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2014

Concussions and Sports: Introduction

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Recommended Citation

Orentlicher, David, "Concussions and Sports: Introduction" (2014). *Scholarly Works*. 1044.
<https://scholars.law.unlv.edu/facpub/1044>

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INTRODUCTION

David Orentlicher

While it has become clear that concussion is a serious problem for football and other sports, it is not clear how best to respond to the problem. When athletes suffer concussions — or injuries that might be a concussion — what steps should be taken? Experts generally agree that the athletes should immediately stop play after a possible concussion, but how long should they rest before resuming practice or competition? What kind of testing should be used to diagnose the injury and how should a concussion be treated? To what degree should guidelines and rules vary depending on the age of the athlete?

More importantly, has the response to concussion focused too much on management of concussive injury and not enough on prevention of harm? Indeed, it is critical to ask whether even the much increased attention to the problem of concussion falls short in acknowledging the extent of the problem and the reforms needed to protect individuals from the risks of athletic competition. As Alan Schwarz reminds us in his Foreword to this symposium, it is clear that sports officials were too slow to respond to the harms from concussion.¹ Unfortunately, it is not clear that they have done enough to compensate for their inadequate responses in the past.

The papers in the symposium shed light on a number of questions, from both theoretical and empirical

perspectives, and they inform our understanding in a number of important ways:

Adopting and implementing state concussion laws. Two papers consider the experiences of the 50 states in adopting and implementing concussion laws. Amanda Cook, Harold King, and John Polikandriotis provide an insider's view on the passage of legislation in Georgia.² As they observe, once Washington State enacted the first concussion law in 2009,³ every other state passed similar legislation over the next five years. The Georgia experience was typical of this rapid response. Only two legislative sessions were needed once a bill was introduced, and the law passed with overwhelming support. The Georgia law also is typical of other state laws in its content. While there are important variations across the states, the Georgia statute imposes the three basic mandates of state concussion laws — (1) distribution of educational materials to student athletes, parents, or legal guardians;⁴ (2) removal from play after a concussion; and (3) medical clearance before returning to play. Beyond these three core requirements, states diverge. About one-half mandate training for coaches, about one-quarter apply to recreational leagues as well as schools,⁵ and only three states require the collection of data on concussion.⁶

As Kerri McGowan Lowrey and Stephanie Morain remind us, laws in practice can deviate from laws on the books, and they report their data from interviews with officials in 35 states regarding implementation of concussion laws.⁷ A number of findings are important. For example, implementation was faster when implementing agencies participated in the legislative process or when implementation could build on prior activity in the state around concussion in sports. In many states, implementation has been hampered

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by uncertainty about qualifications for professionals responsible for deciding whether an athlete can return to play after a concussion and by limited access to qualified professionals in rural or other underserved areas.⁸ Lowrey and Morain also found that enforcement of concussion law “is largely nonexistent.”⁹ Many states did not provide for enforcement in their statutes, and in other states, uncertainty exists as to where the responsibility for enforcement lies. Interestingly, even though some states mandates fell short in their

The papers in this symposium do much to advance our understanding and thinking about concussion. They also do much to raise the questions that should be asked and answered. Ultimately, we must ask whether some sports are so dangerous to health that they should no longer be played.

implementation, other provisions were implemented beyond the requirements of the statutes: “For example, in states where the law applies only to high school sports, school districts may nevertheless strongly encourage middle schools to adopt policies consistent with those at the high school level.”¹⁰

How well do state concussion laws work? Just as laws may not be implemented as intended, they also may not have their desired impact even when implemented as intended. As Christine Baugh and colleagues observe, when the statutes rely on informational documents to apprise athletes and their parents about concussion, the laws do not reflect best educational practices.¹¹ Material in informational documents often is not read, understood, or retained. There are more effective ways to educate people, including in-person seminars, interactive web-based media, refresher sessions, and conspicuously posted reminders.¹² Data collected by Baugh and colleagues illustrate the problems with educational documents. Among football players at eight Division I schools, only 60 percent remembered that they had signed an acknowledgement upon receiving informational documents about concussion.¹³ Almost certainly, their recall of the content of the documents was even worse.

There are other problems with state concussion laws. They place considerable responsibility on young athletes. Indeed, their primary response is to educate athletes about concussion so they will immediately

report any symptoms and be removed from play. But as Baugh and colleagues found in their study, many players, especially juniors or seniors, are reluctant to report symptoms of concussion to their coaches.¹⁴ Baugh and colleagues also found that whether the players viewed their coaches as supportive of concussion reporting behavior was a significant predictor of reporting behavior.

Education about concussion places responsibility on athletes in a different way. With the disclosure of the risks of concussion, athletes can be said to have made an informed choice about their participation in sports. In this view, competitive sports may come with risks to health, but as long as players understand the risks, it is up to them to decide whether to take the risks.¹⁵

This assumption of risk approach is problematic for several reasons. First, as Kathleen Bachynski and Daniel Goldberg observe, much of the risk is assumed by children who because of their age are vulnerable both physically and ethically.¹⁶

Children are more susceptible to concussive injury, and they are less able to make autonomous decisions about their health. Even professional athletes are at an “autonomy disadvantage,” write Richard Robeson and Nancy King, when the athletes are evaluated by physicians who are employed by the team owners and therefore practice under a serious conflict of interest.¹⁷ Robeson and King identify other barriers to a voluntary assumption of risk. For example, a warrior culture and an ethic of loyalty to team push athletes to play even in the face of intense pain and crippling injury. Thus, Robert Griffin III continued to play on a damaged knee in his first NFL season, turning a bad sprain into two ligament tears that required reconstructive surgery.¹⁸

Moreover, argue Bachynski and Goldberg, deeply-rooted cultural norms about sport and competition affect the framing of risk in a way that leads society to avoid the critical question at stake: are sports such as football and ice hockey inherently too violent and dangerous for children, and even adults?¹⁹ Instead, reforms focus on measures such as improvements in equipment, rule changes, and management of concussion that may marginally reduce the risks but still leave players at substantial risk of harm. What we need, write Bachynski and Goldberg, is analysis guided by principles of public health rather than by principles of sport.²⁰

The papers in this symposium do much to advance our understanding and thinking about concussion.

They also do much to raise the questions that should be asked and answered. Ultimately, we must ask whether some sports are so dangerous to health that they should no longer be played. Dr. Robert Cantu, a prominent advocate for reform, believes that children should not play tackle football before age 14.²¹ Some former professional players do not want their children playing football at all.²² It is one thing to assume risks to health when there are meaningful benefits to be gained. But there are many ways to exercise, develop teamwork skills, or gain the other benefits of competitive athletics without playing football or other sports that lead to concussion. Ultimately, the social value of violent sports seems to rest heavily on the entertainment they offer to spectators. And that should lead us to ask whether there is any legitimate role for the levels of physical violence that we tolerate in sport.

References

1. A. Schwarz, "Foreword," *Journal of Law, Medicine & Ethics* 42, no. 3 (2014): 280. The medical profession also was slow to respond to the problem. D. Orentlicher and W. S. David, "Concussions in Football: Failures to Respond by the NFL and the Medical Profession," *Florida International University Law Review* 8, no. 1 (2013): 17-30.
2. A. Cook, H. King, and J. A. Polikandriotis, "Where Do We Go from Here? An Inside Look into the Development of Georgia's Youth Concussion Law," *Journal of Law, Medicine, & Ethics* 42, no. 3 (2014): 284-289.
3. The Washington statute was named for Zachary Lystedt, who in 2006, at the age of 13, suffered a severe brain injury while playing football. *Id.*
4. A few states do not require information disclosures. C. Baugh, E. Kroshus, A. P. Bourlas, and K. I. Perry, "Requiring Athletes to Acknowledge Receipt of Concussion-related Information and Responsibility to Report Symptoms: A Study of the Prevalence, Variation, and Possible Efficacy," *Journal of Law, Medicine, & Ethics* 42, no. 3 (2014): 297-313. Moreover, states vary in terms of the content of the information that must be disclosed. *Id.*
5. Even when recreational leagues are covered, the law may apply only in part. Georgia imposes its educational requirement on recreational leagues, but not its removal from play or medical clearance requirements. See Cook et al., *supra* note 2.
6. *Id.*
7. K. M. Lowrey and S. R. Morain, "State Experiences Implementing Youth Sports Concussion Laws: Challenges, Successes, and Lessons for Evaluating Impact," *Journal of Law, Medicine & Ethics* 42, no. 3 (2014): 290-296.
8. *Id.*
9. *Id.*
10. *Id.* Baugh et al. also found that many states go beyond the statutory minimums. For example, "although New York is the only state with a law that requires return to school information be provided, there were 23 other states that included information about returning to school in their concussion education materials." Baugh et al., *supra* note 4.
11. See Baugh et al., *supra* note 4.
12. *Id.*
13. *Id.*
14. C. Baugh, E. Kroshus, D. H. Daneshvar, and R. A. Stern, "Perceived Coach Support and Concussion Symptom-Reporting: Differences between Freshmen and Non-Freshmen College Football Players," *Journal of Law, Medicine, & Ethics* 42, no. 3 (2014): 314-322.
15. See Baugh et al. *supra* note 4. If athletes make an informed decision whether to accept the risks of sport, then teams may thereby limit their liability for injuries to the players. *Id.*
16. K. Bachynski and D. Goldberg, "Youth Sports & Public Health: Framing Risks of Mild Traumatic Brain Injury in American Football and Ice Hockey," *Journal of Law, Medicine & Ethics* 42, no. 3 (2014): 323-333.
17. R. Robeson and N. M. P. King, "Loss of Possession: Concussions, Informed Consent and Autonomy," *Journal of Law, Medicine & Ethics* 42, no. 3 (2014): 33-343.
18. *Id.*
19. See Bachynski and Goldberg, *supra* note 16. In another context – that of spanking and other corporal punishment of children – I have discussed societal tendencies to undervalue children and overvalue pain. Both of those tendencies may also be at work with concussion and sports. For the earlier article, see D. Orentlicher, "Spanking and Other Corporal Punishment of Children by Parents: Undervaluing Children, Overvaluing Pain," *Houston Law Review* 35, no. 1 (1998): 147-185.
20. See Bachynski and Goldberg, *supra* note 19.
21. R. C. Cantu and M. Hyman, *Concussion and Our Kids: America's Leading Expert on How to Protect Young Athletes and Keep Sports Safe* (Boston: Houghton Mifflin Harcourt, 2012): at 144-145. Cantu also would ban heading in soccer until players reach the age of 14. *Id.*, at 40.
22. *Id.*