April 15, 2013

Position of Authority Statutes in Athletic Programs: A Proposed Roadmap for the Model Penal Code Revisions in Response to Jerry Sandusky

Casey Schwab, *University of Southern California*

Position of Authority Statutes in Athletic Programs: A Proposed Roadmap for the Model Penal Code Revisions in Response to Jerry Sandusky

Casey D. Schwab[1]

[1] The author is a third-year law student at the USC Gould School of Law. The author would like to thank Professor Camille Rich for her literary contributions and guiding hand – this article would not be possible without her. The author would also as like to thank Professor Vered Yakovee for all of her help connecting the world of sports with the law.

I. Introduction

Jerry Sandusky, in an interview with Bob Costas on NBC's "Rock Center," admitted to "horsing around" while showering with young boys.[2] He denied any sexual misconduct despite this admission.[3] Since his admission of "horseplay" but denial of sexual abuse, the American public has been calling for a broad statutory rule barring adult coaches from being present while young athletes are in the shower.[4]

Sandusky was convicted on 45 counts of sexual abuse and child molestation.[5] His actions in the shower clearly crossed the line. However, if Sandusky had not been accused of assaulting the young boys, would the reaction to his admission of "horsing around" while in the shower be different? Let's go one step further. If he had simply been in the shower but no horseplay was alleged, would Sandusky have been engaging in an act that should be barred by statute?

A hardline, categorical rule against coaches being present while young athletes shower may curtail sexual abuse by coaches as a deterrent.[6] Moreover, child molesters do not want to believe their actions are abnormal; thus, a rigid rule keeping coaches out of the shower room

---

[2] More than 3.87 million people watched the interview. *See* David Bauder, *Bob Costas Interviews Jerry Sandusky About Penn State Scandal On NBC*, Huffington Post, November 15, 2011, http://www.huffingtonpost.com/2011/11/15/bob-costas-interviews-jerry-sandusky-nbc_n_1096248.html.

[3] *Id.*

[4] Two witnesses testified that they, too, had showered with young boys in their coaching capacity. Although these articles do not explicitly criminalize these witnesses, the comments to the articles are overwhelmingly condemning. *See* David Lohr, *Jerry Sandusky Trial: Witnesses In Penn State Sex Abuse Trial Said They Also Showered With Boys*, Huffington Post, June 18, 2012, http://www.huffingtonpost.com/2012/06/18/jerry-sandusky-trial-witness-showering-boys_n_1606512.html.

[5] Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, New York Times, June 22, 2012, http://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html?pagewanted=all.

[6] Sex offender registration laws and their deterrent effect – or lack thereof – can be analogized to a potential categorical rule against coaches supervising athletes in the shower. *See generally Rowe v. Burton*, 884 F. Supp. 1372, 1379 (D. Alaska 1994) ([t]he district court, while analyzing whether sex offender registration promoted deterrence, found that the only meaningful deterrence came from the modified conduct of the police and the public, not the registrant. The court reasoned that the deterrence stemmed from both forewarning the potential victims of a sex offender's presence enabling them to take evasive action and allowing the police to act more swiftly).

may keep some potential abusers from acting on their desires.[7] Even if both of these justifications for a categorical rule barring coaches from supervising athletes in the shower are assumed to be true, however, they are outweighed by the consequences that would follow from such a rule.

This article is in three parts. Part 1 presents the ambiguities in current state versions of "position of authority" statutes and laws criminalizing "sexual contact." These examples support the contention that the American Law Institute ("ALI") must provide a model statute in the Model Penal Code ("MPC") in response to Sandusky's crimes.

Part 2 examines the unique relationships, circumstances and standards of conduct in athletics, revealing the prudence of a statutory structure that takes these characteristics into account. Then, cases exemplifying these unique constructs are presented, along with stories of falsely accused coaches and the consequences of shortcomings within current statutory authority.

Part 3 provides a proposal for the revision project of the MPC, modeled after the burden-shifting approach used in Title VII discrimination cases. The proposal begins with several reasons why the burden-shifting approach used in Title VII cases is appropriate for cases in which coaches are accused of sexual abuse. Then, the proposed MPC statute is delineated demonstrating the benefits of each step. Lastly, potential problems with the proposal are presented.

[7] In a report on child pornography and pedophilia prepared for the United States Senate, experts stated that pedophiles seek justification: "[a] pedophile needs to know or to convince himself that his obsession is not 'abnormal' and dirty, but is shared by thousands of other intelligent, sensitive people." *See* Permanent Subcomm. on investigations of the comm. on gov't affairs, child pornography and pedophilia, S. REP, NO. 99-537, at 8 (1986). However, other reports suggest that the abnormality of such desires is secondary to the intensity and consuming nature of such desires. In a series of prison interviews conducted by researchers, pedophiles admitted that their lives were consumed by their perverse desires. *See* Duane L. Dobbert, *Halting the sexual predator among us: preventing attack, rape, and lust homicide*, 66 (2004).

II. Current State of the Literature

This article is the first to identify the needs for a particular position of authority provision in the MPC and to propose a burden-shifting approach that can best accommodate the unique evidentiary challenges in a case involving a coach accused of sexual abuse. Thus, this article is the first of its kind.

Legal scholars have long been calling for the ALI to update the section of the MPC that addresses sexual assault, § 213.[8] These scholars point to the drastically different cultural views on sexuality since the 1950s when § 213 was first drafted.[9] Its outdated vocabulary and inaccurate assumptions about sexual behavior – specifically in the context of rape – have drawn the most notable criticism from legal experts.[10] However, these experts have failed to urge the ALI to specifically address the unique case of a coach accused of sexually abusing an athlete.[11]

Furthermore, scholarly literature citing Sandusky's story is extremely limited, of course, because of its recency.[12] Although commentators have addressed coaches sexually abusing athletes, the focus has not been on the core issues addressed here. There are journal articles discussing athletic organizations' liability for coaches who sexually abuse;[13] the differences

[8] *See, e.g.,* Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Should Be Pulled and Replaced*, 1 Ohio St. L.J. 207 (2003); Stephen J Shulhofer, *Model Penal Code Article 213 Rape and Related Offenses: Prospectus for a Project Revision*, Proposed Official Draft (May 14, 2012).
[9] *Id.*
[10] *Id.* (Shulhofer, *supra,* cites Denno for this claim.)
[11] This contention is based upon research conducted for this article. The research, however extensive, could not reach into the minds of the current project contributors to the revisions to § 213. Thus, it is possible that the revisions will include provisions addressing these issues.
[12] Mark Scolforo, *Jerry Sandusky Trial: Judge Delays Start Date Of Sex-Abuse Trial Of Ex-Penn State Coach*, Huffington Post, March 29, 2012, http://www.huffingtonpost.com/2012/03/29/judge-delays-jerry-sandusky-sex-abuse-trial-june_n_1389341.html.
[13] Gibbons and Campbell, *Liability of Recreation and Competitive Sport Organizations for Sexual Assaults on Children by Administrators, Coaches and Volunteers*, 13 J. Legal Aspects Sport 185 (Fall 2003).

between Canadian and American jurisprudence in respect to sexual abuse by coaches;[14] and the monetary consequences of coaches who sexually abuse.[15]

The majority of the current relevant literature examines the consequences that follow once coaches are already convicted of sexual abuse – not *how* their convictions were reached. The cases in which a coach is accused of sexual abuse for engaging in an action inherently accepted or necessary in athletics, but is ultimately acquitted, have yet to be addressed by both the MPC and contemporary jurisprudence.

Nonetheless, scholars have tackled similar issues. For example, one law professor takes on the issue of the sexualization of innocent grooming practices of children.[16] She argues that, although grooming may provide an avenue for molesters to commit crimes, the law must construct sexual abuse in a way that does not criminalizes innocent touching.[17] Her argument is the spring board for the present article.

This roadmap for the ALI's revisions necessitates immediate attention. The ALI is currently revising § 213 of the MPC and, if these issues highlighted by Sandusky are not addressed, it may be another fifty years before it is revised again. Thus, the ALI must seize this opportunity.

III. The American Law Institute and its Revisions to the Model Penal Code

Sandusky is not the first coach to take advantage of his role to sexually abuse children. In 1997, Sheldon Kennedy, a professional hockey player for the Boston Bruins, revealed publicly

[14] M. Bradford Preston, Note, *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*, 39 Vand. J. Transnat'l L. 1333 (Oct. 2006).
[15] 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 (1999).
[16] *See* Camille Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation*, University of Southern California Law School: Legal Studies Working Paper Series, 2012, Paper 87.
[17] *Id.*

that his coach had molested him and other boys while he was a younger athlete.[18] Then, in 1999, Sports Illustrated ran an article reporting "an epidemic" of sexual abuse by coaches in all sports and at all levels.[19] Between 1999 and 2012, several reports of sexually abusive coaches emerged.[20] None had the power of the Sandusky story.[21]

There are several distinguishing – and disturbing – details to the Sandusky story that contributed to its infamy. Sandusky founded a non-profit in 1977 that served underprivileged youth and coached at a premiere football university.[22] Throughout his tenure at Penn State, he had access to thousands of young athletes, and in 2012, he was convicted on 45 counts of sexual abuse and child molestation.[23] Federal officials are still investigating whether Sandusky sold child pornography that he made with his victims across state lines.[24] Finally, the most revolting allegation of all: a former child prostitute alleged that he was taken by Ed Savitz, a convicted sexual predator, to a fundraiser hosted by Sandusky for the purpose of child prostitution.[25] These

---

[18] Tom Appenzeller, *Youth Sports and the Law*, 151 (2000).
[19] William Nack & Don Yaeger, *Every Parent's Nightmare: The Child Molester Has Found A Home In The World Of Youth Sports, Where As A Coach He Can Gain The Trust And Loyalty Of Kids-And Then Prey On Them*, Sports Illustrated, Sept. 13, 1999, at 40.
[20] *See, e.g.*, Nancie Katz, *Jail for Coach in Sex Abuse*, N.Y. Daily News, July 16, 2002, at p. 2 (In 2002, Gary Session, a volunteer basketball coach at the Flatbush YMCA in Brooklyn, NY, pled guilty to charges that he sexually abused a 12-year old girl during a basketball practice); *Ex-Coach Sentenced In Child Molestations*, Record Net, Dec. 18, 2002, http://www.recordnet.com/articlelink/121802/news/articles/121802-gn-8.php (In December 2002, John Racadio pleaded guilty to molesting six children while he served as an equipment manager for a California Little League organization. Racadio, who had a prior conviction for sexual assault on a child, was sentenced to 30 years in prison.); Queens County District Attorneys' Office, Press Release, *Soccer Coach Sent To Prison For Up To 66 Years For Sexually Attacking Six Young Boys On His Team*, June 5, 2003, http://www.queensda.org/Press%20Releases/2003%20Press%C̈elease/06-June/605-2003.htm (In June 2003, Fernando Colman was found guilty by a jury of sexually assaulting six young boys during overnight stays at motels during soccer team trips in and around New York City. Colman, who was a coach and the vice president of the Argentina Soccer School, was already serving a sentence for sexual attacks on boys in Nassau County.).
[21] *Id. Cf.* Howard Bryant, *Penn State's shame*, ESPN, June 23, 2012, http://espn.go.com/college-football/story/_/id/8087426/jerry-sandusky-crimes-failure-stop-hang-penn-state (calling Sandusky's crimes the "worst crimes in the history of sports"); *Cf. also Jerry Sandusky: From Rising Star To Most Hated Man In America*, Athlon Sports, November 10, 2011, http://www.athlonsports.com/college-football/jerry-sandusky-rising-star-most-hated-man-america (naming Sandusky "the most hated man in America.").
[22] Drape, *supra, Sandusky Guilty of Sexual Abuse of 10 Young Boys*.
[23] *Id.*
[24] *Feds probe possible Sandusky child porn ring*, CBS News, August 10, 2012, http://www.cbsnews.com/8301-201_162-57491185/feds-probe-possible-sandusky-child-porn-ring/.
[25] *Id.*

details send a chill down the author's spine. Undoubtedly, this is not an uncommon reaction, and the public outcry has aligned with this spine-chilling sentiment.[26]

Crimes such as these are proscribed by state criminal codes, but statutes governing the unique role of coaches are inconsistent, and thus unpredictable, across states. Some states explicitly include coaches in their statutes. Others implicitly address coaches through statutes governing educators. Meanwhile, adding more ambiguity, some states do not address coaches statutorily at all – of these, some state courts have created a special duty through case law and others have not. In light of the foregoing, it is clear that the ALI must capitalize on its current opportunity to provide congruity and predictability by including a model statute in the MPC addressing coaches accused of sexual abuse.

A. Abuse of Trust Provisions & the Model Penal Code

The ALI is the leading independent organization in the United States that produces scholarly work to clarify, modernize and otherwise improve the law.[27] It is enormously respected and its MPC, including § 213, is often cited by courts and legislatures.[28] But, scholars agree that the fifty-year hiatus between the implementation and revision of § 213 has been far too long.[29] Accordingly, project participants of the ALI have begun revising the model statutes addressing crimes of sexual assault.[30]

One might propose that Congress, instead of the ALI, address this issue by passing a federal statute. On its face, this suggestion is supported by the Congressional history mandating

[26] *See, supra,* Bryant ("worst crimes in the history of sports"); *see also* Athlon Sports ("most hated man in America").
[27] *ALI Overview*, ALI's "About ALI" tab, last visited December 7, 2012, 11:47 a.m., http://www.ali.org/index.cfm?fuseaction=about.overview.
[28] Gerard E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 Ohio St. J. Crim. L. 219, 220 (2003).
[29] *See, supra,* Shulhofer (*citing, supra,* Denno).
[30] *Current Projects*, ALI's "About Current Projects" tab, last visited December 7, 2012, 1:32 p.m., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=26.

pedophile registration and notification laws.[31] However, a closer examination of the federal government's powers reveals a fatal flaw in this suggestion: pursuant to the 10th Amendment of the Constitution, the federal government has limited lawmaking abilities and policing sexual abuse does not fall within the purview of those abilities.[32] Registration and notification laws do not add a crime to states' criminal codes; address the elements of any particular crime; or create an affirmative defense to any particular crime – all of which are done by this proposal[33] Thus, a proposed federal bill creating specific provisions for addressing coaches accused of sexual abuse would likely end its life on the Senate floor.[34]

B. Current Statutory Authority

State lawmakers have recognized the imbalance of power between educators and children and have accordingly passed laws that criminalize sexual relations between educators and their students.[35] These "position of authority" statutes implicitly include coaches in some states; in others, there are separate carve-outs in the criminal code for coaches.[36]

States have also criminalized "sexual contact" between an adult and a child. The legislative purpose behind criminalizing "sexual contact" between adults and children is to

[31] *See, e.g.*, Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, tit. XVII, subtit. A, § 170101, 108 Stat. 1796 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)); Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071 (2006)); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. §§ 16901-62).

[32] U.S.C.A. Const. Art. I § 1, USCA CONST Art. I § 1.

[33] *See, supra,* Wetterling Act; Megan's Law; Adam Walsh Act.

[34] In another highly publicized case, Casey Anthony was acquitted of all felony charges of murdering her daughter, Caylee, after she failed to report Caylee missing. This sparked a national movement for a federal law making a mother's failure to report a crime. The proposed Act was met with scrutiny from Constitutional scholars and, soon after it was proposed, the drafters of the petition removed the "federal" portion of their movement to focus on state lawmakers due to the limitation of federal lawmaking powers. *See* Kevin Underhill, *Number of Americans Calling for Unconstitutional "Caylee's Law" Increasing All the Time*, Forbes, http://www.forbes.com/sites/kevinunderhill/2011/07/07/number-of-americans-calling-for-unconstitutional-caylees-law-increasing-all-the-time/.

[35] Caroline Hendrie, *States Target Sexual Abuse by Educators*, Educ. Week, April 30, 2003, http://www.edweek.org/ew/ew_printstory.cfm?slug=33abuse.h22.

[36] *See, e.g.*, Wyo. Stat. Ann § 6-2-303 (Lexus 1982); Conn. Gen. Stat. § 53a-71 (2003); N.C. Gen. Stat. § 14-27.7 (2003); Ohio Rev. Code Ann. § 2907.03 (Anderson 2003); Miss. Code Ann § 97-3-95(2) (1998).

"protect children from being exposed to alarming displays and exhibits of genitalia, and from being coerced to display their own genitalia."[37] However, "sexual contact" is left undefined in many state statutes and is defined differently through case law from state to state.

Although both position of authority statutes and sexual contact laws have obvious advantages, both are inconsistent and thus unpredictable for coaches.[38] These inconsistencies further evidence the desirability and likelihood of a uniformed model statute specifically governing coaches accused of sexual abuse.

i. "Position of Authority" Statutes

"Position of authority" statutes specifically address educators and/or coaches charged with sexual abuse, and include sentence enhancements where the sexual relationship is already illegal (as in the case in which a coach has sex with an athlete below the age of consent, for example).[39] Eighteen states currently have such language.[40] For example, Wyoming has incorporated the following language that governs anyone in a position of authority over the victim:

> (a) [a]ny actor who inflicts sexual intrusion on a victim commits sexual assault in the second degree if, under circumstances not constituting sexual assault in the first degree: . . .
>
> > (vi) the actor is in a *position of authority* over the victim and uses this position of authority to cause the victim to submit. . .[41]

[37] *State v. Bouse*, 150 S.W.3d 326 (Mo. Ct. App. W.D. 2004), *transfer denied*, (Nov. 23, 2004) and *transfer denied*, (Dec. 21, 2004).
[38] The author fully recognizes the purpose and benefits of both "position of authority" statutes and laws criminalizing "sexual contact" between an adult and a child.
[39] *Supra*, Wyo. Stat. Ann § 6-2-303.
[40] AR; CO; CT; DE; IA; KS; ME; MI; MN; NH; NJ; NM; NY; ND; OH; VT; WA; WY. *State survey of sexual assault statutes in the United States*, National Crime Victim Law Institute and the National Women's Law Center, last visited December 7, 2012, 2:06 p.m., http://www.lclark.edu/org/ncvli/clipps.html.
[41] *Supra*, Wyo. Stat. Ann § 6-2-303.

Meanwhile, some states specifically include a "[c]oach" as a person in a position of authority and subject to the reach of the criminal code.[42] Connecticut has the following provision:

> (a) [a] person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: . . .
>
> > (9) the actor is a coach in an athletic activity or a person who provides intensive, ongoing instruction and such other person is a recipient of coaching or instruction from the actor and is a secondary school student and receives such coaching or instruction in a secondary school setting, or
>
> (B) is under eighteen years of age.[43]

Mississippi has a similar provision:

> (2) A person is guilty of sexual battery. . . if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor. . . scout leader or coach.[44]

Complicating the matter further, Alaska, North Carolina, Ohio and Rhode Island have created a special duty for offenders in a position of authority through case law.[45] The Ohio Appellate Court, Sixth District, created this special duty by affirming a conviction for forcible rape due to the defendant's position of authority.[46] The court reasoned:

> [t]he Court wishes to give you this added definition as to force and threat. The force and violence necessary in rape is naturally a relative term, depending upon the age, size and strength of the parties and their relationship to each other; as [to] the relationship between [the accused] and the [ten year old victim]… Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established… The youth and vulnerability of children, coupled with the power inherent in [the accused's] position of authority creates a unique situation of dominance and control

---

[42] *See, e.g.*, Conn. Gen. Stat. § 53a-71 (2003); N.C. Gen. Stat. § 14-27.7 (2003); Ohio Rev. Code Ann. § 2907.03 (Anderson 2003).
[43] *Supra*, Conn. Gen. Stat. § 53a-71 (2002); *see also* Conn. Gen. Stat. § 53a-73a (2002).
[44] *Supra*, Miss. Code Ann § 97-3-95(2).
[45] *See, e.g.*, *Skrepich v. State*, 740 P.2d 950, 953 (Alaska Ct. App. 1987); *State v. Gilbert*, 385 S.E.2d 815, 817 (N.C. Ct. App. 1989); *State v. Fenton*, 588 N.E.2d 951, 966 (Ohio Ct. App. 1990); *State v. Burke*, 522 A.2d 725, 733-34 (R.I. 1987).
[46] *See, supra, Fenton* at 966.

> in which explicit threats and displays of force are not necessary to affect the abuser's purpose.[47]

This language creates a heightened duty for coaches due to the power imbalance and influence they have over youth athletes.[48]

As these examples show, the heightened duty for coaches due to their position of authority over athletes is inconsistent both within and between states. In Ohio, for example, the duty is created through case law – this means there is no statutory authority governing coaches. On the other hand, in Mississippi and Wyoming, a coach convicted of sexual abuse will have her sentence enhanced due to her position of authority.

ii. Other Ambiguous Statutory Authority

"Sexual contact" between an adult and a child is illegal.[49] However, exactly what constitutes "sexual contact" is ambiguous within and between states. The following are examples of statutory definitions of "sexual contact":

- Colorado: "The knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."[50]

[47] *Id.*
[48] *Id.*
[49] *See, e.g.*, Colo. Rev. Stats, § 18-3-401(4) ("intimate parts" means "the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person"); Conn. Gen. Stats. Ann., § 53a-65(3) ("intimate parts" means "the genital area, groin, anus, inner thighs, buttocks or breasts"); Del. Code. Ann., 11 § 761(f) ("any intentional touching of the anus, breast, buttocks or genitalia of another person" including those areas "when covered by clothing"); Ky. Rev. Stats. Ann., § 510.010(7) ("any touching of the sexual or other intimate parts of a person"); Me. Rev. Stats. Ann., 17-A § 251(1)(D) ("any touching of the genitals or anus, directly or through clothing"); NY Penal Law, § 130.00(3) ("any touching of the sexual or other intimate parts of a person not married to the actor"); ALI, Model Penal Code, § 213.4 (1985).
[50] *Supra,* Colo. Rev. Stats., § 18-3-401(4).

- Delaware: “Any intentional touching of the anus, breast, buttocks or genitalia of another person,” including those areas, "when covered by clothing.”[51]
- Kentucky: “Any touching of the sexual or other intimate parts of a person.”[52]
- Maine: “Any touching of the genitals or anus, directly or through clothing.”[53]
- New York: “Any touching of the sexual or other intimate parts of a person not married to the actor.”[54]
- ALI Model Penal Code: “Touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.”[55]

These statutory examples are inconsistent. In Colorado and the ALI Model Penal Code, the statute includes a *mens rea* requirement; that is, the accused must have “the purpose of arousal, gratification or abuse.”[56] However, the other examples do not require a mental state at all. This means that touching a child’s intimate area – even if innocuous – is criminal.[57] This inconsistency creates a difficulty for coaches: if a player is injured or requires stretching, the coach must be cognizant of the possibility that touching the athlete, even if solely for innocent purposes, could lead to criminal charges.

Case law regarding sexual abuse only complicates the issue. In one Kansas Appellate Court case, “lewd fondling or touching,” for purposes of a statute criminalizing aggravated indecent liberties with a child, was defined as:

[51] *Supra*, Del. Code Ann., 11 § 761(f).
[52] *Supra*, Ky. Rev. Stats. Ann., § 510.010(7).
[53] *Supra*, Me Rev. Stats. Ann., 17-A § 251(1)(D).
[54] *Supra*, NY Penal Law, § 130.00(3).
[55] *Supra*, ALI, Model Penal Code, § 213.4 (1985).
[56] *Supra, Id.*; Colo. Rev. Stats., § 18-3-401(4).
[57] *See* Del. Code Ann., 11 § 761(f); Ky. Rev. Stats. Ann., § 510.010(7); Me. Rev. Stats. Ann., 17-A § 251(1)(D).

> [Touching] that which undermines the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or to satisfy the sexual desires of either the child or the offender or both.[58]

However, whether the touching was "lewd" was dependent on the totality of the circumstances, and proof of actual arousal was not required to support a conviction for aggravated indecent liberties with a child.[59] What does it mean to "outrage the moral senses"? Further, whose "moral senses" must the court consider – the accused or the accuser? If proof of actual arousal is not necessary, does that eliminate the *mens rea* requirement?

In another a case decided in July, 2012[60] by the Connecticut Appellate Court, a provision in a "risk of injury to children" statute, which prohibited "contact with the intimate parts of a child in a sexual and indecent manner likely to impair the health or morals of such child," was not unconstitutionally vague so as to violate due process.[61] The court reasoned that the statute clearly proscribed the defendant's deliberate contact with the victim's intimate parts even though the contact occurred only once in a public location.[62] This holding focused on the victim's perception, not the accused's intent.[63] By holding that the statute was constitutional, the court implicitly shifted the focus from the accused to the victim. However, this is inconsistent with statutes that require intent to arouse, gratify or abuse.

The crimes of Sandusky have stirred public outcry as much as any crime in history and, in the past, similar crimes have invoked legislative response.[64] Moreover, current statutes governing coaches accused with sexual abuse, including "position of authority" statutes and laws

---

[58] *State v. Rutherford*, 184 Kan. App. 2d 767, 776 (2008) (*emphasis added*).
[59] *Id.*
[60] This is notable because it is post-Sandusky. It is hard to imagine any fact-finder, judge or member of a jury not considering Sandusky's crimes given how recent it took place.
[61] *State v. John O.*, 137 Conn. App. 152, 165 (July 31, 2012).
[62] *Id.* at 164.
[63] *Id.*
[64] *See, supra*, Bryant ("worst crimes in the history of sports"); *see also* Athlon Sports ("most hated man in America").

barring "sexual contact," are inconsistent and unpredictable across states. For these reasons, a model statute should be included in the MPC in order to redress the crimes of Sandusky. Further, the ambiguity of these laws – specifically the issue of whose mental state should be focused on – supports an individualized approach that would properly asses the unique facts of each case in reaching a verdict.

IV. Unique Circumstances Inherent In Athletics

"I've had a gun to my head, so to speak, for two years and now I'm hoping slowly that I'm going to be able to get back on my feet," said Ray Collingham.[65] Collingham, a former gymnastics teacher, was charged with seven counts of sexual assault, four counts of sexual interference, two counts of invitation to sexual touching and two sexual exploitation charges.[66] The allegations came from a former athlete; Collingham was acquitted on all of the charges.[67]

A simple search on Google retrieves hundreds of stories similar to Ray Collingham's.[68] These stories tell of coaches who, while acting in their role as a coach, were accused of sexual abuse and ultimately acquitted because their actions, although perhaps inappropriate in other settings, were appropriate in their role as coach. To ensure proper instruction for athletes, coaches must be able to act in accordance with traditional norms of sports; supervise athletes when they are in the locker room and/or shower; properly assist athletes in stretches to avoid injury; as well as respond to adequately respond to injuries. A strict statute that bars coaches from touching an athlete's buttocks or supervising young athletes in the shower will inhibit coaches and diminish the value of athletics. The ALI must consider the unique relationships, circumstances and standards of conduct in sports when drafting a model law in response to the

[65] Brett Clarkson, *'I've had a gun to my head'Man wants life back after sex charges tossed*, Toronto Sun News, July 28, 2009, http://www.torontosun.com/news/torontoandgta/2009/07/28/10283596-sun.html.
[66] *Id.*
[67] *Id.*
[68] The search phrase: "Coach falsely accused."

crimes of Sandusky to avoid the negative consequences of an overly rigid statute while acknowledging the imbalance of power between a coach and athlete.

A. Special Relationship Between and Athlete and Coach

There is a special relationship that exists between an athlete and a coach which must shape the inquiry for convicting coaches charged with sexual abuse.[69] There are several distinguishing characteristics of a relationship between a youth athlete and his or her coach that must be taken into consideration.

First, an athlete is encouraged by her parent at an early age to follow the coach's instructions and, as the level of competition rises, will likely be punished for questioning a coach's wisdom.[70] Stemming directly from this is consent. Children are more likely to consent to improper sexual contact in an environment where the child is familiar with the adult and the adult is in a nurturing, parental-like role.[71] Moreover, due to the intimate nature of the relationship, a young athlete will be internally discouraged from reporting a coach because he or she may feel as if it is wrong to get the coach in trouble. As one young athlete reported, "[Coach] had been such a friend that it was kind of like I was betraying him."[72] Finally, young male athletes are often afraid of being labeled homosexual if they report their male coach.[73] Unlike sexual abuse generally, boys are abused more often than girls by their coaches.[74]

These factors, which are unique to a relationship between a coach and an athlete, were present in the case of Jerry Sandusky. The man who was designated by the Pennsylvania grand

[69] *See, supra*, Hendrie.
[70] *Id. See also, supra,* Gibbons and Campbell.
[71] *See, supra*, Appenzeller at 152.
[72] *See, supra*, Nack.
[73] *Id.* at 45. ("Outside youth sports, however, girls are generally victims of sexual abuse much more frequently than boys.")
[74] *Id.*

jury as "Victim 1" was described as "shameful and in fear of his life" by his psychologist.[75] The psychologist described Victim 1's angst when reporting such a well-known man.[76] "This was Jerry Sandusky we're talking about here," he said.[77] He then cited an official from Victim 1's school who said that Sandusky possessed "a heart of gold."[78] The unique relationship, and the overwhelming power of a coach, must be taken into consideration when forming a statute to govern coaches accused of sexual abuse.

B. Standards of Conduct

Along with the unique athlete-coach relationship, which supports a closer look at coaches due to their overwhelming power, there are also unique circumstances and standards of conduct present in athletics that must be taken into consideration. These unique circumstances and standards support a potentially competing interest: a statute addressing coaches accused of sexual abuse cannot criminalize coaches for engaging in traditionally accepted practices or actions necessary to effectively coach their athletes.

i. Buttocks Slapping

In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that same-sex sexual harassment is actionable under Title VII.[79] Justice Scalia, while stressing the objective component of the "severe and pervasive" standard, used the following example:

> [a] professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations,

[75] Kevin Johnson, *The torturous, winding path of Sandusky's 'Victim 1'*, USA Today, July 18, 2012, http://content.usatoday.com/dist/custom/gci/InsidePage.aspx?cId=dailytribune&sParam=56278226.story.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82 (1998).

> and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.[80]

A coach who "smacks" his player on the buttocks is apparently exempt under Title VII, even though Justice Scalia fails to give any evidentiary support in logic or case law for this conclusion.[81]

By assuming that buttocks-smacking was not actionable harassment in the context of two adults, Justice Scalia implicitly reinforced the permissibility of this tradition within the context of athletics as a whole. This underlying assumption – that it is okay to touch someone's buttocks during athletics but not in other settings – must be considered when crafting a statute that governs coaches accused of sexual abuse of youth athletes. Coaches, at all levels, use the "smack" on the backside as a motivator.

The act of touching a child's buttocks is, in fact, criminal child molestation in the Fifth Circuit[82] – which is where the claims in *Oncale* arose. This raises an obvious tension: a statute addressing coaches' sexual abuse must have the versatility to withstand situations in which a coach is innocently using a smack on the buttocks as motivation, while simultaneously holding the coach with sexual intent criminally liable.

ii. Showering

"Jerry Sandusky admitted to my face, he admitted it," a mother of one of his victims said. "He admitted that he lathered up my son. They were naked and he bear-hugged him," she exclaimed.[83] Jerry Sandusky admitted to showering with young boys – yet, he maintained that

---

[80] *Id.* at 81-82.

[81] Justice Scalia was not referring to an adult coach touching a child-athlete's buttocks and the author is not implying that here.

[82] *United States v. Moore*, 425 Fed. Appx. 347, 351-52 (5th Cir. 2011) (holding that the defendant's act of touching his twelve-year-old stepdaughter's clothed buttocks was an offense of child molestation, and thus, admissible as evidence of defendant's similar crime).

[83] Michael Muskal, *At Jerry Sandusky trial, Mike McQueary steps forward – again*, LA Times, June 13, 2012, http://articles.latimes.com/2012/jun/13/nation/la-na-nn-jerry-sandusky-20120613.

he had not molested or assaulted them.[84] One explanation as to why a grown man with no sexual motives would shower with young boys was given by one of Sandusky's attorneys: "[s]ome of these kids don't have basic hygiene skills. Teaching a person to shower at the age of 12 or 14 sounds strange to some people, but people who work with troubled youth will tell you there are a lot of juvenile delinquents and people who are dependent who have to be taught basic life skills, like how to put soap on their body."[85] The attorney went on to claim that his former cross country coached showered with him and his teammates.[86] The argument that it is permissible for a grown man to shower with 12-14 year-old boys *to teach them hygiene* is not going to be explored here.[87] However, it does raise another powerful concern. The shower is a place where young athletes are most vulnerable to coaches who are sexual predators – but it is also a place where these same athletes are susceptible to bullying by their peers if there are no adults to supervise. This tension must be addressed by a statute governing coaches accused of sexual abuse.

The shower is a hunting ground for bullies. As the Supreme Court has noted, "there is an element of 'communal undress' inherent in athletic participation."[88] Young athletes, with the same adolescent insecurities as any non-athlete, are more exposed in the shower than any other time.[89] In one case, a freshman basketball player was bullied and nicknamed "Stiffy" because he

---

[84] *Id.*
[85] Al Gnoza, *Attorney: Sandusky may have been teaching kids to shower*, Harrisburg ABC 27 News, December 13, 2011, http://www.abc27.com/story/16319215/carlise-attorney-hired-by-sandusky.
[86] *Id.*
[87] The author will not entertain that as a credible argument out of respect for the victims. First, according to testimony, Sandusky showered alone with the young athletes – not with groups of them. Yet, there was no explanation as to why he would not teach them as a group, if in fact it was for educational purposes. Second, there was a plethora of – what the jury found to be – credible testimony supporting the contention that Sandusky abused the victims he showered with. Lastly, and perhaps most compellingly, there are clearly other appropriate methods to teach children hygiene.
[88] *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (*citing Schaill by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1318 (1988)).
[89] *See* Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, And Tort Duties to Supervise*, 77 Temple L.Rev. 641 (2004).

was the only player to shower after practice.[90] In another case, a freshman football player was approached by a gang of upper-classmen while showering after football practice.[91] One of the upper-classmen grabbed the freshman's buttocks and called him a "faggot."[92] Finally, another football player, Brian, was subjected to the following:

> Brian was grabbed as he came out of the shower, forcibly restrained and bound to a towel rack with adhesive tape. Brian's genital area was also taped. After Brian was restrained, one of his teammates brought a girl that Brian had dated into the locker room to view him. All of this took place while other members of the team looked on.[93]

If Brian's coach had been present, would this bullying have occurred? Could it have been worse if Brian's attackers knew there was a statute barring their coaches from supervising the shower at all?

The tension between supervision and the prevention of sexual abuse by coaches is clear. Thus, a categorical rule barring coaches from supervising young athletes in and around the shower simply will not work. By solving one problem (preventing against the small percentage of coaches who are sexual abusers), a broad mandate would serve to exacerbate another (bullying in the shower).

iii. Injury Prevention & Response

One variable common in sports that is uncommon in an educational setting is the potential for, and response to, injuries.[94] When an athlete is injured at practice, his or her coach may be the only adult present to administer care.[95] Administering proper care may involve taking off the athlete's uniform or massaging the injured area which could include the groin or

[90] *Snelling v. Fall Mountain Regional School Dist.*, 2001 WL 276975 at 1 (N.H. Dist. 2001).
[91] *Id.*
[92] *Id.*
[93] *Seamons v. Snow*, 84 F.3d 1226, 1230 (10th Cir. 1996).
[94] High school athletes account for an estimated 2 million injuries, 500,000 doctor visits, and 30,000 hospitalizations annually. *See* Center for Disease Control and Prevention Official Statistics, last visited December 7, 2012, 3:04 p.m., http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5538a1.html.
[95] *See Coaching Our Kids to Fewer Injuries A Report on Youth Sports Safety*, Safe Kids Worldwide Report, April, 2012, pp. 5-7.

buttocks.[96] Moreover, injury prevention requires proper stretching and this may require that a coach touch an athlete.[97] Thus, another inherent tension arises when considering the framework of a model statute to police sexual abuse by coaches.

In one exemplary case, a high school hockey player accused his coach of sexual assault after the coach responded to an injury at practice.[98] The teen complained about soreness in his leg and testified that the coach offered to massage it.[99] "[Coach] said he knew what he was doing, so I trusted him," the teen said.[100] "He started to go higher and higher and he went up into my boxers and into my groin area."[101] However, the judge did not find the testimony to be credible and held, "[i]f, as the teen said, [the coach] did touch the teen's groin area, it was accidental."[102] The coach was acquitted on all charges.

In a similar case, a jury acquitted a track coach accused of sexually assaulting two female track athletes.[103] One of the teen girls alleged that the coach offered to help her stretch and the stretching led to inappropriate touching of her genitals.[104] The coach testified that he had in fact helped both girls stretch, but that he never did anything inappropriate.[105] Ultimately, the jury believed the coach's emphatic assertion that he never had sexual intent and never touched the girls inappropriately.

These examples highlight the unique situation for coaches when an athlete gets injured or when an athlete must stretch before competition. A strict, categorical rule against coaches

---

[96] *Id.*
[97] *Id.* at 8.
[98] Galen Eagle, *Hockey coach acquitted of sexual-assault charge*, Peterborough Examiner, April 11, 2009, http://www.thepeterboroughexaminer.com/2009/04/11/hockey-coach-acquitted-of-sexual-assault-charge.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] Gene Sears, *Jury acquits former FLHS track coach*, Fort Lupton Press, December 7, 2011, http://www.ftluptonpress.com/content/jury-acquits-former-flhs-track-coach.
[104] *Id.*
[105] *Id.*

touching athletes will preclude innocent coaches from properly preventing and responding to injuries. On the other hand, a statute addressing coaches must hold coaches, who use a massage or stretch to prey on their victims, criminally liable.

V. A Roadmap Modeled after *McDonnell-Douglas*

If the ALI answers its call to action and includes a model statute addressing coaches accused of sexual abuse, it must consider the unique characteristics inherent in athletics, as discussed above.[106] To avoid the inconsistency and unpredictability of its state predecessors, the model provision must have the ability to address the unique circumstances and standards of conduct in sports while acknowledging the power imbalance between a coach and athlete. Moreover, a model statute properly evaluating claims of sexual abuse by coaches must provide clarity to the overarching question of sexual abuse law: Should the law focus on the intent of the accused or the perception of the accuser?

The following proposal begins with an examination of the burden-shifting test from *McDonnell-Douglas*, a seminal Title VII discrimination case. The similarities between discrimination cases and cases in which a coach is accused of sexual abuse are presented as support. Discrimination law provides an appropriate model because of the connection between discrimination and sexual abuse. Both discrimination and sexual abuse inherently entail an imbalance of power.[107] In addition, sexual harassment law – which is addressed by Title VII – is often explored alongside sexual assault law.[108]

---

[106] The consequences of inconsistent, ambiguous statutes are exemplified by the story of the former gymnastics coach falsely accused of molesting an athlete, Ray Collingham. In that case, the young girl testified that she perceived a sexual violation; yet, Collingham was acquitted. Thus, that court focused on the accuser's intent. On the other hand, the statutes criminalizing "lewd fondling or touching" were interpreted by the Kansas Appellate Court as focusing on the impairment of the mental state of the child – clearly focusing on the accuser's perception. This is inconsistent.

[107] Julie Goldscheid, *Gender Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 Colum. J. Gender & L. 61 (2008).

[108] *Id.*

Then, recognizing distinguishable characteristics between sexual abuse cases and discrimination cases, a statutory burden-shifting mechanism is proposed. Lastly, potential problems with the proposed roadmap are noted. If enacted, this proposal would satiate the public outcry; provide predictability and consistency for coaches accused of sexual abuse; and finally, convict coaches who sexually abuse, while preventing coaches from being falsely accused due to the unique standards of conduct and circumstances in athletics.

A. Using McDonnell-Douglas' Burden-Shifting Mechanism

In 1973, the Supreme Court, in its interpretation of Title VII of the Civil Rights Act of 1964,[109] developed a burden-shifting method for plaintiffs lacking direct evidence in *McDonnell-Douglas*.[110] For a plaintiff to succeed in a Title VII action, the employer must have had the intent to discriminate.[111] The Court, recognizing the difficulty of proving discriminatory intent by an employer, created a judicial mechanism for examining cases in which a plaintiff only has circumstantial evidence of discriminatory motives in an adverse employment action.[112]

The *McDonnell-Douglas* test begins with the plaintiff's burden of producing her *prima facie* case of discrimination.[113] In a Title VII case decided after *McDonnell-Douglas*, the Supreme Court explained that the *prima facie* showing is:

---

[109] 42 U.S.C. § 2000e (1994) (prohibiting discrimination in employment based on race, sex, religion or national origin).

[110] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("[T]he entire purpose of the McDonnell Douglas *prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.").

[111] Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 215 (1993).

[112] *See*, *supra*, *McDonnell Douglas*, at 802.

[113] An example of a prima facie case in a discrimination action would include these four factors: (1) the plaintiff belongs to a protected group under Title VII; (2) the plaintiff applied and was qualified for a job for which the employer was seeking applications; (3) despite the plaintiff's qualifications, the plaintiff was rejected; and (4) after the plaintiff's rejection, the position remained open and the employer continued to seek applications from similarly qualified applicants. *Id.*

> [s]imply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.[114]

Once this burden is met, the plaintiff has raised an "inference of discrimination."[115]

In the second step, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the adverse employment action.[116] This, like the plaintiff's *prima facie* showing in step one, is simply a burden of production and is presumptively legitimate, provided the reason is not because of a protected category.[117] In the final step of the test, the burden bounces back to the plaintiff and she has an opportunity to *prove* by competent evidence that the presumptively valid reason for the employer's adverse employment action was in fact a pretext for a discriminatory decision."[118]

This unique judicial mechanism is an appropriate model for a model statute governing coaches accused of sexual abuse for the following reasons.

i. Direct Evidence Of Intent

If a child or her parents comes forward with direct evidence of sexual intent by the accused, this proposal – like *McDonnell-Douglas* with cases with direct evidence of discriminatory intent – is inapplicable.[119] Legislators are clearly concerned with the intent of the accused, as evidenced by the phrase "for the purpose of sexual arousal, gratification or abuse"

---

[114] *Furnco Construction Corp. v. Waters*, 438 U.S. 576, 538 (1978).
[115] *Id.* at 579-80.
[116] *Id.* at 577.
[117] *Id. See also, supra, Hopkins,* at 270 (1989) ("[i]n the face of this inferential proof, the employer's burden was deemed to be only one of production; the employer must articulate a legitimate reason for the adverse employment action."); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 10 (1981) ("[o]nce the defendant meets the burden of rebuttal, the plaintiff's prima facie case creating the presumption of discrimination drops from the case.")
[118] *See McDonnell Douglas,* at 805.
[119] Examples could include a recording – in written, video or audio format – of the coach reciting sexual intent; a history of sexual abuse by the coach; or, of course, a confession of sexual intent by the accused.

found in several state statutes.[120] However, like discriminatory intent, sexual intent is a state of mind and is very difficult to prove.[121]

ii. "Inference of Sexual Intent"

In cases decided pursuant to *McDonnell-Douglas*, a plaintiff who meets her prima facie case for discrimination is said to have "raised an inference of discrimination."[122] The same logic applies for a child who alleges sexual abuse by a coach. In fact, the Supreme Court's exact wording in its application of the first step of *McDonnell-Douglas* can be applied:

> [t]he allegations of [sexual abuse] are simply proof of actions taken by the [coach] from which we infer [sexual intent] because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible [intent].[123]

In the context of a coach accused of sexual abuse, after a child meets its *prima facie* case[124] for properly alleging sexual abuse, an "inference of sexual intent" would be drawn.

iii. Legitimate, Non-Sexual Reasons

A District Court recently granted summary judgment in favor of an employer who fired six employees because they had "liked" a page on Facebook.[125] Clearly, courts and legislators have refused to replace the judgment of employers and, aligned with this principle, the *McDonnell-Douglas* test only requires an employer to provide a "legitimate, non-discriminatory" reason for taking adverse action against the employee.[126] The burden on the employer is not to

[120] *See, supra,* Colo. Rev. Stats., § 18-3-401(4); ALI, Model Penal Code, § 213.4 (1985).
[121] *Id.* at 802.
[122] *See, supra, Furnco,* 438 U.S. at 579-80.
[123] *Id.* at 576 (*alteration in original*).
[124] The elements of the *prima facie* case are set forth below in **Section V. B.** of the proposal.
[125] *See Bland v. Roberts,* 857 F.Supp.2d 599, 610 (E.D.Va. 2012) (The employees worked for a Sheriff's Dep't and "liked" the page of a candidate running against the incumbent sheriff. When the incumbent won re-relection, he fired the employees.).
[126] *See Furnco,* at 577.

prove that its reason was the *actual* reason – rather, simply that it is a *possible* reason.[127] Thus, at the second step, the employer has a "burden of production."[128]

Similarly, a coach that is accused of sexual abuse should only have a burden to produce a legitimate, non-sexual reason for the action(s) that the accuser is basing her allegations on. This has multiple benefits. First, by characterizing the second step as a burden of production for the coach – not a burden of proof – the ultimate burden lies with prosecutor on the accuser's behalf. This comports with the principle underlying criminal law that the accused is innocent until proven guilty beyond a reasonable doubt.[129] Further, although policing sexual predators is obviously the state's responsibility, a coach must have assurance that legitimate, non-sexual touching such as massaging or stretching will not result in a criminal conviction. Without this assurance some coaches will be debilitated in their effectiveness as a coach, while many others will be deterred entirely from coaching.

iv. Definition "Sexual Abuse" and Whose Perspective to Focus on

The phrase "sexual abuse" is not easily defined and is used differently by law enforcement agencies, social services agents and medical professionals.[130] This is similar to the phrase "to discriminate" in the context of Title VII – it, too, has no clear definition.[131] The

[127] *Id.*
[128] *Id.*
[129] However, this principle is often forgotten in crimes involving sexual violence against children. *See* Fitzpatrick, *Innocent Until Proven Guilty: Shallow Words For The Falsely Accused In A Criminal Prosecution For Child Sexual Abuse*, University of Bridgeport Law Review (1991).
[130] *Id.* (*citing* May, *Understanding Sexual Child Abuse* (1978)). A narrow definition of sexual abuse would include child rape or genital stimulation. *Id.* at 2. Sexual perversion, however, manifests itself in many ways; an abuser may be sexually stimulated by "[v]arious body parts, certain types or ritualistic behavior, and unusual objects and activities . . . ." *Id.* Sexual offenses are classified as non-touching, touching and violent. *Id.* at 4-9. The legal community and law enforcement take the viewpoint that sexual abuse is a "punishable criminal act." *Id.* Physicians and nurses equate abuse "with its possible consequences such as physical damage to the genitals, pregnancy and venereal disease." *Id.*
[131] To discriminate under Title VII, must an employer know that she is acting prejudicially toward a certain class of people? What if an employer genuinely holds no biases; yet, treats members of a protected class differently? Studies show that prejudices are often unconscious. Thus, an employer could be racist and not even know it. This is

McDonnell-Douglas test was developed to properly assess this malleable concept, and so, it is a fitting model for examining another concept that is not easily defined.

One source identifies "sexual abuse" as:

> [t]he involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend, are unable to give informed consent to, and that violate the social taboos of family roles.[132]

Moreover, some statutes governing sexual contact require the accused make the contact "for the purpose of sexual arousal, gratification or abuse."[133] But, then, case law (and other statutes like the "lewd touching or fondling" statutes mentioned above) focuses on the child's perception of the event and how the child is affected.[134] The ambiguous definition of "sexual abuse" and the inconsistencies between statute and case law epitomize the inherent tension that lawmakers face when proscribing laws to evaluate sexual abuse of children. Should sexual abuse laws focus on the intent of the accused, the perception of the accuser, or both?

A broad, rigid statute necessarily falls short of simultaneously preserving both perspectives; however, a burden-shifting approach does not. The perception of the accuser is highlighted in the first step as the *prima facie* threshold is only that of production, not proof. Then, in the second step, the accused has an opportunity to proffer a legitimate, non-sexual reason for engaging in the alleged sexual contact – thus, the focus shifts to the intent of the accused. In the last step, the accuser, through the prosecutor, has the opportunity to either prove that: (1) the coach's reason was a pre-text for sexual intent, or (2) regardless of the coach's intent, any reasonable child in the accuser's position would perceive the contact as sexual.

---

one example of how discrimination, like sexual abuse, cannot be easily defined. *See* Blanton & Jaccard, *Unconscious Racism: A Concept in Pursuit of a Measure*, Annual Review of Sociology (2008).

[132] *Id.* at 8.

[133] *See, supra,* Colo. Rev. Stats., § 18-3-401(4); Del. Code Ann., 11 § 761(f); Ky. Rev. Stats. Ann., § 510.010(7); Me Rev. Stats. Ann., 17-A § 251(1)(D); NY Penal Law, § 130.00(3).

[134] *See, supra, Rutherford,* at 776.

B. *Prima Facie* Case and Elements of Proposal

Most cases of coaches accused of sexual abuse begin when another adult, often a parent, reports a suspicion that abuse is taking place.[135] In fact, statutes in most states impose an affirmative duty to report suspected sexual abuse of children.[136] By the time the coach makes it to court, the story has hit the news and much of the damage to the coach's reputation and career is done.[137] This proposal will not address those issues. Rather, this proposed model statute facilitates appropriate outcomes of a coach accused of sexual abuse, irrespective of the social condemnation following allegations of such abuse.[138]

i. Step 1: Prosecutor's *Prima Facie* Case

The prosecutor, on behalf of the child, must make its *prima facie* case by alleging the following elements in the criminal complaint: (1) that the alleged victim was less than 18 years of age at the time of the alleged acts that constituted sexual abuse; (2) that the accused was at least 18 years of age at the time of the alleged acts that constituted sexual abuse; (3) that the accused was acting in a role as a coach, trainer or other supervisory role in athletics before or during his or her relationship with the alleged victim; and (4) allege a specific action, or multiple actions, by the accused that the alleged victim perceived as sexual abuse. If the prosecutor successfully alleges these four elements, an "inference of sexual intent" is raised.

---

[135] Irving Kristol, *"Doing Something" About Child Abuse: The Need To Narrow The Grounds For State Intervention*, 8 HARV. J.L. & PUB. POL'Y 540, 556 (1985).
[136] *See, e.g.,* Cal. Penal Code § 11166 (West 1990); Minn. Stat. Ann. § 626.556 (Subd. 3) (West Supp. 1990); N.Y. Soc. Serv. Law § 413 (Mckinney Cum. Supp. 1990); Va. Code §§ 63.1-248.3 -248.4 (1987).
[137] Once the investigation has advanced to the stage of criminal charges and arrest, it becomes part of the public record. Public knowledge of the alleged abuse and the accused's identity represents only a few of the problems incurred by the defendant. Following either the dismissal of the charges or an acquittal, the defendant is still subject to the doubts of the public, employers, fellow workers and the family. The effects of such doubt include total disruption of the family through separation or divorce, loss of employment, difficulty finding new employment, loss of housing, and distancing by family and friends who fear for the safety of their own children. *Supra*, Besharov.
[138] *See Id.*

It is likely that pre-trial motions will decide several of the elements. For example, if the defendant has credible evidence of "legitimate, non-sexual" reasons for her actions, she may be willing to stipulate to her own age, the alleged victim's age, and that she was a coach in order to avail herself to this statute. Contrarily, a court may grant summary judgment in the defendant's favor if there is no genuine, material issue of fact as to whether the defendant was the alleged victim's coach pursuant to this statute (if the defendant is only a teacher, for example).[139] If this happens, the defendant will avoid the harsher penalties of being convicted pursuant to this proposal.[140] The *prima facie* elements are necessary, however, because this model statute is predicated on the unique relationships, circumstances and standards of conduct in athletics, and thus, should not be applied outside of that context.[141]

ii. Step 2: Coach's Opportunity to Raise a Legitimate, Non-Sexual Reason for the Conduct

Assuming the prosecutor meets its burden of alleging the *prima facie* elements,[142] the statute's burden-shifting mechanism is triggered. The accused coach now has the burden to produce – but not to prove – a legitimate, non-sexual reason for engaging in the alleged action(s) that led to the inference of sexual intent. This legitimate reason could be stretching; massaging; injury response; or, supervising athletes in the shower. This step of the burden-shifting mechanism addresses the unique characteristics inherent in athletics, as discussed above.

[139] Summary judgment is appropriate where the court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c).
[140] Sentencing for a coach convicted pursuant to this proposed statute will not be explored here. However, the sentences would be significantly higher than an abuser who is not in the position of authority convicted of sexual abuse.
[141] Consider the application of this model statute to a teacher in a classroom. It is hard to imagine a scenario in which a teacher would have a credible "non-sexual reason" for stretching or massaging a student's upper-thigh. Thus, this proposal's fundamental predicate – that athletics have inherent characteristics that are unique and require a different statute – is improperly applied in a teacher-student context.
[142] If the prosecutor fails to successfully allege one of the elements, or if the defendant succeeds on summary judgment on any of the elements, the criminal complaint falls on its face.

Furthermore, at this step, the accused coach has an opportunity to present her intent, irrespective of the alleged victim's perception of what took place. This is critical. Consider the cases above in which coaches were falsely accused of sexual abuse because they had been stretching or massaging athletes. Even if an athlete perceives sexual intent from a coach, if it is unreasonable to do so and the coach has a legitimate, non-sexual reason for engaging in the action – injury response, for example – the coach must be acquitted. This step of the analysis considers this potential and prevents false convictions.

iii. Step 3: Prosecutor's "Last Bite" to Show Pretext or Disprove Coach's Reason

The final step of the test shifts the burden – at this step, the burden is one of proof – to the prosecutor. The prosecutor may prove that the accused coach had sexual intent, or that, regardless of the coach's intent, her action(s) were so egregious that any reasonable child would perceive it as sexual contact. Prior to this step, the burden has been simply to produce evidence. Here, because the burden is to prove, the prosecutor has multiple options. One of the chief purposes of this proposal is to protect child athletes from sexual abusers who are in a position of authority;[143] therefore, the child's perception (provided that it is reasonable) is ultimately dispositive.[144]

The first avenue for the prosecutor is to prove that the defendant's legitimate, non-sexual reason for engaging in the alleged action(s) is a pre-text (i.e. it is simply a cover-up for sexual intent). This is a fact-specific inquiry and will provide the individualization required by the

[143] This relates back to the discussion about the unique nature of a relationship between a coach and athlete. Due to the position a coach holds, this proposal for the revision project seeks to ensure protection for children who are vulnerable.

[144] This article has focused on the difficulty of parsing out the accuser's perception and the accused's intent. The step-by-step process attempts to address both but, ultimately, one side must outweigh the other. The author contends that the premiere concern in any statute such as this is to protect children – thus, the child's perception ultimately outweighs the accused's intent.

special circumstances and standards of conduct in sports. For example, if an athlete alleges that her coach sexually abused her by rubbing the inside of her thigh, the coach can produce evidence that the child had an injury that required touching of the thigh. Then, the prosecutor can present evidence suggesting the child was not really injured; the coach has a history of allegations of abuse; and/or the child was not truly injured.

The second route that for the prosecutor to secure a conviction is to prove that, irrespective of the coach's legitimate, non-sexual reason, the action(s) were so egregious that any "reasonable" child athlete would perceive it as sexual abuse. This way of securing a conviction addresses the scenario in which a coach performs an act on a child genuinely without sexual intent, but the child is psychologically or emotionally scarred in the same way she would have been if the coach did have sexual intent.[145] This proposed model recognizes the most important concern with any legislation regarding child victims: to protect them against abuse.

C. Potential Problems

The most prominent issues facing this proposal stem from applying a civil burden-shifting test in a criminal context. First, the burden of proof for the prosecutor, unlike a Title VII plaintiff, is to prove her case beyond a reasonable doubt. Practically, this means that a coach would have a much lower burden persuading the fact finder that her action was legitimate than a Title VII defendant-employer. This is inconsistent with the legislative purpose of broadening the protection of children. Moreover, the different structures proscribing the presentation of evidence in the criminal and civil arenas presents a potential issue. If this proposal's guidelines

[145] Proof of sexual intent may be sufficient for a coach to be convicted of sexual abuse, but should not be necessary. Consider the following hypothetical: an unwitting coach massages his young football player's groin when he is injured. The coach genuinely has no sexual intent. Yet, the boy feels sexually violated. The boy begins having feelings of deep-seeded fear before practice because he knows his coach is going to touch him. This coach should be convicted, irrespective of his intent and the standards of conduct, solely because of the athlete's perception. If the coach in this hypothetical is not held accountable because of the lack of intent, the legislative purpose of protecting children is lost.

are employed, the prosecutor would be required to present her entire case at the forefront of trial, knowing that the defendant (coach) will raise her defense that her actions were appropriate due to the unique nature of athletics. The consequence of this is that the pure burden-shifting would be diluted: the prosecutor would present evidence refuting the defendant's legitimate reason for the action, before the defendant even had a chance to raise the issue.

Further, this proposed statute only addresses close cases. It does not provide extra protection for cases in which a coach is actually having intercourse with a child and these are the cases that shock the public. Thus, it may not fully satiate the public outcry for legislative response.

VI. Conclusion

Consider Bobby Knight and Phil Jackson: one threw chairs during fits of rage, while the other is nicknamed the "Zen Master" and rarely raised his voice.[146] Yet, both were iconic coaches and brought the best out of their athletes. There is no definition of the "ideal coach" because athletes, from Little Leaguers to Professionals, respond differently to different types of coaches. Coaches must be able to act freely within the unique constructs of athletics in order to be fully effective.

The ALI has the ripe opportunity to address the public outcry over Jerry Sandusky's crimes with a model statute. If the ALI seizes this opportunity, it must be mindful of the unique relationships, circumstances and standards of conduct present in athletics. Protecting children from child abusers is obviously a paramount concern – but this protection should not debilitate

[146] *See* Jeff Walker, *Exclusive: Knight speaks about retirement decision*, Lubbock Avalanche-Journal, February 4, 2008, http://lubbockonline.com/stories/020408/loc_243647726.shtml (Bobby Knight was an NCAA men's basketball coach for 43 years and has the second most wins of any coach. He was also well-known for his fits of anger – throwing chairs, swearing at reporters and being physical with players.); Heisler, Mark, *Phil Jackson's tenure produced the most success and fun we've ever seen*, Los Angeles Times, November 10, 2012, http://articles.latimes.com/2011/may/11/sports/la-sp-heisler-lakers-20110512 (Phil Jackson won 11 NBA titles and has the highest winning percentage of any NBA coach.).

current coaches' ability to reach their athletes, nor should it deter people from coaching in the future.[147]

[147] The driving force behind this article is the author's personal ambition to coach his son or daughter in the future. After hours of jump-shots, groundballs and the occasional argument, one man has exemplified the meaning of "Coach." Thank you, Dad.