SYMPOSIUM: GENERAL ASPECTS OF RECREATION LAW

Liability of Recreation and Competitive Sport Organizations for Sexual Assaults on Children by Administrators, Coaches and Volunteers

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Child molesters[1] are infiltrating places traditionally thought to be safe havens for our children. This practice is no more evident than with the growing number of reported accounts of sexual abuse by Catholic priests on minor children. While the conduct is reprehensible, it is more disturbing given the power and trust that accompanies clerical status and the abhorrent way that trust is breached. There was a time when parents felt safe handing their children over to clergy, police, and teachers. While most of these people conduct themselves honestly, many trusted servants have been doing harm to our children.

Likewise, this disturbing breach of authority and trust is one that has plagued competitive and recreational sport organizations[2] around the country for years. At community centers and sports leagues, child molesters are

1. The term "child molesters" is used here rather than "pedophiles." Pedophilia is the "sexual attraction to children" and should not be used synonymously with terms such as "child sexual abuse" and "child molesters" because not all sexual abusers of minors are "pedophilic." It is possible to be sexually attracted to minor children and to never act on that feeling. Also, persons who are not "pedophilic" may sexually abuse minors because they are available. Peter J. Fagan, et al., *Pedophilia*, 288 JAMA 2458, 2459-2460 (2002).

2. "Competitive and recreational sport organizations" are also referred to herein as "sport organizations." For purposes of this article, it is assumed that these organizations are not-for-profit, but the recommendations contained herein apply equally to for-profit sport organizations

working as coaches and administrators. Through these positions, perpetrators gain their communities' trust and have direct access to their victims.[3]

Sexual abuse of athletes by coaches and other personnel, paid and volunteer, is a serious problem for sport organizations that provide services to children. Sport organizations should diligently screen volunteers and employees to determine their fitness to work with children. Sport organizations that fail to screen volunteers and employees as to their fitness to work with children breach both their legal duty and their moral duty to act reasonably to protect the children they serve.

Part I of this article indicates that child sexual abuse is a major societal problem. This problem should be of particular concern to any organization that has programs involving adult-child contact. Almost every sport organization in the country relies heavily on adult employees and volunteers for staffing. Recent examples of coaches and administrators working in these organizations that have been charged, and in some cases, convicted of sexually abusing athletes placed in their trust indicate that organizations are not doing enough to protect their children. In some instances, a companion civil case has been filed by the parents of the victim, which suggests that these organizations face the possibility of having to pay out considerable sums of money to defend claims and for money damage awards.

Part II surveys current federal and state legislation intended to protect children from sex offenders, including federal laws that require states to maintain sex offender registries. This Part suggests that state and federal governments have yet to provide easy and inexpensive access to information that would allow sport organizations to more comprehensively check the criminal backgrounds of volunteers.

Part III examines various national and state youth sport organizations to see how these organizations are approaching this important issue. It also takes a closer look at some national sport organizations which have recently implemented comprehensive screening programs, including sex offender registry searches and/or criminal history background searches.

Part IV addresses the potential legal claims these organizations will face if they fail to act responsibly and take advantage of some of the available resources that can assist in protecting their children. The most common legal theories used by plaintiffs suing sport organizations include vicarious liability

3. Mark C. Lear, Note: *Just Perfect for Pedophiles? Charitable Organizations That Work with Children and Their Duty To Screen Volunteers*, 76 TEX. L. REV. 143, 144 n.9 (1997). *See also* Danielle Deak, *Comment: Out of Bounds: How Sexual Abuse of Athletes at the Hands of Their coaches is Costing the World of Sports Millions*, 9 SETON HALL J. SPORTS L. 171 (1999).

and negligent hiring.[4] While many complaints based on these legal theories are dismissed on defendant's motion for summary judgment, a review of recent case law suggests that courts might be more willing to allow a plaintiffs' complaint to survive the summary judgment phase and reach a jury.

Part V concludes by suggesting elements that should be part of a sport organization's screening program as well as steps that sport organizations can take, in addition to screening, to protect the children they serve.

PART I – CHILD SEXUAL ABUSE IS A MAJOR CONCERN FOR SPORT ORGANIZATIONS THAT HAVE ADULT-LED PROGRAMMING INVOLVING MINOR CHILDREN

Child sexual abuse is a significant social issue that requires the attention of parents, community leaders, and lawmakers. Organizations that have been tracking incidents of child sexual abuse report that the majority of juvenile victims are known to their abusers. The adverse health risks associated with being a victim of child sexual abuse are compounded by the breach of trust associated by the known offender. Many sex offenders use sport organizations as a means to gain an individual's trust and then commit their next sexual assault. Recent cases of child sexual assault suggest that coaches continue to abuse their position of authority created by the player/coach relationship.

A. Prevalence of Sexual Assaults

The sexual abuse of minor children is a national public health issue and a major concern for sport organizations that provide programming for minor children.[5] According to findings from the Third National Incidence Study of Child Abuse and Neglect, the estimated number of sexually abused children increased 125% from 133,600 reported cases in 1986 to 300,200 reported cases in 1993.[6] While more recent studies indicate the incidence of sexual abuse is actually declining—information submitted by child protection service

4. While it is not dealt with in this article, organizations that receive public funding are also subject to liability under 42 U.S.C. § 1983 and Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, et. seq. (2003).

5. Fagan, *supra* note 1, at 2459.

6. Andrea J. Sedlak & Diane D. Broadhurst, *Executive Summary of the Third National Incidence Study of Child Abuse and Neglect.* U.S. Department of Health and Human Services; Administration for Children and Families; Administration on Children, Youth and Families; National Center on Child Abuse and Neglect (1996), *available at* http://nccanch.acf.hhs.gov/pubs/statsinfo/nis3.cfm (August, 29, 2003).

(CPS) agencies to the National Child Abuse and Neglect Data System suggests that the incidence of sexual abuse declined 39% between 1992 and 1999—it is unclear what has caused this trend and whether or not the decline indicates an actual drop in the number of child sexual assaults or whether it is due to changes in attitudes, policies, or reporting behaviors.[7] Notwithstanding recent reports of a decline, it is important to note that the decline is based on the number of cases actually reported to child protection service authorities.[8] Thus, any decline in the reporting of sexual assaults on children should be looked at in light of the fact that only a small percentage of children (10%) report abuse to professionals.[9]

According to a 2000 Bureau of Justice Statistics Report, a profile of victims of all types of sexual assaults indicates that juvenile victims (under the age of 18) make up 70% of reported crimes.[10] While rapes by persons unknown to victims attract the most media attention, the vast majority (86%) of all sexual offenders are familiar with their victims.[11] The percentage is higher with juvenile victims. In all sexual assault cases reported to police involving juvenile victims from 1991-1996, 93% of the offenders were known to their victims.[12] Excluding family members, juvenile victims are known to their offenders in almost 60% of the cases.[13]

According to the Bureau of Justice Statistics report, 82% of all juvenile victims were female.[14] Other studies suggest that girls are 2.5 to 3 times more likely than boys to be sexually assaulted, and that boys make up roughly 22%

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7. Lisa M. Jones, David Finkelhor & Kathy Kopiec, *Why Is Sexual Abuse Declining? A Survey Of State Child Protection Administrators.* 25 CHILD ABUSE & NEGLECT 1139, 1140 (2001). The study surveys child protection service agencies throughout the country and attempts to discover what is causing the decline in sexual abuse.

8. John Leventhal, *A Decline In Substantiated Cases Of Child Sexual Abuse In The United States: Good News Or False Hope?*, 25 CHILD ABUSE & NEGLECT 1137, 1137-1138 (2001).

9. *Id.*

10. HOWARD N. SNYDER, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS (2002). The report was compiled from data from the National Incident-Based Reporting System, which consists of law enforcement agency reports from 1991-1996. The types of sexual assaults reported include, forcible rape, forcible sodomy, sexual assault with object, and forcible fondling. Statistics are broken down according to age group: 0-5, 6-11, 12-17, 18-24, 25-34, above 34.

11. *Id.* at 10. The victim-offender relationship in sexual assaults of all victims is reported as: family member (26.7%), acquaintance (59.6%), stranger (13.8%).

12. *Id.* Victim-offender relationship in sexual assaults of juveniles is reported as: family members (34.2%), acquaintances (58.7%) and strangers (7.0%).

13. *Id.*

14. *Id.* at 4.

to 29% of all sexual assault victims.[15] In addition to the immediate harmful consequences sexual assaults have on children, studies show that their effects last into adulthood and cause depression, substance abuse, bulimia nervosa, and other personality disorders.[16]

B. Sexual Assaults in Recreation and Competitive Sport Organizations

Given the high incidence of child sexual assaults by persons known to the victim, administrators of sport organizations should be aware that their organizations may provide both opportunity and means for child molesters to become acquainted with and assault their victims. For years, child molesters have used sport organizations to meet families and molest male and female victims. This is a local, national, and international phenomenon that received world-wide attention in 1997 when Boston Bruins' player Sheldon Kennedy revealed that his coach, Graham James, had sexually molested him and other boys while playing hockey in Canada.[17] In 1999, the topic received national attention from a Sports Illustrated article that reported widespread sex abuse by coaches who had volunteered in a variety of sports, all using sports to gain the trust of victims.[18]

There is a special relationship that exists between a player and coach in a sport setting.[19] In both recreation and competitive environments, a player looks to his/her coach for guidance and advice. While the advice sought and given generally begins with matters relating to the particular sport - such as skills, tactics, and conditioning - the relationship becomes close and may evolve into conversations about other matters. Regardless of the topic, the

15. Frank Putnam, *Ten Year Research Update Review: Child Sexual Abuse*, 42 J. OF THE AM. ACAD. OF CHILD AND ADOLESCENT PSYCHIATRY 269, 270 (2003).

16. *Id.* at 272.

17. TOM APPENZELLER, YOUTH SPORTS AND THE LAW 151 (2000)

18. William Nack & Don Yaeger, *Every Parent's Nightmare: The Child Molester Has Found A Home In The World Of Youth Sports, Where As A Coach He Can Gain The Trust And Loyalty Of Kids-And Then Prey On Them*, SPORTS ILLUSTRATED, Sept. 13, 1999, at 40.

19. State legislators have recognized the potential for abuse of this special relationship and have passed laws that criminalize sexual relations between educators (including coaches) and their students. Caroline Hendrie, *States Target Sexual Abuse by Educators,* EDUC. WEEK, April 30, 2003, *at* http://www.edweek.org/ew/ew_printstory.cfm?slug=33abuse.h22. Most state statutes include increased penalties where the sexual relationship is already illegal, as with a student below the age of consent. *Id.* At least five states, Connecticut, Georgia, North Carolina, Ohio, and Wyoming, make it illegal for a teacher or administrator to have sex with a student, even where the student is of the age of majority. *Id.* Connecticut, North Carolina, and Ohio specifically include "coach" as a person in a position of authority and subject to the reach of the criminal code. *See* CONN. GEN. STAT. § 53A-71 (2003); N.C. GEN. STAT. § 14-27.7 (2003); OHIO REV. CODE ANN. § 2907.03 (Anderson 2003).

coach is often viewed by the player as an expert in sport and life. Moreover, we are encouraged from our parents at an early age to obey a coach's instructions. This relationship, while subject to abuse at youth and recreation levels, may have larger ramifications with elite athletes in competitive sports when the coach is the connection between the athlete and all-star team, regional team, and college scholarship. This position of authority and influence allows a coach to get players to do things they would not otherwise agree to do.[20]

Some recent examples suggest that there is not enough being done to remedy the problem of sexual abuse in sport organizations. In July 2002, Gary Session, a volunteer basketball coach at the Flatbush YMCA in Brooklyn, NY, pleaded guilty to charges that he sexually abused a 12-year old girl during a basketball practice held at the Y.[21] Session, who had previously been convicted of sexually abusing girls, was sentenced to a mere 60 days in jail.[22] In December 2002, John Racadio pleaded guilty to molesting six children while he served as an equipment manager for a California Little League organization.[23] Racadio, who had a prior conviction for sexual assault on a child, was sentenced to 30 years in prison.[24] In June 2003, Fernando Colman was found guilty by a jury of sexually assaulting six young boys during overnight stays at motels during soccer team trips in and around New York City. [25] Colman, who was a coach and the vice president of the Argentina Soccer School, was already serving a sentence for sexual attacks on boys in Nassau County.[26] He was sentenced to 61 1/3 – 66 years in prison.[27]

In response to this wide ranging problem affecting society generally, and sport organizations specifically, federal and state lawmakers have tried to come up with legislative solutions.

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20. Gil Fried, *Unsportsmanlike Contact, Strategies for Reducing Sexual Assaults in Youth Sports*, 6 J. LEGAL ASPECTS OF SPORT 155 (1996).

21. Nancie Katz, *Jail for Coach in Sex* Abuse, N.Y. DAILY NEWS, July 16, 2002, at p. 2.

22. *Id.*

23. *Ex-Coach Sentenced In Child Molestations,* RECORDNET.COM, Dec. 18, 2002, *at* http://www.recordnet.com/articlelink/121802/news/articles/121802-gn-8.php.

24. *Id.*

25. Queens County District Attorneys Office, *Press Release, Soccer Coach Sent To Prison For Up To 66 Years For Sexually Attacking Six Young Boys On His Team*, June 5, 2003, *at http://www.queensda.org/Press%20Releases/2003%20Press%20Release/06-June/6-05-2003.htm.*

26. *Id.*

27. *Id.*

PART II – FEDERAL AND STATE LEGISLATION DESIGNED TO PROTECT CHILDREN FROM SEX OFFENDERS

Part II examines recent federal legislative efforts in this area, which began in the 1990s with legislation that sought to better collect information and statistics on criminals who abuse children (through the National Child Protection Act and the Jacob Wetterling Act) and to compile that information into a federal database (created by the Pam Lychner Act) designed to track the whereabouts and movements of registered offenders throughout the United States. Subsequently, a federal pilot program was established with the passage of the PROTECT Act of 2003, whereby specified organizations can readily and inexpensively use the information collected via the earlier acts to screen employees and volunteers who work with children. The federal government will study the outcome of this pilot program to determine if, and to what extent, broader use of such screening methods by volunteer organizations is feasible.

This part also provides an overview of the widely varying methods by which states have implemented the federal mandates for registration of sex offenders.

A. Federal Law

1. National Child Protection Act

The National Child Protection Act of 1993 ("NCPA"), provides a method by which information on criminals who commit child abuse crimes can be collected in a "national criminal history background check system."[28] States are required to report such information to the Federal government[29] and the U.S. Attorney General uses it to compile annual statistical summaries of child abuse crimes.[30]

Beyond this reporting requirement, though, the NCPA is largely permissive. Under a 1998 amendment to the NCPA, called The Volunteers for

28. 42 U.S.C. § 5119(a) (West 1995). "National criminal history background check" means the FBI's criminal history record system, which is based on fingerprint identification or any other method of positive identification. *Id.* § 5119c(8).

29. *Id.* § 5119(a).

30. *Id.* § 5119(d). The names of victims and perpetrators are not revealed in these summaries. *Id.* For publications of the Attorney General pertaining to criminal statistics, see the website of the U.S. Department of Justice at http://www.usdoj.gov/05publications/05_3_a.html.

Children Act,[31] states may require "qualified entities"[32] to contact an "authorized agency"[33] of the state to request national background checks to determine the fitness of a "provider."[34] Where a state requires a national background check, the qualified entity requesting the check must submit a set of fingerprints and a detailed statement, signed by the potential provider, which includes, among other things, personal information and descriptions of any criminal convictions.[35]

Where a state requires a national background check on a volunteer provider, the fee for the search cannot exceed $36 (up to $18 to the state and up to $18 to the FBI).[36] Additionally, states that require non-profit organizations to conduct background checks must establish fees that "do not discourage volunteers from participating in child care programs."[37] To help in this regard, the NCPA made funds available to states to assist them in paying for all or part of the state's cost of conducting background searches of people employed by, or volunteering with, a "public, not-for-profit or voluntary qualified entity."[38] However, this funding was only authorized through 2002.[39]

Under this permissive scheme (and now without federal funding), the NCPA has not been effective in encouraging states to require national

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31. Pub. L. 105-251, 112 Stat 1870 (1998).

32. A "qualified entity" is a "business or organization, whether public, private, for-profit, not-for-profit, or voluntary, that provides care or care placement services, including a business or organization that licenses or certifies others to provide care or care placement services. . ." 42 U.S.C. § 5119c(10). "Care" is defined as "the provision of care, treatment, education, training, instruction, supervision or recreation to children, the elderly, or individuals with disabilities. . ." *Id.* § 5119c(5).

33. An "authorized agency is a "division or office of a State designated by a State to report, receive, or disseminate information under this subchapter." *Id.* § 5119c(5). Pursuant to Pub. L. 92-544, criminal background information cannot be provided to a private entity absent specific statutory direction. Act of October 25, 1972, Title II, § 201, 86 Stat. 1115. Therefore, under the NCPA, a private group requesting a national criminal background check must go through an authorized agency which will review the background information and determine whether the applicant is fit to care for children. *Id.*§ 5119a(b)(3)-(5).

34. *Id.* § 5119a(a)(1). "Provider" means a person employed by or volunteering, or one who seeks to be employed by or volunteer, with a qualified entity; one who owns or seeks to own a qualified entity; or one who may have or seeks to have unsupervised access to children for whom the qualified entity provides child care. *Id.* § 5119c(9).

35. *Id.* § 5119a(b)(1).

36. *Id.* § 5119a(b)(1) and (e). There is no maximum fee specified for an organization requesting a background check in a state that does not require it.

37. *Id.* § 5119a(e).

38. *Id.* § 5119b(b)(1)(E).

39. *Id.* § 5119b(b)(2).

background checks of volunteers working with children.[40] Most states do not require national background searches on volunteers and many do not even authorize private entities to obtain national criminal history checks on volunteers.[41]

Therefore it is left up to the volunteer organizations, most of which are not-for-profit, to determine: first, whether the state where they are located authorizes them to conduct national background searches;[42] and second, if so, whether the very real benefits of utilizing the checking system (protecting children) outweigh the very real costs of such in-depth screening.

Conducting fingerprint searches can cost anywhere from $6 to over $50 dollars per search, depending on the state.[43] Such costs can be prohibitive, particularly for organizations using large numbers of volunteers. They can also discourage volunteers if the costs of screening are passed through to them.

In addition to these financial costs, conducting fingerprint based background searches adds to the administrative burden of the organization requesting them. In some states, obtaining information from background checks can take many weeks, thus wreaking havoc on an organization's efforts to be adequately and safely staffed.[44] There are also the time costs associated with obtaining fingerprints and administering the screening program.[45]

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40. MENTOR: NATIONAL MENTORING PARTNERSHIP, SAFETYNET PILOT PROGRAM MANUAL 4-6 (August 14, 2003) *at* http://www.mentoring.org/safetynet/manual.pdf (manual of National Mentoring Partnership's participation in the Pilot Program on volunteer screening authorized by the PROTECT Act of 2003) (hereinafter "SafetyNET Manual"). *See also,* U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, GUIDELINES FOR SCREENING OF PERSONS WORKING WITH CHILDREN, THE ELDERLY, AND INDIVIDUALS WITH DISABILITIES IN NEED OF SUPPORT 8-9 (1998), *at* http://www.ncjrs.org/pdffiles/167248.pdf (hereinafter "Guidelines.")

41. *See* SafetyNET Manual, *supra* note 40, at 4-6; Mentor: National Mentoring Partnership, *President Signs PROTECT Act, Significant Step Forward for National Background Checks,* at http://www.mentoring.org/common/whats_new/whats_new.adp?Menu=nav_left_home.adp (May 8, 2003); Guidelines, *supra* note 40, at 9.

42. Under Pub. L. 92-544, if the state does not authorize these searches and designate an "authorized agency" that can accept the criminal history information from the FBI and make a fitness determination, volunteer organizations within that state cannot access the national criminal history background system. *See also* SafetyNET Manual, *supra* note 40, at 4-5.

43. According to a U.S. Department of Justice survey based on statistics gathered in 1999, fees for fingerprint-supported searches range from $6 in Arizona to up to $52 in California. U.S. DEPARTMENT OF JUSTICE: OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 1999 58-59, *at* http://www.ojp.usdoj.gov/bjs/pub/ascii/sschis99.txt (2000).

44. SafetyNET Manual, *supra* note 40, at 4-6.

45. *Id.* at 16. Fingerprinting at a local police department costs an average of $3 to $5 but can cost as much as $20.

In sum, many not-for-profit organizations, including sport organizations, are unable to implement national fingerprint-based background searching because the state in which they are located does not authorize such searches. Even where such searches are authorized, many not-for-profit groups are reluctant to implement them for fear that it will damage the organization financially and increase its administrative burdens. Organizations in states that permit national background searches, should seriously examine any prior decision not to conduct national fingerprint-based screening and try to find resources to cover the "costs." More funds should be made available, at the state and/or federal levels, to make national criminal background screening universally available and cost-effective for not-for-profit organizations using volunteers to serve children.

As discussed in detail below, despite that national criminal background checks are not yet universally accessible and inexpensive, state sex offender registries can be easily and cheaply accessed (often for no fee) in virtually all states. [46] Therefore, as part of a minimum basic screening program, sport organizations should check the names of all volunteers and employees against these registries.[47]

2. *The Wetterling Act*

State registration of sex offenders is mandated by the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 (the "Wetterling Act").[48] States that fail to comply with the Wetterling Act lose 10% of their federal law enforcement block grants, which funds are reallocated to states in compliance with the Act.[49]

There are two essential components to the legislation: the mandatory registration component and the notification component.

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46. U.S. DEPARTMENT OF JUSTICE: OFFICE OF JUSTICE PROGRAMS: BUREAU OF STATISTICS, SUMMARY OF STATE SEX OFFENDER REGISTRIES, 2001, *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ssor01.pdf (2002); *See also* Klaas Kids Foundation, *Sex Offender Registration & Community Notification Internet Access, available at* http://www.klaaskids.org/pg-legmeg2.htm (containing descriptions of sex offender registries in all 50 states) (last visited August 31, 2003).

47. Organizations that decide not to conduct fingerprint-based searches but want to do more than sex offender registry searches, should explore the possibility of doing name-based criminal history searches either through a state agency or through a private company that conducts such searches.

48. 42 U.S.C. § 14071 (2003). The Act is named for Jacob Wetterling who was abducted in 1989 by a masked gunman near his home in St. Joseph, MN. He was eleven years old at the time and has not been seen since. *See* Website for the Jacob Wetterling Foundation, *at* http://www.jwf.org/ (last visited August 31, 2003).

49. 42 U.S.C. § 14071(a)(1)(A).

a. Registration

Under the Wetterling Act, states must require anyone convicted of a criminal offense against a minor[50] or a sexually violent offense[51] to register their address with the state[52] for at least ten years.[53] States must require offenders with 2 or more prior convictions for registration-eligible offenses; those convicted of aggravated sexual abuse (as defined in 18 U.S.C. § 2241 or the state criminal code);[54] and sexually violent predators[55] to register their address with the state for the rest of their lives.[56] These are minimum requirements - states can choose to require registration for a broader range of offenses than is listed in the Wetterling Act.[57]

As a part of compliance with the Wetterling Act, the state must inform all offenders being released from prison of the duty of the offender to register his or her address with the state and to inform the state of any change of address,

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50. A criminal offense against a minor is defined as:

> any criminal offense in a range of offenses specified by State law which is comparable to or which exceeds the following range of offenses: (i) kidnapping of a minor, except by a parent; (ii) false imprisonment of a minor, except by a parent; (iii) criminal sexual conduct toward a minor; (iv) solicitation of a minor to engage in sexual conduct; (v) use of a minor in a sexual performance; (vi) solicitation of a minor to practice prostitution; (vii) any conduct that by its nature is a sexual offense against a minor; or (viii) an attempt to commit an offense described in any of clauses (i) through (iv), if the State - (I) makes such an attempt a criminal offense; and (II) chooses to include such an offense in those which are criminal offenses against a victim who is a minor for the purposes of this section.

Id. § 14071(a)(3)(A).

51. A "sexually violent offense" is defined as:

> any criminal offense in a range of offenses specified by State law which is comparable or which exceeds the range of offenses encompassed by aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2241 of title 18 or as described in the State criminal code) or an offense that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse (as described in such sections of title 18 or as described in the State criminal code).

Id. § 14071(a)(3)(B).

52. Even for registration-eligible convictions in another state, federal court or a court martial. *Id.* § 14071(b)(7). The state registry must also include registration information on nonresidents who work or attend school in the state. *Id.*

53. *Id.* § 14071(a)(1)(A).

54. *Id.* § 14072(a)(3)(B).

55. A "sexually violent predator" is defined as: "a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." *Id.* § 14071(a)(3)(C).

56. *Id.* § 14071(a)(6).

57. *Id.* §§ 14071(a)(2)(C) & 14071(a)(3)(A)-(B).

including a change to another state.[58] A registrant's address must be verified at least annually.[59] The state must also obtain a photograph of the registrant and the registrant's fingerprints.[60]

There are heightened registration requirements for sexually violent predators. In addition to the requirements above, the state must "obtain the name of the person, identifying factors, anticipated future residence, offense history, and documentation of any treatment received for the mental abnormality or personality disorder of the person."[61] Also, the address of any sexually violent predator must be verified every 90 days.[62]

States must promptly make registry information available to any law enforcement agency with jurisdiction where the person is expected to live (including in another state).[63] States must also make this information available to the FBI and participate in a national database of sex offenders, as established in the Lychner Act.[64]

In general then, the Wetterling Act places the responsibility on states to set up a registry of certain, statutorily-defined criminals.[65] However, in 2000, as part of the Campus Sex Crimes Prevention Act,[66] the Wetterling Act was amended to add a registration requirement which is largely the responsibility of the offender.[67] Under § 14071(j), a registered offender must notify the state of "each institution of higher education in that State at which the person is employed, carries on a vocation, or is a student. . ."[68] The offender must also notify the state of any change in the offender's employment or enrollment status at such institution.[69] Under this amendment, the state does still have the

58. *Id.* § 14071(b)(1)(i)-(iii). Changes of address within the state of registration must be provided promptly according to that state's law. *Id.* § 14071(b)(1)(ii). Changes of address to another state must be reported to the second state (and to the FBI) not more than 10 days after the establishment of a new residence. *Id.* § 14072(g)(3).

59. *Id.* § 14071(b)(3)(A).

60. *Id.* § 14071(b)(1)(iv).

61. *Id.* § 14071(b)(1)(B).

62. *Id.* § 14071(b)(3)(B).

63. *Id.* § 14071(b)(2)(A).

64. *Id.* §§ 14071(b)(2)(B) & (b)(5).

65. Though offenders who knowingly fail to register or keep their registration current are subject to criminal penalties. *Id.* § 14071(d).

66. Pub. L. 106-386, Div. B, Title VI, Oct. 28, 2000, 114 Stat. 1537.

67. 42 U.S.C. § 14071(j).

68. *Id.* § 14071(j)(1)(A)(i).

69. *Id.* § 14071(j)(1)(A)(ii).

responsibility to ensure that this information is made available to law enforcement agencies with jurisdiction in the location of the institution.[70]

b. Notice

The notice provision of the Wetterling Act, found at § 14071(e), provides for discretionary release of registry information "for any purpose permitted under state law."[71] Not surprisingly, given this broad language, the determination as to what discretionary information is made public varies widely by state.[72]

The Wetterling Act also provides for mandatory release of relevant information[73] from the registry where "necessary to protect the public concerning a specific person required to register. . ."[74] This mandatory notice provision was amended in 2003 (as a part of the Prosecutorial Remedies And Tools Against The Exploitation Of Children Today Act Of 2003 ("PROTECT Act"[75]) to "include the maintenance of an Internet site containing such information that is available to the public and instructions on the process for correcting information that a person alleges to be erroneous."[76] States have three years from the date of enactment (April 30, 2003) to comply with this internet-access amendment.[77]

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70. *Id.* § 14071(j)(2)(A).

71. *Id.* § 14071(e)(1).

72. Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, 64 Fed. Reg. 572 (issued January 5, 1999, amended Jan. 22, 1999) [hereinafter "Final Guidelines"].

73. "Relevant information" to be released cannot include the identity of a victim of an offense requiring registration. 42 U.S.C. § 14071(e)(2).

74. *Id.* This mandatory notice provision is also known as the federal Megan's Law, Final Guidelines, *supra* note 72, at 581; *See also,* U.S. DEPARTMENT OF JUSTICE: OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE STATISTICS, NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES vii-xii, *at* http://www.ojp.gov/bjs/pub/pdf/ncsor.pdf (April, 1998). Megan's Law is named for Megan Kanka who was raped and murdered by a convicted child molester who lived across the street from her New Jersey home. Klaas Kids Foundation, *supra* note 46.

75. Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 (PROTECT Act), P.L. 108-21, 117 Stat 650 (2003).

76. 42 U.S.C. § 14071(e)(2). Note also that under the Criminal Identification Technology Act, 42 U.S.C. § 14601, states are eligible to receive grants for establishing or upgrading criminal justice information systems and identification technologies.

77. Pub. L. 108-21.

3. The Lychner Act

The Pam Lychner[78] Sexual Offender Tracking and Identification Act of 1996 (the "Lychner Act"), created an FBI database to track the "whereabouts and movements" of anyone convicted of committing a criminal offense against a minor or a sexually violent offense; and sexually violent predators.[79] The national database contains information collected by the states as part of their Wetterling Act registration requirements.[80] The Lychner Act also provides for offenders to register directly with the FBI in the event any state is not in compliance with the Wetterling Act.[81] The requirements of this federal registration essentially mirror the minimum registration requirements of the Wetterling Act in terms of who must register, how long they must register and the requirement of verification of offenders' addresses.[82]

If the FBI is unable to verify the address of an offender - or if a state that has a registry in compliance with the Wetterling Act is unable to verify the address of an offender - the Lychner Act provides that the FBI shall classify the person as being in violation of the national database registration requirements, and shall "add the name of the person to the National Crime Information Center Wanted person file and create a wanted persons record: Provided, that an arrest warrant which meets the requirements for entry into the file is issued in connection with the violation."[83]

The Lychner Act also authorizes the FBI to release relevant information[84] about registered offenders when necessary to protect the public.[85]

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78. Pam Lychner, a real estate agent, was attacked as she prepared to show a vacant home to a prospective buyer. She narrowly escaped when her husband arrived on the scene. *See* Justice for All: A Criminal Justice Reform Organization, *In* Memory, *at* http://www.jfa.net/memory.html (last visited August 31, 2003).

79. 42 U.S.C. § 14072 (1996). "Criminal offense against a victim who is a minor," "sexually violent offense" and "sexually violent predator" carry the same definitions in the Lychner Act that they have in the Wetterling Act. *Id.* § 14071(a)(3)(A).

80. *Id.* § 14071(b)(2)(B).

81. *Id.* § 14072(c).

82. *Id.* §14072(b)-(e). However, the FBI is additionally responsible, in the event an offender moves to a different state, for notifying the state and local law enforcement officials of both states involved of the offender's new residence. *Id.* § 14072(g)(5).

83. *Id.* § 14072(g)(5)(C)(ii).

84. The identity of a victim of an offense requiring registration is not "relevant information." *Id.* § 14072(f)(2).

85. *Id.* § 14072(c) and (f).

4. PROTECT Act

The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (the "PROTECT Act") was enacted on April 30, 2003.[86] As a part of the PROTECT Act, the U.S. Attorney General established a pilot program allowing specified volunteer programs to obtain state and national criminal history background checks using state criminal history records and the FBI's Integrated Automated Fingerprint Identification system (the "Pilot Program").[87]

In addition, the PROTECT Act requires the Attorney General to conduct a feasibility study "for a system of background checks for employees and volunteers."[88] Such a study (discussed below) should yield useful information on how, and to what extent, a broad national system of criminal background checking could be made available to volunteer organizations, including sport organizations, and implemented in an efficient and cost-effective manner.

There are two parts of the Pilot Program: the State Pilot Program and the Child Safety Pilot Program.[89]

a. State Pilot Program

Under the State Pilot Program, the Attorney General designated three states to participate in an 18-month pilot.[90] Those states are Tennessee, Montana and Virginia.[91] Within those states, volunteer organizations which are part of the Boys and Girls Clubs of America, the National Mentoring Partnership, or the National Council on Youth Sports can request 10-fingerprint checks from the state in which they are located.[92]

Once the state receives the request from a participating volunteer organization, the state conducts a state criminal history check and requests a federal criminal history check through the FBI's fingerprint identification

86. PROTECT Act of 2003, P.L. 108-21.

87. Pilot Program for National Criminal History Background Checks and Feasibility Study, Pub. L. 108-21, § 108 [hereinafter "Pilot Program"].

88. Pilot Program, § 108(d).

89. *Id.* § 108(a)(2)-(3).

90. *Id.* § 108(a)(2)(A).

91. Safety Net Manual, *supra* note 40, at 12 (describing the procedures for National Mentoring Partnership organizations to participate in the Pilot Program).

92. Pilot Program, § 108(a)(2)(B).

system.[93] Information from the federal check is provided to the state or the National Center on Missing and Exploited Children (the "Center").[94]

The state must provide its criminal history record to the Attorney General within seven days of the volunteer organization's request.[95] The Attorney General then has seven business days after receiving the state's request to provide the criminal history records information to the state or the Center for determination, in compliance with the criteria established by the National Child Protection Act,[96] as to whether the volunteer is fit or unfit to provide care to children.[97]

The state is permitted to collect a fee for conducting its background search, which fee cannot exceed the actual cost of the search.[98] The Attorney General can also collect a fee, not to exceed eighteen dollars, to cover the cost of the FBI background check.[99]

The PROTECT Act authorizes funding for participating states, for fiscal years 2004 and 2005, "to establish and enhance finger print technology infrastructure of the participating State."[100]

b. Child Safety Pilot Program

The Attorney General also established a Child Safety Pilot Program which allows volunteer organizations that are part of the Boys and Girls Clubs of America, the National Mentoring Partnership, or the National Council on Youth Sports but which are not in one of the three states participating in the State Pilot Program to request 10-fingerprint checks.[101] This 18-month pilot

93. *Id.* § 108(a)(2)(C).

94. The Center is the "national resource center and clearinghouse", working in conjunction with the Department of Justice, the FBI, the Department of the Treasury, the Department of State, and other agencies to find missing children and prevent child victimization. 42 U.S.C. § 5771(5) (West 2003).

95. Pilot Program, § 108(a)(2)(F).

96. Under the NCPA, and pursuant to Pub. L. 92-544, criminal background information cannot be provided to a private entity absent specific statutory direction. Therefore, the criminal background information obtained from a national fingerprint search cannot go to the organization requesting it, but must be given to the Center (which is statutorily permitted to receive it) or an authorized agency of the state which makes a determination as to the fitness of the volunteer, and then forwards that determination to the organization.

97. Pilot Program, § 108(a)(2)(F).

98. *Id.* § 108(a)(2)(E).

99. *Id.* § 108(a)(4).

100. *Id.* § 108(c).

101. *Id.* § 108(a)(3)(A)-(B).

provides for the processing of 100,000 10-fingerprint check requests, split evenly among the three participating national volunteer organizations.[102]

In this program, the organizations make their requests directly to the Attorney General.[103] The request must include the volunteer's fingerprints and a statement completed and signed by the volunteer.[104] The statement must: (1) provide pertinent personal information about the volunteer including name, address, date of birth and a copy of a valid identifying document; (2) state whether the volunteer has a criminal record and if so, set out specifics of that record; (3) notify the volunteer that the Attorney General may conduct a criminal background check and that the volunteer, by his or her signature, consents to such check; (4) notify the volunteer that the organization may deny the volunteer access to children; and (5) notify the volunteer that he or she has the right to correct an erroneous record.[105]

Within 14 business days of its receipt of the volunteer organization's request, the Attorney General will provide the criminal history records to the Center.[106] The Center will then make its determination, in compliance with the National Child Protection Act, as to the fitness of the volunteer to care for children.[107] The Center will then convey this determination to the requesting organization.[108]

The Attorney General can collect a fee, not to exceed eighteen dollars, to cover the cost of the FBI check.[109]

As part of the Child Safety Pilot Program, the PROTECT ACT authorizes funding for the Center, as may be necessary to carry out this program, for fiscal years 2004 and 2005.[110]

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102. *Id.* § 108(a)(3)(A) and (C).

103. *Id.* § 108(a)(3)(A).

104. *Id.* § 108(a)(3)(E).

105. *Id.* § 108(a)(3)(E).

106. *Id.* § 108(a)(3)(F).

107. *Id.* § 108(a)(3)(G).

108. *Id.* § 108(a)(3)(G)(ii). The National Mentoring Partnerships organization estimates that, where a volunteer has *no* criminal history, the Center's determination will usually be completed within two weeks from the time the request is received by the federal government. SafetyNet Manual, *supra* note 40, at 16.

109. Pilot Program, § 108(a)(4). This does not cover the cost of fingerprinting the volunteer which can range from $3 to $20 and averages $3 to $5. SafetyNet Manual, *supra* note 40, at 16.

110. Pilot Program, § 108(c).

c. Feasibility Study

Within 180 days of the enactment (April 30, 2003) of the PROTECT Act, the Attorney General is required to conduct a "[f]easibility study for a system of background checks for employees and volunteers."[111] The study will examine, "to the extent discernible" a number of issues:

- the current state of fingerprint "capture and processing" by states and localities, including infrastructure and capacity, and time of processing;
- states' intentions as to participation in a national criminal background check system to provide information to qualified entities;
- how many volunteers, employees and others would require a fingerprint-based background check;
- what impact a national system of background checking would have on the FBI fingerprint identification process in terms of capacity and staffing;
- current fees charged by the FBI, states, local agencies and private companies for processing fingerprint and criminal checks;
- whether "model or best practice programs" exist that could be expanded and duplicated on the state level;
- the extent private companies are performing background checks and whether such companies could capture and transmit fingerprints and fitness determinations;
- cost of developing the technology and infrastructure necessary for a national fingerprint-based and other criminal background check system;
- the extent to which states participate in the background check procedures under the National Child Protection Act;
- the extent to which states give access to national criminal history checks to organizations serving children;
- the extent to which states allow volunteers to appeal adverse fitness determinations and what appeal procedures, if any, might be necessary at the Federal level;

111. *Id.* § 108(d).

- the implementation of the State Pilot Program and the Child Safety Pilot Program;
- privacy concerns regarding national criminal checks; and
- any other information the Department of Justice deems relevant. [112]

Based on its findings regarding the issues identified above, the Attorney General shall present an Interim Report to Congress "which may include recommendations for a pilot project to develop or improve programs to collect fingerprints and perform background checks on individuals that seek to volunteer with organizations that work with children, the elderly or the disabled."[113] This Interim Report shall be submitted no more than 180 days after enactment (April 30, 2003) of the PROTECT Act.[114]

Based on its findings regarding the Pilot Project, the Attorney General will submit a Final Report to Congress, no more than 60 days after completion of the Pilot Project.[115] This report will include recommendations, possibly including "a proposal for grants to the States to develop or improve programs to collect fingerprints and perform background checks on individuals that seek to volunteer with organizations that work with children, the elderly, or the disabled. . ."[116] The report may include recommendations for amending the National Child Protection Act and the Volunteers for Children Act "so that qualified entities can promptly and affordably conduct nationwide criminal history background checks on their employees and volunteers."[117]

Given the anticipated broad scope of the feasibility study and the Pilot Project, the subsequent Interim and Final Reports should provide a wealth of knowledge for volunteer organizations and states as they go forward. Hopefully, these reports will lead to universal access to the national criminal background checking system for organizations that use volunteers to serve children; and will lead to provision of funding by the states and/or federal government to make such access affordable to not-for-profit organizations that serve children. If this is accomplished, the study and reports will lead to increased safety for children and other victims of crime, a truly great accomplishment.

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112. *Id.* § 108(d)(1).
113. *Id.* § 108(d)(2).
114. *Id.* § 108(d)(2).
115. *Id.* § 108(d)(3).
116. *Id.* § 108(d)(3).
117. *Id.* § 108(d)(3).

B. State Legislation

Currently, all 50 states and the District of Columbia have legislation requiring the registration of certain statutorily defined sex offenders and requiring the release of at least some registry information to the public.[118] However, given the discretion allowed by the federal statutory scheme requiring such legislation, specific state requirements vary widely.[119] States have wide latitude in determining, using the Wetterling Act as a minimum guideline, which criminals must register;[120] which criminals present a risk to public safety and are therefore subject to community notification; and, where community notification is deemed appropriate, the extent, form and content of that notification.[121]

1. Registration

As noted above, the Wetterling Act is merely a minimum guideline for states when it comes to determining who must be listed on a state sex offender registry. Thus, the states requirements of registration vary quite a bit because of this discretion, because states sometimes criminalize different behavior, and because different states may even use different names to describe virtually the same crime.[122]

For example, in Alabama, all people convicted of the following crimes must register: first or second degree rape; first or second degree sodomy; sexual torture; first or second degree sexual abuse; enticing a child for immoral purposes; promoting prostitution; violation of the Alabama Child Pornography Act, kidnapping of a minor by a non parent; incest; and soliciting a child by computer for sexual purposes.[123]

In Arizona, the list of offenses which would require a person to register, while overlapping somewhat with Alabama requirements, is significantly

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118. U.S. DEPARTMENT OF JUSTICE, *supra* note 46, at 2; *See also*, Kimberly B. Wilkins, *Sex Offender Registration and Community Notification: Will These Laws Survive?* 37 U. RICH. L. REV. 1245 (2003).

119. Final Guidelines, 64 Fed. Reg. 572, 582; *See also* Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure,* 3 BUFF. CRIM. L.REV. 593, 596 (2000).

120. 42 U.S.C. §§ 14071(a)(2)(C) & 14071(a)(3)(A)-(B).

121. *Id.* §14071(e)

122. *See, e.g.*, Klaas Kids Foundation, *supra* note 46; Little League Online, *Local League Background Checks, available at,* http://www.littleleague.org/childprotect/map.htm (last visited August 31, 2003).

123. ALA. CODE 15-20-21 (2003).

longer, including: Unlawful imprisonment or kidnapping by a non-parent of a victim under age 18; sexual abuse of a victim under age eighteen; sexual conduct with a minor; sexual assault; sexual assault of a spouse; molestation of a child; continuous sexual abuse of a child; taking a child for the purpose of prostitution; child prostitution; commercial sexual exploitation of a minor; sexual exploitation of a minor; a second or subsequent violation of indecent exposure to a person under the age of fifteen; a second or subsequent violation of public sexual indecency to a minor under fifteen; a third or subsequent violation of indecent exposure; a third or subsequent violation of public sexual indecency; and luring a minor for sexual exploitation.[124]

Because of these wide variations, even broad generalizations are not easy to make regarding who must register in the different states. Such a determination can only be made by reference to that state's laws.[125]

2. Notice Generally

The Final Guidelines for the Jacob Wetterling Act (the "Final Guidelines") provide some guidance to states as to appropriate notification schemes.[126] The Final Guidelines identify three appropriate approaches to making information on registered offenders available to the public.[127]

The first approach involves assessing the risk of danger posed by individual offenders and requiring differing degrees of information released based on the degree of risk.[128] An example of this "compulsory"[129] approach would be where states authorize the use of registration information on "low-risk" offenders for law enforcement purposes only; provide notice additionally to "organizations with a particular safety interest (such as schools and other child care entities)" for "medium risk" offenders; and provide notice additionally to neighbors for "high risk" offenders.[130]

The second approach involves states making judgments about the risk of danger posed by different classes of offenders required to register and then subjecting all offenders within a class to the same notification requirements,

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124. ARIZ. REV. STAT. ANN. § 13-3821 (West 2003).

125. Klaas Kids Foundation, *supra* note 46; Little League Online, *supra* note 122.

126. Final Guidelines, 64 Fed. Reg. at 582.

127. *Id.*

128. *Id.*

129. Logan, *supra* note 119, at 602-603 (using the term "compulsory" to describe one approach states take to classify sex offenders for purposes of notification).

130. Final Guidelines, 64 Fed. Reg. at 582.

without making a determination as to the risk of any particular offender.[131] An example of this "discretionary"[132] approach would be a state subjecting all child molesters to stringent notification requirements based on the vulnerability of the victims of such offenders and the potential for recidivism among such offenders.[133]

A third approach is to make registry information available to the public on request.[134] This involves states making registration lists available for public inspection; or establishing a process by which members of the public can request and receive registration information.[135] Presumably, all states will ultimately provide information "on request" as they come into compliance with the recent Wetterling Act amendment requiring states to make registry information available on the internet.[136] Essentially, this third approach describes a method of providing access to registry information rather than a method of categorizing offenders.

State notification schemes generally follow either the compulsory approach or the discretionary approach set forth in the Final Guidelines.[137]

a. Compulsory Notification

As discussed above, one notification scheme used by states is the compulsory scheme. Under this scheme, states do not make determinations regarding the danger a particular offender poses to the public.[138] Rather, the state legislature makes a determination as to whether, and to what extent, certain classes of offenders are subject to notification.[139] Offenders then are subject to the notification scheme applicable to the class in which they fall, regardless of the threat a particular offender poses to society.[140]

131. *Id.*

132. Logan, *supra* note 119, at 602-603 (using the term "discretionary" to describe one approach states take to classify sex offenders for purposes of notification).

133. Final Guidelines, 64 Fed. Reg. at 582.

134. *Id.*

135. *Id.*

136. 42 U.S.C. § 14071(e)(2).

137. Logan, *supra* note 119, at 602-603.

138. *Id.* at 602-605

139. *Id.*

140. *Id.*

Nineteen states use this compulsory method of determining who is subject to notification.[141]

b. Discretionary Notification

Thirty-one states and the District of Columbia inject some level of discretion in deciding who is subject to community notification and what shape that notice will take.[142] Unsurprisingly, the processes used by the states within this category vary widely.[143] In nine states, the discretionary determination is made by a court.[144] In seven states, the determination is made by local law enforcement officials.[145] In the remaining states using a discretionary scheme, a non-law enforcement entity determines notification classifications.[146]

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141. ALA. CODE § 15-20-21 (2003); ALASKA STAT. § 12.63.010 et seq. (Michie 1999); CAL. PENAL CODE § 290 et seq. (West 1999); CONN. GEN. STAT. § 54-251 et seq. (2003); DEL. CODE ANN. tit. 11, § 4121(3) (2002); 730 ILL. COMP. STAT. 150/3 et seq. (West 2003); IND. CODE § 5-2-12-4 et seq. (2003); KAN. STAT. ANN. § 29-4902 et seq. (1999); MICH. COMP. LAWS ANN. § 28.722 et seq. (West 1999); MISS. CODE ANN. § 45- 33-1 et seq. (1999); MO. REV. STAT. § 589.400 et seq. (1999); N.H. REV. STAT. ANN. § 651-B:1 et seq. (1999); N.M. STAT. ANN. § 29-11A-2 et seq. (Michie 1999); OKLA. STAT. tit. 57, § 581 et seq. (1999); S.C. CODE ANN. § 23-3-410 et seq. (Law. Co-op. 1999); S.D. CODIFIED LAWS § 22-22-31 et seq. (Michie 1999); TENN. CODE ANN. § 40-39-102 et seq. (1997); UTAH CODE ANN. § 77-27-21.5 et seq. (1999); VA. CODE ANN. § 19.2-298.1 (Michie 1999).

142. Wikins, *supra* note 118, at 1250-1251.

143. Logan, *supra* note 119, at 606.

144. COLO. REV. STAT. §§ 16-11.7-103 & 18-3-414.5 (1999); GA. CODE ANN. § 42-1-12 (1999); FLA. STAT. ANN. § 775.21 (West 1998); IDAHO CODE §§ 18-8312 - 8321 (Michie 1999); LA. REV. STAT. ANN. § 542.1 (West 1999); MD. CODE ANN., CRIMES AND PUNISHMENTS § 792(a)(2) & (10) (1999); N.C. GEN. STAT. § 14-208.20 (1999); OHIO REV. CODE ANN. § 2950.09(B)(1) (Anderson 1999); W. VA. CODE §§ 61-8F-2a & 2b (1999).

145. ARIZ. REV. STAT. ANN. § 13-3825 (West 1999); HAW. REV. STAT. §§ 846E-1 - 846E-3 (1999); ME. REV. STAT. ANN. tit. 34-A §§ 11121 - 11144 (West Supp. 1999); NEB. REV. STAT. ANN. §§ 29-4005 & 29-4013 (Michie 1999); N.D. CENT. CODE § 12.1-32-15 (1999); WASH. REV. CODE ANN. § 4.24.550 (West 1999); WIS. STAT. ANN. §§ 301.45 & 301.46 (West 1999).

146. ARK. CODE ANN. § 12-12-1303 (Michie 1999) (department of corrections or the "Sex Offenders Assessment Committee" determines classifications); IOWA CODE ANN. § 692A.13A (West 1999) (one of three agencies provides assessment, depending on institutional status of offender); MASS. GEN. LAWS ch. 6, §§ 178K & 178L (1999) (sex offender registry board); MINN. STAT. ANN. § 244.052 (West 1999) ("end- of-confinement review committee" located in each state correctional and treatment facility); NEV. REV. STAT. ANN. §§ 179D.720, 179D.730 & 179D.7301 (Michie 1999); OR. REV. STAT. § 181.586 (1999) (Board of Parole and Post-Prison Supervision, Department of Corrections or "community corrections agency" determines if an offender is a "predatory sex offender"); R.I. GEN. LAWS § 11-37.1-12(C)(4) (1999) (parole board or in the case of sexually violent predators, and upon request of the district attorney, the courts); TEX. PENAL CODE ANN. § 62.03(a) (Vernon 1999) (risk assessment review committee or, in the case of probationers, the sentencing court); D.C. CODE ANN. § 24-1104(a) (1999) ("Sex Offender Registration Advisory Council").

Largely because of federal mandates, state sex offender registries are becoming more and more readily and inexpensively available to the public. The federal government has not been as active in assuring access for not-for-profit organizations, including sport organizations, to the national fingerprint-based background checking system. The result is that many organizations do not have access to the national background checking system, and even those with access often do not conduct such searches because they are expensive and administratively cumbersome. In time, the pilot programs and feasibility study authorized by the PROTECT Act of 2003 will hopefully shed light on how best the federal and state legislatures can find the resources to make searches inexpensively available (including through improvements in technology). However, until then, sport organizations need to carefully explore if and when they can conduct national background searches on employees and volunteers to protect the children they serve, and, in the process, protect their organizations from liability.[147] The next part of this article examines some national sport organizations to see how they are addressing this important issue.

PART III – SPORT ORGANIZATIONS SHOULD IMPLEMENT COMPREHENSIVE SCREENING PROGRAMS THAT INCLUDE CRIMINAL HISTORY BACKGROUND CHECKS

As state and federal lawmakers continue to improve access to state sex offender registries and move toward developing a national fingerprint-based criminal background check system, sport organizations are beginning to recognize the need to develop and conduct a comprehensive screening program. While the response is uneven, some national sport organizations are requiring affiliated members to conduct some form of criminal history background search when screening prospective employees and volunteers. Little League Baseball and Pop Warner are two organizations that require a criminal history background search as part of their screening program. The policies of these two sport organizations should serve as models for other organizations.

A. Screening Generally

In addition to the customary check of references, businesses have been screening prospective employees for some time now to verify degrees and

147. It should be noted, however, that under the NCPA, liability will not attach solely due to an organization's failure to conduct national criminal background searches.

confirm employment history.[148] In addition, more and more businesses are checking to see if applicants have a record of criminal convictions that would, among other things, indicate a proclivity to commit employee on employee assaults or attacks on third persons.[149] In positions where employees have close contact with children, elderly and the disabled, the need for such scrutiny is even more compelling.[150] Indeed, most states require teachers and day care workers to undergo background checks as a condition of their employment.[151] Likewise, many national sport organizations have been encouraging their members to implement screening policies that include criminal history background checks to protect the children in their programs.

Despite the passage of the Volunteers for Children Act[152] and the overwhelming evidence to suggest that children are at risk of being sexually assaulted, there does not appear to be any consistency in the way sport organizations have approached screening prospective volunteers and employees.[153] Many state and local sport organizations look to their national associations for guidance on how to screen applicants.[154] While some national organizations "recommend" screening programs be adopted, others take a step further and provide resources to facilitate the screening process.[155] However, these organizations generally leave it up to state and local agencies to decide whether or not to conduct criminal history background searches.

Within the past year, and as discussed in detail below, some sport organizations have taken steps at the national level to require mandatory background checks for everyone who has contact with children in their program. Some have recently required it as a condition of continued affiliation

148. Merry Mayer, *Background Checks in Focus*, 47 HRMAGAZINE 59 (2002).

149. *Id.*

150. *See generally*, Guidelines, *supra* note 40.

151. *See Id.* at 9.

152. This Act amended the NCPA to allow "qualified entities" access, through an authorized state agency, to the FBI's fingerprint-based background checking system. 42 U.S. C. § 5119a.

153. SafetyNET Manual, *supra* note 40, at 4-6 (discussing the lack of consistency because of the lack of federal funding).

154. *See, e.g.*, U.S. YOUTH SOCCER, KIDSAFE: A PROGRAM TO PROMOTE THE HEALTH, SAFETY AND PROTECTION OF SOCCER PLAYERS, *available at* http://www.usyouthsoccer.org/downloads/national_office/KIDSAFEfrompm65.pdf (last visited November 17, 2003). *See also* Little League Online, *Little League Child Protection Program*, *available at* http://www.littleleague.org/childprotect/index.htm (last visited November 17, 2003). Pop Warner, *Pop Warner Mandatory Background Checks*, *at* http://www.popwarner.com/admin/check.asp (last visited November 24, 2003).

155. The Attorney General, as a part of the feasibility study authorized by the PROTECT Act, will examine the effectiveness of using private companies to conduct background searches.

with the national organization. In many instances, the national organizations provide comprehensive risk management information, suggestions on how to access sex offender registries, and recommend companies specializing in pre-employment searches. Some organizations have aligned themselves with specific screening companies and arranged for screening services at a reduced fee for all members.

B. Screening Programs in Sport Organizations

The United States Youth Soccer Association (USYSA) encourages its affiliated members to conduct background searches.[156] USYSA's Kidsafe Program is a risk management program designed "to promote the health, safety and protection of its players."[157] The program is designed to "exclude from participation in its activities all persons who have been convicted of felonies, crimes of violence or crimes against persons."[158] USYSA suggests that all affiliate members develop written policies and question "all coaches, administrators and employees concerning convictions of felonies, for crimes of violence, or crimes against persons."[159] While USYSA recently contracted with ChoicePoint, a provider of pre-employment screening services, to conduct background checks at 80% below retail, it does not require all affiliated organizations to screen prospective volunteers and employees. [160]

Little League Baseball was one of the first sport organizations to encourage its members to conduct background checks. Its Child Protection Program (formed in 1997 as an education and awareness initiative) also focuses on helping its member leagues find the most effective and feasible ways to conduct background checks.[161] Recommended until the start of the 2003 season, Little League Baseball now requires that all member organizations conduct annual background checks of all employees and volunteers who have "repetitive access to, or contact with, players or teams," including managers, coaches, and Board members.[162] Each volunteer or

156. U.S. YOUTH SOCCER, *supra* note 154, 9.

157. *Id.* at 3.

158. *Id.*

159. *Id.* at 3-5.

160. *Id. See also* Press Release, U.S. Youth Soccer, *U.S. Youth Soccer To Offer Volunteer Screening*, *at* http://www.usyouthsoccer.org/scripts/runisa.dll?m2.66130:gp:262775.3049:15040+mediacenter/display+E+59954+N, July 23, 2003.

161. Little League Online, *supra* note 154.

162. *Id.*

employee consents to a background check as a condition of volunteering.[163] Every local league must complete proper background checks or risk sanctions, including loss of tournament privileges and suspension or termination of the league's charter.[164]

Pop Warner has instituted a similar program that will require all affiliated programs to conduct background checks of coaches and Board of Directors, whether they are paid employees or volunteers.[165] The new regulations require that names be checked against the sex offender registry of the state in which the applicant resides.[166] Once all background checks have been completed, an officer from each league must complete an affidavit confirming that the organization has conducted background checks as required and that confidentiality has been maintained.[167] To help with the financial burden associated with conducting background searches, Pop Warner contracted with Rapsheets.com, a pre-employment background screening provider, to conduct searches at $1.50 per name.[168]

PART IV – FAILURE TO SCREEN APPLICANTS MAY RESULT IN LAWSUITS FOR VICARIOUS LIABILITY AND NEGLIGENT HIRING

A number of jurists and commentators have examined whether an employer should be held liable when an employee[169] commits a sexual assault on a third person. Most of the literature tends to explore this issue in the context of vicarious liability and negligent hiring. The power and authority an employee has over the victim, especially a child, has also been considered, as well as what constitutes an adequate screening process to avoid liability. In most instances, the organizations considered are not sport organizations. However, the cases and commentaries that engage in this discussion in the context of related institutions, such as the Boy Scouts of America, are

163. *Id.* Little League Baseball, *Revised Little League Volunteer Application for 2003*, *available at* http://www.littleleague.org/childprotect/VolApp03.pdf (last visited November 17, 2003).

164. *Id.*

165. Pop Warner, *supra* note 154.

166. *Id.*

167. *Id. See* Pop Warner Little Scholars, Inc., *Confirmation Of Compliance With Background Checks*, *at* http://www.popwarner.com/admin/pdf/Affidavit.pdf (last visited November 24, 2003).

168. Pop Warner, *supra* note 154.

169. Whether someone is an employee, under either a theory of vicarious liability or negligent hiring, does not depend on whether the person is in a paid position. Rather, the determination is based on whether the employer exercises control over the employee. *See, e.g.*, Lear, *supra* note 2, at 150, 160-165.

instructive for sport organizations aiming to protect their children and to avoid liability.

A. Vicarious Liability

Vicarious liability is the legal theory that allows a plaintiff to hold an employer liable for the wrongful act of one of its employees. [170] However, liability will not be found pursuant to this doctrine unless the employee was acting within the scope of the employment. Vicarious liability has its origin in English common law that held the master responsible for the acts of his servant.[171] The modern justification for vicarious liability is founded pursuant to a policy consideration that recognizes that the employer is in the best position to absorb the risk and, therefore, has the incentive to control the employee.[172] While modern day courts universally apply the "scope of employment" standard, courts differ in their interpretation of what constitutes "scope of employment," especially in cases involving sexual assaults.[173]

Courts generally have held that criminal acts, including sexual assaults, fall outside the scope of employment pursuant to the "motivation to serve" test or the "outrageous conduct" test.[174] Under the "motivation to serve" test, sexual assaults are usually considered outside the scope of employment because such acts are done solely for the personal benefit of the employee and in no way to further the interests of the employer.[175] Cases are generally also dismissed pursuant to the "outrageous conduct" test because sexual assaults are considered shocking and unforeseeable.[176]

In certain circumstances, however, courts have held that an employee's sexual assault falls within the scope of employment even when not motivated by a purpose to serve the employer.[177] Some of these cases involve instances where the employee was a police officer or health care worker, held a position

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170. Vicarious liability is also known by its Latin name, *respondeat superior*.

171. Todd DeMitchell, *The Duty to Protect: Blackstone's Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L.J. 17, 28 (2002).

172. *Id.* (citing PROSSER AND KEETON ON THE LAW OF TORTS 500-01 (W. Page Keeton ed., 5th ed., 1984).

173. Rochelle Rubin Weber, Note: *"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 MINN. L. REV. 1513, 1514 (1992).

174. Lear, *supra* note 2, at 151-152. *See also*, Weber, *supra* note 173, at 1524-1525.

175. *See, e.g.*, Kladstrup v. Westfall Health Care Center, 701 N.Y.S.2d 808 (N.Y. S.C. 1999).

176. *Id.*

177. DeMitchell, *supra* note 171, at 30.

of authority, and wielded power over their victim.[178] Other cases suggest that schools should be held liable for the sexual assaults committed by teachers because of the power and authority a teacher has over students.[179]

Since coaches, administrators, and volunteers within sport organizations hold positions of power and authority over their athletes, sport organizations should be held vicariously liable for the sexual assaults committed upon children in their organizations. Indeed, one commentator has suggested that the coach/athlete relationship is even more powerful and subject to greater abuse than that of a teacher/student.[180] A recent court decision applying the "motivation to serve" test recognized the employment-related power and authority bestowed on volunteers within the sport setting and found a Little League organization vicariously liable for the sexual abuse of two minor children.[181]

In *Southport*, Kent Simmerman began volunteering with the Little League when his children began playing in 1979 and continued volunteering after his children had outgrown the organization.[182] By 1992, Simmerman held the positions of equipment manager, vice president, board member and member of the executive committee of the board of directors.[183] Simmerman was authorized to wear a Southport Little League baseball cap and a t-shirt indicating he was a Southport Little League Official.[184] In his capacity as equipment manager, Simmerman had access to an equipment shed and was in

178. *Id.* at 30-31, discussing Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. 1991) (court noted the authority and power police officer held over woman he sexually assaulted after demanding payment for not arresting her for drunk driving), & Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 345 (Alaska 1990) (counseling center could be held liable for the sexual misconduct of one of its employees even where the sexual relationship began after the therapy had been terminated). *But see* Juarez v. Boy Scouts of America, 81 Cal. App. 4th 377 (2000) (holding that the abuse of job created authority falls outside the scope of employment).

179. Harrington v. Louisiana State Bd. of Elementary & Secondary Educ., et al, 714 So. 2d 845 (La Ct. App. 1998) (reversing a trial court's dismissal of vicarious liability claim after trial in a case involving the sexual assault of a female student by a teacher and culinary arts program director that occurred in the driveway of a restaurant owner they had stopped to visit). *See also*, DeMitchell, *supra* note 171, at (citing the dissent in Gebser v. Lago Vista Indep. Sch. Dist, 524 U.S. 274, 299 (1998), "As a secondary school teacher, Waldrop exercised even greater authority and control over his students than employers and supervisors exercise over their employees. His gross misuse of that authority allowed him to abuse his young student's trust.")

180. Fried, *supra* note 20, at 155.

181. Southport Little League v. Vaughan, 734 N.E.2d 261 (Ind. Ct. App. 2000)

182. *Id.* at 266.

183. *Id.*

184. *Id.*

charge of fitting youths with baseball uniforms.[185] On separate occasions while dressed as a Little League official, Simmerman invited one boy, age 9, and another, age 11, to the equipment shed and molested them.[186]

Before addressing the scope of employment issue, the court decided whether a master-servant relationship existed in the context of a volunteer.[187] A servant is defined as an "agent employed by a master to perform service in his affairs whose physical condition in the performance of the service is controlled or is the subject to the right to control the master."[188] While it has been suggested that the "right of control" is often lacking in cases involving organizations like Boy Scouts of America, the *Southport* court held that Simmerman was an "employee" of the Little League.[189] Simmerman was under the direct supervision of the board of directors, subject to discharge by the organization, and both parties believed an employment relationship existed.[190]

Turning to the scope of employment issue, the court noted "an employee is acting within the scope of his employment when he is acting, at least in part, to further the interests of his employer."[191] In other words, "[l]iability will attach where an employee acts partially in self-interest but is still 'partially serving his employer's interests.'" [192] "The proper test is whether the employee's actions were at least for a time authorized by his employer."[193] Since Simmerman's acts of fitting the boys for uniforms were authorized, the case was not appropriate for summary judgment.

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185. *Id.*

186. *Southport Little League,* 734 N.E.2d at 267. No background search (interview, reference check, criminal background search) was ever done on Simmerman before or during his employment with Southport. See Id at n5. Simmerman had a prior arrest of indecent exposure in a nearby park, an area known for homosexual activity, which was dismissed after he completed a pre-trial diversion program. *Id.*

187. *Id.* at 268 n.6. The test is not actual control but rather "right of control" which depends on a number of factors: the right to discharge, mode of payment, supplying tools or equipment, belief by the parties in the existence of an employer-employee relationship; control over the means used in the results reached, length of employment, and establishment of work boundaries. *Id.*

188. *Id.*

189. *Id.* at 268 n.6.

190. *Id.*

191. *Southport Little League,* 734 N.E.2d at 268. *See also*, Interim Healthcare of Fort Wayne, Inc. v. Moyer, 746 N.E.2d 429 (Ind. Ct. App. 2001) (upholding a trial court's denial of a motion for summary judgment in a case involving a sexual assault by a home health aide charged with bathing and changing the victim and stating that a jury might conclude that the employee's acts were, at least for a time, authorized by his employer and motivated by his employer's interest).

192. *Id.* at 268.

193. *Id.*

The *Southport* court recognized the injustice of holding all sexual assaults motivated by personal interests of the employee to be outside the scope of employment:

> [a] blanket rule holding all sexual attacks outside the scope of employment as a matter of law because they satisfy the perpetrators' personal desires would draw an unprincipled distinction between such assaults and other types of crimes which employees may commit in response to other motivations, such as anger or financial pressure.[194]

The court also recognized the power and authority that Simmerman held over the young boys: "Youths who participated in Little League baseball were taught to respect adult authority, and it was clear to participating youths that Simmerman held a position of authority with the Little League."[195] "When an individual is clothed with authority by an organization in which youths are participating, such as Little League baseball, youths will typically comply with requests or commands of the adult individual in authority."[196]

While this case is one of the few to uphold a vicarious liability claim, it may indicate that increased litigation in the area of sexual assault is moving courts to reconsider holding employers liable for sexual assaults of their employees, especially when the employee holds a position of power and authority over children.

A player's willingness to comply with a coach's instructions is learned early. Children are told by parents and coaches at the outset of their sport involvement to do what the coaches ask. The competitive and recreational sports setting offers numerous opportunities for abuses to occur. In particular, tournaments that require competitive travel teams to make overnight stays in hotels present a means for abuses to be carried out. In these instances, coaches and administrators in positions of authority have access to players in hotel rooms. Courts may find that coaches and administrators that sexually assault players accompanying them on team trips are, at least in part, acting within the scope of their employment.

B. Negligent Hiring

Despite the suggestion that sport organizations should be held vicariously liable for sexual assaults on minor children that are made possible by virtue of an employee's job-created authority, the vast majority of courts are unwilling

194. *Id.* at 272-273.

195. *Id.* at 271.

196. *Id.* at 276.

to impose vicarious liability because the sexual assault is considered to be outside the scope of employment. Nevertheless, courts are much more willing to accept claims based on negligent hiring.[197] In these cases, scope of employment is not an issue because the conduct examined is not that of the employee, but rather that of the employer.[198] The focus is whether the organization exercised reasonable care during the selection of its employees.[199] As federal and state laws continue to make access to criminal records more affordable and less of an administrative burden, courts may decide that a reasonable investigation should include a criminal history background check. At the outset, a claim based on negligent hiring requires proof that the employer owed the victim a duty of care.[200]

As a general rule, an organization has no duty to protect a victim from the dangerous propensities of an employee.[201] However, courts recognize that "a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger."[202] Consequently, courts have found the existence of a special relationship in organizations that place adult caregivers in positions of authority over children.[203] Similarly, in the context of a sexual

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197. In addition to negligent hiring, causes of action based on negligent retention and negligent supervision have also received more favorable treatment by courts. *See Kladstrup*, 701 N.Y.S.2d at 809 ("where an employer cannot be held vicariously liable for its employee's torts, the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision. . .")

198. Mark Minuti, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 DEL. J. CORP. L. 501 (1988). *See also*, Dermott Sullivan, *Note: Employee Violence, Negligent Hiring, and Criminal Records Checks: New York's Need to Reevaluate its Priorities To Promote Public Safety*, 72 ST. JOHN'S L. REV. 581, 585 (1998) ("Negligent hiring. . .concerns the causal link between the employer's negligence in hiring an individual with known harmful propensities and the employee's subsequent violent behavior.").

199. Minuti, *supra* note 198, at 506.

200. Sullivan, *supra* note 198, at 586. In addition to proof of duty, plaintiff has the burden of proving six elements:: "(1) The employment relationship must have existed between the defendant and the tortfeasor; (2) the employee must have been unfit under the circumstances of employment; (3) the employer must have known or should have known through reasonable investigation that the employee was unfit; (4) the employee's tortuous act must have been the cause in fact of the plaintiff's injuries; (5) the negligent hiring must have been a proximate cause of the plaintiff's injuries; and (6) actual damage or harm must have resulted from the tortuous act." Lear at 159. *See also* Minuti, *supra* note 198, at 509.

201. Jessica Lynch, *Note: A Matter Of Trust: Institutional Employer Liability for Acts of Child Abuse by Employees*, 33 WILLIAM & MARY L. REV. 1295, 1301-1302 (1992) (noting that "institutions may owe the children in their care several duties, including a duty of reasonable care, a duty of special care, a public duty, a contractual duty to the child's family, and a statutory duty to report suspected abuse.")

202. *Juarez*, 81 Cal. App. 4th at 410.

203. Id.

assault on a minor child by a person employed or volunteering in a sport organization, a special relationship may exist between the organization and the child/victim.[204] According to one jurist,

> [t]he mission of youth organizations to educate children, the naivete of children, and the insidious tactics employed by child molesters dictate that the law recognize a special relationship between youth organizations and the members such that the youth organizations are required to exercise reasonable care to protect their members from the foreseeable conduct of third persons.[205]

Thus, in determining whether a duty is owed, the question becomes whether a sexual assault on a child is reasonably foreseeable.[206] "Foreseeability supports a duty only to the extent the foreseeability is reasonable."[207] Organizations that provide services and recruit children to engage with adult caregivers clearly recognize that child sexual assault is a reasonably foreseeable consequence of its programming.

As indicated above, a number of studies note that sexual assaults on children pose a serious national health concern. According to one commentator, sex abuse in scouting "is more common than accidental deaths and serious injuries combined."[208] Indeed, the topic was explored in a book entitled, *Scout's Honor*: *Sexual Abuse in America's Most Trusted Institution*.[209]

In addition, many of these organizations readily admit the potential exists for child sexual assaults and have instituted safety programs in an effort to

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Recognized special relationships include an operator of a preschool or daycare center to the children in attendance. . .; a school district to a mother whose child was sexually molested by another student because the school stood in loco parentis while the child was in attendance. . .; and the wife of a sexual offender to children she invited to play in her home because '[b]eing of tender years they were particularly vulnerable to this sort of misconduct and not fully able to protect themselves against it. . .

204. Williams v. Butler, 577 So. 2d 1113, 1116 (La. Ct. App. 1991) (finding that "when an employee is to be placed in a position of supervisory and/or disciplinary authority over children, the employer has a duty to properly screen the applicant (and continue to provide screening) to determine if the applicant has been convicted of a crime (or crimes) involving moral turpitutde").

205. *Id.*

206. *Juarez*, 81 Cal. App. 4th at 401. The existence of a duty depends on the following factors: "(1) the foreseeability of harm to the injured party; (2) the degree of certainty that the injured party suffered harm; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; (6) the extent of the burden to the defendant; and (7) the consequences to the community of imposing a duty to exercise care, with resulting potential liability. *Id.*

207. *Id.* at 402. "[A] duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." Id.

208. Lear, *supra* note 2, at 144.

209. *Juarez*, 81 Cal. App. 4th at 403.

prevent these occurrences. The Boy Scouts of America (BSA), for example, acknowledged as early as the 1980s that sexual abuse of children is a major social concern.[210] In response, the BSA created a "Youth Protection Program" which was established "to educate adult volunteers, parents and the scouts themselves to aid in the detection and prevention of sexual molestation by volunteers associated with scouting."[211] Toward that end, BSA has implemented a number of publications and educational programs designed to guard against abuse.[212]

In light of the number of reported cases and media exposure, sport organizations should recognize the foreseeability of a sexual assault occurring in their organization and adopt similar educational programs. Little League, Pop Warner, and others all have child protection programs which acknowledge that safety is an important goal of the program, that the possibility of a sexual assault occurring exists, and the need to guard against it with comprehensive screening programs.[213] Sport organizations that rely on children for their membership, acknowledge the possibility of a sexual assault occurring, and implement educational programs to prevent these problems from occurring, foresee the possibility that a sexual assault will occur.

Once a duty has been established, the inquiry turns to whether the duty has been breached and whether the breach was the proximate cause of the injury. Courts have found a breach of duty in cases where organizations have failed to conduct a background search.[214] Sport organizations may also breach a duty owed to children when they fail to exercise reasonable care during the hiring process. The breach occurs when the employer knew or should have known through reasonable investigation that the employer was unfit.[215] A reasonable

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210. *Id.* at 398.

211. *Id.*

212. *Id* at 405.

213. U.S. YOUTH SOCCER, *supra* note 154; Little League Online, *supra* note 154; Pop Warner, *supra* at note 154.

214. *Harrington*, 714 So. 2d at 851 (finding a breach of duty for failing to screen a professor, a convicted felon, who subsequently raped a student). *But see* K.I. v. New York City Bd. Of Educ., 256 A.D.2d 189, 191-192 (N.Y. App. Div. 1998) (case dismissed where failure to conduct a background check would not have revealed anything that would lead an organization to suspect person posed a danger to others).

215. T.W. v. City of New York, 729 N.Y.S.2d 96, 97-98 (N.Y. App. Div., 2001) (noting that "an employer may be liable for the negligent hiring and retention of an employee when it knew or should have known of the employee's propensity to commit injury").

investigation includes, at a minimum, screening the background of prospective employees and volunteers via application, interview, and reference checks.[216]

An applicant's failure to answer questions on the application should raise suspicion and suggests further inquiry is necessary.[217] Actual knowledge of a prospective employee's propensity to commit violence also mandates further investigation.[218] However, the addition of "other circumstances" surrounding the employment relationship gives rise to a heightened duty and should warrant an organization to go further and conduct a criminal history background check.[219] These circumstances include "the type and extent of contact between the applicant and the clients served, the degree of supervision over the applicant, the vulnerability of the clients, and the potential for serious harm created by the employment."[220]

An organization like the BSA, that places trust and authority in its volunteers clearly meets the criteria for more extensive screening.[221] Similarly, sport organizations clearly meet the criteria. As noted throughout, coaches are in a position of power and authority over athletes and may, at times, have unsupervised contact with children. Children in these organizations, ranging in age from 5-16, are particularly vulnerable given the authority and trust vested in the coach and the age of the athlete.[222] The potential for harm is significant in light of the long term effects these acts have on children.[223]

Courts may be reluctant to impose a duty where access to criminal records imposes a financial or administrative burden on the employer. "Any duty to perform criminal records screening hinges on the accessibility of those records."[224] As discussed at length above, state sex offender registries are readily and inexpensively available in virtually all states. Unfortunately, few

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216. *Kladstrup*, 701 NYS2d 808 (defendant's motion for summary judgment denied where the application was incomplete, including applicant's failure to answer the question of whether he had ever been convicted of a crime, even though a background check would not have shown a history of sexual assaults).

217. *Id.*

218. *See T.W.*, 729 N.Y.S.2d at 245 (jury could reasonably conclude employer had duty to conduct further investigation once it knew of prospective employee's conviction and that he would be working as a custodian in a community center for children).

219. Lear, *supra* note 2, at 172.

220. *Id.*

221. *Id.*

222. *Id.* at 173.

223. Putnam, *supra* note 15, at 272.

224. Lear, *supra* note 2, at 175.

sport organizations have access to the national criminal history checking system. As criminal history records become more accessible, courts will expect sport organizations to conduct criminal background searches of all employees and volunteers.

PART V – ELEMENTS OF A MODEL SCREENING PROGRAM

Sport organizations that serve children often rely on volunteers to carry out many, if not most, of the positions within those organizations, including many that involve extensive contact with children. These organizations have a moral duty to do all they can to protect the children in their charge. Beyond that, and as discussed in detail above, they also have a legal duty to, at the very least, exercise reasonable care in hiring, supervising and retaining employees and volunteers.

In order to meet that duty, sport organizations must screen potential employees and volunteers to identify those persons most likely to cause harm to children participating in the organization's programs. Exactly what will constitute reasonable screening will depend in part on the nature of the organization, the extent and nature of the involvement of the potential volunteers with children, and the resources (financial and administrative) of the organization.

A. Written Policy

What the sport organization determines is a reasonable course of screening should be part of a written, comprehensive and detailed policy designed to prevent physical and sexual abuse.[225] As some national organizations require members to conduct criminal background searches of employees and volunteers, these organizations are generally helpful in providing information on how to implement a screening program.[226] Any screening program should apply to all employees and volunteers that regularly have contact with children.

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225. Guidelines, *supra* note 40.

226. U.S. YOUTH SOCCER, *supra* note 154; Little League Online, *supra* note 154; Pop Warner, *supra* at note 154. For a comprehensive guide to screening, *see* PETER LINDBERG, ET AL, ABUSE AND SCREENING POLICIES: GUIDELINES FOR ADMINISTRATORS (2nd Ed., 2000) *available at* http://www.usahockey.com/usa_hockey/main/home/abuse_screen_policy/.

B. Basic Level Screening

At a minimum, persons interested in working or volunteering with a sport organization that serves children should be screened at a basic level.[227] A basic level screening program includes a comprehensive application form with a signed waiver, a personal interview designed to reveal information relative to the applicant's past employment or volunteer experience, as well as any other indicators of potential behavior problems, and reference checks of past employers and personal contacts.[228]

A basic level screening should also include checking the name of the volunteer against the sex offender registry of the state in which the organization is located. Checking these registries has become easier and less expensive over time with most states' registries being available for free over the internet.[229]

C. Criminal Background Checking

Sport organizations serving children should examine the feasibility of obtaining state criminal background checks on all applicants for volunteer and employment positions. Charges by the state for searches vary and some private companies can provide state criminal background searching information for a very reasonable fee. Where state criminal background checks are available at such low costs, an organization should be prepared to include such searching as part of its basic screening.

Sport organizations should also explore the feasibility of having national fingerprint-based background checks conducted on all volunteer and employee applicants. At this time, such searches are not accessible in all states. Organizations should check accessibility in the state in which they are located. Where available, fingerprint searches cost from $6 to $52 plus the cost of fingerprinting. If an organization's budget allows for this expenditure, they should be conducting these types of searches. They are far superior to state background checks in that there is no chance of misidentification because they are based on fingerprints (some state searches are based on name/social security number). Also, the national search covers crimes committed in all states where a state search only includes crimes committed in that state.

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227. Guidelines, *supra* note 40.

228. *Id.*

229. By 2006, all state registries should be available over the internet.

If the cost and accessibility of national fingerprint searches present obstacles that an organization cannot overcome, the organization should still revisit this issue annually. This issue is currently being examined on a broad scale by the federal government and recommendations and, possibly funding, will likely follow.

D. Administering a Screening Program

In administering a screening program, one person from the organization should be responsible for receiving applications and submitting names and biographical information for background searches. Applicants should not be allowed to begin employment or volunteer duties until the results of the background search are returned to the organization and the applicant is not considered to be a danger to children. Results of background searches should be kept confidential. In the event that a background search reveals a disqualifying conviction, the applicant should be notified in writing of his/her dismissal, and that he/she has a right to appeal the decision.[230] The appeal process should allow the applicant the opportunity to come challenge the dismissal before three board members.

Organizations that proceed with conducting state criminal background checks should give notice to prospective volunteers that such checks will be conducted. In application for employment or volunteer positions, each person should be required to provide biographical information,[231] state whether they have ever been convicted of a crime involving sexual abuse, and consent to a criminal background search. Applicants should be informed that supplying false or incomplete information and/or refusing to submit to a criminal background search may disqualify the applicant. Applicants should sign and date the application, certifying that the information provided is true and correct and waiving, releasing and discharging the organization, its officers, employees, volunteers from any and all liability.

E. Other Precautions and Training

Finally, because even with the most comprehensive screening program in place, it is possible that a sexual predator (particularly one with no criminal

230. Ideally, persons should not be employed or allowed to volunteer until the background search is completed. In the event that the volunteer/employee has started his/her duties, he/she should be notified and dismissed immediately.

231. A volunteer application form should provide information regarding the applicant's full name, address, home and work telephone number, date of birth, social security number, driver's license number, and any previous addresses from another state.

background) will ultimately be hired to work or volunteer in an organization that serves children, other precautions must be followed. The amount of one-on-one contact between volunteers and children should be eliminated where unnecessary, or at least minimized and observed. Moreover, screening assessments should be updated on an annual basis.

Additionally, all volunteers and employees should receive training on how to identify victims and perpetrators of child abuse so that in the tragic event that a child becomes the victim of a crime while participating in a sports and recreation organization, other volunteers and employees can act quickly to stop the offense, seek appropriate intervention and direct the victim to appropriate treatment. Child participants should also receive age-appropriate training on how to identify inappropriate behavior and to whom they should report such behavior.

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