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Slipping through the Cracks and into Schools: The Need for a Uniform Sexual-Predator Tracking System.

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ARTICLE

SLIPPING THROUGH THE CRACKS AND INTO SCHOOLS: THE NEED FOR A UNIFORM SEXUAL-PREDATOR TRACKING SYSTEM

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“Too many of our kids fall prey to sexual predators. You can have a part in tightening loopholes that allow these monsters to roam free. Our children deserve nothing else.”¹

I. A HEINOUS CRIME: SEXUAL ASSAULT OF CHILDREN

Over half a million registered sex offenders currently live in the United States.² Sex offenses are among the most devastating crimes because of the long-lasting emotional, physical, and psychological effects it has on victims. Sadly, most victims of sex offenses are innocent children.³ “Most sex offenders are not in prison, and . . . are largely unknown to

1. Matthew Keegan, *The Child Safety Act of 2005*, EZINE ARTICLES, July 29, 2005, <http://www.ezinearticles.com/?The-Child-Safety-Act-of-2005&id=55067>.

2. NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, SEX-OFFENDERS: HISTORY, http://missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=3032 (last visited Oct. 3, 2007); see also NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, REGISTERED SEX OFFENDERS IN THE UNITED STATES, http://www.missingkids.com/en_US/documents/sex-offender-map.pdf (last visited Oct. 3, 2007) (reporting that there are currently 602,189 registered sex offenders in the United States).

3. NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, STATISTICS, http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2810 (last visited Oct. 3, 2007) (“Research indicates that 1 in 5 girls and 1 in 10 boys will be sexually victimized before adulthood.”).

people in the community.”⁴ Sex offenders also have a propensity for re-offending their crimes.⁵ “While community supervision and oversight is widely recognized as essential, the system for providing such supervision is overwhelmed.”⁶

There are many loopholes in the current system that allow sex offenders to slip through the cracks unnoticed. Many predators remain undetected because law enforcement lacks the resources to track their whereabouts.⁷

There is need for a uniform system to track sex offender/predators. A uniform system would provide consistency for registration and community notification of the presence of sex offenders, thereby decreasing the chances of future victimization of innocent children. Several states now have their own systems in place, but new systems with improved technology are needed to track offenders as they wander from state to state. Failure to track these serious offenders will leave them free to continue assaulting victims.

Part II of this article will explore the existing laws pertaining to sexual predators and investigate the background of teacher misconduct as it relates to sex offenses against children. Part III will uncover the root of the problems that are associated with difficulty of handling teacher misconduct, while Part IV proposed a course of action to address the problem of sexual predators in the school system. Finally, Part V will provide a summary of this article’s findings, while Part VI offers a conclusion.

II. LEGAL BACKGROUND

A. *Existing Measures to Prevent Reoffenses by Sexual Predators*

1. General Registration Requirements Imposed by the States

In 1994, Congress provided a nation-wide minimum standard for sex offender registration by enacting the Wetterling Act.⁸ The recommended baseline affects “such matters as the offenses for which registration is required, duration of registration periods, periodic verification of the regis-

4. NAT’L CTR. FOR MISSING & EXPLOITED CHILDREN, SEX-OFFENDERS: HISTORY, http://missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=3032 (last visited Oct. 3, 2007).

5. *Id.*

6. *Id.*

7. *Id.*

8. See Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act, 42 U.S.C. § 14071 (2006) (requiring those convicted of a criminal offense against a minor, or of a sexually violent offense, to register); see also Laura L. Rogers, *The Smart Office: Open for Business*, 41 PROSECUTOR 10, 10 (2007), available at <http://www.ojp.usdoj.gov/smart/pdfs/register.pdf>.

tered address, continued registration of sex offenders when they move from one state to another, and community notification.”⁹ These federally mandated requirements, however, “constitute a floor for state programs, not a ceiling.”¹⁰ Thus, states are free to broaden the restrictions,¹¹ as a result, “significant variation exists in the types of offenses warranting registration under state laws.”¹² While it is commendable that states have individual registries, it is also confusing and difficult to thoroughly and efficiently search for sex offenders.

2. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act of 1994

The Wetterling Act was passed in 1994 in response to the mysterious kidnapping of Jacob Wetterling. The law required states to implement a registry for sex offenders and crimes against children.¹³

9. Laura L. Rogers, *The Smart Office: Open for Business*, 41 PROSECUTOR 10, 10 (2007), available at <http://www.ojp.usdoj.gov/smart/pdfs/register.pdf> (explaining the effects of the Wetterling Act of 1994).

10. Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 281 (2005) (quoting Megan’s Law).

11. See, e.g., Connecticut Department of Public Safety, <http://www.ct.gov/dps/site/default.asp> (last visited Oct. 3, 2007) (follow “Sex Offender Registry” hyperlink) (requiring registration of only those offenders whose accusation resulted in a conviction or not guilty by reason of mental disease or defect). There are two caveats to the Connecticut registry: any offenders released before Oct. 1, 1998 are not required to register and only those offenders convicted after Oct. 1, 1998 are required to register. *Id.* See also Vermont Criminal Information Center, http://www.dps.state.vt.us/cjs/s_registry.htm (last visited Oct. 3, 2007) (requiring offenders of the following crimes to register: sexual assault, aggravated sexual assault, lewd and lascivious conduct, and sexual activity by a caregiver); see also Maryland Department of Public Safety & Correctional Services: Sex Offender Registry, <http://www.dpsscs.state.md.us/onlineservs/sor/> (last visited Oct. 3, 2007) (containing “self-reported” information and indicating that offenders may have moved, even out of state, without duty to notify); see also Minnesota Department of Corrections—Contributing to a Safer Minnesota, <http://www.doc.state.mn.us/level3/search.asp> (last visited Oct. 3, 2007) (tracking only level three predators and including information on each offender pursuant to the particular factors of each case); see also Colorado Bureau of Investigation: Convicted Sex Offender Site, <http://sor.state.co.us/> (last visited Oct. 3, 2007); see also Georgia Sex Offenders: Community Alerts and Sex Offender Maps, <http://www.georgia-sex-offenders.com/index.php> (last visited Oct. 3, 2007) (maintained by the Georgia Bureau of Investigation, providing a map of offender locales as well as the means to sign up for e-mail notification of sex offender alerts).

12. Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 281 (2005).

13. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act, 42 U.S.C. § 14071 (2006). The Act provides:

(a) In general

(1) State guidelines

The Attorney General shall establish guidelines for State programs that require—

3. Megan's Law

In 1994, seven-year-old Megan Kanka of New Jersey was brutally raped and murdered by a previously registered sex offender.¹⁴ In 1996, the Wetterling Act was amended by the Megan's Law,¹⁵ which establishes a system that notifies a community of a sex offender residing in the area.¹⁶ The FBI's Crimes Against Children Unit coordinates the development and implementation of the National Sex Offenders Registry (NSOR).¹⁷

(A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address for the time period specified in subparagraph (A) of subsection (b)(6) of this section; and
(B) a person who is a sexually violent predator to register a current address for the time period specified in subparagraph (B) of subsection (b)(6) of this section. *Id.*

14. Megan Nicole Kanka Foundation, Our Mission, <http://www.megannicolekankafoundation.org/mission.htm> (last visited Oct. 3, 2007).

15. Megan Nicole Kanka Foundation, Megan's Law from Coast to Coast, <http://www.megannicolekankafoundation.org/ctc.htm> (last visited Oct. 3, 2007).

16. Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program Act (Megan's Law), 42 U.S.C.A. § 16921 (2006). The Act provides:

(a) Establishment of Program

There is established the Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program (hereinafter in this section referred to as the "Program").

(b) Program notification

Except as provided in subsection (c) of this section, immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to the following:

(1) The Attorney General, who shall include that information in the National Sex Offender Registry or other appropriate databases.

(2) Appropriate law enforcement agencies (including probation agencies, if appropriate), and each school and public housing agency, in each area in which the individual resides, is an employee or is a student.

(3) Each jurisdiction where the sex offender resides, is an employee, or is a student, and each jurisdiction from or to which a change of residence, employment, or student status occurs.

(4) Any agency responsible for conducting employment-related background checks under section 5119a of this title.

(5) Social service entities responsible for protecting minors in the child welfare system.

(6) Volunteer organizations in which contact with minors or other vulnerable individuals might occur.

(7) Any organization, company, or individual who requests such notification pursuant to procedures established by the jurisdiction.

(c) Frequency

Notwithstanding subsection (b) of this section, an organization or individual described in subsection (b)(6) or (b)(7) of this section may opt to receive the notification described in that subsection no less frequently than once every five business days. *Id.*

17. Federal Bureau of Investigation, Crimes Against Children: National/State Sexual Offender Registry, <http://www.fbi.gov/hq/cid/cac/registry.htm> (last visited Oct. 3, 2007).

4. Pam Lychner Sexual Offender Tracking and Identification Act

The Lychner Act¹⁸ requires the U.S. Department of Justice to establish a national database through the FBI to track the movements of certain sex offenders.¹⁹

B. *Robins Report*

In what is commonly referred to as “passing the trash,” teachers who have been accused of sexual impropriety with a student, and who have not been formally charged through the criminal justice system, usually go unpunished, as their teaching credentials remain unscathed, and are free to continue teaching within the public school system.²⁰ The real problem is coming up with a legitimate system that will hold teachers, who escape criminal prosecution, accountable for their actions.

Kenneth DeLuca was a sexual predator who was also an elementary school teacher. “He attacked little girls in closets, bathrooms and hallways, even in the principal’s office. He kissed and fondled them, used filthy language, rubbed up against them, put his hands under their clothes and made them touch his genitals.”²¹ In 1996, Mr. DeLuca was found guilty of fourteen sex offenses against thirteen different victims.²² Complaints and accusations were brought against DeLuca as early as 1973, and in 1994 he was charged with forty-one offenses involving twenty-one

18. Pam Lychner Sexual Offender Tracking and Identification Act (Lychner Act), 42 U.S.C. § 14072. (imposing two major obligations on the FBI that became effective October 3, 1997). First, to establish a national database that tracks the location and movements of each person who has been convicted of a criminal offense against a victim who is a minor, has been convicted of a sexually violent offense, or is a sexually violent predator. *Id.* And second, to register and verify the addresses of sex offenders who reside in states without a “minimally sufficient” sex offender registry (SOR) program. *Id.*

19. Federal Bureau of Investigation, Crimes Against Children: Background on the National Sex Offenders Registry, http://www.fbi.gov/hq/cid/cac/registry_background.htm (last visited Oct. 3, 2007) (“The National Crime Information Center (NCIC) run by the FBI enables the NSOR to retain the offender’s current registered address and dates of registration, conviction and residence.”). Today, all fifty states have minimally sufficient SOR programs. *Id.*

20. Elinor Florence, *Who’s at School with Your Kids?* READER’S DIGEST: CANADA, Nov. 2000, available at <http://readersdigest.ca/mag/2000/11/school.html> (narrating the story of elementary schoolteacher, Kenneth DeLuca). “In several instances his victims were forced to apologize to the handsome, charming teacher for hurting his feelings. In a practice known in educational circles as passing the trash, DeLuca was given good references by his employers and moved from school to school, leaving his emotionally wounded victims behind.” *Id.*

21. *Id.*

22. *Id.*

different complainants.²³ Even though all but one of his known victims was between the ages of ten and eighteen, DeLuca was sentenced to only forty months in jail.²⁴ His record prompted government officials to investigate. As a result, the Canadian government published the Robins Report.²⁵

Judge Sydney Robins, a former Ontario Court of Appeals judge, headed a provincial commission appointed by the Ministry of the Attorney General to research sexual misconduct in Ontario schools.²⁶ The investigation revealed 200 episodes of sexual misconduct over ten years committed by Canadian teachers.²⁷ Judge Robins noted that the “figure is probably far lower than the real number due to the tendency of abusive teachers not to seek help, the pressure on victims to remain silent and the reluctance of school authorities and fellow teachers to believe the worst.”²⁸

The Robins Report delineates the kinds of predators within the school system into four categories:

There are abusive teachers who . . . are “opportunistic” sexual predators motivated by power, control and sexual gratification. Some are pedophiles who prefer to have sex with children and have chosen to work in schools so they can better access their targets. Others have “romantic/bad” judgment relationships with students, believing that their conduct is harmless or is acceptable because the students are said to be doing what they want to do. Still others engage in sexual harassment or insensitive and inappropriate, though not necessarily criminal, conduct.²⁹

Sadly, students reported DeLuca’s inappropriate conduct, but were disregarded. The Robins Report concluded the school board’s response to

23. SYDNEY L. ROBINS, *PROTECTING OUR STUDENTS: EXECUTIVE SUMMARY AND RECOMMENDATIONS* ch.2 (2000), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/robins/ch1.asp>.

24. Elinor Florence, *Who’s at School with Your Kids?* *READER’S DIGEST: CANADA*, Nov. 2000, available at <http://readersdigest.ca/mag/2000/11/school.html> (“When [DeLuca’s] sordid past finally came to light, there was such public outcry that the attorney general appointed a provincial commission headed by former Ontario Court of Appeal Judge Sydney Robins to investigate sexual misconduct in Ontario schools.”).

25. *Id.*

26. *Id.*

27. *Id.* (concerning the provincial commission appointed by the Ministry of the Attorney General).

28. *See id.* (“Robins wrote ‘[i]t can safely be assumed that many—probably most—incidents of sexual misconduct go undisclosed or unreported.’”).

29. SYDNEY L. ROBINS, *PROTECTING OUR STUDENTS: EXECUTIVE SUMMARY AND RECOMMENDATIONS* ch. 1 (2000), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/robins/ch1/asp> (differentiating different types of predators found in the school system).

complaints made by DeLuca's victims were inadequate and ultimately harmful.³⁰ The school's officials could have and should have done more to investigate the victims' claims.³¹

So how do predators like DeLuca slip through the cracks? DeLuca slipped through for several reasons. First, no inquiries were made of DeLuca's former school to obtain any background information on him—when he transferred in even when his new principal became aware of inappropriate behavior DeLuca engaged in at his former school.³² Second, although multiple complaints had been made against DeLuca, officials failed to document them.³³ Third, parents' complaints were dismissed as being “overprotective.”³⁴ The School Board blamed the victims, failed to properly investigate students, and threatened to sue parents for slander if allegations were reported.³⁵

C. Existing Literature of Sexual Misconduct Among Teachers

In June 2004, C. Shakeshaft of Hofstra University prepared a report for the U.S. Department of Education entitled, “Educator Sexual Misconduct: A Synthesis of Existing Literature.”³⁶ In her analysis, Shakeshaft found that out of 80,000 schools, about ten percent of all students between eighth and eleventh grade reported unwanted educator sexual misconduct.³⁷ Based on her findings and on the assumption that the surveys were accurate, it was approximated that over 4.5 million students were

30. See SYDNEY L. ROBINS, PROTECTING OUR STUDENTS: EXECUTIVE SUMMARY AND RECOMMENDATIONS ch. 2 (2000), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/robins/ch2.asp> (declaring the school board afforded an inadequate and ultimately harmful response to victims complaints).

31. See *id.* (stating that the school board did not properly investigate allegations from students, nor did it report the allegations to the appropriate authorities).

32. See *id.* (finding that school officials failed to obtain DeLuca's background information).

33. See *id.* (reporting that despite numerous allegations of abuse or improper conduct by DeLuca, most complaints were not documented, and the few records that referred to allegations of abuse were not placed in DeLuca's personnel file).

34. See *id.* (accusing the School Board of having minimized its reaction to parent and student complaints on DeLuca's behavior).

35. SYDNEY L. ROBINS, PROTECTING OUR STUDENTS: EXECUTIVE SUMMARY AND RECOMMENDATIONS ch. 2 (2000), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/robins/ch2.asp> (illustrating the school boards' reaction to the disclosure of complaints from parents and students).

36. C. Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, Dep't of Educ. Doc. No. 2004-09 (2004), available at <http://www.ed.gov/rschstat/research/pubs/misconductreview/report.pdf> (reporting on the prevalence of educator sexual misconduct in America's schools).

37. See *id.* (showing the significant percentage of students who reported unwanted contact and/or non-contact from educators).

subjected to sexual misconduct by a school employee at some time between kindergarten and the twelfth grade.³⁸

Shakeshaft points out that sexual abusers use various strategies to trap students and that victims usually end up being “vulnerable or marginal students who are grateful for the attention.”³⁹ In regards to student allegations, Shakeshaft reports that “notice of educator sexual misconduct comes to the attention of school officials in five ways: formal complaints, informal complaints, observed abuse, observed suspicious behaviors, or rumors and/or anonymous reports.”⁴⁰ However, studies shockingly reveal that only six percent of children report their sexual abuse by an adult to those in a position to act, while the other ninety-four remain silent or divulge their secret to peers.⁴¹

In regards to state laws, Shakeshaft reaffirms the problem with divergent laws among the fifty states.⁴² It is insufficient that only some states have specific laws making educator-student sex a crime; in absence of a uniform law throughout all of the states, there is doubt as to how effective the law can truly be in the grand scheme of the problem.⁴³

The objective would be to create an environment where student teacher sex was absolutely forbidden regardless of age.

Education Week published several items after polling various state departments of education. Twenty-seven states had laws targeting educators who “abuse their positions of trust or authority by having sex with students.”⁴⁴ Forty-two states required criminal background checks for

38. *See id.* (noting that if anything, the reported findings underestimate educator sexual misconduct due to five limitations).

39. *See id.*

40. *Id.*

41. C. Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, Dep’t of Educ. Doc. No. 2004–09, at 34 (2004), available at <http://www.ed.gov/rschstat/research/pubs/misconductreview/report.pdf>.

42. *See id.* (pointing out that criminal codes are not uniform throughout the states and that each state defines the crime of adult-child sex differently).

43. *See id.* (highlighting multiple shortcomings in using state statutes to address educator sexual misconduct: multiple state laws only pertain to students who have not reached the age of consent, many state laws do not require the guilty to register as sex offenders, lack of uniformity in regards to a legal definition of child sexual assault, or criminal sexual activity from state to state, no uniform penalties among the states, and the varying age of what constitutes a minor).

44. Caroline Hendrie, *States Target Sexual Abuse by Educators*, EDUC. WEEK, Apr. 30, 2003, available at <http://www.edweek.org/ew/articles/2003/04/03/33abuse.h22.html?levelId=2100&print=1> (“twenty-seven states either make it a crime, or increase criminal penalties, for educators to abuse their positions of trust or authority by having sex with students”).

teacher certifications using FBI, state records and fingerprinting.⁴⁵ Seventeen states require school officials to report alleged wrongdoing or the resignation of educators suspected of sexual misconduct to state education officials.⁴⁶ Seventeen states have a law protecting “school officials from defamation suits based on job reference given for current or former employees.”⁴⁷

III. TEACHER MISCONDUCT REGARDING SEX OFFENSES AGAINST STUDENTS

A. *Who is to Blame?*

Teachers are often angry with victims for their accusations, and with those responsible for the investigations, after seeing the harrowing statistics of teacher sexual misconduct.⁴⁸ However, emotional reactions are not the only problems standing in the way of accessing information when allegations arise.

1. School Administrators

Problems occur when administrators attempt to investigate alleged crimes that take place at their schools.⁴⁹ There are several possible reasons why schools are not anxious to seek outside help when accusations arise. First, it may be that the use of these professionals is not cheap. Another possibility is that the more people involved outside of the school where the allegation arises, the higher the risk the school will receive negative publicity.⁵⁰ Furthermore, administrators may be hesitant to offer access to information regarding a specific teacher’s sexual misconduct because the parameters of an administrator’s liability are not always clear.⁵¹

45. *Id.* (differentiating the number of states that now require criminal-background checks compared to fifteen years earlier).

46. *Id.* (showing the number of states that are attempting to fix a problem the article refers to as “passing the trash”).

47. *See id.* (“The same number of states said they had laws shielding school officials from defamation suits based on job references given for current or former employees.”).

48. *See* Mary Jo McGrath, *The Psychodynamics of School Sexual Abuse Investigations*, FINDARTICLES.COM, Oct. 1994, http://findarticles.com/p/aticles/mi_m0JSD/is_9_51/ai_77196650 (last visited Oct. 3, 2007) (indicating that many educators feel attacked as a group and their tendencies to express great deals of anger and outrage as both the accusers and investigators).

49. *See id.* (stating that “[i]nterviewing witnesses, the alleged victim, and the accused is a delicate process that should only be undertaken by an investigator with extensive experience”).

50. *Id.*

51. *See, e.g.,* Latosha Higgins, *Lack of Knowledge of Sexual Harassment Shields School Districts From Employer Liability Under Title IX* *Gebser v. Lago Vista Independent School District*, 18 ST. LOUIS U. PUB. L. REV. 317, 325–26 (1999) (discussing the standards

2. Imposing Liability Upon School Districts

There are two theories that illustrate the responsibility imposed on school districts: the principle of *respondeat superior* and the theory of an affirmative duty. *Respondeat superior* holds an employer vicariously responsible for the acts of his or her employee.⁵² The “threshold question to be asked under the doctrine of vicarious liability is whether the employee is acting within the scope of his/her employment when the harm occurs. In other words, is the employee performing the work for which he or she was hired?”⁵³

Under the legal doctrine of *respondeat superior*, a school district is responsible for the unlawful acts of its employees that occur in the “course and scope of employment” but not for actions of employees taken for their own purposes. Sexual abuse of students generally has been held to be outside the “course and scope” of employment, even when committed on school grounds or while engaged in school-related activities.⁵⁴

Therefore, on its face, *respondeat superior* is inapplicable for teacher sexual misconduct with students because “teachers and other school employees are not hired to molest students.”⁵⁵

Establishing an Affirmative Duty: In 1989, the United States Supreme Court, in *DeShaney v. Winnebago County Department of Social Services*, held that “[w]hen [the] state takes a person into its custody and holds him there against his will, [the] Constitution imposes upon it a corresponding

for imposing school district liability for sexual harassment claims); see also Ralph D. Mawdsley, *Compensation for the Sexually Abused Student*, 84 EDUC. LAW REP. 13, 15 (explaining a plaintiff’s chances for recovery against a school district for sexual misconduct).

52. Todd A. DeMitchell, *The Inadequacy of Legal Protections for the Sexual Abuse of Students: A Two-Track System*, 215 EDUC. LAW REP. 505, 508 (2007) (denoting that the Latin term stands for “let the master answer”).

53. *Id.* at 509 (demonstrating the need to decide whether the employee engaged in an act consistent with his or her hire for employment).

54. Mary Jo McGrath, *The Psychodynamics of School Sexual Abuse Investigations*, FINDARTICLES.COM, Oct. 1994, http://findarticles.com/p/articles/mi_m0JSD/is_9_51/ai_77196650 (illustrating that sexual abuse is outside of the range of reasonable activities school districts hire teachers to perform).

55. Todd A. DeMitchell, Commentary, *The Inadequacy of Legal Protections for the Sexual Abuse of Students: A Two-Track System*, 215 EDUC. L. REP. 505, 509 (2007) (asserting that because school districts do not hire teachers and other employees to sexually abuse students, the doctrine of vicarious liability, on its face, is inapplicable). See, e.g., *Boykin v. District of Columbia*, 484 A.2d 560, 562 (D.C. Cir. 1984) (concluding that only the teacher’s malicious and selfish purposes could be attributed to his attack on a female student). Student’s sexual assault was neither derivative of her teacher’s assigned duties, nor an integral school objective or interest; therefore, the District of Columbia could not be held vicariously liable for her assault. *Id.*

duty to assume some responsibility for his safety and general well-being.”⁵⁶

If a centralized database for sex offenders is implemented, then courts may be more willing to find liability on a theory of negligent hiring and retention and less reluctant to deny the fact that the school district has an affirmative duty to protect its pupils.⁵⁷ A national registry is an efficient and less intrusive way for administrators to monitor who is coming into the schools.⁵⁸

B. *Problems Accessing Information Regarding Teacher Misconduct*

After contacting the U.S. Department of Education, it became evident that the Department believed that the teacher predatory issue was a “state issue,” having nothing to do with the U.S. Department of Education.⁵⁹ Schools only risk losing federal funding under Title IX when they have actual knowledge of the sexual harassment but still fail to act.⁶⁰ While the Office of Civil Rights at the U.S. Department of Education has issued guidelines in order to create a cohesive understanding of school districts’ Title IX responsibilities, too many districts still have poorly written policies resulting in insufficient responses regarding any harassment claims that may occur.⁶¹

56. *Deshaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (holding that “[w]hen a person is institutionalized-and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist”)).

57. See generally Herbert B. Kaplan, *Is This What They Mean by Sex Education?: Keeping Sex Offenders Out of the Schools*, 8 U. FLA. J.L. & PUB. POL’Y 51, 58–62 (1996) (discussing the implications and application of the doctrine of negligent hiring).

58. See *id.* at 77 (proposing the establishment of a national sex offender registry).

59. Telephone Interview with Susan Aitel, Office of Civil Rights, U.S. Dept. of Educ., in Washington, D.C. (Aug. 24, 2006).

60. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (Stevens, J., dissenting) (holding that school districts can’t be held responsible under Title IX when teachers sexually abuse or harass students if the administrators did not know of the misconduct); see also Cynthia L. Remmers, *Managing Sexual Harassment Issues in the Workplace: The Elements of an Effective Prevention Policy and Complaint Procedure*, Training and Special Issues, N98SHCB ABA-LGLED C-21, 75 American Bar Association Center for Continuing Legal Education, National Institute (1998).

61. See Cynthia L. Remmers, *Managing Sexual Harassment Issues in the Workplace: The Elements of an Effective Prevention Policy and Complaint Procedure*, Training and Special Issues, N98SHCB ABA-LGLED C-21, 75 American Bar Association Center for Continuing Legal Education, National Institute (1998) (discussing court decisions that relate to two common insufficient responses by the school system: the school turns its head and takes no action to remedy the misconduct and the school takes reasonable steps that result in ineffective prevention of future misconduct).

The most obvious problem with not having a national database for incidents is the lack of uniformity among the states in regard to laws protecting students from these situations. Without uniformity of the law, teachers are readily able to move from school-to-school and state-to-state continuing their wrongful acts. There are other potential problems that must be considered before establishing a national database.

1. Boy Who Cried Wolf: Possibly True, Positively Tragic

A national database tracking teacher sexual misconduct could easily become a tool for disgruntled students and parents to make false accusations against teachers.⁶² Just as it is impossible to determine how many teachers actually sexually abuse students, it is also impossible to say with assurance how often teachers are wrongly accused of doing so.⁶³ This is a major concern for administrators due to the fact that, in the public eye, an accusation carries the same weight as guilt.⁶⁴

This issue is not to be dealt with in the context of Aesop's famous fable, "The Boy Who Cried Wolf,"⁶⁵ because "[r]eliance on the boy who cried wolf motif is in one sense troubling."⁶⁶ Relying on Aesop's ultimate message that "lying begets disbelief" could lead to detrimental results and mounds of liability for neglecting a child's claim.⁶⁷ School districts must

62. See generally C. SHAKESHAFT, *EDUCATOR SEXUAL MISCONDUCT: A SYNTHESIS OF EXISTING LITERATURE 1* (2004), <http://www.ed.gov/rschstat/research/pubs/misconductreview/report.pdf> (discussing allegations and responses to sex abuse as well as the frequency and consequences of false accusations).

63. See *id.* at 36 (explaining that there are no studies on point with false accusations of teacher sexual abuse and noting that, in 1995, out of 225 allegations of educator sexual misconduct, not one resulted in a false accusation).

64. See *id.* (describing the serious emotional stress that can come from false accusations of sexual abuse and inadequate investigations).

65. AESOP'S FABLES: THE BOY WHO CRIED WOLF, available at <http://tomsdomain.com/aesop/t3n06.htm>.

There was a Shepherd Boy who tended his sheep at the foot of a mountain near a dark forest. It was lonely for him, so he devised a plan to get a little company. He rushed down towards the village calling out "Wolf, Wolf," and the villagers came out to meet him. This pleased the boy so much that a few days after he tried the same trick, and again the villagers came to his help. Shortly after this a Wolf actually did come out from the forest. The boy cried out "Wolf, Wolf," still louder than before. But this time the villagers, who had been fooled twice before, thought the boy was again lying, and nobody came to his aid. So the Wolf made a good meal off the boy's flock. *Id.*

66. Jules Epstein, *True Lies: The Constitutional and Evidentiary Bases for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions*, 24 QUINNIPIAC L. REV. 609, 656 (2006) (illustrating the negative connotations with the moral of the story and how previous false statements are not necessarily predictive of future statements).

67. *Id.* at 656 n. 204 (denoting that "a secondary cautionary lesson is that even liars can and do report real harm accurately").

take each allegation as truthful because “prior false alarms thus [have] no predictive value” in some instances.⁶⁸

Some teachers are concerned that a “heightened awareness of sexual abuse may, as a byproduct, alter the ways in which teachers interrelate with children, sometimes to the detriment of those children.”⁶⁹ While there may be a high price to pay for being falsely accused of a sex crime, it cannot be said that victims of real sex abuse do not suffer even more so.

2. Constitutional Safeguards

Moreover, due process consideration for accused teachers stand in the way of a database that flags individuals who have not technically been found guilty of a crime. “The essence of due process is that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.”⁷⁰ Protected liberty interests are implicated, and due process issues are triggered, whenever an individual who has never been convicted of a sexual offense is required to register as a predatory offender.⁷¹ Everyone in our criminal justice system is innocent until proven guilty;⁷² however, having one’s name associated with such actions without formal prosecution raises questions about the rights associated with due process of law. The government undoubtedly has a right and reason to protect the public; however, the importance of such objective “does not justify trammeling constitutional due process protections.”⁷³

If a teacher is going to be accused of abuse, it is imperative that the nature of the abuse is adequately understood and described so as to not infringe upon any constitutional safeguards.

68. *Id.* at 656 (illustrating how the boy’s cry was finally truthful and the wolf ultimately decimated the flock).

69. SYDNEY L. ROBINS, *PROTECTING OUR STUDENTS - EXECUTIVE SUMMARY AND RECOMMENDATIONS* ch. 5 (2000), <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/robins/ch5.asp>.

70. Melissa Ceglian, *Predators or Prey: Mandatory Listing of Non-Predatory Offenders on Predatory Offender Registries*, 12 J.L. & POL’Y 843, 865 (2004) (quoting *People v. Bell*, 778 N.Y.S. 2d 837 (N.Y. Sup. Ct. 2003)).

71. *See id.* (illustrating how the Ninth Circuit found an implication of a protected liberty interest when a dismissed inmate was discharged of his sex offense but was never given the right to challenge his “sex offender label”) (citing *Neal v. Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997)).

72. *See Bell v. Wolfish*, 441 U.S. 520 (1979) (stating that “[f]undamental to the Anglo-American jurisprudence of criminal law is the premise that an individual is to be treated as innocent until proven guilty by a jury of his or her peers”).

73. Melissa Ceglian, *Predators or Prey: Mandatory Listing of Non-Predatory Offenders on Predatory Offender Registries*, 12 J.L. & POL’Y 843, 865 (2004).

IV. WHAT SHOULD BE DONE TO BETTER TRACK TEACHER-OFFENDERS?

A. *Mandatory Reporting*

The National Association of State Directors of Teacher Education and Certification (NASDTEC) is an organization “that represents professional standards boards and commissions and state departments of education in all 50 states, the District of Columbia [and] the Department of Defense Education Activity . . . that are responsible for the preparation, licensure, and discipline of educational personnel.”⁷⁴ NASDTEC promotes comprehensive personnel screening, high standards for educators, interstate teacher mobility, and a uniform standard for teacher discipline.⁷⁵

Although much is being done to track sexual predators generally, there is a need to more specifically track teachers who also have a history of sexual molestation or assault. NASDTEC serves as a clearing house for teachers with criminal convictions, but the national program is not utilized by every state. For example, in Michigan an investigation revealed that “inadequate tracking of teachers, incomplete criminal background checks and poor communication among schools, courts and law enforcement agencies have allowed potentially abusive teachers to slip through the cracks.”⁷⁶ This occurs despite the Michigan Department of Education’s vow that it “aggressively goes after abusive teachers.”⁷⁷

B. *Federalism and the Commerce Clause*

Federalism allows our nation’s individual states to retain autonomy from the federal government while also giving states the power to handle matters not specifically granted to the federal government in the United States Constitution. This autonomy, “as famously recognized by Justice Brandeis,” allows states to “serve as ‘laborator[ies],’ enjoying the freedom to undertake ‘experiments without risk to the rest of the country.’”⁷⁸

74. Nat’l Assoc. of State Directors of Teacher Educ. and Certification General Information, <http://www.nasdtec.org/about.tpl> (last visited Sept. 6, 2007).

75. *See id.* (paraphrasing a list of the types of services that NASDTEC provides).

76. Marisa Schultz, *State Fails to Stop Teacher Sex Abuse (Part 1); Poor Background Checks and Lack of Communication Let Crimes Go Unchecked*, DETROIT NEWS, Apr. 24, 2005, at A1 (“[A] Detroit News investigation finds that inadequate tracking of teachers, incomplete criminal background checks and poor communication among schools, courts and law enforcement agencies have allowed potentially abusive teachers to slip through the cracks.”).

77. *Id.*

78. Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (internal quotations omitted)).

While federalism affords states protection from big government, it nonetheless results in non-uniformity and contradicting laws among the fifty states.⁷⁹ Enabling states to act pursuant to their own powers and beliefs permits the flourishing of healthy democratic pluralism, “which in turn . . . increases governmental responsiveness by ‘putting the States in competition for a mobile citizenry.’”⁸⁰ Until the states begin to “reconcile federalism’s inherent age-old tension between comity and autonomy[.]”⁸¹ the federal government needs to take action to cure this non-conforming epidemic.

The United States Supreme Court has upheld numerous “congressional Acts regulating intrastate economic activity where [it] . . . concluded that the activity substantially affected interstate commerce.”⁸² Based on this assumption, establishing a federal sex offender database conforms to this theory because of the need to regulate an individual from moving between states in order to commit sexual crimes.⁸³

While on its face it may seem like a state issue, teachers can readily move from state to state to get new teaching jobs without future employers being the wiser as to why they were removed from their previous job. This shows that all states have a stake in a uniform policy regarding this problem. Therefore, it only seems logical that the Commerce Clause would allow Congress the authority to intervene and police this specific area if it had the inclination to do so.

79. See generally Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007) (discussing the interplay between federal and state governments).

80. Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 257–58 (2005) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) and citing Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1504 (1987) (“The liberty that is protected by federalism is not the liberty of the apodictic solution, but the liberty that comes from diversity coupled with mobility.”)).

81. Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 333 (2005).

82. *United States v. Lopez*, 514 U.S. 549, 559–60 (1995) (citing *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981) (“These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”); *Perez v. United States*, 402 U.S. 146 (1971); *Katzenback v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942)).

83. *Cf.*, *Gonzales v. Raich*, 545 U.S. 1 (2005) (using the Commerce Clause to regulate users and growers of interstate marijuana).

V. SUMMARY

“A central purpose of law is to protect the weak from the strong and to compensate victims for injuries caused by carelessness and neglect. Unfortunately, when confronted by child abuse in the schools, courts often fail to fashion effective remedies.”⁸⁴ “Children are the center of our educational system . . . [therefore] [t]heir welfare should be of paramount concern.”⁸⁵ A national registration system needs to be “implemented if we are serious about our espoused value that our children are our greatest treasure and our future.”⁸⁶

First and foremost, the most flagrant observation made is the sheer lack of information on this specific subject. From the interviews, online resources, and the little help from those who were willing to talk, it remains obvious that this is a “hot” topic that nobody wants to address.

Second, teacher sexual misconduct is not perceived as a national problem although it is blatantly having an affect on our national education system. The cases and reports illustrate that our public education system is systematically failing its students, not only in educating them, but in protecting them from would be abusers as well. The ramifications of bad and harmful teachers on the quality of public school education will affect this nation in a detrimental way.

Probably the most likely reason that this teacher sexual misconduct continues to run rampant is the complete lack of uniformity in state rules and the total absence of a national database to keep track of these incidents throughout the nation. While this topic is becoming more prevalent in education circles, unless the federal government gets involved and makes this a priority, there may never be any real improvement. As previously suggested, the government could take action against teacher misconduct by using the authority provided by the Commerce Clause.

Additionally, administrators need to be able to know who they are hiring and parents need to know who is teaching their children. Teachers who truly have nothing to hide should have no problem subjecting themselves to regulation. The goal of this database does not need to be criminal prosecution. While that may be desirable, especially for the most

84. Todd A. DeMitchell, *The Inadequacy of Legal Protections for the Sexual Abuse of Students: A Two-Track System*, 215 EDUC. L. REP. 505 (2007) (quoting TODD A. DEMITCHELL & RICHARD FOSSEY, *THE LIMITS OF LAW-BASED SCHOOL REFORM: VAIN HOPES AND FALSE PROMISES* 102 (1997)).

85. Todd A. DeMitchell, *The Inadequacy of Legal Protections for the Sexual Abuse of Students: A Two-Track System*, 215 EDUC. L. REV. 505, 529 (2007) (“Students must, at a minimum, receive the same level of protection as adults. A one-track system of protection must be implemented if we are serious about our espoused value that our children are a greatest treasure and our future.”).

86. *Id.*

egregious offenders, the main objective is to get teacher-abusers out of schools permanently with no chance of re-certification. Where evidence is lacking for a criminal prosecution, but substantial enough to allow for a dismissal from a teaching position, teachers should be taken off campus. If the main goal is to get the teacher out of their position as opposed to put them behind bars, perhaps lawmakers' fearing "lack of due process" would be assuaged.

Regarding state laws that prohibit criminalized sex with students, it is imperative that the ages of consent need to be uniform throughout the states. While federalism allows our nation's states the province to govern themselves on issues such as these, for reform to be truly effective, uniformity is imperative.

VI. CONCLUSION: WHAT TO DO AND WHERE TO GO

The Boise School District encourages individuals to volunteer as tutors, art teachers, and for other administrative services; but starting this year, the school district plans on spending \$30,000 on the implementation of a background checking system for volunteers in order to keep sex perpetrators away from the kids.⁸⁷ Another commendable example is the steps being taken by Superintendent Scott Thompson of Illinois's Antioch District 34.⁸⁸ This Illinois school district is upgrading its security system to scan each and every visitor entering the school.⁸⁹ Each potential visitor's driver's license or state identification card will be screened against sex offender databases from forty two states before being granted permission to enter.⁹⁰ Without taking away from the commendable actions these two school districts have taken, there still exists a strong need for a centralized database.

87. Anne Wallace Allen, *Boise Schools to Check Out Volunteers: District Will Screen Those Who Work Unsupervised with Students for Past Criminal Problems*, IDAHO STATESMAN, Aug. 14, 2007, at 1 (explaining how the Pilot Program that served as the previous screening process unfortunately allowed a few questionable individuals to slip through the cracks and into the schools last year).

88. Korrina Grom, *D.34 to Upgrade Security for New School Year*, ANTIOCH REV., Aug. 9, 2007, at 1.

89. *See id.* ("A number of changes await Antioch District 34 parents and students this school year, from security upgrades to new administrators. Perhaps the biggest change in District 34 this school year will be the addition of a new security system in all of the schools.").

90. *See id.* (documenting Thompson's remark about how campus safety is top priority and this cost-effective system is necessary to protect students and prevent predators from easy access into the hallways).

Establishing a national sex offender database would enhance the “effort to prevent recurrence of sex crimes.”⁹¹ Furthermore, a centralized system will establish uniformity among the law enforcement agencies, spread the cost among a broad group of users, and most importantly, prevent offenders from relocation to states without such registries in order to dodge the bullet.⁹² A national database ultimately results in a better sense of security for victims and the general public as a whole.

Along with creating these laws comes enforcement. Turning the other cheek and leniency must be a thing of the past. Lawmakers, school boards, principals, educators, parents, and students all need to be aware of this threat and the ramifications thereof. The American education system is just now recognizing that this is a problem, and despite the reluctance to act, it is time to do something about it for the sake of our children the innocence they know when they go to school with in the morning should remain when they return home in the afternoon.

91. Julia A. Houston, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 766 (1994).

92. *Id.*