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Sheldon Kennedy and a Canadian Tragedy Revisited

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Sheldon Kennedy and a Canadian Tragedy Revisited: A Comparative Look at U.S. and Canadian Jurisprudence on Youth Sports Organizations' Civil Liability for Child Sexual Exploitation

ABSTRACT

National Hockey League player Sheldon Kennedy's 1997 revelation that his award-winning junior hockey coach had molested him for years created a national outcry in Canada. It resulted in the appointment of a special commission and declarations from the United States and Canada that this must never happen again. However, Kennedy was not alone; child sexual exploitation occurs at the hands of youth coaches across geographic and class boundaries and across individual and team sports.

Youth sports organizations, including schools, have approached the human and legal issues presented by child sexual exploitation in numerous ways. This Note analyzes the differences between—and strengths and weaknesses of—U.S. and Canadian courts' respective treatment of these organizations' actions both before and after sexual abuse is discovered. It also examines the degree to which youth sports organizations in both nations have acted to prevent future problems, specifically as compared to the recommendations of the commission formed in response to Kennedy's story. The Author concludes the Canadian judicial standard for youth sports organizations' liability ultimately is superior to the standard employed by U.S. courts.

TABLE OF CONTENTS

I. SHELDON KENNEDY'S STORY

A. *A Young Athlete's Predicament*

In 1982, when Sheldon Kennedy was thirteen years old, he left his rural home in Elkhorn, Manitoba, and traveled nearly two hundred miles to attend a hockey school near Winnipeg.[1] One of his instructors at the camp was Graham James,[2] who one day would be named *The Hockey News*' Man of the Year.[3] During the school year, Kennedy played bantam hockey in Elkhorn, and his junior hockey rights were held by a team sixty-five miles away in Brandon, Manitoba.[4] James coached another junior team, the Winnipeg Warriors, and in 1982 James arranged to have Kennedy's junior rights traded to the Warriors.[5] After the trade, James invited Kennedy to Winnipeg for a visit.[6] The teenager did not get along well with his father, and he was excited to get out of the house for a few days.[7] During that visit, and through 1989, when Kennedy was drafted by the Detroit Red Wings of the National Hockey League (NHL), James maintained control of the teenager's hockey career and molested Kennedy several times per week.[8] James continued to sexually assault Kennedy as often as possible through 1994.[9]

For Kennedy, there was no easy way out of this existence. Canadian junior hockey is the pre-eminent feeder system for the NHL, as Canadian universities do not offer hockey scholarships, and the junior season is viewed as the closest parallel to an NHL season.[10] Therefore, Canadian youth players see the junior leagues as their best route to the NHL.[11] James controlled Kennedy throughout his junior hockey career, first having him traded to the Winnipeg team and then to a higher-level junior team in Moose Jaw, Saskatchewan (more than two hundred miles in the other direction from Kennedy's hometown), after the Warriors moved there.[12] As Kennedy recalled

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1. Alan Adams, *NHLer Tells of Horror of Sex Abuse*, TORONTO STAR, Jan. 6, 1997, at A1.
2. *Id.*
3. James won the award in 1989. *Falling Down: The Greatest Downfalls in Canadian Sports History*, http://www.cbc.ca/sports/columns/top10/fallingdown.html (last visited July 18, 2006).
4. Adams, *supra* note 1.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. Tom Weir, *Junior Hockey Faces Age Old Question*, USA TODAY, May 5, 2005, at 3C.
11. *See id.* (comparing Canadian junior hockey leagues to the NHL).
12. Adams, *supra* note 1.

the experience, James "kept me with him all the time, on all the trips. It was like we were married. It was unbelievable."[13] "He is the door you will never get through to your dreams unless you run into it."[14]

Kennedy could not elude James's reach and, at the same time, continue to pursue his dream of one day reaching the NHL. Kennedy realized his family would force him to quit his team (and, in essence, quit competitive junior hockey) if they learned of the abuse, and he was not eager to reveal a homosexual relationship—coerced or not—to his adolescent hockey teammates.[15] Sadly, Kennedy himself summed up best why he did not reveal to anyone what was happening: "You tell your mom and she makes you come home. You tell your friends and they will just portray you as a gay guy and nothing will come of it. It is just a very scary thing."[16]

Although Kennedy was a highly regarded junior player,[17] his NHL career did not live up to expectations—he "bounced around between the NHL and [the minor leagues] for . . . seven seasons, with Detroit, Calgary, and Boston"[18] and gained a reputation around professional hockey as a hard drinker and loose cannon.[19] Such problems were the outward symptoms of deep-rooted emotional troubles: Kennedy described feeling "mixed up mentally" and "brutal" throughout his NHL career, and he considered suicide "many times."[20] Finally, in 1996 Kennedy confided in his wife, the police, and a psychiatrist.[21] James accepted a plea bargain and was sentenced to three and one-half years in prison.[22]

B. *The Revelation and its Aftershocks*

Kennedy's revelation stunned and mortified the world of Canadian junior hockey and Canada as a whole.[23] Within days of the

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13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Kennedy was a key member of Canada's 1988 World Junior Championship team, which defeated the Soviet Union in Moscow for the gold medal. His Canadian teammates in that tournament included such future NHL All-Stars as Joe Sakic, Mark Recchi, Theo Fleury, and Trevor Linden. *See* 1988 IIHF World Junior Championship Team, National Junior (Under-20) Team, Team Canada Final Statistics, http://www.hockeycanada.ca/1/9/3/7/index1.shtml (last visited Sept. 24, 2006).
18. Adams, *supra* note 1.
19. *Id.*
20. *Id.*
21. *Id.*
22. *26: Graham James Sex Scandal*, Nov. 30, 2004, http://www.tsn.ca/20/news_story/?ID=106465.
23. GORDON I. KIRKE, QC, PLAYERS FIRST: A REPORT COMMISSIONED BY THE CHL 1 (1997), *available at* www.canoe.ca/PlayersFirst/home.html.

story going public, the Canadian Hockey League (CHL) issued a press release declaring, "[I]t is both humane and imperative for the best interests of the league and its players" that the CHL do everything p ssible to ensure such a tragedy will never happen again.[24] To that nd, in January 1997, the CHL "commissioned the Players First Report . . . to confront the issues of harassment and abuse within the CHL."[25] The CHL hired prominent Canadian attorney Gordon Kirke[26] to prepare the report.[27]

In a front-page story the *Toronto Star* declared, "If there is one legacy to emerge from Kennedy's experience, it is that hockey must come to grips with the vulnerability of its players, and that it has next to nothing in place to help abused kids."[28] In the same story, Kennedy himself noted his desire to "heighten awareness."[29] His story "opened the nation's eyes to the pervasiveness of the traditionally taboo issue of sexual abuse and exploitation of young people . . . [because few] would have believed that such an insidious and destructive crime could have infiltrated the CHL, an institution imbued with Canadian tradition and pride."[30]

The aftershocks of Kennedy's revelation were felt in the United States, too. *New York Times* sportswriter George Vecsey wondered, in light of Kennedy's story, "Whom do you trust? Every athlete, every parent, must ask this question."[31] Vecsey noted that youth sports only exist because of contributions from untold numbers of volunteer and low-paid coaches, and concluded, "These good people are going to find children and parents looking at them a little more carefully, but if the scrutiny can avoid anybody suffering like Sheldon Kennedy, it will be worth it."[32]

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24. Press Release, Canadian Hockey League, CHL Commissions Gorden [sic] Kirke to Develop "Players First" Report (Jan. 21, 1997), *available at* http://www.chl.ca/CHLNews9600/jan21_kirke.html [hereinafter Players First Report].

25. KIRKE, *supra* note 23, at 1.

26. Kirke has been called "the dean of Canadian sports lawyers." George Gross, *Sports Law is a Game Kirke Dominates*, TORONTO SUN, Dec. 10, 1995, at SP5. He has represented Major League Baseball, the NHL Players Association, and stars such as the NHL's Eric Lindros and World Wrestling Entertainment's Bret "The Hitman" Hart. *Id.*

27. Players First Report, *supra* note 24.

28. Adams, *supra* note 1.

29. *Id.*

30. KIRKE, *supra* note 23, at 1.

31. George Vecsey, *Questions for Parents of Athletes*, N.Y. TIMES, Jan. 10, 1997, at B9.

32. *Id.*

II. PURPOSE OF THIS NOTE

In January 1997, hope was high that a new chapter had begun in preventing child sexual abuse. The secret was out. No longer would youth sports organizations in Canada or the United States allow sexual predators to use positions of trust to prey on innocent children. Although Sheldon Kennedy had suffered, his courage in coming forward "provided a major step" toward preventing similar tragedies in the future.[33]

This Note revisits the optimism that was so apparent in 1997. Graham James's conviction and Sheldon Kennedy's admission that he was the victim of years of molestation at the hands of his coach surely should have served as a wake-up call to youth sports organizations in Canada and the United States.

This Note also analyzes the treatment of the problem by the Canadian judicial system, specifically as compared with the U.S. legal system's treatment of the same issue. Can one learn from the other? Or have both nations failed to address the problem effectively?

Additionally, in the context of U.S. and Canadian courts' treatment of youth sports organizations whose coaches or representatives sexually exploit child participants, the following questions must be asked: In the nearly ten years since this revelation, what, if anything, have these youth sports organizations done? Importantly, do they continue to expose themselves to civil liability resulting from this problem? This Note addresses both of these questions, and suggests how the current approaches to the problem of holding these organizations civilly liable for the actions of their employees and volunteers should be improved.

III. BACKGROUND

A. *Youth Sports in the Twenty-First Century*

Three observations about youth sports may be made without much debate: countless children are playing, numerous people donate their time, and most in the community believe participation will help a child develop into a good person. A recent study indicates that "an estimated 38 million youngsters in the United States participate in some type of sport. . . . They are coached by millions of volunteers."[34]

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33. KIRKE, *supra* note 23, at 3.

34. The 2001 study was performed by the National Council of Youth Sports. Sandra Stokley, *Fingerprints on the Ballfield*, THE PRESS-ENTERPRISE, Dec. 23, 2004, at B03.

One Canadian hockey parent's reason for encouraging his son's participation is representative of a common belief: "If your sons are involved in sports, they don't have time to get into trouble. . . . Keep them busy, and they have a chance to contribute to society and not become a burden on the system."[35] A professional in the field of children's studies has stated that participation in youth sports yields benefits including "learning responsibility, increased self-confidence, positive self-image, learning teamwork, and learning good sportsmanship."[36] Similarly, one youth sports organization advertises that its mission is "to foster the physical, mental and emotional growth and development of America's youth through the sport of soccer."[37]

These beliefs and observations bring into focus the importance of this Note: parents are told youth sports will benefit their children, and millions of children participate. Therefore, if a danger exists in youth sports, parents may be unaware, and millions of children will be at risk. When a problem does occur, who is legally liable? For youth sports organizations, this is literally a multi-million dollar question.

B. *The Elite Level of Youth Sports*

In reality, young athletes take part in sports for reasons far beyond "keep[ing] busy"[38] or "learning teamwork [and] good sportsmanship."[39] Three dominant motivations among U.S. and Canadian athletes and their families for participation are: (1) gaining an athletic scholarship at a National Collegiate Athletic Association (NCAA) Division I school, (2) winning a medal at the Olympic Games and all of its accompanying accoutrements, and (3) a professional athletic career and the perceived economic windfall and fame that accompany such a career.[40]

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35. Stephen Cannella, *The Secret Agent*, SPORTS ILLUSTRATED, May 3, 2004, at 19.

36. ROBERT J. SHOOP, SEXUAL EXPLOITATION IN SCHOOLS: HOW TO SPOT IT AND STOP IT 29–30 (2004).

37. U.S. Youth Soccer, What is US Youth Soccer, Jan. 1, 2004, http://www.usyouthsoccer.org/ndex.php?s=&url_channel_id=3&url_subchannel_id=&url_article_id=214&change_well_id=2.

38. Cannella, *supra* note 35.

39. SHOOP, *supra* note 36, at 29–30.

40. *See, e.g.*, WILLIAM L. FIBKINS, INNOCENCE DENIED: A GUIDE TO PREVENTING SEXUAL MISCONDUCT BY TEACHERS AND COACHES 61 (2006); Maureen O'Hagan and Christine Willmsen, *Unregulated Private Coaching Ripe for Abuse*, SEATTLE TIMES, Dec. 17, 2003, at A1; JOAN RYAN, LITTLE GIRLS IN PRETTY BOXES: THE MAKING AND BREAKING OF ELITE GYMNASTS & FIGURE SKATERS 8, 13, 57–58, 79–80 (2d ed. 2000); Adams, *supra* note 1; Weir, *supra* note 10.

In the United States, "a spot with a Division I team . . . represent[s] the highest achievement for many student athletes."[41] One female basketball player described an athletic scholarship as "the key to your future."[42] Young players join teams with intensive schedules in pursuit of this goal, at times traveling to games and tournaments "out of town . . . often staying overnight."[43] In Canada, boys often "leave home in order to play hockey in distant towns as a means of furthering their hockey prospects."[44]

Families in both countries make similar sacrifices in hopes of reaching the Olympics. One couple moved out of its house and rented an apartment in another city to be closer to a more elite gymnastics program for its ten-year-old daughter.[45] A mother of a thirteen-year-old gymnast commuted more than 120 miles six days per week for two years, and then moved with her daughter (leaving her husband and son behind) and worked two jobs to support her daughter's career.[46] Of course, financial sacrifices accompany the personal sacrifices: parents "invest tens of thousands of dollars . . . sometimes hundreds of thousands," for a child who "might only have one shot" at Olympic glory.[47]

Not surprisingly, parents' investments in their children's participation in youth sports can bring with them parents' dreams for *themselves*—not simply for their offspring. Parents' motives can be of the vicarious living variety: one parent's "own dream" was to "be the mother of an Olympian, riding the buses through the streets of Barcelona with other mothers of Olympians, sitting together in the arena in their red, white and blue clothing."[48] These dreams may also be of a more base, financial vein, transforming from hopes of happiness and success for one's child into visions of "appearance fees . . . paying off mom and dad's home equity loans and trading in the Toyota for a Mercedes."[49]

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41. FIBKINS, *supra* note 40, at 61.
42. *Id.* at 66.
43. SHOOP, *supra* note 36, at 32.
44. Danielle Deak, Note, *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. SPORT L. 171, 174 (1999) (citation omitted).
45. RYAN, *supra* note 40, at 19.
46. *Id.* at 19–20.
47. *Id.* at 8.
48. *Id.* at 79–80.
49. *Id.* at 13.

C. *The Elite Youth Sports Coach*

In the intense, goal-driven world of elite youth sports, coaches enjoy "star status"[50] for two major reasons: (1) their role as a means to the end of the child's success, and (2) the positive attention their teams bring to their communities.

Both children and parents know that the guiding hand of a superior coach can be the vehicle to translate their dreams to reality—whether those dreams involve a scholarship, a professional career, or a spot on an Olympic team. Often a coach convinces children or parents that athletes will not earn a scholarship unless he is their coach.[51] Beyond scholarships, a coach's assistance or recommendation boosts an athlete's chances for college admission.[52]

Elite coaches at schools and private clubs also gain status beyond the individual child or family, stemming from the excitement and reflective glory in which others bask. "They bring winning teams to the community, putting the community and its schools on the front page of area newspapers and television stations . . . and serv[e] as a draw to bring new parents and their athletic children into the community."[53] They assume roles as "politically connected . . . community icons"[54] and gain power "akin to a small-town mayor."[55] Because of this celebrity and influence, "[d]oors closed to others . . . open to them and their athletes."[56] When their success is great enough at club teams and even within school systems, these coaches can grow to become "beyond reproach . . . their own bosses and supervisors."[57]

D. *Child Sexual Exploitation*

1. Victims

To place the issue of child sex offenders in youth sports in the proper context, one first must understand the nature and extent of the general problem of child sexual exploitation. According to one study, approximately 90,000 children in the United States were

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50. FIBKINS, *supra* note 40, at 56.

51. *See, e.g.*, FIBKINS, *supra* note 40, at 65–66; Bob Cohn, *Crossing the Line*, THE WASHINGTON TIMES, June 18, 2003, at C1; Robin Finn, *Growth in Women's Sports Stirs Harassment Issue*, N.Y. TIMES, Mar. 7, 1999, at 1.

52. FIBKINS, *supra* note 40, at 56.

53. *Id.*

54. *Id.* at 60.

55. *Id.*

56. *Id.*

57. *Id.* at 56.

sexually abused in 2003 alone.[58] The problem strikes across geographic and socio-economic boundaries,[59] and nearly all victims are familiar with their perpetrators.[60] The children most vulnerable to victimization are those with the fewest resources.[61] One Canadian author points out that among sexually abused boys, "[t]he father [often] is absent, indifferent, or violent. The boy feels the absence in his life of a masculine figure who is attentive and gratifying, and . . . the aggressor can profit from" this feeling.[62] Sadly, "[s]ome boys went so far as to say they would have done anything at all just to be loved."[63]

The molestation discussed here does not consist of mere groping and fondling, not to trivialize these other crimes. Instead, the three most common sexual acts experienced by boys are "anal penetration of the boy, fellatio of the boy, and fellatio of the perpetrator"; these three acts also commonly are viewed as the most serious forms of sexual assault on boys.[64] Furthermore, "the mean act [or] modal act experienced by boys is coercive receptive rectal intercourse."[65] The abuse suffered by girls is equally physically invasive, frequently involving sexual intercourse.[66]

Despite the seriousness of the abuse, the average molestation victim fails to report it.[67] One analysis found that police only discover 3% of all cases.[68] Boys are even less likely to disclose sexual abuse than girls,[69] and research has found lack of reporting by up to 99% of abused boys.[70] Children's reasons for failure to come forward vary

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58. U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, CHILD MALTREATMENT 2003, at 58 (2003), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm03/cm2003.pdf (last visited Sept. 24, 2006).

59. *See, e.g.*, MICHEL DORAIS, DON'T TELL – THE SEXUAL ABUSE OF BOYS 42 (Isabel D. Meyer trans., 2002).

60. *See, e.g.*, JOSEF SPIEGEL, SEXUAL ABUSE OF MALES: THE SAM MODEL OF THEORY & PRACTICE 14 (2003); Jane Ellen Stevens, *Myths Cover Up Further Tragedies in Episodes of Child Molestation*, April 3, 2005, *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=%20/c/a/2005/04/03/INGN4C224F1.DTL&%20hw=Myths+cover+up+further+tragedies&sn=003&sc=664.

61. DORAIS, *supra* note 59, at 160.

62. *Id.* at 43.

63. *Id.*

64. SPIEGEL, *supra* note 60, at 46.

65. *Id.*

66. *See id.*

67. SPIEGEL, *supra* note 60, at 52; The Leadership Council on Child Abuse and Interpersonal Violence, Eight Common Myths About Child Sexual Abuse, http://www.leadershipcouncil.org/1/res/csa_myths.html (last visited Sept. 24, 2006); *see also* SHOOP, *supra* note 36, at 32 (stating that the average aggressor molests 120 times before being caught).

68. Eight Common Myths, *supra* note 67.

69. *Id.*

70. SPIEGEL, *supra* note 60, at 52.

widely: they include fear of angering their parents,[71] embarrassment at being "duped,"[72] "fear of disbelief,"[73] and concern about backlash from accusing the aggressor.[74] Boys, specifically, "fear being perceived as gay, . . . 'feminine,' . . . [or] abnormal or deviant."[75] They worry about accusations that they "accepted . . . or provoked contact in the first place, or . . . enjoyed it."[76] Additionally, because an erection or ejaculation can be a physiological response to molestation, boys maintain tremendous guilt and trepidation that perhaps these perceptions contain some truth.[77]

These concerns are not wholly without merit. When a child does report sexual abuse, the family often refuses to believe it, and children recant their stories more often when they do not receive support from their families.[78] With boys, many parents lose track of the true issue; they worry more about their son's sexual orientation or whether the molestation will cause him to "become" gay.[79]

Molestation has long-ranging harmful effects on all of society, as its injuries are not confined to the victim's immediate harm. In school, effects include "difficulty concentrating, a significant and abrupt decline in grades, [and] behavioral problems."[80] Adolescent male victims—when compared to non-victims—display increased aggression, anger, and "disregard for familial, social, and legal rules and policies."[81] Victims may continue to encounter problems through their adult lives, including drug and alcohol abuse, eating disorders, and depression.[82] Even suicide rates increase dramatically among child sexual assault victims.[83] Finally—and perhaps most germane to the topic at hand—a U.S. Bureau of Justice analysis found that "22% of imprisoned child sex offenders reported having been sexually abused during childhood."[84]

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71. William Nack & Don Yaeger, *Every Parent's Nightmare*, SPORTS ILLUSTRATED, Sept. 13, 1999, at 40.
72. *Id.*
73. SPIEGEL, *supra* note 60, at 52.
74. *Id.*
75. *Id.*
76. DORAIS, *supra* note 59, at 17–18.
77. *Id.* at 17.
78. SPIEGEL, *supra* note 60, at 52.
79. *Id.* at 53.
80. *Id.* at 84.
81. *Id.* at 93.
82. Michael Gibbons & Dana Campbell, *Liability of Recreation and Competitive Sport Organizations for Sexual Assaults on Children by Administrators, Coaches and Volunteers*, 13 J. LEGAL ASPECTS OF SPORT 185, 189 (2003).
83. SPIEGEL, *supra* note 60, at 52.
84. Stevens, *supra* note 60.

2. Perpetrators

The typical aggressor in molestation cases is not the oft-portrayed, monster-like social outcast. Most "are white males who have average to high I.Q.'s and extremely good verbal and interpersonal skills."[85] Most are not married, and they are generally known to their victims. Even abusers of boys are nearly universally heterosexual.[86] This seeming anomaly is understood when considering the following facts: abusers view their acts as a form of "sexual . . . initiat[ion]," and "it is not the homosexual nature of the act that arouses the abusers . . . but the power relationship that surrounds the sexual abuse."[87]

Another myth is that the molester employs violence to achieve the assault; instead, almost all aggressors use a tactic known as "grooming." This is done by gradually building a friendship with the victim and playing games with an increasing level of physical contact.[88] As the relationship grows, the perpetrator "coerce[s] in a stepwise manner, carefully and subtly testing [the child's] reaction to increasing levels of sexualized talk [and] sexual materials."[89] When sexual discussion slowly intensifies, the physical contact accordingly "begin[s] with nonsexual parts of the body before progressing to the genital area."[90] The physical and sexual grooming is often accompanied by gifts and bribes.[91] The end result of this grooming process is the illusion—often held by both the aggressor and the victim—that the child, in a sense, has consented.[92] "He did not say no, for example, when the adult massaged his back."[93] The illusion created by grooming serves two purposes: the offender feels less culpable[94] and the victim views himself as at least partially

85. Nack and Yaeger, *supra* note 71, at 40.

86. DORAIS, *supra* note 59, at 64; SPIEGEL, *supra* note 60, at 38.

87. DORAIS, *supra* note 59, at 64.

88. Stevens, *supra* note 60.

89. SPIEGEL, *supra* note 60, at 43.

90. DORAIS, *supra* note 59, at 44.

91. Gifts may include the "introduc[tion] . . . to pornography, drugs, and alcohol." Such "gifts" serve multiple roles: they make the victim more receptive or susceptible to sexual contact, burden the victim with a feeling of complicity for accepting the gifts, and create another bar to disclosure: the child would have to admit using drugs or alcohol, an obvious violation of rules and/or laws, and as a "rule-breaker" or criminal, becomes less credible. SPIEGEL, *supra* note 60, at 35.

92. DORAIS, *supra* note 59, at 44; SPIEGEL, *supra* note 60, at 44.

93. DORAIS, *supra* note 59, at 44.

94. While it strikes the average person as unfathomable that the perpetrator could lack a feeling of responsibility, this is enabled by "his or her inability to recognize, let alone empathize with, a child's distress upon subjection to [sexual abuse] and the harm generated by the sexually abusive relationship." SPIEGEL, *supra* note 60, at 45.

responsible. With this belief, the child is much less likely to report the abuse.[95]

3. Confluence of Youth Sports and Perpetrators of Child Sexual Abuse

The worlds of youth sports and child sexual abusers come together in a very simple fashion: perpetrators view sports as a direct route to children, and they enter youth sports as coaches or volunteers. One U.S. expert noted,

> [S]ports provide the perfect opportunity for adults to sexually exploit children. Coaches are placed on a pedestal by parents and children. They work closely with youngsters, often away from other adults. In some cases they travel out of town together, often staying overnight. Parents have assumed that their child will be protected because there are other children around.[96]

An ex-police officer and youth sports volunteer put it more bluntly, calling youth sports "a ready-made cesspool for pedophiles."[97]

The draw of coaching youth sports is the perpetrators' ability to "locate and isolate children by gaining supervision of them."[98] Supervision is exactly what many parents are eager to surrender, especially during the hours after school has ended when parents are still at work.[99] Isolation can be as simple as providing a child with a ride home from a practice or game.[100] To the aggressor, the logic is obvious: children are constantly warned not to accept a ride from a stranger, but how many are instructed not to get into a car with their soccer coach?

Abusers serving as coaches have all the tools necessary to employ the tactics discussed above: access to weed out the most vulnerable children and time to groom their victims. In selecting victims, coaches "seek out students who . . . need adult attention, can be intimidated by threats, are less likely to be believed, and in the end are easy marks and low risks."[101] Interestingly, coaches generally groom the child's parents as well as the child.[102] In so doing, one offender ensured his mark's parents knew he abstained from alcohol and drugs and held himself up as a role model for their

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95. DORAIS, *supra* note 59, at 64; SPIEGEL, *supra* note 60, at 44.
96. SHOOP, *supra* note 36, at 32.
97. Nack and Yaeger, *supra* note 71.
98. SPIEGEL, *supra* note 60, at 35.
99. Nack and Yaeger, *supra* note 71.
100. SPIEGEL, *supra* note 60, at 35.
101. FIBKINS, *supra* note 40, at 80.
102. Maureen O'Hagan and Christine Willmsen, *supra* note 40.

child; eventually, they trusted him to drive their son to and from games.[103]

4. The Elite Coach's Power Fosters An Environment for Sexual Exploitation to Occur

As discussed above, children and parents involved in competitive youth sports often view their coach as the conduit between them and their goal of college admission, an athletic scholarship, a professional career, or the Olympics. If and when the coach sexually abuses a player, the coach's influence "allows a coach to get players to do things they would not otherwise agree to do."[104] One victim kept quiet due to her need for her coach's recommendation to a college program: "I knew my parents couldn't afford to send me to school for four years. I went along with the relationship" with the coach.[105] Another girl, age thirteen, continued to have sexual intercourse with her tennis coach because, in her mother's words, "She thought it would be the end of her tennis career if she told anybody. . . . He [her coach] always told her she'd never make it without him."[106]

Athletes' parents can also play a role in enabling the sexual exploitation through their kowtowing to the coach. One observer noted that the girls on an elite gymnastics squad "held the spots every girl wanted—*and every parent too.*"[107] One of those parents later confessed, "[Y]ou become so involved in it you just really can't see the whole picture. You're only seeing what you want to see."[108] Some have gone so far as to accuse parents of "serv[ing] their kids on a platter" and point to parents' egos as enabling coaches' sexually exploitative behavior.[109] Even when their egos are not the problem, parents' naïveté may lead to the same result. For instance, the parents of the aforementioned thirteen-year-old tennis player merely believed their daughter's coach was extremely interested in her tennis career, and they tragically opened their home to him.[110]

The coach's power is not the only reason children fear accusing him. A girl who revealed that her popular basketball and softball coach had victimized her was accused of "exaggerating" the incident

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103. SHOOP, *supra* note 36, at 30. This coach even disguised his isolation of the child by providing transportation for several other children on the team. However, he picked the boy up first and dropped him off last, giving him the time alone necessary to molest the boy. *Id.*

104. Gibbons & Campbell, *supra* note 82, at 190.

105. FIBKINS, *supra* note 40, at 75.

106. Finn, *supra* note 51, at 1.1.

107. RYAN, *supra* note 40, at 21 (emphasis added).

108. *Id.* at 22.

109. O'Hagan and Willmsen, *supra* note 40, at A1.

110. Finn, *supra* note 51.

by her teammates, who then ostracized her.[111] Another victim feared coming forward would cause her parents to view themselves as "bad parents" or cause others to see her parents that way.[112]

5. Opportunity and Existence of Child Sexual Exploitation by Coaches

Child sexual exploitation by coaches may occur—and has occurred—in virtually every competitive sport one can imagine. Victims can be found in team sports such as Little League baseball,[113] softball,[114] basketball,[115] volleyball,[116] and even water polo.[117] Likewise, coaches have taken the same liberties with their players in individual sports ranging from gymnastics,[118] to figure skating,[119] tennis,[120] and cycling.[121]

Crimes of sexual exploitation are not confined to any one geographic region, gender, or economic class, nor are they limited to any sport or type of sport. Instead, the circumstances are in place for a predatory coach to molest a player wherever children are chaperoned by a lone coach while traveling or living away from home, wherever coaches provide transportation to or from home for a single athlete, wherever potential volunteers and coaches are not screened or regulated, and wherever parents' dreams for their children's athletic prowess prevent them from noticing or acting on warning signs.

E. *The Players First Report*

As discussed previously, the CHL commissioned Gordon Kirke with great fanfare to draft the Players First Report. In the Report, Kirke left no doubt as to the overwhelming reason he undertook the task: he named Sheldon Kennedy as the project's inspiration and declared that Kennedy's courage in going public was both a "rude awakening" and a "major step" in fighting child sexual

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111. FIBKINS, *supra* note 40, at 58.
112. O'Hagan and Willmsen, *supra* note 40, at A1.
113. Nack and Yaeger, *supra* note 71.
114. Deak, *supra* note 44, at 182.
115. FIBKINS, *supra* note 40, at 65.
116. *See* King v. Conroe Indep. Sch. Dist., No. Civ.A. H-03-1295, 2005 WL 1667803 (S.D. Tex. July 15, 2005).
117. Cohn, *supra* note 51, at C1.
118. RYAN, *supra* note 40, at 169.
119. *Id.*
120. Finn, *supra* note 51, at 1.1.
121. Deak, *supra* note 44, at 181.

exploitation.[122] Kirke described the problem as pervasive—despite the secrecy normally surrounding it—and lamented that it had sullied the CHL, an organization "imbued with Canadian tradition and pride."[123]

Kirke's mandate was to assist the CHL itself—not youth organizations in general—so his conclusions were drawn according to that league's specific needs.[124] The Report aimed to get the league out in front of the problem, and it predicted that by following its recommendations, "the CHL will be among those in the vanguard of what will hopefully be a wave throughout society."[125] Most importantly, it reminded readers that it was not a one-stop proposal, but a "work in progress" that its author expected to lead to a newer, safer environment for children.[126] Because of the Report's fairly generalized recommendations, its suggestions for the CHL may be, with caution, adapted to similar issues facing other competitive youth sports organizations.

The Report first recommended the CHL implement a confidential screening procedure for applicants for both paid and volunteer positions by using multiple reference checks, various law enforcement background checks, and if possible, checks of names against those listed on a "Child Abuse Registry."[127] It also advised requiring all applicants to consent to these background checks; the checks would not invade applicants' privacy as long as the organization allowed applicants to decline the procedure and withdraw their applications.[128] With official reports in hand, as opposed to possible rumors or innuendo, the League would have a valid basis on which to deny an application.[129] Kirke wisely noted that screening must not be used as a crutch, because it could not be expected to discover all predators or prevent all harassment. But screening could serve as a strong deterrent to those who had been caught before.[130]

Kirke next advocated the creation of anonymous mid-season and post-season evaluation of coaches and other organization officials by

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122. KIRKE, *supra* note 23, at 1, 3.
123. *Id.* at 1.
124. *Id.* at 1–2.
125. *Id.* at 2.
126. *Id.* at 2–3.
127. *Id.* at 3–6. Kirke advocates background checks through local police; a national database (the Canadian Police Information Centre, which held data on all convicted sex offenders); and an international database (the Automated Canadian-United States Police Information Exchange System, or ACUPIES).
128. *Id.* at 4.
129. *Id.*
130. *Id.* at 3. To reinforce the point, Kirke mentions germanely that Graham James himself would not have been flagged by such a check. *Id.* at 5.

children and parents.[131] Through this process, any pattern of complaints will surface sooner, rather than only after a victim musters the courage to publicly accuse the predatory coach (which could be numerous victims and years later).

Finally, the Report recommended the establishment of a mandatory training program on the topic of sexual harassment, which would educate both adolescent athletes and CHL employees and coaches.[132] In conjunction with this program, seminars were recommended on "lifestyle issues designed to promote self-esteem and respect for others."[133] The training was aimed at helping players understand the balance of power between themselves and those in positions of authority or trust, helping them recognize potentially harmful situations, and providing them with resources for dealing with potential problems.[134] Kirke believed this awareness would reduce the chances of harassment and exploitation by "diffus[ing] the power imbalance that poses the greatest threat to players."[135]

Along with his affirmative recommendations, Kirke also criticized those who sought to hold the CHL draft responsible for past child exploitation in the League.[136] He opined that the draft can exacerbate sexual exploitation of athletes only in a situation "without a framework of prevention education and preventative measures."[137] Because the Report envisioned the CHL creating such a framework, it advocated protection of the players through prevention education,[138] as opposed to the more unrealistic notion of hiding children from any possible harms.

IV. ANALYSIS

With the Players First Report in mind, this Note explores and compares treatment of the problem of child sexual exploitation by coaches in the United States and in Canada. Two areas are examined:

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131. *Id.* at 6.
132. *Id.* at 7.
133. *Id.* at 7–8.
134. *Id.* at 8.
135. *Id.*
136. *Id.* at 7. The CHL's three leagues each conduct an entry draft in which prospective players' junior hockey rights are "drafted" by teams, much in the same way that professional sports leagues hold drafts. This is done to maintain a competitive balance among teams within each league. Because a player's rights can be drafted by a team outside of his hometown, players commonly move away from home and live with a host family. *Id.* at 2, 7; Anthony DePalma, *Sex Abuse Jolts Canada's Revered Pastime*, N.Y. TIMES, Jan. 16, 1997, at A10; Vecsey, *supra* note 31, at B9.
137. *Id.*
138. *Id.*

the manner in which each nation's legal system addresses the issue and the ways in which each country's youth sports organizations have reacted. In doing so, this Note first attempts to discern any differences between the two systems and then seeks to determine which approach—if either— appears to be more effective.

A. *Jurisprudence in the United States*

Two different sets of standards apply to civil liability in the United States: one for public schools and another for private youth sports organizations.

1. Public Schools in the United States

U.S. law views coaches employed by public schools in the same manner in which it views any other teachers who work for schools.[139] In other words, liability on the part of school districts for actions of coaches is no different from liability for acts committed by any other district employee.[140] Therefore, school district liability for coaches' behavior can be gleaned through analysis of jurisprudence involving civil liability stemming from teacher misconduct—not only misconduct by a coach specifically. Generally, "[c]ivil suits surrounding teacher sexual misconduct episodes tend to center on specific issues . . . includ[ing]: sexual harassment of students, negligent hiring, negligent supervision, constitutional violation for denial of civil rights, the right to safety and liberty, [and] equal protection under the law."[141]

While this appears to be a long list of lawsuit classifications, nearly all actionable claims against school districts in the United States stemming from their employees' sexual exploitation of their students can be placed into one of three categories: (1) claims under § 1983, (2) claims under Title IX, or (3) tort actions alleging some form of negligence (such as negligent hiring, negligent retention, and negligent supervision of the employee).[142]

Generally, courts refuse to accept the premise that school districts are vicariously liable for the actions of their employees, because sexual assault of students is so far outside the "scope of employment."[143] Vicarious liability may fail under one of two separate tests used in various jurisdictions: the "motivation to serve" test,

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139. SHOOP, *supra* note 36, at 32.

140. *Id.*

141. MARY ANN MANOS, RUMORS, LIES, AND WHISPERS: CLASSROOM "CRUSH" OR CAREER CATASTROPHE? 83 (2004).

142. *Id.* at 85–87

143. Gibbons & Campbell, *supra* note 82, at 215–16.

under which sexual abuse is found to be perpetrated for the employee's personal gain and not in furtherance of the goals of the school district, and the "outrageous conduct" test, under which the sexual exploitation is viewed as so extreme and unforeseeable that the district cannot be held accountable.[144]

One common claim resulting from sexual abuse in public schools is the allegation that the school violated the student's civil rights under 42 U.S.C. § 1983, which creates a federal cause of action for an individual who was deprived of his civil rights by one acting under color of law.[145] The basic logic of the claim is obvious: as a school district employee, the teacher or coach works under state authority. However, the cause of action is not without boundaries; the U.S. Supreme Court clearly established that respondeat superior[146] is not available for victims to recover under § 1983.[147] To establish a colorable claim under § 1983, the victim must demonstrate he possessed a federal right (here, a personal liberty interest) which the employee violated.[148] Once the assault has been established, the more difficult challenge is to tie the district to the employee's violation.

One federal appellate circuit explained, "[T]he right to be free from sexual abuse at the hands of a public school teacher is clearly protected by the Due Process Clause of the Fourteenth Amendment."[149] Thus, "a schoolchild's right to personal security and to bodily integrity manifestly embraces the right to be free from sexual abuse at the hands of a public school employee."[150] Therefore, establishing a § 1983 claim against the coach himself is not difficult; the key for most victims is proving the school to be liable as well (among other reasons, because the school district nearly universally

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144. *Id.* at 212.

145. The applicable portion of the statute reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C.A. § 1983 (2006).

146. Respondeat Superior is "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. — Also termed *master-servant rule*." BLACK'S LAW DICTIONARY 1338 (8th ed. 2004).

147. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

148. Doe v. Claiborne County, 103 F.3d 495, 505–07 (6th Cir. 1996).

149. *Id.* at 506.

150. *Id.*

has more money than has the coach to pay out a monetary judgment). The Sixth Circuit Court of Appeals in *Doe v. Claiborne County* delineated a four-part standard (an "inaction theory")[151] for a common claim in this area:

> To state a municipal liability claim under an "inaction theory," [the victim] must establish:
>
> (1) the existence of a clear and persistent pattern of sexual abuse by school employees;
>
> (2) notice or constructive notice on the part of the School Board;
>
> (3) the School Board's tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and
>
> (4) that the School Board's custom was the "moving force" or direct causal link in the constitutional deprivation.[152]

This standard is attainable in some, but far from all, situations, even where undisputed sexual exploitation is involved. For instance, one court failed to find a school district liable for a teacher and elementary school basketball coach who molested three team members during an overnight trip to raise money for a summer basketball camp.[153] Several people informed the principal, both before and after the teacher was hired, that they suspected him of pedophilia.[154] Regardless, the court ruled the camp—which was advertised at the elementary school and held at the high school—was not a school-sponsored activity, and thus, the district could not be liable for the coach's actions under § 1983.[155]

Another case involved a teacher who rubbed a female student's stomach in the school hallway and made sexually suggestive remarks to her.[156] Here, the court examined the claim under a separate due process doctrine: that some official acts "may not occur regardless of the procedural safeguards accompanying them," and which creates a colorable claim if the act "'shocks the conscience' of the court."[157] In this case, the court deemed that the teacher's behavior was "deplorable" and "wholly inappropriate," but "simply [was] not of the outrageous and shocking character that is required for a substantive due process violation."[158]

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151. This particular standard is used as an example both for its relative clarity and due to the fact that it has been adopted by other courts in more recent cases. *See, e.g.*, Craig v. Lima City Sch. Bd. of Educ., 384 F.Supp.2d 1136, 1148 (N.D. Ohio 2005).

152. *Claiborne County*, 103 F.3d at 508.

153. D.T. v. Indep. Sch. Dist. No. 16 of Pawnee County, 894 F.2d 1176, 1194 (10th Cir. 1990).

154. *Id.* at 1179–83.

155. *Id.* at 1190–92.

156. Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 726 (6th Cir. 1996).

157. *Id.* at 724 (citations omitted).

158, *Id.* at 726.

In contrast, an example of a successful § 1983 claim in the face of school employee sexual abuse contains noteworthy differences. In *Stoneking v. Bradford Area School District*, a school band director sexually assaulted a student throughout her high school career, at times in the band room and on school-sponsored band trips.[159] In this case, the court allowed the action against both the instructor and the school district.[160] It was significant to the claimant's success that the sexual abuse occurred *on school grounds or during a school-sponsored trip* (on which the band teacher presumably was assigned to serve as a chaperone). Conversely, the unsuccessful victims discussed above were either assaulted during non-school events or faced a lesser degree of harassment.

The other common federal claim in cases of sexual assault in public schools arises under Title IX of the Education Amendments Act of 1972.[161] In 1992, the U.S. Supreme Court held that damages may be awarded in actions brought to enforce Title IX.[162] The standard for sexual abuse suits under Title IX requires the plaintiff to show that a supervisor of the offending school employee had *actual notice* of the discrimination,[163] but responded with *deliberate indifference*.[164] Under this strict standard, even unsuccessful responses by school authorities to notice of sexual abuse, if reasonable, allow the school district to avoid liability to the victim.[165]

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159. 882 F.2d 720, 722 (3d Cir. 1989).

160. *Id.* at 781.

161. 20 U.S.C.A. §§ 1681(a),(c) (2006). The applicable portions of the statute read as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .
>
> 20 U.S.C.A. § 1681(a);
>
> For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education . . . .
>
> 20 U.S.C.A. § 1681(c).

162. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992).

163. For Title IX purposes, the sexual exploitation of the student is deemed "discrimination"; the use of this seemingly euphemistic nomenclature is not intended to discount or ignore the serious invasiveness of the abuse.

164. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998). "Deliberate indifference" has become the key standard in Title IX cases involving school sexual abuse and harassment, and later cases credit *Gebser* with introducing the standard as it exists today. *See, e.g.*, Davis *ex rel.* LaShonda D. v. Monroe County Bd. of Educ., 526 U.S. 629, 661 (1999) (Kennedy, J., dissenting); King v. Conroe Indep. Sch. Dist., No. Civ.A. H-03-1295, 2005 WL 1667803 (S.D. Tex. July 15, 2005), at *4.

165. *King*, 2005 WL 1667803, at *4 (citing Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380, 384 (5th Cir. 2000).

For example, in *King v. Conroe Independent School District*, an assistant principal and principal heard rumors about a school coach having an "inappropriate relationship" with a student.[166] The administrators met with the coach, inquired about the rumor (which the coach denied), and warned her to act professionally at all times.[167] The court found this response quite reasonable.[168] Therefore, although the coach continued to abuse the student after the meeting, the court held that the plaintiff victim failed to raise an issue of fact as to the school district's Title IX liability and granted the school district's motion for summary judgment.[169]

While *Claiborne County* concerned a § 1983 claim, it also makes an important point that could apply to both § 1983 claims and Title IX claims involving a deliberate indifference standard. It states, "'Deliberate indifference' in this context does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference to sexual abuse."[170]

2. Private Organizations in the United States

In the United States, jurisprudence resulting from child sexual abuse at the hands of a representative of a private youth sports organization differs considerably from cases concerning abuse by a government actor. In the private sector, the causes of action created under § 1983 and Title IX are not available. Instead, "[t]he most common legal theories used by plaintiffs suing [private] sports organizations include vicarious liability and negligent hiring."[171] Negligence in this field does not differ from negligence in other areas of law. Although the phraseology varies slightly across jurisdictions, one U.S. District Court stated in a representative case, "In order to succeed on any negligence theory, plaintiff must establish that: (1) defendant owed plaintiff a duty of care; (2) defendant breached that duty; (3) and defendant's breach was the proximate cause of plaintiff's injury."[172] In the absence of even one of these elements, the defendant will prevail.[173]

Therefore, in a claim of negligent hiring, retention, or supervision, the first hurdle for the plaintiff—the abuse victim—is to

166. *Id.* at *9–10.
167. *Id.*
168. *Id.*
169. *Id.* at *10–11.
170. Doe v. Claiborne County, 103 F.3d 495, 508 (6th Cir. 1996).
171. Gibbons & Campbell, *supra* note 82, at 186–87.
172. Mihalovits v. Vill. of Crestwood, No. 00 C 897, 2003 WL 1745513, at *10 (N.D. Ill. Mar. 31, 2003).
173. *Id.*

demonstrate that the sports organization owes him a duty of care. Normally, an organization does not have an affirmative duty to protect individuals from the "dangerous propensities" of its employee.[174] But because minors, by definition, cannot fully "appreciate risks and avoid danger," the judicial system does recognize a higher duty of care on the part of an organization toward a child.[175] In determining whether a youth sports organization owes a duty of care to its participants, "the question becomes whether a sexual assault on a child is reasonably foreseeable."[176] The answer in U.S. society today may seem obvious, at least in light of the litany of anecdotal and judicial evidence discussed both in this Note, as well as in the media. According to at least two scholars, "Organizations that provide services and recruit children to engage with adult caregivers clearly recognize that child sexual assault is a reasonably foreseeable consequence of [their] programming."[177]

Assuming the duty of an organization to its minor participants is established, however, establishing a negligence claim is still not an easy task, as both breach of the duty and proximate cause must be shown. Youth sports organizations may be found to breach their duty by "fail[ing] to exercise reasonable care during the hiring process."[178] The exercise of reasonable care requires, at a bare minimum, looking into an applicant's background through a written application, an interview, and checking references.[179]

Proving the link between even an acknowledged breach of duty and the cause of the victim's injuries also can prove more difficult than one might expect. For example, in *Mihalovits v. Village of Crestwood*, the offender, Thomas Broukal, was a volunteer football coach.[180] While he was a coach in the early 1990s, he was charged with neglect of a child and criminal sexual abuse, with both charges stemming from the combination of a party at his house, alcohol, and an adolescent male victim.[181] Even though the football organization was aware of these charges and his conviction on the neglect count, it allowed Broukal to return to coaching youth football.[182] A few years later, Broukal molested a boy on several occasions who was involved in the football program.[183] Clearly, once the football organization's

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174. Gibbons & Campbell, *supra* note 82, at 216.
175. *Id.*
176. *Id.* at 217.
177. *Id.*
178. *Id.* at 218.
179. *Id.* at 218–19.
180. Mihalovits v. Vill. of Crestwood, No. 00 C 897, 2003 WL 1745513, at *1 (N.D. Ill. Mar. 31, 2003).
181. *Id.*
182. *Id.*
183. *Id.* at *2–3.

duty had been established, the organization breached that duty by retaining a known child abuser (if not sex offender) as a coach. However, the plaintiff victim did not prevail because he could not demonstrate the breach was the proximate cause of his injury.[184] The court relied on the following facts: Broukal was not the victim's coach (although they were involved in the same league); the victim quit the league after just one month; the victim was never alone with Broukal during his participation in the organization; and none of the incidents occurred during any organization game or function.[185] Broukal had used the football association to strengthen his relationship with the victim but did not sexually assault him until after the boy had quit.[186] From these facts, the court held as a matter of law that any negligence by the football league could not have been the proximate cause of the victim's injury.[187]

Proving vicarious liability of an organization for the acts of a coach can be equally difficult, if not more difficult, even though such a remedy is legally available. A victim of alleged molestation at the hands of his church-league basketball coach had his complaint against the church dismissed because, in the court's words:

> Plaintiff has not proffered any evidence that [the perpetrator's] alleged sexual assault of plaintiff was committed for anything other than personal reasons, or that the alleged assault was somehow in furtherance of [the church's] business. Therefore, a rational fact finder could not conclude that the alleged abuse was within the scope of [the coach's] authority as a coach in and director of [the] basketball program.[188]

The case differed nominally in that the victim attempted to impute the coach's actions to the church under agency law, but such a theory serves the same purpose as vicarious liability.

While vicarious liability can be difficult to prove, one recent case illustrates that a youth sports organization can be held vicariously liable for its representative's sexual assault of a child. In *Southport Little League v. Vaughan*, an appellate court upheld a finding of vicarious liability against a Little League baseball club.[189] The abuser was an equipment manager who molested several children in an equipment shed where he took them, ostensibly to distribute and check the fitting of baseball uniforms and equipment.[190] One key

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184. *Id.* at *11.
185. *Id.*
186. *Id.*
187. *Id.*
188. Holmes v. Lorch, 329 F.Supp.2d 516, 531 (S.D.N.Y. 2004).
189. Southport Little League v. Vaughan, 734 N.E.2d 261, 267, 273 (Ind. App. 2000).
190. *Id.* at 266–67.

distinction in this instance was the fact that the perpetrator, through his roles as Little League official (the court noted that he wore official Little League attire) and equipment manager, had organizational authority to be alone with a participant in the equipment shed.[191] Although this is but one case, Michael Gibbons and Dana Campbell speculate it could mark a trend of courts reconsidering holding employers liable for their employees' sexual assaults of children, particularly if the organizations place their employees in a position of trust and authority.[192] Regarding the implications of *Southport Little League*, they suggest, "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."[193]

Gibbons and Campbell succinctly summarize U.S. courts' treatment of vicarious liability as compared to negligence:

> [T]he vast majority of courts are unwilling 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. 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.[194]

B. *Canadian Jurisprudence*

1. Public Schools in Canada

In Canada, victims of public school coaches and other employees generally do not employ the sweeping, government-specific statutory claims used by their counterparts in the United States. Instead, Canadian jurisprudence treats situations in which government employees sexually abuse children in their stead under the same standard as situations in which employees of private employers commit the same acts.[195] However, the lack of a claim directly analogous to § 1983 or Title IX does not automatically harm the chances of Canadian plaintiffs. This is because, unlike in the United States, government schools and agencies may be—and often are—found vicariously liable for their representatives' sexual exploitation of children.[196]

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191. *Id.* at 272.
192. Gibbons & Campbell, *supra* note 82, at 215.
193. *Id.*
194. *Id.* at 215–16.
195. *E.g.*, Blackwater v. Plint, [2005] D.L.R. 275, 283–87 (Can.).
196. *E.g.*, *id.*; B. (K.L.) v. British Columbia, [2001] D.L.R. 431 (Can.); D.N. v. Oak Bay, [2005] B.C.C. LEXIS 2880, at *4 (B.C.).

In examining recent Canadian case law, it is apparent just how commonly courts hold the Crown[197] vicariously liable for sexual abuse. For instance, in *B. (K.L.) v. British Columbia*, government social workers assigned the minor plaintiffs to foster homes; the plaintiffs were molested while residing in these homes.[198] At trial, the social workers were found negligent in their monitoring and supervision of the home environments into which they placed the children.[199] Based on this finding, the appellate court upheld a ruling that the government was vicariously liable to the plaintiffs for its social workers' negligence.[200]

Similarly, a minor plaintiff in British Columbia was molested by a volunteer hockey coach of another team in the plaintiff's youth league.[201] The coach was a convicted sex offender. His probation officer knew the coach's first victim was a ten-year-old boy and also learned that the offender coached minor hockey in his spare time.[202] The court found the probation officer had two duties of care: one to advise the coach to quit this type of volunteer work and another to warn the youth hockey league of the coach's presence and history.[203] The probation officer was negligent in his failure to take either step, according to the court.[204] Again in this instance, the court also found the Crown vicariously liable for the probation officer's negligence.[205]

Other cases display just how ordinary the finding of vicarious liability is with regard to the government. In a lawsuit claiming molestation at the hands of the headmaster of a Crown-run Indian residential school in Saskatchewan, the defendant government admitted vicarious liability, as long as the sexual abuse was proven to have taken place.[206] The Supreme Court of Canada, in *Rumley v. British Columbia*, did not find vicarious liability in the case of widespread sexual abuse at a state-run school for deaf children (negligence and fraudulent misrepresentation were argued instead).[207] However, the court made a point to mention the only reason it did not address vicarious liability was that the plaintiff had

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197. "The Crown" is a term commonly used in Canadian judicial opinions to refer to Canadian government.

198. B. (K.L.), [2001] D.L.R. at 435.

199. *Id.* at 436.

200. *Id.* at 442.

201. Oak Bay, [2005] B.C.C. LEXIS 2880, at *12–13.

202. *Id.* at *12.

203. *Id.* at *61.

204. *Id.* at *53–54. The court suggested a number of ways in which the probation officer might have pursued this duty of care; in addition to the steps discussed here, the court also posited that the officer could have attempted to have the coach's probation order amended by a court to prohibit working with children. *Id.*

205. *Id.* at *61.

206. C.M. v. Canada, [2004] S.K.C. LEXIS 289, at *1–2 (Sask. Q.B.).

207. Rumley v. British Columbia, [2001] D.L.R. 39, 45–46 (Can.).

dropped that argument during the proceedings.[208] By raising the idea *sua sponte*, the Canadian Supreme Court demonstrated its receptivity to the doctrine in this situation. Clearly, vicarious liability claims against the Crown are not only possible, but they are common and attainable.

The standard on whether to find vicarious liability comes from *Bazley v. Curry*, which involved sexual abuse of children in a private residential care facility for emotionally troubled children.[209] In that case, the Canadian Supreme Court stated:

> The question in each case is whether there is *a connection or nexus* between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence. . . . Vicarious liability is generally appropriate where there is a *significant connection* between the creation or enhancement of a risk and the wrong that accrues therefrom, *even if unrelated to the employer's desires*.[210]

Although *Bazley* itself involved a private employer, the *Bazley* standard is cited in cases in which the government is the employer as well. *Blackwater v. Plint*, another case in Canada's highest court, best illustrates the uniformity with which the vicarious liability standard is applied.[211] In that case, Native children during the 1940s, 1950s, and 1960s were taken from their homes, pursuant to the Indian Act, and sent to live at schools run by both the Canadian national government and the United Church of Canada.[212] One of the many children who suffered sexual abuse at the school sued both of its operators: the Crown (a public defendant) and the church (a private defendant).[213] In addressing the defendants' potential vicarious liability, the court treated them as distinct employers but, interestingly, did not distinguish between their respective statuses as public and private parties.[214] Instead, the court imposed vicarious liability on both parties under the *Bazley* standard.[215] After essentially restating *Bazley*, the *Blackwater* court emphasized, "The fact that wrongful acts may occur is a cost of business. The imposition of vicarious liability in such circumstances serves the policy ends of providing an adequate remedy to people harmed by an employee and of promoting deterrence."[216]

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208. *Id.*
209. Bazley v. Curry, [1999] S.C.R. 534, 540 (Can.).
210. *Id.* at 557, 559 (emphasis added).
211. Blackwater v. Plint, [2005] D.L.R. 275, 283–87 (Can.).
212. *Id.* at 278–79.
213. *Id.* at 279.
214. *Id.* at 283–87.
215. *Id.*
216. *Id.* at 283.

Negligence claims are also standard procedure for plaintiff sexual abuse victims. For instance, in both *B. (K.L.) v. British Columbia* and *N. (D.) v. Oak Bay*,[217] the issue of vicarious liability only arose following the establishment of negligence. However, where vicarious liability is available, it is the more prudent claim for the abuse victim to make, as it does not necessarily require a clear showing of a breach of a duty, whereas foreseeability of harm and breach of duty are necessary elements of a negligence claim.[218] *Blackwater* addressed the possibility of the Canadian government owing a statutory duty of care to the school children involved.[219] This may appear, at first blush, to resemble the U.S. requirements contained in § 1983 or Title IX. But upon closer scrutiny, the statutory duty at issue here is a different and narrower one. The duty alleged in *Blackwater* stemmed not from the fact that the government was the employer, but from specific provisions within the Indian Act—the statute which initially created the framework by which the children were moved from their families' homes to the residential schools.[220]

2. Private Organizations in Canada

Private youth sports organizations in Canada are susceptible to the same vicarious liability standard as are government employers when their employees sexually exploit children. Because *Bazley* is the benchmark case for this field of jurisprudence, further examination is warranted.

Bazley involved sexual abuse of minor residents by a staff member at a private home for emotionally troubled children aged six through twelve.[221] The home gave its staff the authority to engage in all types of "parental" duties, including intimate tasks such as bathing the children and putting them to bed each night.[222] The case's aforementioned vicarious liability standard involves seeking a "significant connection" or "nexus" between (1) the employer's goals and its creation or enhancement of a risk, and (2) the employee's action against the victim.[223] Under this test, whether or not the act is related directly to the employer's wishes is irrelevant.[224]

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217. Oak Bay, [2005] B.C.C. LEXIS 2880, at *1 (B.C. Sup. Ct.).
218. Blackwater, [2005] D.L.R. at 282–84.
219. *Id.* at 289–91.
220. *Id.* The *Blackwater* court ultimately concluded, "[T]he trial judge erred in finding a non-delegable statutory duty on Canada in this case." *Id.* at 291.
221. Bazley v. Curry, [1999] S.C.R. 534, 540 (Can.).
222. *Id.*
223. *Id.* at 557, 559.
224. *Id.* at 559.

In applying the standard to employee sexual abuse, *Bazley* deemed, "It must be possible to say that the employer significantly increased the risk of harm by putting the employee in his or her position and requiring him to perform the assigned tasks."[225] Importantly, the court unambiguously stated that *in determining vicarious liability, negligence law's test of foreseeability of harm is not applicable.*[226] Instead, a Canadian court only must find "a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee."[227] *Bazley* suggested several factors to consider when applying the standard, including the opportunity the employer's enterprise provided to the employee to abuse his power, "the extent to which the wrongful act was related to . . . intimacy inherent in the employer's enterprise," and "the vulnerability of potential victims to wrongful exercise of the employee's power."[228]

The *Bazley* court found the group home vicariously liable for its staff member's assaults.[229] The court noted, "The abuse was not a mere accident of time and place, but the product of the special relationship of intimacy and respect the employer fostered, as well as the special opportunities for exploitation of the relationship it fostered."[230] This standard of vicarious liability seems fairly easy to satisfy, particularly in that it does not require foreseeability on the part of the organization. But the *Bazley* court seemed comfortable with the idea of holding employers to this stricter bar to encourage organizations to take more preventive steps and to discipline employees who break rules; both incentives, the court felt, would serve as valuable tools in decreasing future harms.[231]

Two Canadian cases in which vicarious liability was not established elaborate on the fine points of the *Bazley* standard. In *Jacobi v. Griffiths*, released by the Supreme Court of Canada on the same day as *Bazley*, two minor victims (brother and sister) sued a Boys and Girls Club after an employee at its after-school program sexually assaulted them.[232] The court refused to find the club vicariously liable, distinguishing this case from *Bazley* because of the following facts: the employee was not put in a special position of trust, as the club's emphasis was on children building relationships among themselves (not with staff members); no club activities left any

225. *Id.* at 560 (emphasis omitted).
226. *Id.* at 561.
227. *Id.*
228. *Id.* at 560.
229. *Id.* at 567.
230. *Id.* at 568.
231. *Id.*
232. Bazley, [1999] S.C.R. 570 (Can.).

child alone with the employee; and the children were free to leave the club and go home at their pleasure.[233] Furthermore, the court noted the club's program—the "employer's enterprise" —would suffer, not gain, from intimacy between an employee and any one participant.[234]

More recently, in *B. (E.) v. Order of the Oblates of Mary Immaculate (B.C.)*, the same court again refused to find vicarious liability, this time claimed against a church-run residential school whose employee, Martin Saxey, molested the minor plaintiff.[235] The court held that the claim did not pass muster under *Bazley*:

> The employment of Saxey as a baker, boat driver and odd-job man did not put him in a position of power, trust or intimacy with respect to the children. His job did not include regular or private contact with the children. He was not encouraged or required to develop any sort of personal relationship with the children. His role did not include supervising any intimate activities . . . The "strong connection" was not established.[236]

Again, important factors not found here included job features which place the employee in a position of trust and authority over children, the requirement to establish personal relationships with children, and involvement in intimate acts with children. The court declared, "[M]ere opportunity . . . does not suffice."[237]

Despite the result in *Order of the Oblates*, there is no exemption from liability for charitable organizations; *Blackwater* considered and rejected the idea.[238] That court reasoned, "[S]ympathy does not permit courts to grant exemptions from liability imposed by settled legal principle."[239]

C. *Analysis of Differences Between U.S. and Canadian Jurisprudence*

Both U.S. and Canadian courts repeatedly have faced the issue of organizational liability for coaches' or representatives' child sexual exploitation. While similarities in their responses to such suits do exist, several differences come to the fore.

1. Advantages of Each System

The most obvious difference lies in the availability to many victims in the United States (most often where public schools are

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233. *Id.* at 618–21.
234. *Id.* at 621.
235. [2005] D.L.R. 385, 389 (Can.).
236. *Id.* at 410.
237. *Id.* at 398 (citation omitted).
238. Blackwater v. Plint, [2005] D.L.R. 275, 287–89 (Can.).
239. *Id.* at 288.

involved) of the federally created causes of action arising from § 1983 and Title IX. Strategically, this difference provides eligible plaintiffs with several advantages. These include the opportunity to get the case into federal court; separate, distinct claims beyond the usual negligence allegations; and the chance to make a constitutional claim (in § 1983 cases), as opposed to a simple tort claim.

At the same time, the Canadian judiciary's willingness to find both schools *and* organizations vicariously liable for child sexual abuse perpetrated by employees and representatives stands out in contrast to U.S. courts' treatment of vicarious liability claims, which ranges from completely prohibited, to available, but rare or difficult to attain. Furthermore, even where U.S. courts do find vicarious liability, they do not treat it in the same manner as Canadian courts, as the Canadian standard specifically rejects a foreseeability test.[240]

2. An Example of the Relative Advantages

These distinctions will have a far-reaching impact on the way in which claims are pursued by similarly-situated victims in the United States and Canada and, more importantly, on the comparative success of plaintiffs in the two countries. The difference can be seen more easily by examining the divergent effect on the parties involved in a common child exploitation situation under each judiciary's standard. Consider the hypothetical situation of a child athlete on a small, elite sports team, who is sexually abused by his coach during an overnight, out-of-state trip to a team competition. The coach is the only adult on the trip. The incident takes place in the coach's hotel room after the player is summoned there for a one-on-one meeting about the player's performance in the competition. Assume the coach has had no past complaints or convictions, and the employer exercised proper diligence in hiring and retaining the coach.

Under the U.S. standard, if the team in question is a school team, the athlete must demonstrate deliberate indifference by the school district to notice a potential problem with the coach. However, in this example, the victim would stand almost no chance—the school had not received any warning or suspicion, so the victim would lose on his federal claims. His state claim for negligence by the school would also likely stand little chance, since taking athletes on a trip to a competition is not unusual, and the other people on the trip did not raise questions. Likewise, even if the hypothetical coach is assumed to be leading a non-school club team, the same problems with establishing negligence by the club remain.

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240. Bazley v. Curry, [1999] S.C.R. 534, 561 (Can.).

Under the Canadian standard found in *Bazley* and its progeny, the incident would be viewed in a different light: deliberate indifference and foreseeability do not affect the vicarious liability question. Instead, the court would look for a nexus between the employer's enterprise and the wrong committed by the employee. Vicarious liability would attach upon finding of a significant connection between the creation or enhancement of risk and the injurious action. Here, the victim would have a strong chance at success because: (1) the school or organization created or enhanced the risk by (a) sending children on a trip with just one authority figure, and (b) failing to instruct the coach not to hold meetings in his hotel room; and (2) the injury bears a strong connection to that risk. Furthermore, using applicable factors, the coach was placed in a special position of trust (he served not only as coach, but also as sole chaperone); the employer's enterprise fostered a special relationship of intimacy (the need for many hours of discussing strategy and psychological aspects of the sport, as well as physical contact through instruction of technique); the victim was not free to leave and go home; and the employer's enterprise (overnight trips and personal meetings) offered the opportunity to exploit this relationship.

D. *Schools and Organizations: Responses*

In light of lawsuits and the seemingly ever-escalating media attention paid to child sexual exploitation by coaches, how have schools and private youth sports organizations responded? As one might expect, responses have varied greatly. Still, several themes emerge.

1. Positive Change

Particularly regarding school districts in the United States, an effort has been made to make one obvious adjustment: to enforce existing laws and policies. For instance, in 2003 the athletic director for Washington, D.C., public schools disclosed that although fingerprint checks for coaches had been mandated for several years, they were not always done.[241] Instead, whether or not the screenings took place depended on the motivation of each school principal to get them done.[242] The school system finally began enforcing the policy strictly in 2003—even going so far as to withhold paychecks from coaches until they were fingerprinted.[243] At about the same time, a

241. Cohn, *supra* note 51, at C1.
242. *Id.*
243. *Id.*

Washington state law enforcement agent publicly called on school officials to follow state law requiring them to bring suspected abuse to the attention of police within forty-eight hours of receiving the information.[244]

Most large-scale youth sports organizations have enacted tougher and clearer policies on the topic, and most make these policies known through their websites. On its website, American Youth Football and Cheer warns its member leagues that, "Failure to implement a child abuse / molestation risk management program may expose leagues and [their] officials, volunteers and other representatives to significant legal liability."[245] The organization also provides the framework for setting up such a risk management program.[246] Similarly, USA Hockey's bylaws clearly spell out the definition of sexual abuse and its prohibition. They mandate a permanent ban for anyone proven to have violated this prohibition from all programs sanctioned by the organization or its affiliates.[247]

A less obvious change involves the role of insurance. Linda Lester, an elite-level youth figure skating coach, carries a $1,000,000 liability insurance policy—the recommended policy for skating coaches today.[248] Lester asserts that in her experience, no ice rink operator today would allow a skating coach to teach at its rink without liability insurance.[249] Of course, a skating coach with a record of child sexual abuse likely would not be granted a policy by any insurance company,[250] so this requirement indirectly creates a safer environment for child athletes.

Perhaps most significantly, background checks and screening in some form of prospective coaches and volunteers have become much more common. Both Little League baseball and Pop Warner football now require a criminal background check for all applicants, with policies that have been described as "models for other organizations."[251] Similarly, USA Hockey refuses to authorize any volunteer or employee with access to children if the individual does

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244. Maureen O'Hagan and Christine Willmsen, *What School Districts Can Do*, SEATTLE TIMES, Dec. 15, 2003, at A15.

245. AYF – American Youth Football and Cheer, Child Abuse/Molestation Risk Management Program, Statement on Child Abuse/Molestation, http://www.americanyouthfootball.com/AYFStatementOnChildAbuse.pdf (last visited Sept. 24, 2006) [hereinafter AYF Statement].

246. *Id.*

247. Atlantic Amateur Hockey Association, Sexual, Physical Abuse and Screening Policies, http://www.atlantic-district.org/policies.html (last visited Sept. 24, 2006).

248. Telephone Interview with Linda Lester, Coach/Choreographer, New York Islanders Ice Girls (Feb. 13, 2006).

249. *Id.*

250. *Id.*

251. Gibbons & Campbell, *supra* note 82, at 208.

not consent to background screening; it also requires its affiliates to adopt the same policy.[252]

Not coincidentally, the Canadian Hockey League itself has been "[t]he leader in requiring background checks."[253] In the CHL, every employee and volunteer is not automatically subject to this screening process, but due to their contact with adolescent players, coaches virtually always undergo the checks.[254]

2. Organizational Shortcomings

Despite such positive change, not all organizations have heeded the myriad warning signs. In 2003, a newspaper investigation chastised the Amateur Athletic Union (AAU), the largest U.S. organization for club sports, for its failure to require training, certification, or criminal background checks for its member coaches.[255] And a 2006 book quotes the NCAA Director of Agent, Gambling, and Amateur Activities as stating, "In the high school girls' basketball circuit of traveling teams, summer leagues, and tournaments, 'there is almost no oversight [of coaches] compared to high school basketball.'"[256] Although the AAU posts its National Policies on its website, this document fails to clarify whether the organization has corrected its lax oversight.[257] The organization denies participation to anyone reasonably believed to have engaged in sexual misconduct, including civil allegations of such or a criminal conviction for sexual abuse, but the specifics of background checks are not mentioned.[258]

Smaller organizations also have failed to implement even the most basic screening procedures, with tragic results. In one instance, a vice president and coach of a New York soccer school molested six boys on his team in hotels during overnight trips; amazingly, the coach was already serving a sentence *in New York* for the sexual exploitation of boys.[259]

Finally, the most large-scale problem exists in schools' inaction when faced with actual sexual exploitation by coaches. Background checks are fine, but obviously they can serve their purpose only if the

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252. AYF Statement, *supra* note 245.

253. Jamie Peterson, Note, *"Don't Trust Me With Your Child": Non-Legal Precautions When the Law Cannot Prevent Sexual Exploitation in Youth Sports*, 5 TEX. REV. ENT. & SPORTS L. 297, 302 (Spring 2004).

254. *Id.*

255. O'Hagan and Willmsen, *supra* note 40, at A1.

256. FIBKINS, *supra* note 40, at 62.

257. Amateur Athletic Union, 2006 National Policies, http://aausports.org/codebook/2006NationalPolicies.pdf (last visited Sept. 24, 2006).

258. *Id.* at 45–46.

259. Gibbons & Campbell, *supra* note 82, at 190.

initial crimes are reported. It is commonplace for schools to react to allegations of sexual abuse, not with full investigations and disclosure to law enforcement, but instead by refusing to rehire the coach without taking any further action.[260] Administrators even purposely neglect to document investigations and agree with the accused coaches not to report the allegations in exchange for the coach's quiet departure from the district.[261] A galling 2003 study revealed that over a ten-year period in Washington state, 159 coaches had been reprimanded or fired for sexual abuse, yet at least ninety-eight continued to coach or teach.[262] Schools engage in such practices for two main reasons: they fear the bad publicity that accompanies a disclosure of sexual abuse, and the cost of fighting the teacher's union in attempting to fire the teacher or coach is often prohibitive.[263] Moreover, one lawyer admitted that to guard against lawsuits by accused coaches or teachers, he has advised school officials not to disclose allegations of sexual abuse when prospective employers call for reference checks.[264]

3. Potential Dangers

For the most part, schools and organizations have made positive strides in the struggle to combat child sexual exploitation by their coaches and volunteers. However, several potential dangers loom in the effort to reduce further or eliminate the problem altogether.

One striking danger is the unintended creation of witch hunts and a paranoid culture. While the safety of children must be paramount, organizations also must be careful to maintain the balance between safety and fairness to coaches in the face of an accusation. Overzealous lawyers can add to the mix. One observer noted, in the wake of scandals involving the Roman Catholic Church hierarchy covering up child sexual abuse by its priests, "Child sexual abuse litigation . . . like asbestos litigation . . . has the potential to snowball, with profits from early settlements financing the recruiting of an ever-widening ring of plaintiffs."[265]

Unfortunately, peril lies in a confluence of several factors: "[S]tudents often see things much differently than adults, parents may hold motivation other than a child's welfare, and finally, school

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260. Cohn, *supra* note 51, at C1.

261. Maureen O'Hagan & Christine Willmsen, *Misconduct Often Goes Unpunished by Districts*, SEATTLE TIMES, Dec. 15, 2003.

262. *Id.*

263. *Id.*

264. *Id.*

265. Daniel Lyons, *Sex, God & Greed*, FORBES, June 9, 2003, at 66.

administrators dislike controversy."[266] In one extreme case, a teacher accused of sexual misconduct was suspended immediately and resigned within days.[267] Less than one week later, the student recanted the accusation, and the student's mother later confided to the principal that she really had not wanted the teacher to be fired; instead, she expected the school district to offer her some money to drop the allegations.[268] A school superintendent in South Carolina remarked, "I don't see how we can beef up our harassment policy [any further] without putting our schools into some sort of terror state."[269]

Importantly, the need for a balance between the accuser and the accused has more serious implications than abstract concepts of fairness; organizations may subject themselves to liability on the other side of the equation. In some cases, "[T]eachers who are not offered procedural due process in the face of wrongful allegations of sexual misconduct have been given the right of redress by . . . state courts."[270]

A paranoid culture can lead to a loss of volunteers and resources. One college track coach wondered: How does one defend oneself against something that never happened?[271] He explained the concept of a false accusation "scares the hell out of me whenever I'm alone with an athlete."[272] The dilemma for organizations is as follows: "On the one hand, they need more competent, caring adults who are willing to give their time to the development of youngsters. On the other hand, many coaches are leaving coaching because they fear that they will be falsely accused of some type of inappropriate behavior."[273] After hearing so many tales of abuse, it can be easy to forget that "the overwhelming majority of coaches on America's youth sports fields are there for all the right reasons. These coaches should be thanked, not subjected to a witch hunt."[274]

Another major problem arises from the financial costs and administrative burdens accompanying more intensive screening. For instance, only some organizations have access to national background-checking systems, but even those with access frequently do not utilize them due to the money and time required.[275] Similarly,

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266. MANOS, *supra* note 141, at xii.
267. *Id.* at xiii.
268. *Id.*
269. Finn, *supra* note 51.
270. MANOS, *supra* note 141, at 88.
271. Finn, *supra* note 51.
272. *Id.*
273. SHOOP, *supra* note 36, at 33.
274. Don Yaeger, *Protecting Your Child,* SPORTS ILLUSTRATED, Sept. 8, 1999, *available at* http://media.cnnsi.com/features/1998/weekly/cover/news/1999/09/08/protecting/.
275. Gibbons & Campbell, *supra* note 82, at 208.

the cost of fingerprint searches varies drastically, even within the United States.[276] In one state, non-profit organizations, including youth sports leagues, are granted fingerprint search access at no cost.[277] Some suggest most parents would pay higher participation fees for increased safety, and "money should [never] be the issue in determining if our kids are safe."[278]

Such idealistic viewpoints ignore the realities. Organizations generally have only a finite amount of funds available to spend, particularly those heavily reliant on volunteers. Additionally, even if most parents are willing to pay, where does that leave the children whose families cannot afford increased participation fees? Society should be loathe to create a system in which participation in youth sports, safe from child sexual abusers, is available based on one's wealth.

V. SOLUTION: U.S. COURTS SHOULD ADOPT CANADIAN COURTS' USE OF VICARIOUS LIABILITY

The current situation involving schools and youth sports organizations—particularly the problems which have yet to be resolved—demonstrates the urgent need to examine ways in which the U.S. and Canadian judiciaries may learn from one another and deal more effectively with child sexual exploitation.

In both the United States and Canada, courts already influence behavior and policies of school districts and youth sports organizations. Although one may wish these entities acted out of altruistic concern for children, the reality is that the fear of legal liability often provides a more urgent, concrete incentive to act or change. For instance, one telling study by child abuse professionals shows that the most common reason for reporting abuse is "compliance with the legal requirement to report," while "a desire to obtain intervention for the child or for the family" is listed *fourth*.[279] Conversely, the most common reason *not* to report abuse is "personal concern . . . such as unfamiliarity with reporting or fear of a legal counterstrike."[280] Through the same logic, representatives of school systems and private organizations are more likely to report abuse if they feel required to do so—either by law or by clear institutional policy. The same holds true for other desired behavior, such as screening procedures for potential applicants with access to children.

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276. *Id.* at 193; Stokley, *supra* note 34.
277. Stokley, *supra* note 34.
278. *Id.*
279. SPIEGEL, *supra* note 60, at 58–59.
280. *Id.* at 59.

Clearly, the more that courts in the United States and Canada hold organizations to a standard minimum level of screening (and the higher this level rises), the more administrators will be motivated to seek out affordable screening processes and assistance from law enforcement and to institute these procedures. Because the Canadian standard holds schools and organizations to a higher standard, and because organizations can overcome the perceived "unfairness" of this standard, the Canadian standard is superior.

The Canadian judiciary's development and frequent use of a vicarious liability standard for schools and organizations whose coaches sexually abuse children provides a far greater incentive for these institutions to take preventive measures. In the United States, judicial standards of deliberate indifference and negligence theory create a motive to maintain a certain floor of diligence. However, under this system, the goal can become merely to keep up with the majority of similarly-situated institutions, so the organization can defend its practices as standard. The U.S. system also seems somewhat preoccupied with what the employer did to avoid or punish predatory coaches. On the contrary, the Canadian approach incentivizes these institutions to go beyond keeping up with peers, and beyond concern for bad apples, but instead, to seek to manage or eliminate situations in which harm could occur.

One could argue the U.S. standard is more "fair." After all, if the employer did not know a problem existed with this coach, why should it have to pay? However, the Canadian standard goes much further in encouraging desired behavior by employers. Instead of simply looking for rogue coaches, organizations under the Canadian standard are pressured by the threat of vicarious liability to take *proactive measures* to prevent situations like the hypothetical discussed above. They are more likely to institute awareness training, as Kirke advised in the Players First Report.[281] They have more incentive to enact policies which reduce the likelihood that such an event could occur, regardless of who the coach is. These policies may include sending at least two chaperones on each trip, banning one-on-one closed-door meetings on trips or at school, or allowing closed-door meetings only where unobstructed windows allow clear sightlines. Such proactive measures both increase children's safety and protect coaches from false accusations and dangerous misunderstandings.

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281 KIRKE, *supra* note 23, at 11.

VI. CONCLUSION

Canadian courts offer a more favorable standard to victims by holding organizations to a higher standard, while the approach in the United States better protects school districts and youth sports organizations. However, the shortcoming of the U.S. standard of deliberate indifference is that, while it may assist organizations in defending lawsuits, it sets them up for repeated problems and incidents. Under the U.S. approach, Sheldon Kennedy would be molested again today. After all, Graham James had no criminal record or other history to be flagged by a background check. Kennedy's team and league could claim they did all they could—or all that was required. And was it not a major goal of the Players First Report to create "a wave throughout society?"[282] The CHL's adoption of the Report's recommendations is great, but one league's actions are not nearly enough to address the problem throughout North America. Until the United States adopts a system which would more carefully protect a young Sheldon Kennedy, Kirke's "wave throughout society" will instead remain a sea of unrealized potential and unprotected young athletes.

Meanwhile, the Canadian judiciary's approach of holding organizations vicariously liable demonstrates that a higher standard can succeed. *Bazley's* nexus test forces organizations and schools to adapt their policies and practices to the standard, leading to the reduction or elimination of risks. Under this standard, youth sports leagues—which, in reality, act for reasons of legal liability as much as for altruism—will serve their own interests by adopting preventive measures such as those outlined in the Players First Report. Because of these preventive measures, a young Sheldon Kennedy participating in a hockey league under this standard would be far less likely to find himself in a situation where one coach has so much control over him. In this way, the stricter *Bazley* standard forces the Players First Report recommendations onto organizations resistant to change, with a potentially crippling legal judgment looming as the alternative.

U.S. courts should follow the Canadian approach to civil liability of schools and youth sports organizations when coaches and volunteers sexually abuse child athletes. The latter demonstrates that holding schools and youth sports organizations to a higher standard provides them with an incentive to create safer environments for their participants.

In 1997, George Vecsey of the *New York Times* figured volunteers and coaches would "find children and parents looking at them a little more carefully, but if the scrutiny can avoid anybody

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282. *Id.* at 2.

suffering like Sheldon Kennedy, it will be worth it."[283] Nearly ten years later, Vecsey's idea rings true. If the U.S. courts adopt the Canadian standard, U.S. schools and youth sports organizations will find courts holding them to a higher standard, and "if the scrutiny can avoid anybody suffering like Sheldon Kennedy, it will be worth it."[284]

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283. Vecsey, *supra* note 31, at B9.

284. *Id.*

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