanda J. Visek et al., *The Fun Integration Theory: Toward Sustaining Children and Adolescents Sport Participation*, 12 J. PHYSICAL ACTIVITY & HEALTH 422 (2015).

<sup>202</sup> *Pressure & Youth Sports Study*, YELLOWBRICK, <https://www.yellowbrickprogram.com/blog/pressure-youth-sports-study> (last visited Feb. 18, 2019).

coaches, parents, and teammates that contributes to their exit from the field.<sup>203</sup> Parental behavior impacts children's sports experience, often negatively.<sup>204</sup> Public health officials are concerned about the subsequent lack of physical activity by those who exit organized sports, and the negative health consequences for the child.<sup>205</sup> In this light, research on the role parental pressure plays in a child's enjoyment of the sport becomes highly relevant, because the child's enjoyment is the key determinant of her continued participation.

A central lament among researchers is that children now begin competitive sports at too young an age and specialize too quickly,<sup>206</sup> in a marked shift from a generation ago.<sup>207</sup> This specialization, in turn, is tied to a significant increase in injuries, particularly orthopedic injuries from repetitive overuse.<sup>208</sup> Because this increased specialization is now infused throughout the youth sports culture, isolating the causal determinants is difficult. In an effort to understand the movement toward specialization, researchers have focused on parental decision-making, and found that parents are a key determinant in the decision to specialize in a single sport at an early age.<sup>209</sup>

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<sup>203</sup> See *id.*

<sup>204</sup> Diana Amado et al., *Incidence of Parental Support and Pressure on Their Children's Motivational Processes Towards Sport Practice Regarding Gender*, PLOS ONE 10, June 2015; Julien E. Bois et al., *The Influence of Parenting Practices and Parental Presence on Children's and Adolescents' Pre-competitive Anxiety*, 27 J. SPORTS SCI. 995, 1002-03 (2009); D. K. Chan et al., *Influences of Coaches, Parents, and Peers on the Motivational Patterns of Child and Adolescent Athletes*, 22 SCANDINAVIAN J. MED. & SCI. SPORTS 558, 565-66 (2011); Ajay S. Padaki et al., *Quantifying Parental Influence on Youth Athlete Specialization: A Survey of Athletes' Parents*, ORTHOPAEDIC J. SPORTS MED. 1, 4-5 (2017); Pedro A. Sánchez-Miguel et al., *The Importance of Parents' Behavior in Their Children's Enjoyment and Amotivation in Sports*, 36 J. HUMAN KINETICS 169, 174 (2013).

<sup>205</sup> See Visek et al., *supra* note 201, at 424.

<sup>206</sup> Neeru Jayanthi et al., *Sports Specialization in Young Athletes: Evidence-Based Recommendations*, 5 SPORTS HEALTH 251, 251 (2013).

<sup>207</sup> See *id.*

<sup>208</sup> *Id.* at 255; John P. DiFiori et al., *Overuse Injuries and Burnout in Youth Sports: A Position Statement from the American Medical Society for Sports Medicine*, 48 BRITISH J. SPORTS MED. 287 (2014); Daniel B. Hollander et al., *Psychological Factors Associated with Overtraining: Implications for Youth Sport Coaches*, 18 J. SPORTS BEHAVIOR 3, 3 (2010) (emphasizing the psychological harm related to overtraining in youth sports); Anthony S. Kaleth & Alan E. Mikesky, *Impact of Early Sport Specialization: A Physiological Perspective*, 8 J. PHYSICAL EDU. RECREATION & DANCE 29, 31-32 (2010); A Mehran Mostafavifar et al., *Early Sport Specialisation, Does It Lead to Long-Term Problems?*, 47 BRITISH J. SPORTS MED. 1060, 1060 (2013).

<sup>209</sup> See Padaki et al., *supra* note 204, at 4; Rosenwald, *supra* note 18; see also Earl Smith, *A Hoop Dreams Reality Check*, N.Y. TIMES (Oct. 21, 2014, 12:30 PM), <https://www.nytimes.com/roomfordebate/2013/10/10/childrens-sportslife-balance/a-hoop-dreams-reality-check>.

One often-cited explanation for parental over-investment in sports is a misperception that their child will be eligible for financial aid as a collegiate athlete if the appropriate levels of play are achieved in childhood.<sup>210</sup> On this theory of parental misbehavior, parents simply make a factual miscalculation about their child's likelihood of success, which leads to a decision equation with bad data inputs, or optimism bias.<sup>211</sup> Parents compound the problem by overspending on youth athletic programs in the belief that it's a sound financial investment.<sup>212</sup> Several studies show a concerning prevalence of parents spending on youth sports in place of saving for higher education,<sup>213</sup> and sometimes raiding their own retirement funds to do so.<sup>214</sup> That spending, in turn, places pressure on the child, which is linked to burnout and withdrawal from sports.<sup>215</sup>

Parents drive their children to excel in other arenas as well — music and academics, for example. For each, we might evaluate whether parents accurately judge the costs and benefits of the child's investment level, and even judge the academic investment as offering a higher payoff than the athletic investment. This all assumes, though, that the parent is acting on behalf of the child, calculating properly, or improperly.

### B. *Sports Parent Emotions: My Little Gladiator*

Is there something beyond future-oriented optimism bias that may explain parental over-investment in youth sports — something specific to that context? Anecdotally and from media accounts, parents seem to bring more emotion to their children's sporting events than can easily

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<sup>210</sup> See Padaki et al., *supra* note 204, at 4; Rosenwald, *supra* note 18; Smith, *supra* note 209.

<sup>211</sup> See William Hageman, *Study Finds That Parental Spending on Kids' Sports May Be Misguided*, CHI. TRIB. (May 20, 2014), <https://www.chicagotribune.com/living/ct-xpm-2014-05-20-sc-fam-0520-kids-sports-cost-20140520-story.html>.

<sup>212</sup> See Debbie Morrison, *How Much Do Parents "Really" Spend on Youth Sports?*, SCH. OVER SPORTS (July 17, 2012), <https://schooloversports.wordpress.com/2012/07/17/how-much-do-parents-really-spend-on-youth-sports/>.

<sup>213</sup> See, e.g., TD AMERITRADE, PARENT PERSPECTIVES ON THE COST OF COMPETITIVE YOUTH SPORTS 9 (2016), [http://s1.q4cdn.com/959385532/files/doc\\_downloads/research/Sports-Parents-Survey-Report\\_2016.pdf](http://s1.q4cdn.com/959385532/files/doc_downloads/research/Sports-Parents-Survey-Report_2016.pdf).

<sup>214</sup> See, e.g., *id.*; Adam Shell, *Why Families Stretch Their Budgets for High-Priced Youth Sports*, USA TODAY (Sept. 5, 2017), <https://www.usatoday.com/story/money/2017/09/05/why-families-stretch-their-budgets-high-priced-youth-sports/571945001/>.

<sup>215</sup> Kevin Helliker, *The Problem for Sports Parents: Overspending. Large Amounts of Money Can Transform Parental Support into Pressure*, WALL ST. J. (May 12, 2014, 7:13 PM), <https://www.wsj.com/articles/the-problem-for-sports-parents-overspending-1399936390>.

be explained by their investment in collegiate scholarships. After all, researchers have found that some parents' investment in their children's sports causes them to curtail their own work hours,<sup>216</sup> or to choose employment based on a work schedule suitable to facilitating a child's athletics.<sup>217</sup> It's difficult to imagine the ledger sheet that justifies this decision without some independent hedonic benefit to the parent. It seems plausible that sports parents would readily admit to independent enjoyment of their child's participation in sports.

In September of 2018, a brawl broke out among parents who were supposed to be shaking hands after a peewee football game in Wise, Virginia.<sup>218</sup> Parents got into a physical altercation at a fourth grade basketball game in Oklahoma.<sup>219</sup> Several adults were injured fighting at a basketball game among *seven-year-olds* in Ohio.<sup>220</sup> A father whose two children were on the team that lost a championship basketball game in Massachusetts responded by biting the ear off of the opposing coach.<sup>221</sup> It seems that every weekend, a similar story appears in the news, though maybe none as notorious as Thomas Junta, who beat a parent to death after a hockey game in which the two men's kids played on opposing teams.<sup>222</sup> The National Association of Sports Officials reports that 70% of new referees quit within three years, and their survey shows that the

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<sup>216</sup> See Tess Kay, *Sporting Excellence: A Family Affair?*, 6 EUR. PHYSICAL EDU. REV. 151, 158 (2010).

<sup>217</sup> *Id.*; Teresa Arendell, *The New Care Work of Middle Class Mothers: Managing Childrearing, Employment and Time*, in MINDING THE TIME IN FAMILY EXPERIENCE: EMERGING PERSPECTIVES AND ISSUES 180-82 (Kerry J. Daly ed., 2001); Dawn E. Trussel, *Organized Youth Sport, Parenthood Ideologies and Gender Relations: Parents' and Children's Experiences and the Construction of "Team Family"* 109 (2009) (unpublished Ph.D. dissertation, University of Waterloo) (on file with author).

<sup>218</sup> Cindy Boren, *Parents Brawl During Virginia Youth Football Handshake Line*, WASH. POST (Oct. 3, 2018), [https://www.washingtonpost.com/sports/2018/10/03/parents-brawl-during-virginia-youth-football-handshake-line/?utm\\_term=.9a4f0b62c70a](https://www.washingtonpost.com/sports/2018/10/03/parents-brawl-during-virginia-youth-football-handshake-line/?utm_term=.9a4f0b62c70a).

<sup>219</sup> *Parents, Players Brawl at Oklahoma Basketball Game*, OKLA.'S NEWS 4 (Feb. 22, 2016, 6:58 PM), [https://kfor.com/2016/02/22/parents-players-brawl-at-\]-oklahoma-basketball-game/](https://kfor.com/2016/02/22/parents-players-brawl-at-]-oklahoma-basketball-game/).

<sup>220</sup> Vinny Carozza, *2 Hurt at Youth Basketball Brawl in Dayton*, DAYTON DAILY NEWS (Dec. 29, 2016, 1:46 PM), <https://www.daytondailynews.com/news/local/hurt-youth-basketball-brawl-dayton/D6y9WJBCGjtQABtGYGsxol/>.

<sup>221</sup> *Court Upholds Mayhem Conviction in Ear-Biting Case*, BOS. GLOBE (Aug. 26, 2014, 3:27 PM), <https://www.bostonglobe.com/metro/2014/08/26/court-upholds-mayhem-conviction-ear-biting-case/cRDT1YCTfaim5C8Qys2bal/story.html>.

<sup>222</sup> Fox Butterfield, *Man Convicted in Fatal Beating in Dispute at Son's Hockey Game*, N.Y. TIMES (Jan. 12, 2002), <https://www.nytimes.com/2002/01/12/us/man-convicted-in-fatal-beating-in-dispute-at-son-s-hockey-game.html>.

main reason is “pervasive abuse from parents and coaches.”<sup>223</sup> Eighteen states have passed specific laws against assaulting a sports official.<sup>224</sup>

Most parents are able to contain these emotions so that they do not spill over into violent action. But what exactly *are* these emotions? A library of recent coaching and self-help books and articles direct parents to get outside of their own heads and focused on their child’s wellness.<sup>225</sup> Studies confirm what every parent can observe in other parents, that “parents have incongruent views to those of their children with regard to behaviors perceived as exerting pressure and support.”<sup>226</sup> The phenomenon is familiar to researchers concerned about determinants of child enjoyment in sports participation,<sup>227</sup> and begs consideration of the mindset parents bring to risk decision-making.

Research into children’s perceptions of their parents at sporting events places them into three categories: supportive parent, demanding coach, and crazed fan.<sup>228</sup> The first category is appreciated by children, the last two are not,<sup>229</sup> and the last two align with popular representations of overbearing sports parents. Indeed, recent research confirms what any sideline observer can see: parents are highly emotional about their children’s sporting events.

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<sup>223</sup> Bill Pennington, *Parents Behaving Badly: A Youth Sports Crisis Caught on Video*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/sports/referee-parents-abuse-videos.html>.

<sup>224</sup> Christopher Reinhart, *Laws on Assault of a Sports Official*, CT. GEN. ASSEMB. (Dec. 11, 2006), <https://www.cga.ct.gov/2006/rpt/2006-r-0747.htm>.

<sup>225</sup> See, e.g., MARK HYMAN, *UNTIL IT HURTS: AMERICA’S OBSESSION WITH YOUTH SPORTS AND HOW IT HARMS OUR KIDS* (2009); JERRY LYNCH, *LET THEM PLAY: THE POWER & JOY OF MINDFUL SPORTS PARENTING* (2016); JANIS B. MEREDITH, *11 HABITS OF HAPPY AND POSITIVE SPORTS PARENTS* (2016); JOHN O’SULLIVAN, *CHANGING THE GAME: THE PARENT’S GUIDE TO RAISING HAPPY, HIGH PERFORMING ATHLETES, AND GIVING YOUTH SPORTS BACK TO OUR KIDS* (2013); Bob Cook, *How to Become a Better Sports Parent: Stop Caring*, FORBES (May 29, 2013, 1:36 PM), <https://www.forbes.com/sites/bobcook/2013/05/29/how-to-become-a-better-sports-parent-stop-caring/>; Kelly Wallace, *How to Make Your Kid Hate Sports Without Really Trying*, CNN (Jan. 21, 2016, 9:42 AM), <https://www.cnn.com/2016/01/21/health/kids-youth-sports-parents/index.html>.

<sup>226</sup> Michael A. Kanters et al., *Supported or Pressured? An Examination of Agreement Among Parent’s and Children on Parent’s Role in Youth Sports*, 31 J. SPORT BEHAV. 64, 64 (2008).

<sup>227</sup> C. Ryan Dunn et al., *The Impact of Family Financial Investment on Perceived Parent Pressure and Child Enjoyment and Commitment in Organized Youth Sport*, 65 FAM. REL. 287, 294 (2016) (demonstrating the inverse relationship between child’s enjoyment and their perception of parental investment).

<sup>228</sup> Jens Omli & Diane M. Wiese-Bjornstal, *Kids Speak: Preferred Parental Behavior at Youth Sport Events*, 82 RES. Q. EXERCISE SPORT 702, 704-05 (2011).

<sup>229</sup> Chris G. Harwood & Camilla J. Knight, *Parenting in Sport*, 5 SPORT EXERCISE & PERFORMANCE PSYCHOL. 84, 85 (2016).

“Sports-related spectator aggression dates back to the crowds witnessing the gladiators at the Roman Coliseum and spans to present day soccer hooliganism.”<sup>230</sup> Using a model developed to assess other irrational phenomenon like road rage, a recent study surveying 425 parents after watching their child’s youth soccer game identified a parallel phenomenon called “sideline rage.” The study found that 52.9% of sports parents reported being triggered to anger watching their child participate in organized athletics.<sup>231</sup> The authors identify “ego defensiveness” as a prime culprit in parents’ sideline behaviors, meaning that parents have too much of themselves at stake in their children’s sports. A different researcher explains:

[T]he achievements of children in an activity as visible and highly publicized as sports come to symbolize proof of one’s moral worth as a parent. Talented child athletes, therefore, become valuable moral capital in neighbourhoods, communities, and the subcultures associated with high-performance youth sport programmes.<sup>232</sup>

That is to say, sports may be wonderful for children, but they are *independently* meaningful to parents.

A recent headline in the New York Times, “Why Sports Parents Sometimes Behave So Badly,”<sup>233</sup> references this widely understood phenomenon — that parents can be irrational about their children’s sports. The Times cites a New Mexico parental code of conduct that contains language that many sports parents across the country will recognize, asking parents to agree that “I will be in control of my emotions” and “I will remember that the game is for our youth — not adults.” In no other arena are parents asked to sign codes of conduct that remind them of this obvious child-centered framework, because no other arena struggles under the systemic failure of parents to feel and behave as though this were the case. Yet it is that same parent, the one who needs explicit reminders to control his emotions and to consider

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<sup>230</sup> Jay D. Goldstein & Seppo E. Iso-Ahola, *Determinants of Parents’ Sideline Rage Emotions and Behaviors at Youth Soccer Games*, 38 J. APPLIED SOC. PSYCHOL. 1442, 1442 (2008).

<sup>231</sup> *Id.* at 1445-52.

<sup>232</sup> Jay Coakley, *The Good Father: Parental Expectations and Youth Sports*, 25 LEISURE STUD. 153, 160 (2006).

<sup>233</sup> Emilie Le Beau Lucchesi, *Why Sports Parents Sometimes Behave So Badly*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/well/family/why-sports-parents-sometimes-behave-so-badly.html>.

his child's interest in the game, who legitimizes a child's exposure to concussion risk under the Lystedt legislation.

*C. Reevaluating the Parent and Consent in the Lystedt Structure*

We've already established that there are substantial limits to a parent's ability to make decision about health risk on behalf of a child, depending on the context. Given the structure of Lystedt, the form of concussion risk, the law of parental waivers, and the unique characteristics of the sports parent, we can address more directly the potential functioning of parents as risk decision-makers in the sports concussion context. I contend that in this context, the parental role under Lystedt rests on flawed premises about parental decision-making.

1. *The Problem of Sports Parents: Leagues Like Parents at Arm's Length*

One mundane issue raised by the sports parent stereotype is that leagues and coaches work to build clear boundaries around parents. The constant small scale negotiation of those boundaries leaves many parents in fear of being trouble-makers, or wanting to save their capital for the most strategic interventions with coaches. Conversely, these issues leave coaches wary of parent communications. The Lystedt structure offers parents substantial information about what is often a vague and inconclusive initial diagnosis of concussion. But it theorizes that parents will be effective intermediaries between coach and child in much the way parents can serve this role with classroom teachers. Prior to a concussion, the underlying dynamic of the coach-parent relationship is that parents want their child to receive playtime. The post-hit shift, then is dramatic: parents ostensibly want the child not to play for the child's safety, but they communicate this concern against the backdrop of wanting their child to remain in good standing with the coach and to be a team player — and as described above, often wanting the latter too much. This already carefully bounded relationship between parent and coach, complete with rulebooks and codes of conduct, makes it more difficult or risky for parents to act on concerns about their child's post game headache or sleepiness.

2. *Lystedt's Second Hit Structure Depends on Hedonic Reporting by the Child of Subtle Symptoms that Are Easily Misattributed*

The educational information provided to parents about the symptoms of a concussion may be accurate, but unfortunately, the symptoms of

concussion are uniquely susceptible to misunderstanding. In turn, the possibility of importing wishful thinking and cultural influence into the diagnosis as a lay person is quite high precisely because of the subtle and qualitative measures of concussion. Against that already complex backdrop, the parent is not characterizing her own symptoms, but that of her child. The parent must synthesize the child's verbal complaints and the parent's observation of the child's behaviors.

In the moments following a concussion, a child may have very obvious symptoms, including unconsciousness, inability to pass a basic mental status exam by identifying the date, year, or location, blindness, dizziness that makes it difficult to walk, or inability to follow a simple instruction.<sup>234</sup> These are relatively clear, though often the parent is not present to witness them.

A child may have these symptoms, but more often will not. It is possible to have a concussion and not know it.<sup>235</sup> Some symptoms may not emerge for days or weeks following a hit,<sup>236</sup> and concussions are considered very difficult to diagnose. In addition to the more visible indicators above, consider this CDC list of external signs that a person is concussed: "Appears dazed or stunned; Moves clumsily; Answers questions slowly; Shows mood, behavior, or personality changes."<sup>237</sup> In other words, things parents observe about their teenagers, with or without a concussion, as they silently puzzle through the daily parent question, "I wonder if there's anything going on with my teenager?"

One way to find out if there's something going on with your teenager is to ask, of course. The CDC provides the list of self-reported symptoms a concussed child may offer: "Headache or 'pressure' in head; nausea or vomiting; balance problems or dizziness; double or blurry vision; bothered by light or noise; feeling sluggish, hazy, foggy, or groggy; confusion, or concentration or memory problems; just not 'feeling right,' or 'feeling down'."<sup>238</sup> The Lystedt legislation asks the parent of a youth athlete, ordinarily an adolescent under Lystedt, to observe whether that adolescent is feeling right or feeling down, is sluggish or groggy, or bothered by light or noise, and is willing to share that information with a parent. If it weren't serious, it would almost be

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<sup>234</sup> *Concussion Signs and Symptoms*, CTRS. DISEASE CONTROL & PREVENTION (Feb. 12, 2019), [https://www.cdc.gov/headsup/basics/concussion\\_symptoms.html](https://www.cdc.gov/headsup/basics/concussion_symptoms.html) [hereinafter *Concussion Signs and Symptoms*].

<sup>235</sup> *Concussion*, MAYO CLINIC (Mar. 16, 2019), <https://www.mayoclinic.org/diseases-conditions/concussion/symptoms-causes/syc-20355594>.

<sup>236</sup> *Id.*

<sup>237</sup> *Concussion Signs and Symptoms*, *supra* note 234.

<sup>238</sup> *Id.*

funny, because teenagers usually say that they're fine, not just to cover what they're feeling, but because they lack the maturity and insight to meaningfully assess whether they are "feeling right" as their brains and bodies undergo dramatic change. The symptoms of a concussion sound similar to some of the symptoms of being a teenager, at least to the extent a parent can observe and interpret those symptoms on behalf of her child.

The Lystedt structure is the perfect storm of vagaries: it addresses a disorder that's notoriously difficult to diagnose because the symptoms are subtle, and it relies on the self-reporting of these subtle symptoms by children, and then invites parents to investigate their child's hedonic experience and properly attribute that experience to head injury rather than childhood, and finally implicitly invites parents to make a decision about a future of subtle neurological impairment for their child. It's not that informing parents of concussion symptoms is harmful in this context, to the contrary, but it's important to accurately estimate the combined efficacy of parent and coach information as the bedrock to a statutory public policy intervention.

If Lystedt is in function an informed consent regime, it's essential to remember that the consent is given by one party on behalf of another. The unique attributes of concussion may make that particularly problematic, both because concussion relies on self-reporting of symptoms, and because those symptoms are so difficult even for health care professionals to measure, particularly in the absence of baseline testing, which very few Lystedt statutes require. Parents lack the authority to waive liability in far more concrete circumstances where the risk and the waiver language are clearer, yet the decision to allow a child to participate in contact sports is now *in effect* a waiver of liability because Lystedt imparts immunity and because the information can serve as a building block in an assumption of risk defense.

### 3. Parents Are Not at Their Best in the Sports Context

Research shows that along with coaches and teammates, parents contribute to the pressure youth athletes feel not to report concussion symptoms.<sup>239</sup> While athletic deaths due to concussion are rare, long-term impairment to memory and focus is more common, and increased risk of prematurely experiencing serious disorders such as depression and suicidality, multiple sclerosis, Alzheimer's disease, and Parkinson's disease, are at stake when parents minimize concussion symptoms. Yet

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<sup>239</sup> Emily Kroshus et al., *Concussion Under-Reporting and Pressure from Coaches, Teammates, Fans, and Parents*, 134 SOC. SCI. & MED. 66, 73 (2015).

they do, which requires some consideration; after all, parental authority in general is premised in part on maturity and the ability to engage in long-term thinking that children lack.

Given the challenge of assessing an athlete's symptoms and her readiness over time to return to play based on improvements in those symptoms, parents need to bring their "A" game to this work. Yet parents in popular culture and confirmed by research are too often *not at their best* in the sports setting. Ego identification and substantial overestimation of their child's athletic prospects color their risk calculations, both in exposing their children to primary concussion risk and in assessing the seriousness of their condition after a first hit. This is not to say that many parents aren't sober or even overly concerned about concussion risk,<sup>240</sup> but rather to acknowledge that research confirms that parents experience intense emotions surrounding their children's sports, and those emotions have the potential to distort risk decision-making. If over half of sports parents feel anger at some point during a child's sporting event, it shouldn't be offensive to consider whether the context of their decision-making requires more rigorous supervision.

Recall that most parents find it excruciating to listen to their baby cry and to nonetheless refrain from picking her up, or at least turning the car seat around so that the infant can see the other human in the car.<sup>241</sup> In part for that reason, state legislatures impose a more sober perspective on a parent's decision-making in the infant car seat context.<sup>242</sup> These laws aren't accusing a parent of bad faith, but are recognizing that the emotional state of parenting can sometimes interfere with child welfare in predictable contexts. If parents were not susceptible to feeling overwhelmed by temptation in the car seat context, it would be adequate to provide them with full risk information and allow them to implement the best safety protocol given their own value system for the child.<sup>243</sup> A sports parent may experience the urgency of the child's interest in playing, and paired with the parent's

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<sup>240</sup> For an argument that parents are too concerned, see Shen, *supra* 3 at 32-33 (2018). Note that the evidence that parents are too concerned focuses on attitudes, not actions. *Id.*

<sup>241</sup> See KJ Dell Antonia, *Safe, Sound, and Screaming Her Head Off*, SLATE (Mar. 22, 2011, 1:26 PM), <https://slate.com/human-interest/2011/03/safe-sound-and-screaming-her-head-off.html>.

<sup>242</sup> See Jin Yung Bae et al., *Child Passenger Safety Laws in the United States, 1978–2010: Policy Diffusion in the Absence of Strong Federal Intervention*, 100 SOC. SCI. & MED. 30, 31 (2014).

<sup>243</sup> See Sarit Shimony-Kanat et al., *Do Parental Decision-Making Patterns Predict Compliance with Use of Child Booster Seats?*, 25 INT'L J. INJ. CONTROL & SAFETY PROMOTION 53, 53 (2018).

independent emotional stake in the athletic achievement of the child, find themselves minimizing long-term risk as against the impulses of the moment in much the way a parent who turns around a rear-facing car seat does.

4. Parents Have No Control over the Rules of Play or the Conduct of Practices and No Avenue to Influence Them Under Lystedt

To the extent primary prevention is an essential part of reducing overall harms of concussion to youth athletes, Lystedt is arming parents with information but not authority to address primary prevention. Arguably, Lystedt does worse than that. By encouraging parents to focus on second-impact syndrome, Lystedt creates a defined zone of parental action, directing concerned parents to contemplate that space, and explicitly empowering them with instructions in the second-impact context. By omission, Lystedt minimizes parental agency before a first hit.

In addition, even the highly concerned and informed parent who worries about primary prevention is presented with a binary choice set at the beginning of the season: play with the current risk scenario, or don't play. This is the same decision parents face with respect to all recreational waivers, which courts do not tend to enforce. It's the choice parents faced prior to child labor laws: put the child to work with limited education and safety, or don't, and absorb the economic consequences. Parents may, however, want to have that third choice, the warrant of habitability: participate, but with smarter rules of play, and more conscientious practices. Lystedt cannot operate to achieve that third way. Other forces will get us there eventually, as public pressure increases on sports organizations at the international, national, state, and local levels, from professional to collegiate to youth leagues, but the Lystedt framework largely disarms parents as an effective force in that process.

Game changes underway in youth leagues are to be celebrated. Yet there's little reason to trust the leagues to act with a speed or seriousness that matches the state of the evidence or medical advice. Consider the established medical recommendations around the appropriate age to begin checking in ice hockey. That recommendation is age fifteen; leagues are reforming, but not the whole way up to that recommendation. Public health researchers characterize the problem clearly:

[T]he American Academy of Pediatrics has recommended that body checking in ice hockey be limited to players over the age of 15. Despite this recommendation, most ice hockey

associations across North America allow body checking as early as 13 years old. This particular issue reinforces how the culture of sport in today's society is engulfed in the idea of performance and professionalization, which ultimately has a negative impact on the physical health and well-being of young athletes.<sup>244</sup>

While a series of unsuccessful lawsuits against leagues in pursuit of rule changes, including soccer<sup>245</sup> and football,<sup>246</sup> seem to have nonetheless energized rule changes, Lystedt separates the individual parent from these larger forces. If the detailed attention state law has given to return to play protocols were extended to evaluating rules of play, we could energize a real revolution in the safety of youth sports. By immunizing coaches and sports organizations from suit, Lystedt *decreases* the pressure these actors would receive from liability insurers to study and implement appropriate game changes.

Not only does Lystedt render parents less effective as a pressure point on game rules, but arguably, it uses them to legitimize the status quo. Parents are not the cheapest cost avoiders, they are not experts in medicine or in the subtleties of game rules and risks, and they do not have the power to design around the safety risks even if they had the expertise. In the scheme of this moment of cultural contradictions, parents are serving as a fig leaf on the system of youth concussion risk, and the Lystedt Laws are consistent with that conception of the parent role.

A serious public health approach to concussion risk would ask what reduces that risk overall at relatively low social cost, and then implement the plan uniformly. Whatever answer such an investigation yields, if that answer performs better than parents at protecting youth from traumatic brain injury, then it should prevail. The movement to adopt Lystedt across all fifty states has interfered with the process of arriving at those optimal prevention strategies by declaring one focal point of prevention, return to play, and immunizing all other potential intervention points.

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<sup>244</sup> Corliss N. Bean et al., *Understanding How Organized Youth Sport May Be Harming Individual Players Within the Family Unit: A Literature Review*, 11 INT'L J. ENVTL. RES. & PUB. HEALTH 10226, 10232 (2014); see also Carolyn A. Emery et al., *Risk of Injury Associated with Body Checking Among Youth Ice Hockey Players*, J. AM. MED. ASS'N 2265, 2271 (2010).

<sup>245</sup> *Mehr v. Fédération Internationale de Football Ass'n*, 115 F. Supp. 3d 1035, 1044 (N.D. Cal. 2015).

<sup>246</sup> *Pierscionek v. Ill. High Sch. Ass'n*, No. 14 CH 19131, 2015 WL 6550826 (Ill. Cir. Ct. Oct. 27, 2015).

## CONCLUSION

The Lystedt legislation is unusual. It is not an explicit informed consent statute, but it trades on the legal rituals of providing information and requiring parental sign-off to enhance the sense that risks are knowingly undertaken. Yet the risks that are undertaken are not fully explicated to parents or athletes in the Lystedt framework, because the primary risks of a first concussion are not described at all, and those are the risks most likely to occur. The Lystedt paperwork *feels* like waiver information, but it is not. It is formally second-impact syndrome prevention information, as it primarily instructs actors on protocols after a concussion has occurred. Parents do not waive their child's right to sue for injury contractually, though they surely sense that they are engaged in that ritual. Often, unbeknownst to them, that potential liability for negligent harm to their child has already been removed by Lystedt laws with the grant of statutory immunity from suit. The information they are given, though, trains their attention toward post-concussion risks, and focuses their agency toward preventing a catastrophic but unlikely second-impact injury. There is almost a theatrical quality to this, with parents playing a compliant and prescribed role that puts them at a safe distance from the actual controversy surrounding appropriate levels of risk for children in youth sports. What role parental voice might have played in agitating for change in risk levels before the fifty states trained their focus on return to play protocols, we cannot know. But their value in legitimizing the status quo, utilizing the great weight of their parental decision-making authority, should not be underestimated. We must understand the real oddity of the Lystedt structure and its departure from the norms of parental decision-making to reveal its functioning. In their assigned role under the Lystedt laws, parents play an underappreciated but essential part in furtherance of Lystedt's status quo protective operation, one that stretches rather than reflects the conception of parents in other areas of law.