

**TACKLING THE ISSUE HEAD-ON: THE EVOLUTION OF THE NFL'S
CONCUSSION PROTOCOL AND ITS IMPACT ON YOUTH FOOTBALL PROGRAMS
AT THE STATE AND LOCAL LEVEL**

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I. Introduction

On May 2, 2012, tragedy struck the football community when Junior Seau, a linebacker for the San Diego Chargers, was found dead at the age of forty-three from a self-inflicted gunshot wound to the chest.¹ An autopsy revealed that Seau suffered from chronic traumatic encephalopathy (CTE)—a degenerative brain disease found in those with a history of repetitive trauma to the brain.² In football, this head trauma often results from symptomatic concussions and asymptomatic sub concussive hits to the head.³ Following Seau's death, many saw similarities between his suicide and that of former Chicago Bears safety, Dave Duerson, who also died from a self-inflicted gunshot wound to the chest.⁴ In a suicide note, Duerson asked his family to donate his brain to the Boston University School of Medicine for research purposes, where scientists later determined that he too suffered from a neurodegenerative disease linked to concussions.⁵

Concussions are unfortunately not unique to the professional football world, nor are their consequences.⁶ On October 12, 2006, thirteen-year-old Zackery Lystedt of Washington suffered a hit to the head during the second quarter of his junior high school football game that would alter his life forever.⁷ Despite the head injury, Lystedt returned to play at the beginning of the third quarter.⁸ After the game, he collapsed to the ground and was air-lifted to a nearby hospital

¹ See Sam Farmer, Junior Seau Had Brain Disease When he Committed Suicide, L.A. TIMES (Jan. 10, 2013), <https://www.latimes.com/sports/la-xpm-2013-jan-10-la-sp-sn-junior-seau-brain-20130110-story.html>.

² See J. Brad Reich, When "Getting Your Bell Rung" May Lead to "Ringing the Bell": Potential Compensation for NFL Player Concussion-Related Injuries, 12 VA. SPORTS & ENT. L.J. 198, 199 (2013).

³ See *id.*

⁴ See Farmer, *supra* note 1.

⁵ See Alan Schwarz, Duerson's Brain Trauma Diagnosed, N.Y. TIMES (May 2, 2011), <https://www.nytimes.com/2011/05/03/sports/football/03duerson.html> (surmising that Duerson shot himself in the chest rather than in the brain to preserve his brain for research purposes, since he apparently complained of "his deteriorating mental state during his final months").

⁶ For further development of this argument, see *infra* notes 7–10 and accompanying text.

⁷ See Andrew J. Kane, An Incomplete Pass: Inadequacies in Ohio's Youth Concussion Legislation and the Ongoing Risk for Players, 28 J.L. & HEALTH 201, 203 (2015).

⁸ See *id.*

to receive life-saving medical treatment.⁹ Zackery survived the injury, but he spent three months in a coma and could not eat, speak, or move his arms or legs for several months.¹⁰

In February 2023, researchers at the Boston University CTE Center diagnosed 345 former National Football League (NFL) players with CTE out of the 376 players it studied.¹¹ Many scholars and activists no longer believe concussions are merely something to be aware of when it comes to the game of football.¹² Rather, they have become an “epidemic” plaguing players at both the professional and youth levels.¹³

This paper argues that while the NFL's concussion protocol has improved over the last decade, it continues to fall short in its objective to adequately protect the health and safety of NFL players.¹⁴ It is thus imperative that the NFL and the NFL Players Association (NFLPA) work together to improve the protocol, particularly through the negotiations of the 2030 collective bargaining agreement (CBA).¹⁵ This is necessary not only to protect future generations of NFL players but also to inform and evolve youth sport concussion laws and guidelines, which are often influenced by the league’s concussion policies.¹⁶

Part II of this paper provides background information about the NFL’s implementation of concussion safety procedures and discusses why its current protocol falls short despite recent improvements. Part III explains why negotiating for more protection in the 2030 CBA is the

⁹ See id.

¹⁰ See The Lystedt Law: A Concussion Survivor’s Journey, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/headsup/pdfs/stories/031210-zack-story.pdf> (last visited Apr. 25, 2023).

¹¹ See Researchers Find CTE in 345 of 376 Former NFL Players Studied, BOS. UNIV. CHOBANIAN & AVEDISIAN SCH. OF MED. (Feb. 6, 2023), <https://www.bumc.bu.edu>.

¹² See, e.g., Kane, supra note 7, at 203.

¹³ See Grant Frazier, Using Your Head: A Different Approach to Tackling the NFL's Concussion Epidemic, 10 HARV. J. SPORTS & ENT. L. 197, 198 (2019); see also Stephanie A. Murray, 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, 205 (2017).

¹⁴ For further development of this argument, see infra Part II(B)–(D).

¹⁵ For further development of this argument, see infra Part III.

¹⁶ For further development of this argument, see infra Parts II(E), III(B)–(C), & IV.

most viable option in comparison to others, and what specific terms could be bargained for to improve player safety. Finally, Part IV addresses the implications of the NFL's concussion protocol more broadly, namely with respect to the influence and impact it has on youth league concussion policies.

II. Fumbling the Ball: The NFL's Journey to CTE Recognition and Implementation of Concussion Protocol

Section A below provides a brief introduction to CTE. Next, Section B offers a historical account of the NFL's concussion position and protocols. Section C discusses the NFL's concussion settlement litigation with former players and the racial framework it used to determine reward amounts. Section D highlights the inadequacies that persist within the league's current concussion framework. Finally, Section E explores the connection between the NFL's concussion policies and state laws adopted to reduce concussions and enhance player safety in youth football programs.

A. A Brief Introduction to CTE

CTE is a brain degeneration disorder caused by repeated head traumas.¹⁷ It is most commonly found in the post-mortem brains of those who played football or other contact sports, and it has never been diagnosed in a living patient.¹⁸ In football specifically, the repeated head traumas causing CTE often result from concussions—mild brain injuries that cause confusion, memory loss, and headaches, and occur “after a person is hit on the head, face, or neck or when a person's upper body is violently shaken.”¹⁹

¹⁷ See Chronic Traumatic Encephalopathy, MAYO CLINIC (Dec. 14, 2022), <https://www.mayoclinic.org/diseases-conditions/chronic-traumatic-encephalopathy/symptoms-causes/syc-20370921>.

¹⁸ See *id.*; 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, 334 (2018).

¹⁹ What is a Concussion?, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 12, 2019), https://www.cdc.gov/headsup/basics/concussion_what.html.

CTE is particularly difficult to identify because its symptoms, including behavioral changes and cognitive deficiencies, usually only develop years after the repeated head trauma occurs; although this is not always the case.²⁰ Studies show that children who start playing football before the age of twelve experience CTE symptoms at a much younger age than those who start playing later in life.²¹ One California family believes the death of their thirteen-year-old son, who started playing football at age nine, was linked to CTE.²² According to the family, he took a hard hit during a football game and shortly thereafter experienced personality changes, short-term memory loss, vision impairment, and symptoms linked to obsessive compulsive disorder (OCD).²³ Their son tragically took his life just one year later.²⁴

The difficulty in identifying CTE is coupled with the fact that the disorder remains relatively novel and unknown to scientists. Dr. Bennett Omalu was the first to discover CTE in 2002 in the post-mortem brain of former Pittsburgh Steelers center, Mike Webster.²⁵ According to Dr. Omalu, Webster's brain resembled that of an older individual with Alzheimer's disease, not a young, fifty-year-old man.²⁶ Prior to his death, Webster suffered from depression and other cognitive dysfunction due to concussions he sustained during his NFL career.²⁷ Although Dr. Omalu could not confirm a causal link between Webster's football-related head injuries and CTE at the time, his finding certainly raised awareness that players suffer from the disorder.²⁸

²⁰ See MAYO CLINIC, supra note 17; see also Finkel et al., supra note 18, at 334 (noting that physical and neurocognitive examinations can help rule out other conditions that can be diagnosed while one is still alive, which could help physicians make a "presumptive diagnosis" of CTE during life).

²¹ See Children Who Play Football Before Age 12 Show CTE-Related Symptoms Much Sooner, CBS NEWS (May 1, 2018), <https://www.cbsnews.com/news/cte-symptoms-youth-football-before-age-12/>.

²² See id.

²³ See id.

²⁴ See id.

²⁵ See Murray, supra note 13, at 185–87.

²⁶ See id.; see also Jason M. Breslow, The Autopsy that Changed Football, PBS NEWS (Oct. 6, 2013), <https://www.pbs.org/wgbh/frontline/article/the-autopsy-that-changed-football/>.

²⁷ See Frank Litsky, Mike Webster, 50, Dies; Troubled Football Hall of Famer, N.Y. TIMES (Sept. 25, 2002), <https://www.nytimes.com/2002/09/25/sports/mike-webster-50-dies-troubled-football-hall-of-famer.html>.

²⁸ See Reich, supra note 2, at 202.

B. The Evolution of the NFL's Concussion Position and Protocol

Since its inception in 1922, the NFL has updated certain safety policies and practices to better protect players.²⁹ In the 1920s, for example, the league started to regularly upgrade its player padding and helmets.³⁰ In 1939, the NFL instituted “roughing the passer rules” to protect quarterbacks from unnecessary injury.³¹ The NFL’s first major attempt to address head injuries, however, did not occur until 1994 when then-NFL Commissioner Paul Tagliabue created the Mild Traumatic Brain Injury (MTBI) Committee to study the long-term effects of brain injuries in players.³² The MTBI Committee was created in response to public concern and media inquiry following several cases of football-related head trauma involving high profile players and lawsuits filed against the NFL.³³

In 2003, the MTBI Committee began publishing papers with their findings, one of which asserted that “the cumulative effect of repeated concussions suffered by NFL players did not result in any neurological damage or brain disease.”³⁴ In 2004, the Committee published another paper suggesting NFL players were “less susceptible to injury” because their brains had evolved to withstand head trauma.³⁵ The MTBI Committee invariably received criticism from

²⁹ See Josh Hunsucker, Buckle Your Chinstrap: Why Youth, High School, and College Football Should Adopt the NFL's Concussion Management Policies and Procedures, 45 MCGEORGE L. REV. 801, 807 (2014).

³⁰ See *id.*

³¹ See *id.*; see also Logan Reardon, When Did Roughing the Passer Become a Rule?, NBC NEWS (Oct. 11, 2022), <https://www.nbcsports.com/boston/patriots/when-did-roughing-passer-become-rule>.

³² See Murray, *supra* note 13, at 189 (clarifying that from the beginning, it was evident the Committee was not committed to this cause). Notably, the MTBI Committee's first chairman was Dr. Elliot Pellman, a rheumatologist with no previous experience in brain science. *Id.*

³³ See Kirstie Brenson, Head to Head: The NFL Concussion Scandal and an Argument for OSHA Regulation, 23 U. CHI. L. F. 595, 600 (2017).

³⁴ Hunsucker, *supra* note 29, at 807; see also Lauren Ezell, Timeline: The NFL's Concussion Crisis, PBS NEWS (Oct. 8, 2013), <https://www.pbs.org/wgbh/pages/frontline/sports/league-of-denial/timeline-the-nfls-concussion-crisis/> (citing Elliot J. Pellman, M.D., et al., Concussion in Professional Football: Epidemiological Features of Brain Injuries and Review of the Literature—Part 3, 54 NEUROSURGERY 81 (2004)).

³⁵ See Ezell, *supra* note 34 (citing Elliot J. Pellman, M.D., et al., Concussion in Professional Football: Injuries Involving 7 or More Days Out—Part 5, 55 NEUROSURGERY 1100 (2004)); see also Murray, *supra* note 13, at 191 (discussing a different MTBI paper, which claimed NFL players were naturally less prone to head injuries than the general population).

the medical community because its findings contradicted well-established research supporting the link between concussions and long-term negative brain defects.³⁶ In 2005, Dr. Omalu published his findings of CTE in Mike Webster’s brain and other experts published studies linking repeated concussions with dementia.³⁷ Nevertheless, the NFL continued to dispute the body of research showing that returning to play after a concussion increased the risk of head injury, and went so far as to call for the retraction of Dr. Omalu’s CTE paper.³⁸ Doubling down on its position, the league issued a brochure to all players during the 2007 season which explicitly stated that “current research with professional athletes has not shown that having more than one or two concussions leads to permanent problems if each injury is properly managed.”³⁹

In 2007, the NFL permitted players to return to the field upon receiving proper medical care and after their symptoms subsided, which included returning-to-play in the same game.⁴⁰

Although the league never admitted that its 2007 concussion protocol was inadequate, it issued additional guidelines in 2009 following a hearing before the House Judiciary Committee on player safety.⁴¹ It was only then—after mounting scientific evidence, increased public scrutiny, and a number of lawsuits filed by former players—that the NFL officially recognized a causal link between concussions and long-term brain disease.⁴² The strong and sustained response by the MTBI Committee and NFL up through 2009 is difficult to reconcile in light of now public rulings by the NFL Retirement Board—dating back to 1999—which show that the head injuries

³⁶ See Hunsucker, *supra* note 29, at 807; see also Ezell, *supra* note 34.

³⁷ See generally Bennett I. Omalu, M.D., Chronic Traumatic Encephalopathy in a National Football League Player, 57 NEUROSURGERY 128 (2005); see also Murray, *supra* note 13, at 191.

³⁸ See Murray, *supra* note 13, at 191.

³⁹ See NFL Outlines for Players Steps Taken to Address Concussions, NAT’L FOOTBALL LEAGUE (Aug. 14, 2007, 12:08 PM), <https://www.nfl.com/news/nfl-outlines-for-players-steps-taken-to-address-concussions-09000d5d8017cc67>.

⁴⁰ See Reich, *supra* note 2, at 203–04.

⁴¹ See *id.*

⁴² See Hunsucker, *supra* note 29, at 808–809.

sustained by several former players during their careers left them permanently disabled.⁴³ The NFL's revised 2009 concussion guidelines required any player showing signs of a concussion to be removed from a game or practice and prohibited from returning to play the same day.⁴⁴

The NFL took further action in 2010 when it created the Head, Neck, and Spine Committee to review its concussion protocol annually and ensure players do not reenter games if they demonstrate signs of a concussion.⁴⁵ In 2011, the NFL moved up the kick-off spot by five yards in the hopes of reducing the speed of potential collisions during the kick-off.⁴⁶ The NFL and NFLPA also agreed in their CBA to limit contact in pre-season practices to reduce players' risk of head injury.⁴⁷ Throughout 2012 and 2013, the league increased concussion awareness by educating teams on symptoms associated with concussions.⁴⁸ It also assigned athletic trainers to press boxes equipped with video replay access to monitor for potential concussions missed by teams during play, and placed an independent neurologist on the sideline at every game to evaluate players following head injury.⁴⁹

The most recent changes to the NFL's protocol occurred in 2016 and 2018 when it implemented fines for teams that violated its rules and added a new "head targeting rule," which imposes an automatic fifteen-yard penalty for players who lower their head and use their helmet to initiate contact with an opponent.⁵⁰ The NFL's fine system, however, received criticism for

⁴³ See Brenson, *supra* note 33, at 600; see also Steve Fainaru & Mark Fainaru-Wanda, NFL Board Paid \$2M to Players While League Denied Football-Concussion Link, PBS NEWS (Nov. 16, 2012), <https://www.pbs.org/wgbh/frontline/article/nfl-board-paid-2m-to-players-while-league-denied-football-concussion-link>.

⁴⁴ See Hunsucker, *supra* note 29, at 809.

⁴⁵ See NFL Concussion Protocol Explained: Symptoms, Evaluation, Return to Play, NBC SPORTS (Oct. 10, 2022), <https://www.nbcsports.com/bayarea/49ers/nfl-concussion-protocol-explained-symptoms-evaluation-return-play>.

⁴⁶ See Ezell, *supra* note 34.

⁴⁷ See Hunsucker, *supra* note 29, at 810.

⁴⁸ See *id.* at 812.

⁴⁹ See NBC SPORTS, *supra* note 45; see also Theresa S. Kim, Tackling Head Injuries in Youth and Interscholastic Football with NFL Contract Reform, 24 SPORTS L. J. 71, 77–78 (2017).

⁵⁰ See Taylor Simpson-Wood & Robert H. Wood, When Popular Culture and the NFL Collide: Fan Responsibility in Ending the Concussion Crisis, 29 MARQ. SPORTS L. REV. 13, 14–17 (2018).

being “too mild.”⁵¹ In 2017, for example, the Seattle Seahawks were fined only \$100,000 for contravening concussion protocols on the field.⁵² Its players and staff were required to undergo remedial head injury training but the team did not face other consequences, such as lost draft picks or suspensions.⁵³

C. Race-Norming in NFL Concussion Settlements

By 2011, over 5,500 former NFL players sued the league for negligently and fraudulently concealing the risk of brain injury associated with playing football.⁵⁴ In 2013, the NFL agreed to a \$765 million settlement and eligible players began to seek payouts in 2017 when the agreement was finalized.⁵⁵ A player’s eligibility to receive payment for concussion-related brain trauma was based on a formula that assessed their degree of cognitive decline; players with more cognitive deficiencies were entitled to more money.⁵⁶ The benchmarks used to make this determination, however, were adjusted for race.⁵⁷ The average benchmark for a Black player was set at a lower level than the average benchmark for his White counterpart.⁵⁸ This required Black players to demonstrate significantly more cognitive decline to be eligible for the same

⁵¹ See *id.* at 14–15.

⁵² See Mark Maske, Seattle Seahawks Fined \$100,000 for Violating NFL Concussion Protocol with Russel Wilson, WASH. POST (Dec. 21, 2017), <https://www.washingtonpost.com/news/sports/wp/2017/12/21/seattle-seahawks-fined-100000-for-bypassing-concussion-test-on-russell-wilson/>.

⁵³ *Id.*

⁵⁴ See Adam M. Finkel et al., *supra* note 18, at 231–32; see also Simpson-Wood & Wood, *supra* note 50, at 41 (explaining that in the Complaint, plaintiffs alleged the NFL “long knew of the dangers of mild traumatic brain injury in professional football, dating back to at least the 1950s”). Plaintiffs asked the court for a declaratory judgment as to liability on counts of wrongful death and survival, fraudulent concealment, fraud, negligent misrepresentation, negligence, loss of consortium, negligent hiring, and negligent retention. *Id.*

⁵⁵ See Tracie Canada, The NFL's Racist 'Race Norming' Is an Afterlife of Slavery, SCI. AM. (July 8, 2021), <https://www.scientificamerican.com/article/the-nfls-racist-race-norming-is-an-afterlife-of-slavery/>.

⁵⁶ See Timothy Davis, America's Race-Based Caste Structure: Its Impact in College and Professional Sports, 9 TEX. A&M L. REV. 599, 645 (2022); see also NFL Ex-Players Agree \$765 Million Settlement in Concussions Suit, NAT'L FOOTBALL LEAGUE (Aug. 29, 2013), <https://www.nfl.com/news/nfl-ex-players-agree-to-765m-settlement-in-concussions-suit-0ap1000000235494>.

⁵⁷ See Davis, *supra* note 56, at 645.

⁵⁸ See *id.*; see also Lucia Trimbur & Lundy Braun, The NFL's reversal on 'Race Norming' Reveals How Pervasive Medical Racism Remains, NBC NEWS (June 8, 2021), <https://www.nbcnews.com/think/opinion/nfl-s-reversal-race-norming-reveals-how-pervasive-medical-racism-ncna1269992>.

compensation as White players and effectively barred thousands of Black players from recovery.⁵⁹

The impact of this discrepancy was far-reaching. Following the 2017 deadline to register with the settlement fund, 20,558 players had enrolled and only 12,837 met the eligibility requirements.⁶⁰ This disparity was amplified by the fact that a majority of all NFL retirees are Black.⁶¹ Commentators now refer to the NFL's practice of race-norming as an egregious form of systematic racism rooted in the idea that "Black athletes are less intelligent than their white counterparts."⁶²

In 2020, two former Pittsburgh Steelers players filed a civil rights lawsuit against the NFL demanding compensation for their concussion-related injuries after being denied awards they would have received if race-norming was not used to assess their cognitive deficiencies.⁶³ The NFL initially argued the lawsuit was unfounded and that racial norming is a scientifically acceptable practice, which was adopted by the medical community to eliminate bias in the testing and treatment of dementia patients.⁶⁴ After several rounds of mediation and receiving widespread public backlash, the NFL agreed to a \$1 billion settlement to resolve the dispute and promised to end its practice of race-norming.⁶⁵ The league also agreed to reconsider the claims

⁵⁹ See Trimbur & Braun, *supra* note 58; see also Canada, *supra* note 55.

⁶⁰ Jodi S. Balsam, Fraud, Race Norming, and Delays: How the NFL's Concussion Settlement Fund is Faring Five Years Later, 1 (Brooklyn L. Sch. Legal Stud. Working Paper, Paper No. 686, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3860375.

⁶¹ See Christina Gough, Players in the NFL in 2022, By Ethnicity, STATISTA (Mar. 27, 2023), <https://www.statista.com/statistics/1167935/racial-diversity-nfl-players/> (reporting that 56% of NFL players are Black); see also Matt Rourke, NFL Agrees to End Race-Based Brain Testing in \$1B Settlement on Concussions, NPR (Oct. 20, 2021), <https://www.npr.org/2021/10/20/1047793751/nfl-concussion-settlement-race-norming-cte>.

⁶² Davis, *supra* note 56, at 646; see also Trimbur & Braun, *supra* note 58 (noting that race-norming presumes that Black people and White people are fundamentally physiologically and cognitively different).

⁶³ See Davis, *supra* note 56, at 645–46.

⁶⁴ See *id.*; see also NFL Pledges to Stop 'Race-Norming,' Review Past Scores for Potential Race Bias, NAT'L FOOTBALL LEAGUE (June 3, 2021), <https://www.nfl.com/news/nfl-pledges-to-stop-race-norming-review-past-scores-for-potential-race-bias>.

⁶⁵ See Davis, *supra* note 56, at 645–46.

of players who were previously denied benefits as a result of their cognitive decline scores being adjusted based on race.⁶⁶ As a result, commentators believe the number of Black players now qualifying for payment will increase significantly.⁶⁷

D. The Concussion Problem Still Looms Over the NFL

Despite the NFL's recent improvements and efforts to resolve the fall-out from its racially-driven settlement framework, the league still does not provide players adequate protections to prevent and treat traumatic brain injury.⁶⁸ At most NFL games today, there are nearly thirty medical professionals on standby to assess and treat head injuries, yet more subtle, prolonged concussion symptoms continue to go unnoticed and the league relies heavily on players to self-report their injuries.⁶⁹ Self-reporting of symptoms is key to diagnosing concussions, but studies reveal that players are often reluctant to speak up due to the risk of being seen as going against football's "next-man-up culture" and the loss of compensation absent a guaranteed contract.⁷⁰ This can have a detrimental effect on young athletes who look to NFL players as role models and tend to mirror their behaviors; if professional athletes conceal their concussion symptoms and continue to play, youth players likely will as well.⁷¹

The NFL's shortcomings are best exemplified by the 2022 incident involving Miami Dolphins quarterback, Tua Tagovailoa. In September 2022, Tagovailoa fell to the ground after

⁶⁶ See id.

⁶⁷ See, e.g., Rourke, supra note 61 (discussing the impact of race-norming). The author points out that despite the public's rage over the discriminatory practice, the NFL did not lose a single sponsor. Id.

⁶⁸ For further development of this argument, see infra notes 83–87.

⁶⁹ See Elena Bergeron, Without Updated Tools, N.F.L. Is Still Finding Concussions Too Late, N.Y. TIMES (Dec. 31, 2022), <https://www.nytimes.com/2022/12/31/sports/football/tua-tagovailoa-nfl-concussions.html>.

⁷⁰ See id.; see also Mike Florio, Latest NFL-NFLPA Joint Review of Tua [Tagovailoa] Concussion Exposes Flaws in System, NBC SPORTS (Jan. 1, 2023), <https://profootballtalk.nbcsports.com/2023/01/01/latest-nfl-nflpa-joint-review-of-tua-tagovailoa-concussion-exposes-flaws-in-system/> [hereinafter Joint Review of Tua Concussion].

⁷¹ See A National Survey of Kids (And Their Parents) About Famous Athletes as Role Models, KAISER FAM. FOUND., <https://www.kff.org/wp-content/uploads/2000/09/3070-sof-national-survey-of-kids-and-their-parents-about-famous-athletes-as-role-models.pdf> (last visited Apr. 25, 2023) (“Children say that famous athletes rank second only to parents (92%) and on par with their teachers (72%) as the people they admire most. Both boys and girls name professional or Olympic athletes as the people they say they ‘look up to or want to be like’ (73%).”).

taking a hit from a Buffalo Bills linebacker.⁷² He stood up stumbling and was taken to the locker room for a concussion check.⁷³ The Dolphins announced that Tagovailoa was “questionable” to return to the game due to his potential head injury but allowed him back during the third quarter.⁷⁴ After the game, Tagovailoa told reporters he fell onto his back before his head hit the turf, causing his back to “lock up” and the resulting stumble.⁷⁵ He noted that he was evaluated for a concussion but was ultimately cleared to return to play.⁷⁶ Four days later in the Dolphins’ game against the Cincinnati Bengals, Tagovailoa was carried off the field by a stretcher after another hit caused his head to “violently slam against the turf and his hands to freeze up.”⁷⁷ Medical personnel confirmed at that point that Tagovailoa indeed had a concussion.⁷⁸

Former and current players criticized the Dolphins’ decision to allow Tagovailoa to return to the game against the Bills and start later that week against the Bengals.⁷⁹ Pointing to the standards set forth in the NFL’s concussion protocol at the time, the Dolphins maintained that Tagovailoa “did not display the obvious loss of motor skills” linked to a concussion, nor did he report having any concussion-related symptoms.⁸⁰ The NFL and NFLPA investigated the Dolphins’ handling of the incident and ultimately exonerated them, despite the fact that Tagovailoa clearly suffered a concussion and was permitted to continue playing thereafter.⁸¹ The

⁷² See Ben Morse, NFL Faces Intense Scrutiny Over Concussion Protocols, CNN (Oct. 3, 2022), <https://www.cnn.com/2022/10/03/sport/nfl-concussion-scrutiny-tua-tagovailoa-spt-intl/index.html>.

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ Rob Maaddi, Should Tua Tagovailoa Have Been Cleared to Return to Football Field After Concussion? NFL Rules Under Criticism, PBS NEWS (Sept. 30, 2022), <https://www.pbs.org/newshour/nation/should-tua-tagovailoa-have-been-cleared-to-return-to-football-field-after-concussion-nfl-rules-under-criticism>.

⁷⁸ See NBC SPORTS, *supra* note 45.

⁷⁹ See Maaddi, *supra* note 77.

⁸⁰ See *id.*; see also Bergeron, *supra* note 69.

⁸¹ See Joint Review of Tua Concussion, *supra* note 70.

league faced public condemnation for this and subsequently enacted the “Tua Rule,” which adds ataxia to the list of symptoms in the protocol mandating removal of a player from a game.⁸²

The NFL’s concussion protocol continues to raise serious concerns as applied to Tagovailoa because teams generally do not initiate the protocol unless and until a player “exhibits or reports signs or symptoms suggestive of a concussion.”⁸³ The protocol fails to recognize that concussions can cause much subtler symptoms, including mild headaches, sluggishness, and difficulty sleeping.⁸⁴ Moreover, concussion-related symptoms often do not appear immediately after a trauma.⁸⁵ The absence of instant and obvious symptoms renders the NFL’s diagnosis protocol wholly underinclusive and therefore ineffective.⁸⁶ Evidently, understanding, assessing, and properly managing head injuries remains a challenge for the NFL.⁸⁷

E. The Connection Between the NFL’s Concussion Protocol and Youth Football

The gravity of this issue is underscored by the fact that the NFL’s concussion protocols and general safety practices have an important influence and impact on youth football programs.⁸⁸ For example, after the NFL first recognized the link between concussions and long-term brain disease in 2009, several states enacted laws to address concussion management protocols at the youth level.⁸⁹ Further, the National Collegiate Athletic Association (NCAA) and high school football leagues barred helmet-to-helmet hits and prohibited players from making contact with

⁸² See Zac Al-Khateeb, Explaining the Tua Rule: How Tua Tagovailoa Changed the NFL’s Concussion Protocol, SPORTING NEWS (Oct. 23, 2022), <https://www.sportingnews.com/us/nfl/news/tua-tagovailoa-nfl-concussion-protocol-rule-change/n3q3rqg9rrxcqzamkraarlmh>; see also Ataxia, MAYO CLINIC (Apr. 9, 2022), <https://www.mayoclinic.org/diseases-conditions/ataxia/symptoms-causes/syc-20355652> (defining ataxia as “poor muscle control that causes clumsy voluntary movements”).

⁸³ Maaddi, supra note 77.

⁸⁴ See Bergeron, supra note 69.

⁸⁵ See id.

⁸⁶ See id.

⁸⁷ See NBC SPORTS, supra note 45.

⁸⁸ For further development of this argument, see infra notes 89–91 and accompanying text.

⁸⁹ See Taylor Adams, The Repercussions of Concussions in Youth Football Leagues: An Analysis of Texas's Concussion Law and Why Reform Is Necessary, 18 SCHOLAR 285, 289 (2016).

the head or neck area only after the NFL did so first.⁹⁰ Addressing football-related concussions at the youth level is especially important given the stark differences between a child’s developing brain and that of an adult; the young brain recovers much more slowly and irregularly than the adult brain after experiencing trauma.⁹¹

Washington was the first state to adopt concussion protocol legislation—known as the Lystedt Law—in response to the tragic brain injury suffered by Zackery Lystedt during his junior high school football game.⁹² This resulted in a proliferation of concussion laws across the United States.⁹³ By April of 2014, nearly every state incorporated some variation of the Lystedt Law’s core components, including concussion education for young players, immediate removal from play, and a slew of return-to-play components.⁹⁴ A key feature of the law is its emphasis on conservatism; athletes who merely “don’t feel right” after a hit to the head are precluded from returning to the game, and the return-to-play protocol requires players to refrain from participating in athletic activity until they have been cleared by a medical professional who determines the brain injury has “fully subsided.”⁹⁵ The law also requires parental consent in writing before a child can play again.⁹⁶

Some state laws are not nearly as protective as the Lystedt Law and leave young football players more susceptible to head injury as a result.⁹⁷ In Wyoming, for example, the law does not

⁹⁰ See Kane, *supra* note 7, at 220.

⁹¹ See *id.* at 211.

⁹² See *id.* at 204.

⁹³ See Adams, *supra* note 89, at 323.

⁹⁴ See *id.*; see also Kane, *supra* note 7, at 222–23.

⁹⁵ See Kane, *supra* note 7, at 222–23 (discussing the Lystedt Law’s adherence to caution). “It [the law] insists that parties are to err on the side of conservatism in these instances; mere suspicion of a concussion is enough to warrant removal from game play. This attitude is encapsulated in the now-widespread mantra, ‘when in doubt, sit them out.’” *Id.* at 222. It is important to note that this paper does not suggest Washington’s “conservatism” approach would be appropriate for football players at the professional level.

⁹⁶ See *id.*

⁹⁷ See *id.* at 289.

require athletes to be removed from play upon suspicion of a concussion.⁹⁸ The law requires school boards to “adopt protocols to address risks associated with concussions,” but it does not require student participation in educational programs nor parental consent before children can return to play following a head injury.⁹⁹ Texas’s concussion law similarly falls short; it does not apply to athletes below the age of thirteen nor private youth football organizations.¹⁰⁰ This inconsistent “patchwork” of state laws is generally attributed to the fact that youth leagues, unlike the NFL, NCAA, and even high school leagues, do not have a centralized governing body to regulate and enforce safety standards.¹⁰¹ As a result, professional athletes appear to be “much better taken care of than our young kids are—and it should just the opposite.”¹⁰²

Despite the shortcomings within the current state statutory regime, the NFL appears to recognize its impact on youth programs and has made efforts to influence positive change.¹⁰³ Indeed, it is no secret that young athletes idolize professional ones.¹⁰⁴ In August 2012, for example, the NFL announced its fully-funded “Heads Up” program—an initiative intended to promote safety and concussion awareness in youth football leagues.¹⁰⁵ The premise of the program is that football can be made safer if children are taught to tackle properly without the use of their heads.¹⁰⁶ The NFL also lobbied for states to adopt concussion laws like the Lystedt Law, and experienced success in Massachusetts, Ohio, and Rhode Island—states with protective

⁹⁸ See *id.* at 227.

⁹⁹ See *id.*

¹⁰⁰ See Adams, *supra* note 89, at 289.

¹⁰¹ See *id.* at 289, 321.

¹⁰² *Id.* at 321.

¹⁰³ See Kane, *supra* note 7, at 245.

¹⁰⁴ See *Head to Head: The National Football League and Brain Injury*, N.Y.U. LANGONE HEALTH, <https://med.nyu.edu/departments-institutes/population-health/divisions-sections-centers/medical-ethics/education/high-school-bioethics-project/learning-scenarios/the-nfl-brain-injury> (last visited Apr. 25, 2023).

¹⁰⁵ See Adams, *supra* note 89, at 319–20; see also Ezell, *supra* note 34.

¹⁰⁶ See *Heads Up Football*, YOUTH SPORTS FOUND., <https://youthsportsfoundation.org/heads-up-concussion>, (last visited Apr. 25, 2023); but see Adams, *supra* note 89, at 319–20 (acknowledging that an important criticism of the “Heads Up” campaign is that the techniques being taught are too complex and not practical for children to apply in real game situations).

statutes that closely mirror Washington’s.¹⁰⁷ It also remains incumbent on the NFL to improve its own concussion protocol because states will likely follow suit.¹⁰⁸ State concussion laws should afford young football players the utmost protections, and the impetus for any such change must come from the top to have a meaningful impact.¹⁰⁹

III. Touchdown: The 2030 CBA as an Opportunity for Increased Player Protections

As Part II highlights, the NFL’s concussion protocol remains inadequate, and this will continue to negatively affect youth football programs that look to the NFL for guidance. Although several states have adopted robust protections for youth athletes, others have not; the level of protection a young football player is afforded varies based on the state he lives in.¹¹⁰ One way to close the gap among the different states is for the NFL and NFLPA to take tangible action in the 2030 CBA to improve the NFL concussion protocol.¹¹¹ This will send a clear message that head injuries are to be taken seriously.¹¹² Following the recent controversy surrounding the handling of Tua Tagovailoa’s concussion, it is an important moment for the NFL to make meaningful progress in its efforts to further reduce concussions and protect players—and the players should demand nothing less.¹¹³

Section A below discusses the shortfalls in the NFL’s current protocol; namely, that it fails to account for players who experience a late onset of subtle concussion symptoms, and that strong incentives are in place for athletes to continue playing despite their injuries. Section B offers two provisions that could be negotiated for in the 2030 CBA to mitigate concussion risks and

¹⁰⁷ See Kane, *supra* note 7, at 224–27, 229.

¹⁰⁸ See *id.* at 229.

¹⁰⁹ See Kim, *supra* note 49, at 80 (“The most effective policy for changing health behaviors in football will persuade both youth participants and adults. For this reason, policy should aim to shift player health behaviors at the professional football level because they have the most influence.”).

¹¹⁰ For further development of this argument, see *supra* Part II(E).

¹¹¹ See Kim, *supra* note 49, at 80.

¹¹² See *id.*

¹¹³ For a discussion of how the Miami Dolphins’ handled Tagovaiola’s concussion, see *supra* Part II(D).

enhance player safety. Finally, Section C explains why the CBA is the most viable solution for both professional and youth athletes, despite recent calls for Congress to enact federal legislation in this area.

A. Problems with the Current NFL Protocol

Issues with the NFL's current approach are best exemplified by the September 2022 Tua Tagovailoa incident discussed in Part II(D) of this paper. Not only did the Dolphins struggle to diagnose Tagovailoa with a concussion due to his masked symptoms, but they allowed him to return to play prematurely.¹¹⁴ Prior to this incident, the NFL did not even recognize ataxia as a concussion symptom.¹¹⁵ Ataxia is “an impairment in any coordination of voluntary muscle movement.”¹¹⁶ It is accompanied by symptoms that include poor balance, stumbling, and decreased muscle coordination in the arms or legs.¹¹⁷ When Tagovailoa stood up after taking a hard hit, he reported that his back “locked up” and caused him to stumble.¹¹⁸ In reality, he suffered from ataxia and was misdiagnosed on the sideline.¹¹⁹ Although the league attempted to remedy the situation by creating the “Tua Rule” and adding ataxia to the list of symptoms that preclude players from re-entering a game, this incident begs the question of how many other NFL players suffered from ataxia yet were permitted to return to play with concussions.¹²⁰ The “Tua Rule” reflects the NFL's overall approach to handling concussions; it has been too reactive in its efforts to prevent head injury and promote player safety.¹²¹

¹¹⁴ See Bergeron, *supra* note 69.

¹¹⁵ See Al-Khateeb, *supra* note 82.

¹¹⁶ Chayil Champion, What is Ataxia and How Does it Affect Your Brain?, UCLA HEALTH (Nov. 9, 2022), <https://www.uclahealth.org/news/what-is-ataxia-and-how-does-it-affect-your-brain#:~:text=Ataxia%20can%20result%20from%20a,a%20sign%20of%20neurological%20distress>.

¹¹⁷ See *id.*

¹¹⁸ Morse, *supra* note 72.

¹¹⁹ See NBC SPORTS, *supra* note 45.

¹²⁰ See Al-Khateeb, *supra* note 82.

¹²¹ See *id.*

Another issue is the league’s reliance on players to self-report their concussion symptoms.¹²² To some extent, the NFL only has so much control over this; the league can encourage players to report their symptoms, but there is no way to consistently enforce it.¹²³ To the NFL’s credit, it currently requires nearly thirty medical professionals to be on the sidelines of every game and assigns athletic trainers to press boxes to monitor for potential concussions missed during play.¹²⁴ Nonetheless, some concussions are bound to go undiagnosed during a game, and this is where the importance of self-reporting comes in. Commentators surmise one reason players might be hesitant to self-report is due to the sport’s “next-man-up-culture.”¹²⁵ The “next-man-up-culture” adheres to the ideology that one player can take over seamlessly when another is hurt, which causes many athletes to refrain from “tapping out” when they are injured.¹²⁶ While some praise the “next-man-up culture” as an integral part of a successful team atmosphere, it also seems to breed a general mentality that everyone is replaceable; if one player becomes injured and cannot perform, there is always someone else who can.¹²⁷ As a result, athletes may feel pressured to play through their injuries because they do not want to lose their spot on the field.¹²⁸ Some players have also identified the sport’s “ultra-masculine” culture as the reason they do not speak up when they are injured—out of fears that it is not “manly” to express their emotions.¹²⁹

¹²² See Bergeron, *supra* note 69.

¹²³ See Mike Florio, *NFL Knows it Must Reconsider Accountability for Hiding and Faking Injuries*, NBC SPORTS (July 19, 2021), <https://profootballtalk.nbcsports.com/2021/07/19/nfl-knows-it-must-reconsider-accountability-for-hiding-and-faking-injuries/> [hereinafter *Accountability for Fake Injuries*] (discussing how Tom Brady played the entire 2020 season with a torn MCL without ever disclosing the injury).

¹²⁴ See Kim, *supra* note 49, at 77–78; see also Bergeron, *supra* note 69.

¹²⁵ See Bergeron, *supra* note 69; see also *Joint Review of Tua Concussion*, *supra* note 70.

¹²⁶ See *Joint Review of Tua Concussion*, *supra* note 70; see also *Definition of Next Man Up*, SPORTS KING, <https://www.sports-king.com/dictionary.php?q=next-man-up> (last visited Apr. 25, 2023).

¹²⁷ See Nathan D., *What Does Next Man Up Mean in Football?*, FOUR VERTS FOOTBALL, <https://fourvertsfootball.com/what-does-next-man-up-mean-in-football/> (last visited Apr. 25, 2023) (discussing the benefits of football’s next man up culture, namely that “any player can be seamlessly replaced by a backup”).

¹²⁸ See *id.*; see also SPORTS KING, *supra* note 126.

¹²⁹ Christina Vogt, *9 Football Players Who’ve Spoken Up About Mental Health*, EVERYDAY HEALTH (Jan. 19, 2023), <https://www.everydayhealth.com/emotional-health/football-players-whove-spoken-up-about-mental-health/>.

Moreover, the structure of NFL player contracts may contribute to the lack of self-reporting.¹³⁰ Whether a player actually receives the money negotiated for in his contract hinges on the amount of money guaranteed and whether he is “cut” from the team.¹³¹ Interestingly, most of the money negotiated for in a contract is not guaranteed; if a player is cut for underperformance or injury, he will not get paid.¹³² Thus, players seek to maximize their guaranteed contract amount because it protects their salaries should they be cut or get injured.¹³³ Further, any portion of a player’s contract could be guaranteed to varying degrees for a number of reasons.¹³⁴ Some players enjoy “fully guaranteed” contracts, meaning they will receive their full contract amount even if they are cut for skill or injury, but this is rare.¹³⁵ NFL contracts may also include incentives that reward players with bonuses if they meet certain performance thresholds set in the contract, such as making the Pro Bowl, catching a certain amount of receptions, or playing a certain amount of minutes throughout the season.¹³⁶

This structure of contract payments can motivate players to abbreviate their recovery from head injuries to reach performance-based pay incentives or prevent their salaries from decreasing.¹³⁷ The importance of sufficient recovery time before returning to play is often outweighed by the financial incentives of these contract provisions.¹³⁸ In a sport where injuries are so frequent and an athlete’s on-field performance is so relevant, it is understandable that

¹³⁰ See Bergeron, *supra* note 69.

¹³¹ See Kim, *supra* note 49, at 82.

¹³² See *id.*; see also Tom Dart, [Injury Pay Cuts and Limited Leverage: Five Brutal Truths about NFL Contracts](https://www.theguardian.com/sport/2023/jan/17/nfl-football-contracts-guaranteed-money-pensions-salary-cap), GUARDIAN (Jan. 17, 2023), <https://www.theguardian.com/sport/2023/jan/17/nfl-football-contracts-guaranteed-money-pensions-salary-cap>.

¹³³ See Kim, *supra* note 49, at 82.

¹³⁴ See *id.* at 83.

¹³⁵ *Id.*; see also Jabari Young, [Inside the NFL’s Fight Over Fully Guaranteed Player Contracts Like DeShaun Watson’s](https://www.forbes.com/sites/jabariyoung/2022/12/02/inside-the-nfls-fight-over-fully-guaranteed-player-contracts-like-deshawn-watsons/?sh=555be71e586d), FORBES (Dec. 2, 2022, 6:30 AM), <https://www.forbes.com/sites/jabariyoung/2022/12/02/inside-the-nfls-fight-over-fully-guaranteed-player-contracts-like-deshawn-watsons/?sh=555be71e586d>.

¹³⁶ See Conner Christopherson, [The Art of NFL Contracts Part 1: The Basics](https://www.si.com/nfl/chiefs/gm-report/the-art-of-nfl-contracts-part-1-the-basics), SPORTS ILLUSTRATED (May 21, 2020, 12:43 PM), <https://www.si.com/nfl/chiefs/gm-report/the-art-of-nfl-contracts-part-1-the-basics>.

¹³⁷ See Kim, *supra* note 49, at 83–84.

¹³⁸ See *id.*

teams include these provisions in player contracts.¹³⁹ At the same time, it is important to recognize that these provisions can lead to a lack of self-reporting and perpetuate further head injuries within the sport.¹⁴⁰ Indeed, if NFL players are playing through their injuries and not taking the time to properly recover, it is doubtful that youth football players are doing so; youth athletes look to NFL players as role models and often mimic their behaviors on the field.¹⁴¹

B. An Opportunity for More Protections: The 2030 CBA

The NFL’s collective bargaining agreement is renegotiated every ten years, and the next negotiation will take place in 2030.¹⁴² In the 2020 CBA agreement—a 300 page document—the word “concussion” appeared only six times.¹⁴³ This statistic is startling given how many NFL players suffer from concussions each year.¹⁴⁴ According to data released by the NFL, there were 149 concussions suffered over 271 games this season alone.¹⁴⁵

The CBA is a labor agreement that reflects the results of negotiations between the NFLPA and the NFL.¹⁴⁶ The NFLPA acts as a union for the professional football players and helps them negotiate a variety of contract terms, including wages, working conditions, retirement benefits, etc.¹⁴⁷ The NFLPA essentially serves as the “bargaining unit” between the players and the league for the purposes of the National Labor Relations Act (NLRA), which governs collective

¹³⁹ See Dom Costenino, How Every Major Sports League Except the NFL Got to Guaranteed Contracts, THE SCORE, <https://www.thescore.com/nfl/news/2185058> (last visited Apr. 25, 2023).

¹⁴⁰ See Kim, supra note 49 at 83–84.

¹⁴¹ See N.Y.U. LANGONE HEALTH, supra note 104 (claiming that youth players tend to look up to professional football players and “want to be like them”); see also KAISER FAM. FOUND., supra note 71.

¹⁴² See Cody Benjamin, NFL’s New CBA Explained: Here’s a Look at All the Season Roster and Salary Changes, CBS NEWS (Mar. 16, 2020, 9:40AM), <https://www.cbssports.com/nfl/news>.

¹⁴³ See Henry Bushnell, Under the Blue Tent: How the NFL’s Concussion Protocol Went From a ‘Joke’ to the Gold Standard, YAHOO (Oct. 14, 2021), <https://sports.yahoo.com>.

¹⁴⁴ See Kevin Seifert, NFL Says Regular Season Concussions Increased 18% in 2022, ESPN (Feb. 3, 2023), https://www.espn.com/nfl/story/_/id/35582897/nfl-says-regular-season-concussions-increased-18-2022 (noting that there was an 18% increase in the number of concussions in 2022).

¹⁴⁵ See id.

¹⁴⁶ See How the NFLPA Works, NAT’L FOOTBALL LEAGUE PLAYER’S ASS’N, <https://nflpa.com/about> (last visited Apr. 25, 2023).

¹⁴⁷ See id.

bargaining agreements and other aspects of labor law.¹⁴⁸ The CBA takes precedence over the NFL's constitution, bylaws, and any private contracts between individual players and their respective teams.¹⁴⁹

Given the volatility of an NFL career and the life-threatening impact of head injuries, there are several changes commentators hope to see reflected in the 2030 CBA to combat the issues discussed above. Two of the most notable ones are analyzed below. Section (B)(1) discusses the possibility of individualized concussion protocols based on a player's medical history, and Section (B)(2) explores the viability of a head injury reserve list.

1. Individualized Protocols

Because some concussion symptoms are subtle and can go unnoticed for days, the league could implement individualized concussion protocols dependent on how many head injuries a player has suffered in the past.¹⁵⁰ This would make it easier for medical staff to identify concussions in players who are not showing classic symptoms in the moment.¹⁵¹ Indeed, doctors estimate that individuals are more susceptible to additional concussions after suffering from one.¹⁵² For some players, the sideline spotters would simply watch for a blow to the head and associated concussive behavior; but for others with a history of concussions, such as Tagovailoa, a blow to the head would require a more thorough investigation.¹⁵³

¹⁴⁸ See Frazier, *supra* note 13, at 212.

¹⁴⁹ See Kim, *supra* note 49, at 80.

¹⁵⁰ See Joint Review of Tua Concussion, *supra* note 70.

¹⁵¹ See *id.*

¹⁵² See Monica Heger, Is it True I am More Likely to Get a Concussion After Already Having One?, SCI. LINE (Apr. 28, 2008), <https://scienceline.org/2008/04/ask-hegerconcussion/#:~:text=After%20having%20one%20concussion%20you,increases%3A%20carelessness%20and%20brain%20chemistry.>

¹⁵³ See Joint Review of Tua Concussion, *supra* note 70.

Requiring medical personnel to develop individualized concussion protocols may be time-consuming and costly for the league.¹⁵⁴ It also might impose a large burden on those monitoring the game to be educated about each player’s medical history.¹⁵⁵ Nevertheless, some commentators argue that if the NFL is going to treat players like patients with respect to other physical injuries, they should be treated no differently for head injuries.¹⁵⁶ The league should ensure that it has the capacities for every player to receive proper and individualized care and attention, even if that requires additional work, resources, and costs.¹⁵⁷

2. A Head Injury Reserve List and Carve-Out Exemption

Other commentators propose a head injury reserve list that would exempt players who need to take time off to rehabilitate without making them ineligible for performance-based incentives in their contracts.¹⁵⁸ The NFL already utilizes an injured reserve list on which players can be placed after suffering a football-related injury.¹⁵⁹ A player still receives his salary while on the injured reserve list but no longer occupies a spot on the team’s roster and is not guaranteed to return.¹⁶⁰ Commentators argue the next CBA should provide for a separate injured reserve list specific to head injuries that operates in a similar way.¹⁶¹ Not only would it decrease the likelihood of players prematurely returning to play just to meet certain performance-based incentives, but the reserve list would further the NFL’s efforts to establish a “uniform and detailed accounting of player safety related to head injuries.”¹⁶² This is especially important

¹⁵⁴ See id.

¹⁵⁵ See id.

¹⁵⁶ See id.

¹⁵⁷ See id.

¹⁵⁸ See, e.g., Kim, supra note 49, at 84.

¹⁵⁹ See Injured NFL Teams Find No Reprieve From IR Rules—Here’s Why, NBC NEWS (Nov. 13, 2022), <https://www.nbcsports.com/bayarea/49ers/how-many-injury-reserve-players-can-nfl-teams-bring-back>.

¹⁶⁰ See id.

¹⁶¹ See Kim, supra note 49, at 84.

¹⁶² Id. at 84–85.

given the fact that concussions may be “elusive[ly] diagnos[ed]”; each player experiences different symptoms and may recover at different rates.¹⁶³ With a separate list, physicians can focus on the severity of the head injury alone and determine how long each player should remain out.¹⁶⁴ Proponents claim this approach accommodates for the fact that an accurate concussion diagnosis readily depends on players honestly disclosing their symptoms and medical examiners providing adequate assessments.¹⁶⁵

The head injury reserve list, however, only works if it is coupled with an exemption from performance-based pay incentives.¹⁶⁶ Playtime percentage is currently calculated by adding a player's total plays and dividing that value by the team's total plays.¹⁶⁷ Under this formula, if a player misses any playtime during the regular season due to a head injury, he cannot earn credit towards a playtime incentive in his contract.¹⁶⁸ As previously discussed, this may motivate a player to return to play prematurely to earn additional pay without fully disclosing his concussive symptoms.¹⁶⁹ To prevent this, the NFL could establish a “head injury carve-out” and adopt a new formula for determining playtime percentages, which would: “(1) add[] a player's total plays . . . and (2) divid[e] the value by the team's total plays . . . minus the total plays missed by a player due to head injuries.”¹⁷⁰ This new approach would remove one major disincentive that exists for players to report symptoms because they would still be eligible to obtain playtime incentives upon return.¹⁷¹ Given the influence and impact that the NFL’s concussion practices have on youth football programs, this CBA provision would send a clear message that continuing

¹⁶³ Id.

¹⁶⁴ See id.

¹⁶⁵ See id.

¹⁶⁶ See id. at 85.

¹⁶⁷ Id. at 86.

¹⁶⁸ See id.

¹⁶⁹ See id.

¹⁷⁰ Id.

¹⁷¹ See id.

to play despite a head injury is never appropriate.¹⁷² It would also help NFL players demonstrate positive health behaviors to youth participants by removing themselves from a game to ensure full recovery from a head injury.¹⁷³

Opponents raise several concerns over this proposed CBA provision.¹⁷⁴ First, it opens up difficult line-drawing questions about which injuries are deserving of their own injured reserve list and an accompanying carve-out from the playtime incentive.¹⁷⁵ The NFL would have to proffer an explanation for why head injuries warrant different treatment than other types of traumatic injuries football players suffer on a daily basis.¹⁷⁶ In addition, commentators cannot predict how the head injury reserve list and playtime carve-out would impact other NFL contract provisions.¹⁷⁷ Players with fully-guaranteed contracts, for example, would still receive all of their performance-based pay even if they were sidelined for head injury.¹⁷⁸ Questions like these make the prospect of considering new CBA reforms challenging, but they are not insurmountable and do not undermine the need to implement new protocols and align incentives to better protect players from head injuries.

C. The 2030 CBA as the Most Viable Option for Change

Advocating for change through the 2030 CBA is the most viable option because of its broad scope; it takes precedence over the NFL's constitution, bylaws, and any private contracts between individual players and their teams.¹⁷⁹ Youth football leagues and state legislatures would presumably follow the NFL's lead and adopt relevant changes to their own concussion

¹⁷² See N.Y.U. LANGONE HEALTH, supra note 104; see also KAISER FAM. FOUND., supra note 71.

¹⁷³ See Kim, supra note 49, at 86.

¹⁷⁴ For further discussion of this argument, see infra notes 175–78.

¹⁷⁵ See Kim, supra note 49, at 93.

¹⁷⁶ See id.

¹⁷⁷ See id. at 92.

¹⁷⁸ See id.

¹⁷⁹ See id. at 80.

protocols because the league has a great deal of influence over youth programs.¹⁸⁰ Even if the proposed CBA reforms are not directly applicable at the youth level, the NFL's willingness to take action coupled with its players promoting positive health behaviors will likely effectuate change.¹⁸¹ For this reason, the next CBA is an optimal opportunity to set a new norm with respect to head injuries and improve player protections at both the professional and youth levels.¹⁸²

One popular alternative solution raised by commentators to resolve the concussion epidemic is the enactment of federal legislation.¹⁸³ On several occasions, the United States Congress has contemplated federal legislation through the ConTACT Act and Protecting Students Against Concussions Act in 2010 and 2011, respectively.¹⁸⁴ Both bills used Washington's Lystedt Law as a template.¹⁸⁵ Despite the fact that all fifty states have enacted some form of concussion legislation, many schools lack the resources and funding to implement best practices in concussion diagnosis and management.¹⁸⁶ A federal law would ensure that every player in every state receives the same minimum protections.¹⁸⁷ It would also provide a uniform framework to override the disparate state laws governing concussion management at the youth level.¹⁸⁸ Both

¹⁸⁰ For a discussion of the connection between the NFL's concussion protocols and those adopted by youth football leagues, see supra Part II(E).

¹⁸¹ See Kim, supra note 49, at 80.

¹⁸² See id.

¹⁸³ See, e.g., Kane, supra note 7, at 221; but see Finkel et al., supra note 18, at 292 (proposing OSHA regulation of the NFL as an alternative solution). The OSHA argument is not without criticism. See Murray, supra note 13, at 182–83 (arguing that OSHA regulation of the NFL would likely not resolve the head injury issue). According to Murray, this is due to the fact that football players can suffer “debilitating neurological damage without ever sustaining a concussion, and because OSHA is precluded from implementing regulations that alter the ‘fundamental nature’ of a workplace, OSHA action will likewise not solve [the problem].” Id. Ultimately, the OSHA solution was not discussed at length in this paper because it would not translate to the youth football world, despite the possibility of it making strides at the professional level.

¹⁸⁴ See Kane, supra note 7, at 228; see also ConTACT Act of 2010, H.R. 1347, 111th Cong., 2d Sess. (2009–2010); Protecting Student Athletes from Concussions Act of 2011, H.R. 469, 112th Cong., 1st Sess. (2011).

¹⁸⁵ See Alan Schwarz, Congress Considers Concussion Protections, N.Y. TIMES (Sept. 23, 2010), <https://www.nytimes.com/2010/09/24/sports/football/24concussion.html>.

¹⁸⁶ See id.

¹⁸⁷ See id.

¹⁸⁸ See id.

statutes, however, received little support among representatives and failed to pass a majority vote.¹⁸⁹

The most recent attempt to pass federal legislation occurred in 2021 with the introduction of the Protecting Student Athletes from Concussions Act.¹⁹⁰ As of today, that bill has yet to even advance out of the Senate.¹⁹¹ While opponents generally acknowledge the need for better concussion management protocols at both the youth and professional levels, they argue the issue should be left to the states and the league.¹⁹² Lawmakers have expressed hesitancy to “legislate in this area” because football “involves contact that can produce injuries . . . [and] [w]e cannot legislate the elimination of injuries from the game[] without eliminating the game[] [it]sel[f].”¹⁹³ Lawmakers also recognize their unfamiliarity with the sport and maintain that the NFL truly is in the best position to oversee concussion management.¹⁹⁴ Moreover, the legislative process is time-consuming, and policymakers will need to defer to scientists for “robust evidence-based guidelines on head injuries” to ensure whatever law they do pass is effective in practice.¹⁹⁵ Although the wait for the 2030 CBA totals seven years, the wait for partisan legislation could be even be longer. For this reason, the 2030 CBA is the most viable option to see meaningful progress in NFL and youth sport concussion policies.¹⁹⁶

¹⁸⁹ See Kane, *supra* note 7, at 228.

¹⁹⁰ See Protecting Student Athletes from Concussions Act of 2021, S.3043, 117th Cong., 1st Sess. (2021).

¹⁹¹ See *id.*

¹⁹² See generally Legal Issues Relating to Football Head Injuries (Part I & II), Hearing Before the Comm. on the Judiciary H.R., 111th Cong. (2010) [hereinafter Hearing on Legal Issues Relating to Football Head Injuries].

¹⁹³ *Id.* (statement of Rep. Smith (TX)).

¹⁹⁴ See *id.*

¹⁹⁵ Kim, *supra* note 49, at 80; see also Hearing on Legal Issues Relating to Football Head Injuries, *supra* note 192 (statement of Ira Casson, M.D., Former Co-Chairman, NFL Mild and Traumatic Brain Injury Committee) (“My position is that there is not enough valid, reliable, or objective scientific evidence at present to determine whether or not repeat head impacts in professional football result in long-term brain damage.”).

¹⁹⁶ See Kim, *supra* note 49, at 80.

To effectuate even more immediate change, there are several steps the NFL could take before 2030. The league could look to implement additional rule changes like it did following the September 2022 Tua Tagovailoa incident by adding ataxia to the list of concussion symptoms that preclude players from returning to play.¹⁹⁷ The NFL could also continue to promote educational programs about safe tackling and proper head injury recovery at the youth level, and donate funding to scientists who study the long-term effects of football-related concussions.¹⁹⁸

IV. Getting the Extra Point: The Impact of the NFL's Concussion Policies on Those Adopted by Youth Football Programs

Regardless of what form the change comes in, it is incumbent on the NFL to improve its concussion protocol and better protect players from head injury at the professional level. The need for such change is underscored by the fact that the NFL's concussion practices heavily influence those adopted by youth football leagues at the state and local level.¹⁹⁹ Indeed, almost all fifty states enacted legislation to govern their youth football programs—albeit to varying degrees—after the NFL formally recognized the link between concussions and CTE in 2009.²⁰⁰ This leaves youth football players in some states more vulnerable to head injury than others. Considering the well-established link between concussions and CTE and football's widespread popularity throughout middle school and high school, the NFL plays an important role in making the game safer for youth participants.²⁰¹

¹⁹⁷ For a discussion of Tua Tagovailoa's head injury and the NFL's response, see *supra* Part II(D).

¹⁹⁸ See Kathleen Bachynski, *NFL Does an End Run Around Serious Brain Injury Discussion*, COLUM. MAILMAN SCH. OF PUB. HEALTH (Jan. 31, 2019), <https://www.publichealth.columbia.edu>; see also Mark Maske, *NFL Allocates More than \$17 Million to Fund Research into Concussions and Brain Health*, WASH. POST (Jan. 5, 2018), <https://www.washingtonpost.com/news/sports/wp/2018/01/05/nfl-allocates-more-than-17-million-to-fund-research-into-concussions-and-brain-health/>.

¹⁹⁹ For further development of this argument, see *supra* Part II(E).

²⁰⁰ See *id.*

²⁰¹ See Kim, *supra* note 49, at 72.

The NFL is in a position to positively affect player health behavior through contract reforms in the 2030 CBA, which will serve as a catalyst to influence much-needed changes in youth football.²⁰² Professional athletes serve as role models to young children; so if NFL players, such as Tua Tagovailoa, return to play too prematurely, younger players will do the same.²⁰³ By exhibiting more conservative protocols in the 2030 CBA, the NFL will send the message that head injuries are to be treated with caution and care.²⁰⁴ Unlike professional players whose salaries and careers depend on their participation in games, youth players have much more at risk; the normal development of their brains.²⁰⁵ For this reason, the NFL should prioritize concussion-related contract provisions in the 2030 CBA negotiations—not only to influence change at the professional level and better protect player safety, but to ensure that youth football leagues do the same.²⁰⁶ It is time for the NFL to take accountability and uses its position of power and influence to better protect one of America’s most vulnerable populations—our children.

²⁰² See id. at 80.

²⁰³ See id. at 76.

²⁰⁴ See Bushnell, supra note 143.

²⁰⁵ See id.

²⁰⁶ See Kim, supra note 49, at 81.