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Is This What They Mean by Sex Education? Keeping Sex Offenders Out of the Schools

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IS THIS WHAT THEY MEAN BY SEX EDUCATION?: KEEPING SEX OFFENDERS OUT OF THE SCHOOLS

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I. INTRODUCTION

"The public is frightened and afraid."[1] On July 29, 1994, Megan Kanka, a seven-year-old girl from New Jersey, was abducted from her home, brutally raped, and then murdered.[2] The accused murderer, Jesse Timmendequas, was living across the street from the Kanka family with two convicted sex

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1. Michael Casey, *Parents Win Passage of Sex Offenders Law Convicts Required to Register with Police in Paterson*, RECORD (N.J.), Oct. 12, 1994, at C3.

2. Michelle Ruess, *Megan's Law Signed By Governor*, RECORD (N.J.), Nov. 1, 1994, at A1.

offenders.[3] Timmendequas had twice been convicted of sexual offenses and had been released into society, after having been supposedly rehabilitated. The Kanka family knew nothing of their neighbor's past. They were helpless against this unknown danger so close to them.

Just five months earlier, six-year-old Amanda Wengert, another New Jersey girl, had been raped and killed by her next door neighbor.[4] The offender in that case was a teenage neighbor with a history of sex offenses.[5]

As a result of these attacks, there was great public outcry for a community notification law that would warn citizens of the presence of convicted sex offenders in their communities. As Megan's mother stated, "If we had known there was a pedophile living on our street, my daughter would be alive today."[6]

These are not the only incidents of this type. It is frightening enough to know that this could occur anywhere in society, but it is even more frightening to know that it could and does happen in the school setting.[7] The perpetrators in these cases are school officials or even the teacher of the student.

One case in particular shows the need for action. Jacob Feuerstein lost his teaching job in 1963, because he was charged with sexually molesting a teenage boy.[8] In 1985, Feuerstein again was forced to resign from a teaching position in another school district due to accusations of sexual abuse of his students.[9] In 1989, after sexually abusing a 14-year-old special education student, Feuerstein was hired as a substitute teacher in another school district.[10] Upon learning of this, the attorney for the school district stated that "maybe we should have a law requiring them to check [backgrounds]."[11] Of course, this statement was made in light of the fact the school district could have been held liable.[12]

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3. *Id.*

4. Michelle Ruess, *Megan's Law Moving Fast in Assembly Crackdown on Sex Offenders*, RECORD (N.J.), Aug. 16, 1994, at A1.

5. *Id.*

6. Michelle Ruess, *A Mother's Plea: Pass Megan's Bill Panel OKs Compromise*, RECORD (N.J.), Sept. 27, 1994, at A1.

7. John Leo, *Pedophiles in the Schools*, U.S. NEWS WORLD REP., Oct. 11, 1993, at 37. "We thought these guys were people who lurk around outside schools. What we found was they lurk around *inside* the schools." *Id.* (quoting John Miller, a WNBC-TV correspondent).

8. Alvin E. Bessent, *Despite Record, Hired to Teach Hicksville Sex Offender Concealed Past Incidents*, NEWSDAY, June 25, 1990, at 3.

9. *Id.*

10. *Id.*

11. *Id.*

12. *See id.* The attorney for the state's Department of Education, Peter Sherman, would not admit liability for its negligence. This, of course, was due to his responsibility as counsel for the Department. *Id.*

Has society come to the point where parental supervision is required twenty-four hours a day, even while the child is attending school? Thomas C. Rooney, Jr., a councilman in New Jersey, thinks that "[i]t's still the obligation of parents to keep watch over their own children."[13] While parents indeed do have an obligation to watch their children, the schools and the state also have an obligation to protect the children.

Many cities have passed ordinances and states have passed statutes that require sex offenders to register with the police in the city in which they intend to reside.[14] This has met with a great deal of resistance from civil rights advocates. Legislators must balance the right of the public to know when a sex offender has been released into their immediate vicinity and the civil rights of the criminals who have served their sentence.[15]

Saddle Brook, New Jersey has passed an ordinance that requires a convicted sex offender to be on a registry list.[16] It was postured that the list could be used as another means of ensuring that a sex offender could not take a child from school.[17] However, nobody even considered that the child's teacher or principal, in fact, might be just such an offender. As Jerome Miller, clinical director of a center in Alexandria, Virginia that treats sex offenders stated, "The image of the sexual offender as a guy hanging around the schoolyard actually accounts for a very small percentage of the cases."[18] In reality, anybody can be a sex offender. "Child molesters don't just hang around playgrounds. They apply for jobs at schools, camps, the Boy Scouts, Big Brothers."[19] In the school setting, there is a unique

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13. *See* Casey, *supra* note 1, at C3.

14. *See, e.g.*, ALASKA STAT. §§ 12.63.010, 18.65.087 (Supp. 1994); LA. REV. STAT. ANN. § 15:543-549 (West 1994); WASH. REV. CODE § 9A-44-130 (1996) (The State of Washington has had this type of notification law in force for about five years.). The notification provisions have had some success. However, the threat of retaliation has caused a number of previously convicted sex offenders to go underground to avoid this system, thus creating the same risks that exist without this legislation. Jim Hooker, *Megan's Law Has a Harsh Prototype How Statute Works in Another State*, RECORD (N.J.), Oct. 10, 1994, at A1. Thirty-eight states have enacted legislation requiring registration of sex offenders upon their release from prison. Lisa Anderson, *Demand Grows to I.D. Molesters: States Weigh Childrens' Safety Versus Offenders' Rights*, CHI. TRIB., Aug. 15, 1994, at 1.

15. *See* Ruess, *supra* note 6, at A1.

16. Ovetta Wiggins, *Tracking Convicts Who Hurt Children Township Plans Sex Crimes Law*, RECORD (N.J.), Sept. 8, 1994, at D1.

17. *Id.*

18. Fred Bayles, *States Requiring Criminal Registries for Sex Offenders*, RECORD (N.J.), Aug. 8, 1994, at A3.

19. Leo, *supra* note 7, at 37. Peter Melzer teaches physics and science at Bronx High School of Science. *Id.* He belongs to North American Man/Boy Love Association (NAMBLA) and is a pedophile. *Id.* The City Board of Education has known since 1984 that Melzer is a pedophile and has done nothing in response. *Id.* At a meeting of NAMBLA members, Melzer was taped urging another member, a public school librarian, to keep his membership in the group secret until he had received tenure. Another member turned out to

relationship that requires the state or the school district to take responsibility for exposing students to convicted sex offenders.[20] Children are most vulnerable to sexual abuse between the ages of eight and twelve years.[21] This is an additional reason for having a national registry for sex offenders, which school officials would be required to check prior to employing or licensing any individual in any capacity.

Some psychiatrists believe that adult sexual disorders cannot be cured.[22] Action must be taken to protect our children from these incurable and dangerous individuals. Something has to be done to ensure that school officials, teachers and other employees to whom children are exposed in the educational setting are not past, and therefore, potentially future sex offenders. By exposing students to sex offenders who are hired as teachers, the school should be held accountable for inadequately performing background checks prior to hiring. A national registry for sex offenders that includes fingerprints and DNA samples must be established.

Part II of this article discusses a school's duty to protect its students based upon the doctrine of *in loco parentis* and the duty created by compulsory school laws. In part III of the article, the doctrine of negligent hiring and retention and whether it is a claim under which a child victim may recover damages when dealing with a situation of sexual abuse of a student by a teacher is discussed. Part IV presents a discussion of a case in New Jersey challenging the New Jersey Sexual Offender Registration Law. Part V analyzes the problems perceived to be inherent in registration, criminal background checks, and notification of others, and raises the problem of schools entering into confidential settlement agreements with teachers accused of sexual abuse. Part VI discusses the implications of allowing such agreements. A proposal for keeping convicted sexual offenders out of the school setting is set forth in part VII.

II. A SCHOOL'S DUTY TO PROTECT ITS STUDENTS

"It can hardly be said that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse

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be a former school psychologist, who had worked with emotionally and physically handicapped children at a Queens, N.Y. elementary school. *Id.*

20. *See infra* part II for a discussion of a school's duty to protect its students.

21. SANDY K. WURTELE & CINDY L. MILLER-PERRIN, PREVENTING CHILD SEXUAL ABUSE: SHARING THE RESPONSIBILITY 11 (1992).

22. WILLIAM CHECK, CHILD ABUSE 68 (1989) (stating the prevailing attitude towards rehabilitation of sex offenders is that there is no cure); *Tougher Controls for Chronic Sex Offenders*, RECORD (N.J.), Aug. 7, 1994, at A20 [hereinafter *Tougher Controls*].

gate."[23] This famous quote from *Tinker v. Des Moines Independent School District* marked the first time the U.S. Supreme Court acknowledged that students have constitutional rights in the schoolhouse.[24] It cannot be disputed that children attending school have the protection of the Constitution. Despite this protection afforded to students, several theories have been utilized to allow school officials greater leeway in setting school policy to protect the educational environment. "The schools are not merely empowered to maintain law and order so that learning can take place; they are required to maintain law and order so that children are kept safe."[25]

A. *The Doctrine of In Loco Parentis*

The doctrine of in loco parentis[26] puts school officials in the place of the parent. As a result, school officials have the rights and responsibilities of a parent to protect the child while the child is under their control.[27] In such a capacity, school officials may not be subject to the same restrictions imposed upon government officials.[28] Therefore, they are not subject to the same constitutional restraints.[29]

This type of reasoning was evident in *Mercer v. State*.[30] In *Mercer*, a

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23. Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969).

24. *Id.*

25. Kimberly M. v. Los Angeles Unified Sch. Dist., 242 Cal. Rptr. 612, 615 (Ct. App. 1987).

26. In loco parentis is defined as "[i]n the place of a parent; instead of a parent; charged factitiously, with a parent's rights, duties, and responsibilities. ' "Loco parentis" exists when person undertakes care and control of another . . . .' " BLACK'S LAW DICTIONARY 787 (6th ed. 1990) (citation omitted).

27. *See, e.g.*, Peck v. Siau, 827 P.2d 1108, 1112 (Wash. Ct. App. 1992) (holding where pupils attend school subject to rules and discipline of the school, and protective custody of teachers is substituted for that of parents, the school has a duty to exercise reasonable care to protect students from harm).

28. *In re* Donaldson, 269 Cal. Rptr. 2d 509, 511 (Ct. App. 1969); *see* Beckley v. Christopher W., 29 Cal. Rptr. 3d 775, 781 (Ct. App. 1973); Hailey v. Brooks, 191 S.W. 781, 783 (Tex. Civ. App. 1916); State v. Wolfer, 693 P.2d 154, 159 (Wash. Ct. App. 1984). The court in *Hailey* stated that

> [g]enerally speaking . . . the . . . principal . . . of a public free school, to a limited extent at least, stand(s), as to pupils attending the school, in loco parentis, and . . . may exercise such powers of control, restraint, and correction over such pupils as may be reasonably necessary to enable the teachers to perform their duties and to effect the general purposes of education.

Id. at 783; *see* D.R.C. v. State, 646 P.2d 252, 256 (Alaska Ct. App. 1982). *But see* Commonwealth v. Carey, 554 N.E.2d 1199, 1201 (Mass. 1990) ("School administrators are governmental actors to whose conduct Fourth Amendment strictures apply.").

29. *In re Donaldson*, 269 Cal. Rptr. 2d at 513; R.C.M. v. State, 660 S.W.2d 552, 553 (Tex. Ct. App. 1983).

30. 450 S.W.2d 715, 715 (Tex. Civ. App. 1970).

high school student was subjected to a search of his person after the principal had been informed that the student was in possession of marijuana.[31] The student said that if his father had been called, he would have required him to empty his pockets.[32] As a result, the boy emptied his pockets for the school official.[33] The court reasoned that the security afforded by the Fourth Amendment is not present in searches conducted by individuals rather than government officials.[34] Since school officials are acting in loco parentis, they are not government officials.[35] Therefore, under this reasoning, a school official may search a student without giving a reason and not be constrained by the Fourth Amendment.

The doctrine of in loco parentis, while still used to some extent, has lost much of its backing. In fact, the doctrine was unequivocally rejected by the Supreme Court in *New Jersey v. T.L.O.*[36] The Court there reasoned:

> Such reasoning is in tension with contemporary reality and the teachings of this Court. . . . If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students.[37]

It is clear from this statement that the doctrine of in loco parentis has lost favor in the courts. In fact, the Alaska Court of Appeals stated that "the phrase in loco parentis, used by Blackstone to describe the relationship between teachers and students when education was predominately private and teachers could reasonably be viewed as agents of the students' parents, has little utility in describing contemporary compulsory public education."[38] In any case, when the doctrine is used, the school official is still acting in an official capacity. Despite the fact that the doctrine of in loco parentis has very nearly been abolished, there is another way to impose duty and liability on school districts.

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31. *Id.* at 716.
32. *Id.*
33. *Id.*
34. *Id.* at 717.
35. *Id. See generally* Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).
36. 469 U.S. 325 (1985).
37. *Id.* at 336.
38. D.R.C. v. State, 646 P.2d 252, 255 (Alaska Ct. App. 1982).

B. *Compulsory Schooling*

An interesting theory that has been successfully utilized is that the compulsory nature of education[39] creates a duty on the part of school officials to protect the student body in a reasonably prudent manner. The reasoning is that compulsory education forces students to be present at school for a specified minimum number of days and associate with individuals with whom they normally might not associate.[40] For example, this imposes a duty on school officials to provide a "safe and secure environment"[41] by "investigat[ing] any charge that a student is using or possessing narcotics and [by taking] appropriate steps, if the charge is substantiated."[42]

In *State v. Young*, a high school student was convicted of possession of marijuana.[43] The student was searched by the Assistant Principal.[44] The student sought to have the evidence excluded in his criminal trial due to the fact that it had been collected with less than probable cause on the part of the school official.[45] The court found that the student was not in voluntary attendance at the school due to the compulsory education laws in the state.[46] As a result of the compelled attendance, "[t]he state owes those students a safe and secure environment."[47] The court held that a search conducted by a school official upon considerably less than probable cause was not a violation of the Fourth Amendment due to the school's obligation to protect all of its students.[48] "Parents and others, teachers for example, who have the primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility."[49]

It is clear that while children are in attendance at school, the school has a duty to both the parents and the children to protect them from harm. The

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39. *See, e.g.*, MINN. STAT. § 120.101 (1993) (requiring attendance at school of children between the ages of seven and sixteen); N.J. STAT. ANN. § 18A:38-25 (West 1989) (requiring attendance at school of children between the ages of six and sixteen). The Minnesota statute extended the age for compulsory education to eighteen to begin in the year 2000. MINN. STAT. § 120.101(5).

40. State v. Young, 216 S.E.2d 586, 592 (Ga.), *cert. denied*, 423 U.S. 1039 (1975).

41. *Id. But see* Rubio v. Carlsbad Municipal Sch. Dist., 744 P.2d 919, 922 (N.M. Ct. App. 1987) (stating that compulsory education causes no contractual duty on part of school district to protect children).

42. People v. Overton, 229 N.E.2d 596, 597-98 (N.Y. 1967).

43. *Young*, 216 S.E.2d at 588.

44. *Id.*

45. *Id.*

46. *Id.* at 592. The compulsory education law requires attendance at school of children aged seven through sixteen. GA. CODE ANN. § 20-2-690.1 (1994).

47. *Young*, 216 S.E.2d at 592.

48. *Id.*

49. *Id.* at 593 (quoting Ginsberg v. New York, 390 U.S. 629, 638-40 (1968)).

duty imposed on the school arises from the involuntary nature of attendance due to compulsory education laws. The *Young* decision is an example of this duty and is based upon U.S. Supreme Court precedent.[50]

In *Sowers v. Bradford Area School District*, a federal court has specifically found that a special relationship exists between school officials and students, giving rise to a duty to protect students from sexual assault by a teacher.[51] In *Sowers*, a marching-band student was molested by the band director.[52] The court stated:

> If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tort feasor as if it had thrown him into a snake pit.[53]

The court therefore found that the school district owed a duty to protect its students from sexual abuse by its teachers.[54] That children must attend school under the compulsory school statutes causes a special relationship to exist that imposes upon the school a duty to protect the children from harm.

III. THE DOCTRINE OF NEGLIGENT HIRING AND RETENTION

Historically, the doctrine of respondeat superior[55] was commonly proffered as the theory of recovery against employers who had knowledge of dangerous employees.[56] The focus of this doctrine is the social value of requiring supervision of employees.[57] However, this theory usually is not

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50. *See, e.g., Ginsberg*, 390 U.S. at 629.

51. 694 F. Supp. 125, 132 (W.D. Pa. 1988).

52. *Id.* at 127. This case did not involve a teacher who was a repeat sex offender. Interestingly, the case was brought by the student against the school under 42 U.S.C. § 1983, a civil rights statute, based upon a breach of the school's legal duty to the student. *Sowers*, 694 F. Supp. at 128. Such an action is hard to prove since it requires a finding of a continued pattern of action that encourages or accepts actions violative of civil rights. *Id.* at 129. However, this may be another avenue for relief in the proper situation.

53. *Sowers*, 694 F. Supp. at 130 (quoting Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)).

54. *Id.* at 132; *see* Virgina G. v. ABC Unified Sch. Dist., 19 Cal. Rptr. 2d 671, 674 (Ct. App. 1993).

55. The doctrine of respondeat superior maintains that a master is liable in certain cases for the wrongful acts of his servant and a principal for those of his agent. *See, e.g.*, Burger Chef Systems, Inc. v. Govro, 407 F.2d 921, 925 (8th Cir. 1969). An employer is liable for injury to a person or the property of another proximately resulting from acts of an employee done within the scope of his employment in the employer's service. Mid-Continent Pipeline Co. v. Crauthers, 267 P.2d 568, 571 (Okla. 1954).

56. *See* Hall v. Smathers, 148 N.E. 654, 655 (N.Y. 1925).

57. *See* 1 ENCYC. OF NEGLIGENCE § 232 (1962).

used in the context of sexual abuse of students by school employees because under respondeat superior, the action must be based upon conduct within the scope of employment for recovery to be possible. Liability for sexual abuse of a student by a school employee arises not from conduct within the scope of employment but from school officials placing the individual in the position to commit the wrongful act.[58]

Recently, in the alternative, courts have been more inclined to recognize and apply the doctrine of negligent hiring,[59] holding that where the employer is negligent "in hiring and retaining an employee with known deficiencies and in permitting such an employee to engage in the master's business, the employer's liability results from his negligence in selection and retention of such an employee."[60] This doctrine originated from the common law fellow-servant law, which imposed a duty on employers to select competent employees who would not endanger fellow employees while performing their duties at work.[61] Courts now recognize this duty as one of the general principles of law.[62]

The doctrine of negligent hiring offers a theory of recovery independent of the doctrine of respondeat superior. Thus, when employees engage in criminal acts that result in harm to others, the employer may be held liable

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58. *See* Boykin v. District of Columbia, 484 A.2d 560, 562 (D.C. Cir. 1984) (no school district liability when outside scope of employment); Bozarth v. Harper Creek Bd. of Educ., 288 N.W.2d 424, 425-26 (Mich. Ct. App. 1979) (holding that the respondeat superior doctrine does not apply when the conduct of teacher is clearly outside the scope of employment); McCann v. State, 247 N.W.2d 521, 525-26 (Mich. 1976) (Kavenaugh, C.J., concurring); RESTATEMENT (SECOND) OF AGENCY § 2190 (1957); *see also* D.T. v. Independent Sch. Dist. No. 16, 894 F.2d 1176, 1186-88 (10th Cir. 1990) (holding there was no liability when assault took place during summer vacation).

59. Moses v. Diocese of Colo., 863 P.2d 310, 314, 318-29 (Colo. 1993); Worstell Parking, Inc. v. Aisida, 442 S.E.2d 469, 471 (Ga. Ct. App. 1994); Rodebush v. Oklahoma Nursing Homes, Ltd., 867 P.2d 1241, 1252 (Okla. 1993) (Simms, J., dissenting).

60. Martin R. Loftus, *Employer's Duty to Know Deficiencies of Employees*, 16 CLEV. MARSHALL L. REV. 143, 145-46 (1967).

61. *Id.* at 145.

62. *See* Country Club of Jackson v. Turner, 4 So. 2d 718, 719 (Miss. 1941), where the court stated:

> Compliance with the duty to use reasonable care to maintain working conditions that are reasonably safe involves the duty to use such care in avoiding the employment or retention of a servant who is known to be dangerous or vicious where such propensities are calculated to expose co-employees [and others] to greater dangers than the work necessarily entails. This principle no longer needs cited authority.

Id.

even if the employees were not acting within the scope of their employment.[63] This doctrine has been applied in a majority of jurisdictions.[64] However, in an effort to avoid overbreadth,[65] some courts have refused to extend the duty so far as to require an employer in every instance to obtain a criminal record in order to avoid liability.[66]

A duty also can be found in statutory law. In *In re Boykin*,[67] the court pointed out that the school official had a statutory duty to maintain discipline and act for the safety of the pupils in the absence of their parents or guardians.[68] The Court upheld a warrantless search of a student on school premises by police officers who had been informed by an assistant principal that he had received an anonymous tip that the student had a gun.[69]

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63. Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1240 (Fla. 2d DCA 1980). The occupant of a townhouse brought action against the developer after being assaulted by an employee of the developer who had been given a passkey to the townhouse. *Id.* at 1239. The court held that the developer was chargeable with such information concerning the employee's background as it could have obtained upon reasonable inquiry. *Id.* at 1241; *see also* RESTATEMENT (SECOND) OF AGENCY § 213 (1957), which reads as follows: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless[] . . . in the employment of improper person[s] or instrumentalities in work involving risk of harm to others."

64. *See, e.g.*, Becken v. Manpower, Inc. 532 F.2d 56, 57 (7th Cir. 1976); Kendall v. Gore Properties, 236 F.2d 673, 682 (D.C. Cir. 1956); Texas Breeders & Racing Ass'n v. Blanchard, 81 F.2d 382, 384 (5th Cir. 1936); Svacke v. Shelley, 359 P.2d 127, 131 (Alaska 1961); Najera v. Southern Pacific Co., 191 Cal. Rptr. 2d 634, 637-38 (Ct. App. 1961); Connes v. Molalla Transp. Sys., Inc., 831 P.2d 1316, 1321 (Colo. 1992); Mallory v. O'Neil, 69 So. 2d 313, 315 (Fla. 1954); Hines v. Bell, 120 S.E.2d 892, 897 (Ga. Ct. App. 1961); Stricklin v. Parsons Stockyard Co., 388 P.2d 824, 828 (Kan. 1964); Strawder v. Harrall, 251 So. 2d 514, 517 (La. Ct. App. 1971); Porter v. Grennan Bakeries, 16 N.W.2d 906, 909 (Minn. 1944); Travelers' Indem. Co. v. Fawkes, 139 N.W. 703, 705 (Minn. 1913); Dean v. St. Paul Union Depot, 43 N.W. 54, 55 (Minn. 1889); Bennett v. T & F Distrib. Co., 285 A.2d 59, 60 (N.J. Ct. App. Div. 1971), *cert. denied*, 289 A.2d 795 (N.J. 1972).

65. *See generally* Evans v. Morsell, 395 A.2d 480, 481-87 (Md. 1978). A customer of a tavern was shot by the bartender and brought action against the owner under the theory of negligent hiring. *Id.* at 481. The court held that since no evidence indicated that the owner knew or should have known that the bartender was potentially dangerous, a reasonable inquiry about his performance with the previous owner was sufficient despite the fact that he had a criminal record. *Id.* at 484.

66. *See, e.g.*, Abraham v. Onorato Garages, 446 P.2d 821, 825 (Haw. 1968); Stevens v. Lankard, 297 N.Y.S.2d 686, 688 (N.Y. App. Div. 1968), *aff'd*, 306 N.Y.S.2d 257 (N.Y. 1969).

67. 237 N.E.2d 460 (Ill. 1968).

68. *Id.* at 461 (quoting ILL. REV. STAT. ch 122, ¶ 34-849 (1967)). In most cases involving police presence on school premises, the student is afforded full protection of the Fourth Amendment, requiring full probable cause prior to the search because, in those cases, the action is clearly state action, and the fruits of the search may subject the student to criminal prosecution.

69. *In re Boykin*, 237 N.E.2d at 461.

In *Horton v. Goose Creek Independent School District*,[70] the court held that in order to properly carry out this duty to protect the educational environment, school officials must have broad powers of supervision and discipline.[71] *Horton* involved a canine search of a student to detect contraband.[72] However, this was held to be beyond the broad powers of the school officials, because it was a dragnet-type search without any individualized suspicion.[73]

By analogy, courts also have generally acknowledged a standard requiring that landlords provide reasonable security in areas of the premises over which they maintain control. Such areas primarily include, but are not necessarily limited to, common areas of the premises that are used by several or all tenants and areas providing access to those common areas. Tenants have been successful in actions against their landlords for degradations in common areas that have led to horrific criminal acts, such as rape,[74] burglary,[75] muggings,[76] assaults,[77] and murder.[78] The imposition of liability on landlords is analogous to the imposition of liability on school officials because both landlords and school officials are in positions of control over others.

Two other important factors the courts have considered in assessing liability are foreseeability and causation. The criminal act that occurs as a result of an employer's act or omission must be of the type that the employer knew or should have known would occur. Likewise, the employer's act or

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70. 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983).

71. *Id.* at 480.

72. *Id.*

73. *Id.* at 481. The use of sniffer dogs to aid in the search of schools has been treated very differently by courts. *See* Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223, 229 (E.D. Tex. 1980) (holding that a search with sniffer dogs was state action); *cf.* Doe v. Renfrow, 475 F. Supp. 1012, 1020 (N.D. Ind. 1979) (finding that the presence of a sniffer dog at the request of school officials for purpose of aiding school officials in their observation of drug use was not a search).

74. *See* Paterson v. Deeb, 472 So. 2d 1210, 1212 (Fla. 1st DCA 1985). A sexually assaulted woman brought action against her landlord, alleging that he breached his duty by: (1) failing and refusing to install or repair locks on the front and back doors leading to common areas, and failing to adequately light such common areas; (2) not providing a security lock for the outside of her bathroom door, which was accessed through a common area; (3) failing to adequately lock and secure the vacant living unit downstairs, which allowed access to interior common areas by trespassers; and (4) violating a statutory duty. *Id.* at 1213-14. The court held that the allegations were sufficient to state a cause of action in negligence. *Id.* at 1220.

75. *See, e.g.*, Braitman v. Overlook Terrace Corp., 346 A.2d 76, 77 (N.J. 1975).

76. *See, e.g.*, Trentacost v. Brussel, 412 A.2d 436, 458 (N.J. 1980).

77. *See, e.g.*, Troy v. Village Green Condominium Project, 196 Cal. Rptr. 680, 685 (Ct. App. 1983).

78. *See, e.g.*, Scott v. Watson, 359 A.2d 548, 554 (Md. 1976).

omission must play a role in causing the crime. In other words, it must be determined that the employer's breach of duty to use reasonable care enhanced the likelihood of the criminal activity occurring.[79]

An employer's knowledge of the existence of prior crimes carries significant weight in determining the foreseeability of the crime causing injury.[80] Some jurisdictions have denied recoveries where no similar crimes had previously occurred.[81] However, most courts now will consider the totality of the circumstances and define foreseeability on a case-by-case basis.

As the courts have expanded the duty and responsibility of employers to take reasonable care to protect others, the school setting also should be afforded this protection. School districts must be held accountable for the harm they cause children by inadequately performing background checks on individuals prior to hiring them.

IV. MEGAN'S LAW — NEW JERSEY'S SEXUAL OFFENDER REGISTRATION ACT CHALLENGED ON CONSTITUTIONAL GROUNDS

On October 31, 1994, New Jersey's Sexual Offender Registration Act[82] (Megan's Law) was enacted. The Act requires any person who has completed a sentence for a conviction of certain designated offenses to register, if at the time of his sentencing, his conduct was found to be "characterized by a pattern of repetitive and compulsive behavior."[83] In

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79. RESTATEMENT (SECOND) OF TORTS § 448 (1965).

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Id.

80. *See, e.g.*, Olar v. Schroit, 202 Cal. Rptr. 457, 462 (1984) (holding that a landlord and homeowners association's knowledge of prior crimes made other crimes of a greater nature foreseeable).

81. Irma W. Merrill, *Landlord Liability for Crimes Committed by Third Parties Against Tenants on the Premises*, 38 VAND. L. REV. 431, 454 (1985) (citing Cornpropst v. Sloan, 528 S.W.2d 188, 197-98 (Tenn. 1975)); *see also* Scott v. Watson, 359 A.2d 548, 556 (Md. 1976). Here, the court held that a landlord's duty arose from criminal activities existing on the landlord's premises and not from knowledge of general criminal activities in the neighborhood. *Id.* at 553-54.

82. N.J. STAT. ANN. § 2C:7-2-8 (1996) (commonly referred to as Megan's Law, named for the seven-year-old victim of a fatal attack by a convicted sexual offender).

83. 1994 N.J. Sess. Law Serv. 84 (West). The individual must give his name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, address of legal residence, address of any current temporary residence, and date and place of employment. *Id.* at § 4.b(1). The address must be verified every ninety days, and the information is sent to the county Prosecutor and the

addition, under this law, offenders are broken down into three classifications based on their likelihood of re-offending.[84] When risk of re-offense is low, only those law enforcement agencies most likely to encounter the registrant are notified.[85] When the risk is moderate, notification is given to schools, licensed daycare centers, and certain other designated agencies and community organizations involved in the care or supervision of children.[86] When the risk is high, notification to members of the public most likely to encounter the registrant is required.[87]

Not long after the New Jersey Sexual Offender Act was passed, it was challenged on constitutional grounds in *Artway v. New Jersey*.[88] Alexander Artway, the plaintiff, had been convicted of sodomy and sentenced to imprisonment for the maximum term.[89] The plaintiff's conduct was found to be "characterized by a pattern of repetitive, compulsory behavior."[90] Upon completion of his sentence in 1992, plaintiff was released from prison. The *Artway* court held that parts of the Act were unconstitutional.[91] However, it did uphold as valid the requirement of registration. It was the notification of others that the court found objectionable and in violation of an individual's rights.

V. PROBLEMS WITH CRIMINAL BACKGROUND CHECKS AND NOTIFICATION OF OTHERS

The plaintiff in *Artway* challenged the law on the following grounds: (1) the ex post facto clause of the U.S. Constitution,[92] (2) the prohibition of cruel and unusual punishment,[93] (3) the constitutional right to privacy, (4) the prohibition against Bills of Attainder, and (5) the Double Jeopardy Clause.[94] The same concerns are present in this forum.

Division of State Police for inclusion in a central registry. *Id.* at § 4.c-d.

84. *Id.* at § 3.c.
85. *Id.* at § 3.c.(1).
86. *Id.* at § 3.c.(2).
87. *Id.* at § 3.c.(3).
88. 876 F. Supp. 666, 668 (D. N.J. 1995).
89. *Id.* Plaintiff was never referred to the State Parole Board for consideration for parole. *Id.*
90. *Id.*
91. *Id.* at 692.
92. U.S. CONST. art. I, § 10, cl. 1.
93. *Id.* at amend. VIII.
94. *Id.* at amend. V.

A. *The Ex Post Facto Clause*

"[N]o state shall pass any . . . ex post facto law."[95] An ex post facto law is "a law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed."[96] The clause was intended to avoid having citizens face the prospect that their conduct, innocent when carried out, would be rendered criminal after the fact.[97]

The clause has been interpreted as a prohibition against states passing laws that punish citizens for conduct after the fact, where the conduct would not have been punishable when it was carried out.[98] Under this clause, the relevant scrutiny to which sex offender registration acts can be subjected is whether the "law . . . changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."[99]

However, the initial question to be resolved is whether such a law is punitive or regulatory. "[T]he Court must focus on the practical purpose and effect of the statute to reach an independent conclusion as to its true nature."[100] The factors to be considered in determining regulatory or punitive effect include:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment [that is,] retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . .[101]

When this criteria has been used, courts have not agreed in their conclusions. In *Louisiana v. Babin*,[102] the Louisiana Court of Appeals found that sections of the registration law did violate the ex post facto clause.[103] An unpublished decision from the District Court of Alaska also

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95. *Id.* at art. I, § 10, cl. 1.
96. BLACK'S LAW DICTIONARY, *supra* note 26, at 580.
97. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 389 (1798).
98. *Id.* at 390.
99. *Id.*
100. *Artway*, 876 F. Supp. at 673.
101. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).
102. 637 So. 2d 814 (La. Ct. App. 1994).
103. *Id.* at 824 (However, the court there did not analyze whether the law was punitive or regulatory.).

concluded a registration law violated the ex post facto clause.[104] There, the court specified that the test is not what the stated purpose of the law is, but rather the effect it has upon individuals[105] and found that the embarrassment likely to result from public dissemination deemed the law punitive.[106]

On the other hand, the Supreme Court of Arizona held that a statute, requiring sex offenders to register with the sheriff of the county in which they reside, did not violate the ex post facto clause.[107] The court there balanced the punitive and regulatory effects of the registration law and determined that the registration act did not constitute punishment.[108] The court reasoned in part that "[r]egistrants are not forced to display a scarlet letter to the world; outside of a few regulatory exceptions, the information provided by sex offenders pursuant to the registration statute is kept confidential."[109] The Washington Court of Appeals also found sex offender registration not violative of the ex post facto clause.[110] This decision was upheld by the Washington Supreme Court two years later.[111] In doing so, the court found that registration did not constitute punishment and was thus constitutional under the ex post facto clause. The court found there was no stigma attached that resulted from the act of registering, rather the stigma attached when the offense itself was committed.[112] Therefore, no extra punishment was attached by requiring offenders to register. In *Artway*, the court determined that there was no ex post facto violation created by the registration provision.[113]

To judge the validity of any proposed regulation requiring registration by sex offenders, it must be determined whether such registration is punishment. It is claimed that forcing an individual to register causes the individual to be viewed apprehensively by police and society, and that a stigma results from being labeled a sex offender. There is no doubt that this happens. However, is the cause the reporting to a registry? The answer to that is an emphatic "No!" Once an individual commits a sexual offense, especially against a child, that individual is branded for life. There is nothing the person can do

104. Rowe v. Burton, No. A. 94-206 (D. Alaska July 27, 1994) (on file with the author).
105. *Id.* at 9.
106. *Id.* at 14.
107. Arizona v. Noble, 829 P.2d 1217, 1224 (Ariz. 1992).
108. *Id.* at 1223-24.
109. *Id.* at 1224. However, the court did find registration to have been traditionally viewed as punitive. *Id.* at 1222. The court noted that the provisions limiting access to the information did significantly offset any deprivation of essential liberty. *Id.* at 1223.
110. Washington v. Taylor, 835 P.2d 245, 249 (Wash. Ct. App. 1992).
111. *See* Washington v. Ward, 869 P.2d 1062 (Wash. 1994).
112. *Cf. id.* at 1071.
113. *Artway*, 876 F. Supp. at 688.

that will change it.

Requiring the individual to report does not add any "punishment" to the punishment already imposed as a result of the offense. The purpose of a registry is regulatory not punitive. A registry allows the tracking of individuals known to be a threat to children. Thus, reporting to a registry in no way increases the punishment of the offender but does regulate his activity in order to protect unsuspecting children. Since this is not punishment, there is no violation of the ex post facto clause.

B. *Cruel and Unusual Punishment*

The Eighth Amendment of the U.S. Constitution prohibits the infliction of cruel and unusual punishment.[114] This clause was included in the Constitution to protect citizens from torture. To avoid being cruel and unusual, the punishment must be proportionate to the crime[115] and fall within civilized standards.[116] Once again, the initial issue is whether registration constitutes punishment.[117]

Assuming that registration is found to be punishment, how would one determine whether that punishment is cruel and unusual? The Supreme Court laid out a three-prong test to determine whether a punishment is proportionate to the crime.[118] The three prongs are "the gravity of the offense and the harshness of the penalty," "the sentences imposed on other criminals in the same jurisdiction," and the "sentences imposed for the commission of the same crime in other jurisdictions."[119] However, this test has lost favor in subsequent courts.[120] As a result, there is mixed guidance in making this determination. It seems "that courts applying Eighth Amendment cruel and unusual punishment analysis react only to severe harshness bearing no relation to the gravity of the underlying offense."[121] This is the test to be met here.

The first test to be applied in this issue is whether registration of sex offenders would be raised to the level of a punishment. The mere registration of individuals convicted of sexual offenses is not punishment under this clause.[122] The *Artway* court clearly distinguished the registration provision

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114. U.S. CONST. amend. VIII.

115. McCleskey v. Kemp, 481 U.S. 279, 305-06 (1987); Weems v. United States, 217 U.S. 349, 367 (1910).

116. *See* Trop v. Dulles, 356 U.S. 86, 99 (1958).

117. *See supra* part V.A. for a discussion of the ex post facto clause.

118. Solem v. Helm, 463 U.S. 277, 290-92 (1983).

119. *Id.* at 291-92.

120. *See* Harmelin v. Michigan, 501 U.S. 957, 967 (1991).

121. *Artway*, 876 F. Supp. at 679.

122. *Id.* at 692.

of Megan's Law as being constitutional.[123] It was the notification provisions that caused the law to be struck down.

The national registry as proposed in this article would require adequate identification, such as a social security number. If this is all that is required, then it clearly would not be punishment. The keeping of a registry of sex offenders to be used by school officials is an action taken to protect the health and safety of this nation's children, not to penalize the ex-sex offender. Further, there would be no branding of the individual, as the full effect of the branding would have been completed when the individual committed the offense and was caught. The information required would allow the hiring school to learn if the proposed teacher were included on the list and nothing more. After that, the school would have an obligation to further investigate the individual prior to hiring. This registration would in no way punish the sex offender further.

The effect of such a law also could not be viewed as punitive. The effect would be to put a hiring school on notice of applicants who have been convicted of sex offenses. Nothing in this law would preclude sex offenders from living a normal life, getting a job, and being left alone. It would then become the decision of the school whether to hire anyone who is on the list. However, because sex offenders have shown themselves capable of harming children, the school would have a moral and legal obligation to its students and to society not to put the children at risk by hiring sex offenders. The effect of the law would be to protect the children from harm, nothing more. A national registry, as proposed herein, is not cruel and unusual punishment.

C. *The Right to Privacy*

No state can "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[124] The test applied to determine equal protection is either strict scrutiny or rational basis.[125] For strict scrutiny to apply, a fundamental right must be involved[126] or the individual must be one of a

123. *Id.* at 688.

124. U.S. CONST. amend. XIV, § 1.

125. There also has been established an intermediate level of scrutiny. Craig v. Boren, 429 U.S. 190, 197 (1976). However, this level of scrutiny is recognized in limited circumstances such as discrimination based upon illegitimacy, Trimble v. Gordon, 430 U.S. 762, 767 (1977) and gender-based discrimination, *Craig*, 429 U.S. at 197. This level of scrutiny requires that a law be substantially related to an important government interest to be upheld.

126. The right to marry, right to travel, right to vote, right of political association, and the right to criminal appeals are fundamental rights that would afford heightened scrutiny.

suspect classification.[127] When neither of these situations exist, the court will apply the minimum rationality test.

1. Privacy as a Fundamental Right?

The Constitution does not expressly provide for a right of privacy. However, there have been cases that have found privacy to be a fundamental right. Zones of privacy are created from "penumbras, formed by emanations from those guarantees that help give them life and substance."[128] There are rights afforded to individuals for which there is no express provision. In this case, it seems only the Ninth Amendment rights retained by the people would apply. This is not enough to cause the right to privacy to become a fundamental right. As one commentator has stated:

> The Ninth Amendment was originally conceived by James Madison. A committee of the House of Representatives, on which Madison served, revised it. The House and Senate debated and approved it and the several states ratified it, along with the rest of the Bill of Rights.
>
> Any provision that has survived this process must be presumed by interpreters of the Constitution to have some legitimate constitutional function, whether actual or only potential. Despite this long-respected presumption, the Supreme Court has generally interpreted the Ninth Amendment in a manner that denies it any role in the constitutional structure.[129]

Does the Ninth Amendment actually allow for a fundamental right to privacy? It would be questionable in any case and most unlikely in this context. Privacy rights have been found to exist in search and seizure and self-incrimination cases. However, this does not necessarily extend to a right to privacy in all contexts. The right of privacy has been recognized in only limited areas or zones of privacy.[130]

The cases where a right to privacy was found to exist due to the Ninth

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127. Suspect classifications include: race, alienage, and national origin.

128. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). These guarantees are found in the First Amendment right of association; the Third Amendment prohibition against quartering soldiers; the Fourth Amendment "right of the people to be secure in their houses, papers, and effects, against unreasonable searches and seizures"; the Fifth Amendment right against self incrimination; and the Ninth Amendment provision for rights retained by the people. *Id.*

129. Randy E. Barnett, *Introduction: James Madison's Ninth Amendment: The History and Meaning of the Ninth Amendment, in* THE RIGHTS RETAINED BY THE PEOPLE 2 (R. Barnett ed., 1989).

130. *Roe v. Wade*, 410 U.S. 113 (1973).

Amendment were very political. The result was reached, and a reasoning was formulated to allow the conclusion. *Roe v. Wade*[131] is a perfect example of this type of judicial action. Of course, that case is the famous[132] abortion case, in which the Court carefully carved its decision to come up with the conclusion that it sought. The path to that conclusion appears to be somewhat tenuous on legal footing.[133] As discussed earlier, the right to privacy is based on limited zones of privacy. The Roe Court did not base the right to privacy on the Ninth Amendment, but rather, it stated that the right came from the Fourteenth Amendment concept of personal liberty.[134]

In *Paul v. Davis*,[135] the police were distributing a photograph and information sheet on an individual known to be a shoplifter, even though he only had been arrested for shoplifting and not convicted. In discussing the individual's right to privacy in that case, the Court stated that

> [the] claim is based, not upon any challenge to the state's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the state may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.[136]

A decision in the Third Circuit made a distinction between information about which the police department could inquire and information that it would be at liberty to disclose to the public.[137]

Even if the right to privacy is a fundamental right, it is "not unqualified and must be considered against important state interests in regulation."[138] When certain fundamental rights are involved, the Court has held that these types of regulation only can be justified by a compelling state interest and

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131. *Id.*

132. Or infamous depending from what perspective it is viewed.

133. I am in no way saying that this conclusion should not have been reached. However, many have questioned the Court's rationale in this case, suggesting that the Court fashioned its opinion and reasoning in a manner that would allow them to reach the desired conclusion.

134. *Roe*, 410 U.S. at 153.

135. 424 U.S. 693 (1976).

136. *Id.* at 713.

137. *See* Fraternal Order of Police, Lodge 5 v. Philadelphia, 812 F.2d 105, 118 (3d Cir. 1987).

138. *Id.* The Supreme Court acknowledged that the right to privacy may include "the individual interest in avoiding disclosure of personal matters," Whalen v. Roe, 429 U.S. 589, 599 (1977), but also found that the privacy interest must be balanced against the public need for information, Nixon v. Administrator of Gen. Serv., 433 U.S. 425, 465 (1977).

"legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."[139] This is the strict scrutiny test.

2. Rational Basis Test

When there is no fundamental right or suspect classification involved, the proper test to apply is the rational basis test. The rational basis test, also called the minimum rationality test, has traditionally been viewed as "minimum scrutiny in theory and virtually none in fact."[140] This test involves determination of whether there is a legitimate government objective in the law, and whether the means used to achieve that objective are rationally related to that legitimate state objective.[141] This test, in reality, has no teeth. It allows the court to base the legitimacy of a law on the legitimate state objective. This is not a difficult task. As Justice Stevens pointed out in his concurring opinion in *Cleburne v. Cleburne Living Center*,[142]

> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and how has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis."[143]

One example of the application of rational basis is *Cleburne*.[144] There, a proposed operator of a group home for mentally impaired individuals was denied a special use permit to operate his center in the city. He claimed this was a violation of equal protection. Writing for the Court, Justice White stated that the record did not reveal "any rational basis" for the conclusion that any legitimate city interest would be affected.[145] Concluding that the ordinance was invalid, the Court found that "requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded."[146] The Court stated that

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139. *Roe*, 410 U.S. at 155 (citations omitted).
140. *See* Gerald Gunther, *Foreword: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).
141. *See, e.g.*, Rennell v. City of San Jose, 485 U.S. 1, 14 (1988); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461-63 (1981).
142. 473 U.S. 432, 453 (1985) (Stevens, J., concurring).
143. *Id.*
144. *Id.* at 437.
145. *Id.* at 450.
146. *Id.*

> where individuals in the group affected by the law have distinguishing characteristics relevant to interests the state has authority to implement, the courts have been very reluctant, as they should be . . . to closely scrutinize legislative choices as to whether, how and to what extent those interests should be pursued. In such cases, the Equal Protection Clause requires only a rational means to serve a legitimate end.[147]

The state interest in cases concerning registration of sex offenders is the protection and safety of children. There is little argument that this is a valid state interest. In fact, the Supreme Court stated that "[i]t is evident beyond the need for elaboration that a state's interest 'in safeguarding the physical and psychological well-being of a minor' is 'compelling.'"[148] Whether or not the right to privacy is determined to be fundamental in this context, the state's interest is compelling. As long as the means used to achieve this interest are rationally related and narrowly drawn, any legislation will pass constitutional muster.

D. *Bills of Attainder*

"No bills of attainder . . . shall be passed."[149] Bills of attainder were devices used to punish individuals for activities against the interest of the [English] Crown.[150] This prohibition against bills of attainder evinces the "concern that legislatures might cater to the 'momentary passions' of a 'free people, in times of heat and violence.'"[151]

In determining whether a statute is punitive in the bill of attainder context, three tests are used: (1) the historical test of whether the "punishment [was] traditionally judged to be prohibited by the bill of attainder clause"; (2) the functional test, which "analyz[es] whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes"; and (3) the motivational test, which examines whether the legislature intended the statute to be punitive.[152]

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147. *Id.* at 441-42; *see* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976).

148. New York v. Ferber, 458 U.S. 747, 756-57 (1982) (quoting Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982)).

149. U.S. CONST. art. I, § 9, cl. 3.

150. *See* Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 330-31 (1962).

151. *See* Nixon v. Administration of Gen. Serv., 433 U.S. 425, 480 (1977) (citing United States v. Brown, 381 U.S. 437, 444 (1965)).

152. *Id.* at 475-78.

The first test to examine is whether the punishment has been traditionally judged to be prohibited by the bill of attainder clause. Registration, however, is not punishment. As stated previously, registration is merely a regulatory means of protecting children. Therefore, it could not be a punishment traditionally prohibited.

The second test to examine is whether the statute reasonably furthers non-punitive purposes. While the effect of the registration may be minimally punitive, its other aspects are non-punitive. The statute purports to protect school children from further sexual assaults by convicted sex offenders. Children require optimal protection because they are the most vulnerable group in society and, in many cases, special relationships are formed between school officials or teachers and children, making them even more vulnerable. School officials and teachers are authority figures whom children look up to and do not question what they are told by them. Thus, these authority figures have an enhanced ability to make children the victims of sexual abuse. Registration would enable a school to know of past sexual offenses and take the necessary precautions when dealing with such an individual in order to protect the children from attack. It is clear that the registration would further non-punitive legislative purposes.

The last test to examine is whether the legislature intended the statute to be punitive. Once again, the statute would not impose any further penalty on the individual. In addition, the proposed regulation would be intended to prevent sexual abuse of children while they attend school.

A review of the three tests indicates that there would be no punishment and no violation of the bill of attainder clause. The purpose of the proposed statute is to protect children not to punish sex offenders.

E. *Double Jeopardy*

The government cannot punish citizens a second time for offenses for which they have already been punished.[153] This applies to criminal sanctions. Sanctions may have both punitive and remedial goals. "The notion of punishment . . . cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the double jeopardy clause, we must follow the notion where it leads."[154] However, this rule was for the rare case where "the subsequent proceeding bears no rational relation to the

153. U.S. CONST. amend. V; *see* United States v. Halper, 490 U.S. 435, 442 (1989) ("The double jeopardy clause . . . prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense.").

154. *Halper*, 490 U.S. at 447-48.

[government's] goal."[155]

Once again, the question hinges on whether sex offender registration is considered punishment. The sexual offender has been punished once. Does reporting to a registry constitute further punishment? As already discussed, reporting to a registry is merely regulatory and imposes no further punishment. In addition, the Double Jeopardy Clause is only for rare cases. Registration is not a rare case calling for the protection of the Double Jeopardy Clause. Use of the Double Jeopardy Clause is a tenuous argument at best under any circumstances. Clearly, this would not constitute double jeopardy.

F. *Other Concerns*

Another concern when notifying others of convicted sex offenders being offered or holding positions in a school district is the possibility of retaliation against them. If parents were made aware that a convicted sex offender was teaching their children or had ready access to their children, their reaction could make it impossible to conduct an effective class. However, is this really a problem? There is always the danger that sex offenders will repeat the offense they have committed in the past.[156] They should not be allowed in environments where they have access to children.

In addition, the proposed legislation "flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray."[157] When an individual has completed a criminal sentence or has been paroled, "the employer to some extent is entitled to rely upon the determination of the government's criminal justice system that the individual is ready to again become an active member of society."[158] The national registry proposal casts a dark shadow on theories of criminal repentance and rehabilitation. It might be said to infringe on the rights of those sex offenders who have legitimately been rehabilitated.[159]

This would be a valid argument if it were possible to determine if and when a sexual molester had been legitimately rehabilitated. It was not long ago that one individual who had been convicted of a violent sex crime against a child boasted that upon his release, he would commit additional

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155. *Id.* at 449.

156. *See Tougher Controls, supra* note 22, at A20. For a brief discussion of repeat sex offenders, see *supra* part I.

157. Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1241 (Fla. 2d DCA 1980).

158. Evans v. Morsell, 395 A.2d 480, 484 (Md. 1978).

159. *See* Ruess, *supra* note 4, at A1. "These laws penalize those people who have successfully rehabilitated themselves," according to Alan L. Zegas, Vice Chairman of the New Jersey Bar Association's Criminal Law Section and an officer of the State Association of Criminal Defense Lawyers. *Id.*

crimes against children; once he was released, he sexually assaulted a seven-year-old boy, cutting off his penis.[160] The fact is, many professionals believe these individuals cannot be rehabilitated.[161] An individual who has truly been rehabilitated should be able to pursue work. However, when that job is that of a school official or a teacher, it would be akin to putting a fox in the henhouse, too tempting and too dangerous.

VI. THE PROBLEM OF CONFIDENTIAL SETTLEMENT AGREEMENTS

Even if all sex offenders were required to register with either a state or national registry, this still would not solve the problem completely. For even with the registry, a sex offender who is a teacher could elude discovery by a hiring school.

When a teacher is accused of sexual abuse, it is not uncommon for the school district to enter into a confidential settlement agreement with the teacher wherein the teacher resigns and dismissal charges are withdrawn.[162] This may be done due to insufficient evidence, fear of wrongly accusing an innocent person, the cost of dismissal proceedings, or due to a desire to avoid additional trauma to the child from testifying in the proceedings.[163] Such a settlement agreement inevitably will have a nondisclosure clause. If the abuse is never disclosed, a future hiring school district would have no way of knowing whether the individual they are hiring has a history of sexual abuse of children.

This should not pose too great of a problem, however. Child abuse reporting laws, which make reporting mandatory in all fifty states, prohibit school districts from independently resolving child abuse allegations.[164] In most jurisdictions, it is a criminal offense if a person required by law to report suspected child abuse fails to do so.[165] The school district is under a legal obligation to report the alleged child abuse.

In addition, the school district has a moral obligation to society to report the incident to other school districts that may want to hire the accused

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160. *See* ALAN M. DERSHOWITZ, THE ABUSE EXCUSE AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY 109 (1994).

161. *See, e.g.*, Andrew Vachss, *Imprison Chronic Sexual Sadists for Life*, *in* CHILD ABUSE: OPPOSING VIEWPOINTS 263 (David Bender & Bruno Leone eds., 1994) ("Some predatory sociopaths can be deterred. None can be rehabilitated, since they cannot return to a state that never existed.").

162. *See generally* W. Richard Fossey, *Confidential Settlement Agreements Between School Districts and Teachers Accused of Child Abuse: Issues of Law and Ethics*, 63 ED. LAW REP. 1 (1990).

163. *See id.*

164. *See id.* at 5-6.

165. *See* John E. B. Myers, *A Survey of Child Abuse and Neglect Reporting Statutes*, 10 J. JUV. L. 1, 62-71 (1986).

individual. A good example of this occurred in *Bowman v. Parma Board of Education*.[166] In 1988, a teacher was terminated for child molestation but entered into a termination agreement with the Parma school that contained a covenant of nondisclosure.[167] He then obtained employment with the Lorain School District. A Parma School Board member informed the Lorain School District of the allegations against the teacher.[168] The Lorain Board of Education subsequently initiated termination proceedings against the teacher for inappropriate sexual behavior with a student.[169] Again, the teacher resigned and entered into a termination agreement with the school board.[170] The teacher then sued the Parma School Board for breach of the covenant of nondisclosure.[171] The trial court held the covenant of nondisclosure was unenforceable.[172] The Court of Appeals subsequently held the nondisclosure clause void as against public policy. The court stated that

> [the teacher's] decision to remain in the teaching profession undermines any validity the non-disclosure clause might otherwise have possessed. This court will not countenance an action for breach of such a clause upon such unchallenged facts as those in the instant case, for to do so would be to expose our most vulnerable citizens to a completely unacceptable risk of physical, mental, and emotional harm.[173]

The court upheld the obligation of the school district to disclose the allegations of child abuse made against a teacher, despite the nondisclosure clause in the termination agreement. This allows sufficient precedent for avoidance of nondisclosure clauses when the threat posed by nondisclosure outweighs the right of the individual to have the information kept secret.

VII. PROPOSAL

A national registry for sex offenders has been established for daycare providers.[174] Although teachers must be licensed to teach, the licensure

166. 542 N.E.2d 663 (Ohio Ct. App. 1988).
167. *Id.* at 665.
168. *Id.*
169. *Id.* at 666.
170. *Id.*
171. *Id.* at 664. The teacher committed suicide after the suit was filed. *Id.*
172. *Id.*
173. *Id.* at 667.
174. *See* Pub. L. No. 103-209, 107 Stat. 2490 (codified as amended at 42 U.S.C. § 5119 (1993)). This federal law requires: "In each State, an authorized criminal justice agency of the State shall report child abuse crime information to, or index child abuse crime information

procedure does not require that criminal background checks be obtained prior to licensure. In addition, there is no requirement that the national registry used for daycare providers be checked by prospective employers. Both of these procedures must be required to protect our children in the schoolhouse. It is imperative that schools be aware of reports of sexual abuse by prospective teachers.

Congress must enact legislation similar to that enacted for daycare providers.[175] This should be supplemented by statutes in every state requiring that prior to renewal or issuing of a license to a teacher, the licensing entity in the state must conduct a background investigation of each applicant.[176] This check must include use of the national registry and any state registries for sex offenders that have been established. The hiring school district would be responsible for obtaining the proper authorization from the applicants to retrieve this information. If the applicant refuses to give authorization, the school district should be allowed to refuse to consider the applicant for a position. The language for this statute could state:

> Any facility, school, or school system involved in the education of children under the age of eighteen shall not employ or contract for the services of any teaching staff member, substitute teacher, teacher aide, child study team member, school physician, school nurse, custodian, school maintenance worker, cafeteria worker, school bus driver, school secretary, clerical worker, or any other person serving in a position that involves regular contact with pupils unless the employer has first determined, consistent with the standards and requirements of this act, that no criminal history record information exists on file with the Federal Bureau of Investigation or the State Bureau of Identification that would disqualify that individual from being employed or utilized in such capacity or position.[177]

If evidence is obtained from use of the registries that the person has been involved in sexual offenses in the past, the school may refuse to hire the individual or may terminate the individual after holding a hearing satisfying the due process requirements to determine whether a person already employed should be terminated.

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in, the national criminal history background check system." *Id.*

175. *See* Leo, *supra* note 7, at 37.

176. *See, e.g.*, WIS. STAT. § 118.19 (1991).

177. *See* N.J. STAT. ANN. § 18A:6-7.1 (1989).

VIII. CONCLUSION

Sexual abuse offenders are among the most despised individuals in society. There is a wave of legislative action in the country to allow communities to be notified of a sex offender's presence in their community. With notice, the community can take precautions to lessen the chances that their children will become victims of sexual abuse at the hands of a known sex offender. This is certainly a step in the right direction. However, the New Jersey notification provisions of Megan's Law have been struck down as unconstitutional.[178]

Children are unable, in most cases, to protect themselves against an attack from an adult. In many cases, the child does not even realize until after the fact that what the teacher did was wrong. Children are the most vulnerable group of people in society and must be protected accordingly.

Schools have a duty to protect students in attendance based on the doctrine of in loco parentis and the duty created by compulsory schooling. This duty includes, but in no way is limited to, doing a thorough background check on teachers and other school employees prior to hiring them. This could be accomplished with minimal intrusiveness by establishing a national registry. Only a name and social security number would be required of the registry. The hiring school could then proceed accordingly, once they became aware of the past sex offense history of the applicant.

Parents would not leave their children with strangers they thought could be sexual abusers, and neither should schools. Parents and schools should be punished if they act in this negligent fashion. Presently, parents are punished if they place their child in a dangerous situation, and so should school districts that place students at such risk. "The culture is so soft minded that many will listen to any self-styled victim group, perhaps even pedophiles. That's why it's so crucial to keep them out of the schools."[179]

The correlation between having once been a victim of sexual abuse and becoming the perpetrator of sexually abusive acts is high.[180] It has been acknowledged that "[m]any child abusers also were survivors of child abuse themselves."[181] In addition, one study found that parents who were abused children are six times more likely to abuse their own children than are parents who were not abused.[182] The state has both an interest and an

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178. *See Artway*, 876 F. Supp. at 692.

179. *See* Leo, *supra* note 7, at 37.

180. Susan Mufson & Rachel Kranz, *A Family History of Abuse Contributes to Child Abuse*, *in* CHILD ABUSE: OPPOSING VIEWPOINTS, *supra* note 161, at 107.

181. *Id.*; CHECK, *supra* note 22, at 41.

182. Elaine Landau, *Many Factors Contribute to Child Abuse*, *in* CHILD ABUSE: OPPOSING VIEWPOINTS, *supra* note 161, at 119.

obligation to put an end to this cycle that often creates sexual abusers. If no protection is afforded our children while they are in the schoolhouse, the state will be sustaining the cycle. Every state government requires certain individuals to report suspected child abuse to the appropriate authorities.[183] In addition, a national registry has been established to protect children from sexual abusers in daycare facilities.[184] It is only logical to afford similar protection for our children in the schoolhouse. This is a rationally related means of achieving a compelling state interest.

183. Almost "every state . . . has enacted mandatory reporting laws for child sexual abuse." Edward J. Saunders, *The Child Sexual Abuse Case*, JUDGE J., Winter 1988, at 20, 23; *see, e.g.*, MINN. STAT. §§ 260.155(4)-.165, 626.556 (West 1971 & Supp. 1982); N.J. STAT. ANN. § 9:6-8:1 (West 1976 & Supp. 1981-82).

184. *See* Leo, *supra* note 7, at 57.