

THE MARK OF CAIN: NO SECOND CHANCE FOR TEACHERS CONVICTED OF SEX OFFENSES AGAINST STUDENTS

INTRODUCTION

In July of 1994, a seven year old child named Megan Kanka was brutally raped and murdered.¹ After the arrest of Jesse Timmendequas, it was discovered that he was a twice-convicted sex offender who had moved to Megan's block after being released on parole.²

As a result, the local community urged the state legislature to take measures to prevent sex crimes against children from recurring.³ Practically all of the other states have followed New Jersey's lead, and have adopted some type of statute to protect children.⁴ Additionally, the United States Senate recently passed a similar measure which requires all states to warn communities when convicted sex offenders, who might still pose a danger, settle in their neighborhoods.⁵ Shortly thereafter, President Clinton signed legis-

¹ This seven year old girl was from Hamilton Township, New Jersey.

² Robert Hanley, *New Jersey High Court Upholds Law Identifying Sex Offenders*, N.Y. TIMES, July 26, 1995, at A1, B2. It was further discovered that the community was completely uninformed about his criminal past and of his living with two other convicted sex offenders. *Id.*

³ On July 25, 1995, the New Jersey Supreme Court ruled in *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995), that in an effort to protect children from sexual predators, the registration and notification statute commonly referred to as "Megan's Law" is constitutional. Hanley, *supra* note 2. Chief Justice Robert N. Wilentz ruled that the requirement for convicted child molesters to register with local authorities and notify the community in which they will live is an effort to enhance community safety. *Id.*

⁴ Symposium, *Megan's Law: The Constitutional Issues & Legal Implications Behind the Law*, CARDOZO WOMEN'S L.J. (1995). All states except Massachusetts and the District of Columbia currently have various forms of registration and tracking statutes for convicted and paroled sex offenders; however, only fifteen states require public notification. *Id.* "Now pending in Congress is a bill sponsored by Senators Phil Gramm (R-Tex.) and Joseph R. Biden Jr. (D-Del.) that would connect the state registries on a national basis, so that a state would know if a newcomer had been convicted of a sex crime elsewhere." John F. Harris, *President Endorses Sex Offender Registry; Reno to Report on a National Tracking System*, WASH. POST, June 23, 1996, at A19. As of September 26, 1996, both houses of Congress passed the "Pam Lychner Sexual Offender Tracking and Identification Act of 1996," which provides for the nation-wide tracking of convicted sexual predators. S. 1675, 104th Cong., 2d Sess. (1996). The bill has been presented to President Clinton and awaits his approval. 142 CONG. REC. S11720 (1996).

⁵ Jerry Gray, *Senate Approves Measure Requiring States to Warn Communities about Sex Offenders*, N.Y. TIMES, May 10, 1996, at A28. "[New Jersey] Representative Dick Zimmer . . . led the fight to turn Megan's Law into a federal statute, winning an earlier amendment to the 1994 federal crime law that required states to register and to track convicted sex offenders for 10 years after their release from prison and to notify law enforcement officials when criminal sex offenders moved into their communities. The law also allowed, but did not require, states to make public notification of the whereabouts of paroled sex offenders." *Id.*

lation requiring neighbors to be notified when a convicted sex offender moves into the neighborhood.⁶

Despite the recent popularity of such legislation, criticism persists. The controversy surrounding these statutes stems from the conflict between the privacy rights of convicted offenders and the need to protect children who are not able to defend their own constitutional rights adequately. All too frequently, stories in the news remind us that children are being abused, and there is often no one to speak out on their behalf. When the abuse comes from a mentor or a teacher, the concern multiplies manifold. Educators are the people to whom we entrust our children, and whom our children trust implicitly. It is this level of trust which makes children in a classroom much more susceptible to sex offenses. When that trust is betrayed, a tragedy occurs. Legislation must be enacted to redress this situation.

There are numerous cases of sexual abuse of children by teachers.⁷ As a society, we bear a special responsibility to do the best job possible to detect teachers who are child molesters, because teachers have such unique and daily access to our children.⁸ Those teachers who are dismissed because of convictions of child molestation should be subject to a type of community registry and notification system similar to that mandated by Megan's Law.

Part I of this Note provides background information related to the creation and adoption of registration and notification laws and explores cases of child sexual abuse which occur in the United States each year. In addition, Part I focuses attention on the signs and consequences of abuse and emphasizes the importance of systems of prevention. A brief discussion of the policy arguments for the protection of children will be addressed as well as a general discussion of the views and beliefs of parties on both sides of the issue. Part II addresses the fact that various schools and courts have been largely ineffective in achieving the desired policy goals of registration and notification statutes. Part III discusses some ex-

⁶ 'Megan's Law': Clinton Signs Legislation that Requires Neighbors be Told When a Convicted Sex Offender Moves In, CHI. TRIB., May 17, 1996, at 1. States could lose federal funding if they fail to comply with the terms of the bill. *Id.*

⁷ In New York City alone, over one hundred cases of school sexual abuse have been reported since 1991. Carey Goldberg, *Student-Teacher Affairs Are Far from Uncommon; Adults Exploit Teens' Crushes*, NEW ORLEANS TIMES-PICAYUNE, May 21, 1995, at A19. "A nation-wide survey in 1993 by the American Association of University Women found that nearly 15 percent of eighth to 11th-graders, 25 percent of girls and 10 percent of boys, had been sexually harassed by a [school] staff member." *Id.*

⁸ Terri L. Regotti, *Negligent Hiring and Retaining of Sexually Abusive Teachers*, 73 ED. LAW REP. 333 (1992). "There is no way of knowing how many teachers resign each year when their dismissal is threatened for sexual abuse of students." *Id.*

amples of different states' reactions to such statutes and their responses to the void left by school systems and courts. Part IV enumerates and analyzes the constitutional arguments, raised in cases around the country, against registration and notification laws. Part V considers current approaches to dealing with teachers who are sex offenders, and proposes a statutory scheme which more accurately addresses the specific concerns posed by teachers who are convicted sex offenders. Part VI concludes by emphasizing the need for a registration and notification system for teachers convicted of sex offenses. The combination of the dangerousness of the offenders, the recidivous nature of the offense, and the offenders' close daily contact with children serve to buttress this position.

I. PROBLEMS OF CHILD SEXUAL ABUSE AND POLICY GOALS FOR SEX-OFFENDER LEGISLATION DESIGNED TO PROTECT CHILDREN

Sexual abuse of a child is defined as "the engaging of a child in sexual activities that the child does not understand, to which the child cannot give informed consent, or which violate the social taboos of society."⁹ This definition is intentionally broad so as to include intrafamilial and extrafamilial sexual abuse.¹⁰ The definition also includes several types of sexual activities, such as fondling, exhibitionism, child pornography, and oral and genital sexual contact.¹¹

Incidents of child sexual abuse are very difficult to calculate and can only be estimated.¹² Nevertheless, "[r]etrospective studies have found that one third of women and one sixth of men will have a sexually abusive experience by the time they reach adulthood."¹³ Child sexual abuse, then, is not an unusual claim and those who are concerned about the possibility of sexual offenses being perpetrated against them or their children have a very real reason for concern.¹⁴

However, it is not always readily apparent that some form of child sexual abuse is taking place or has taken place. Often, chil-

⁹ Richard D. Krugman, M.D., *Recognition of Sexual Abuse in Children*, 8 PEDIATRICS IN REVIEW 1, 25 (July 1986).

¹⁰ *Id.*

¹¹ *Id.*

¹² I was unable to locate any specific statistics for nation-wide examples that discuss occurrences of child sex abuse by teachers. I checked with several child welfare agencies, social services organizations, and different boards of education, all of which were unwilling or unable to provide me with the desired data. *But see supra* note 7 for some general statistics.

¹³ Krugman, *supra* note 9, at 25.

¹⁴ In addition, "[t]here is reason for alarm that the sexual abuse of students by teachers is increasing in our society." Regotti, *supra* note 8, at 333.

dren do not understand the nature or the gravity of the crime, and therefore tend to become secretive.¹⁵ This secrecy is generally enforced for some time before disclosure and children may display symptoms which indicate that they are masking a sexually abusive episode.¹⁶ Teachers are constantly in close contact with children and therefore it is especially important to be aware of any background information which may indicate inappropriate behavior or illegal sexual contact with their students.

Law enforcement on a national scale must take preventive measures to reduce the risk of teachers' illegal sexual contact with students. These children are unlikely to voice their concerns about, or complaints against, their teachers. Typically, "young victims of sexual abuse are afraid to disclose occurrences because they fear teacher retaliation."¹⁷ At the other end of the spectrum, older students may remain silent and let a sexual assault by a teacher go unreported because they fear that the authorities will not believe them.¹⁸

When a convicted sex offender is released from prison, it is presumed that he or she has been rehabilitated to the point where it is permissible to allow the offender to reenter society. Unfortunately, however, many of the offenders have not been adequately rehabilitated, and "it is likely that many have never received any psychological treatment at all."¹⁹ Consequently, there are many people who feel vulnerable and threatened knowing that someone who was convicted of a sex offense will be released from prison, and that nothing will be done to prevent the offender from moving next door and committing the crime again.²⁰

Advocates for children argue that sex crimes require special handling²¹ and that children should be safeguarded from known sexual predators and pedophiles.²² The sex offender problem deserves specific legislation for various reasons, the most important of which is that individuals who commit such crimes are the most

¹⁵ Krugman, *supra* note 9, at 26.

¹⁶ *Id.* Such symptoms might include acting out in different ways toward their parents or guardians, becoming much more introverted, or generally assuming any other of a number of otherwise normal behaviors and acting on them to an extreme. *Id.* at 26-27.

¹⁷ Regotti, *supra* note 8, at 333.

¹⁸ *Id.*

¹⁹ Michelle Pia Jerusalem, Note, *A Framework for Post-Sentence Sex Offender Legislation: Perspectives on Prevention, Registration, and the Public's "Right" to Know*, 48 VAND. L. REV. 219, 231 (1995).

²⁰ *Id.*

²¹ Kate Stone Lombardi, *Child Abuse System Faulted*, N.Y. TIMES, Jan. 7, 1996, sec. 13 at 1.

²² Howard Goldfuss, *'Megan's Law' Needed in NY*, RIVERDALE REVIEW, June 8, 1995, at 20.

likely of all criminals to repeat their crimes in similar acts of violence.²³

There are policy goals to consider before enacting post-release sex-offender legislation. This legislation must be narrowly tailored and specifically focused on people who commit sex crimes against children.²⁴ The first policy goal of sex-offender legislation should be to prevent offenders from striking again.²⁵ It is not possible to identify a sex offender before he or she has committed a crime. Once the offender has acted, however, the primary goal should be to ensure that he or she is unable to repeat the criminal conduct.

The goal is to rehabilitate the offender so that the urge to commit a sexual offense is no longer present when the offender returns to the community.²⁶ Skeptics would argue that, while treating a sex offender is important, it remains of limited value.²⁷ "No treatment program will work unless the offender is motivated to eradicate the urges that lead to sex offenses . . . or to prevent acting on the urges by avoiding high-risk situations . . ."²⁸ Offenders who refuse treatment will almost certainly emerge unchanged from any program they enter.²⁹ In order for rehabilitation efforts to be cost effective, they must be aimed at offenders most likely to profit from those efforts. Thus, a specialist should evaluate the offender and determine whether that particular criminal is treatable.

Finally, a third policy that is served by sex-offender legislation is the need to monitor convicted offenders to determine their propensity for recidivism.³⁰ Subsequently, legislation should be tailored to prevent offenders from simply relocating to a state where he or she cannot be monitored or watched.

These suggestions enumerated above implicate significant constitutional issues which will be addressed in Part V.

²³ Jerusalem, *supra* note 19, at 231. The following reasons explain why sex offenses are among the most recidivous crimes: many sex offenders are drawn to specific victims because of various psychological factors; many offenders deny their actions; and many of them do not feel any remorse for their behavior. Thus, the sexual predators are in no way deterred from committing their crimes again. *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 232.

²⁷ Ingeborg Oppenheimer, *Can Treatment Ever Cure Sex Offenders?*, N.Y. TIMES, Nov. 10, 1994, at A34.

²⁸ *Id.*

²⁹ *Id.* These particular offenders are generally characterized and labeled as untreatable. *Id.*

³⁰ Julia Houston, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 766 (1994).

II. SCHOOLS AND COURTS HAVE BEEN INEFFECTIVE AT ATTAINING THE POLICY GOALS ARTICULATED ABOVE

There are numerous cases where school districts fail to investigate a teacher's past adequately before offering him or her a position at a school. *Doe v. Durtschi*³¹ presents a classic example of a teacher who was dismissed from one elementary school because he had sexually abused students, and was hired by a second school where he again perpetrated sex crimes on children. It is disturbing that the teacher in this case was transferred to a different school without an adequate background check. More disturbing is the fact that this transfer was approved within the same district without any higher authority inquiring into the reasons for the teacher's dismissal. Thus, he was given a clean slate on which he could start committing similar crimes in new surroundings.

While administrative incompetence and sloppiness is partially responsible for such rehiring, this problem is not easily rectified. Administrators are frequently reluctant to sacrifice the reputations of their schools in order to better protect children. Professor Charol Shakeshaft³² studied 225 cases around the country of sexual abuse by teachers.³³ "[A] disproportionate share of [the sex-offending] teachers had won outstanding teacher awards, had been named best teacher by the . . . local PTA. And so most people worry about the adult, and worry about the adult's career, and worry about hurting an adult's career unfairly."³⁴ Many school districts across the country do not report sex offenders, allowing them to move from one school to the next.³⁵ School boards know that the process of removing a teacher is difficult and costly. They fear lawsuits, bad publicity and endless litigation, so they allow teachers to quietly leave when a case of child molestation has occurred.³⁶ Administrators are not required by federal legislation to report any cases of sexual abuse by teachers. Subsequently, administrators do very little and many offenders are merely dismissed rather than tried in a court of law.

The National Association of State Directors of Teacher Education and Certification ("NASDTEC") has created a list of teachers who are presumably reported to this organization if their licenses

³¹ 716 P.2d 1238 (Idaho 1986).

³² Professor Shakeshaft is a Hofstra University professor and co-author of a four-year study on school sexual abuse that appeared in *Phi Delta Kappan*, an educational journal.

³³ *Dateline NBC: Bad Apples* (NBC television broadcast, Mar. 31, 1996) [hereinafter *Dateline*].

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

or certificates have been suspended or revoked.³⁷ This system, however, is insufficient for two reasons. First, there is absolutely no legal requirement for anyone to report teachers to NASDTEC. Second, even if a teacher's name does appear on the NASDTEC list, a state considering the issuance of a license may choose not to investigate the reason for the revocation in a previous state.³⁸ These two glaring problems make the current system incomplete and inefficient in trying to keep criminals and sex offenders out of classrooms around the country. Consequently, there are many convicted felons, sex offenders, and child molesters teaching in schools around the country.³⁹

A federally-mandated and funded registration and notification system would help solve the problem. Additionally, it would be helpful if the police and the courts would be statutorily required to report offenders to the system. School principals and superintendents would no longer have to fear possible legal repercussions from notifying school districts which inquire about a particular teacher's past. A national registry and notification system would demonstrate that schools are taking steps to minimize cases of teachers molesting children and would make the classroom a safer place.

In *Doe v. Blandford*,⁴⁰ a similar situation was presented where a teacher, who also acted as a guidance counselor at a Connecticut school, had been placed on probation for assault and battery of a female student.⁴¹ After the teacher was fired from the first school, he relocated to Massachusetts where, despite his existing probation record, he was hired by another school district to act as both a teacher and a guidance counselor.⁴² A national registry and notification system could have prevented this teacher from being re-hired at the second school.

³⁷ Telephone Interview with Bart Zabin, Senior Investigator with Teacher Moral Character Unit, Office of Professional Responsibility, State Education Department (Aug. 5, 1996). The list now in existence includes the teacher's name, social security number, date of birth, and the state from which the license was revoked. However, nowhere does the list indicate the reason for the revocation. *Id.*

³⁸ *Id.*

³⁹ *Dateline, supra* note 33. Despite having been convicted twice of child molestation in 1962 and again in 1985, James Udell was allowed to continue to teach for 31 years, until 1993 when he was convicted for a third time and imprisoned for 20 years. *Id.* Charles Anderson, a "professional pedophile," was repeatedly convicted during his 16 year teaching career, and yet he was always able to renew his teaching certificate, including once while he was serving part of his prison sentence. *Id.* Finally, James Goebel was convicted twice of molesting students during his 26 year career as a teacher, and yet he was always able to continue teaching. *Id.*

⁴⁰ 525 N.E.2d 403 (Mass. 1988).

⁴¹ Regotti, *supra* note 8, at 336.

⁴² *Id.*

Although the above cases dealt with teachers accused, rather than convicted in a court of law, they highlight the growing problem of teachers who sexually abuse their students. Megan's Law and other registration and notification schemes exist only on the state level and do not go far enough to protect children from their teachers. For constitutional reasons discussed below, the national registration and notification scheme proposed here should apply only to teachers convicted of sexual offenses against their students.

In some school districts, from elementary school through high school, teachers who sexually prey on students are permitted to resign quietly without any fear of publicity or loss of teacher certification.⁴³ In education circles, this is commonly referred to as "passing the trash."⁴⁴ Severance agreements between teachers and school districts are often entirely confidential.⁴⁵ This secrecy enables teachers to move to another district without having to worry about the reputation that he or she may have earned in the first district. The new district, therefore, may be hiring a teacher with a history of abuse who might bring trouble to the school.⁴⁶ When school districts agree to secret contract and severance settlements with teachers who are accused of sexually assaulting students, they "protect themselves and the predators, while putting children at risk."⁴⁷

An example of such a scenario occurred recently when George Crear III entered into a "quiet pact." Crear was a band teacher in Flint, Michigan. In 1987, two students accused him of having had long-term sexual affairs with them and he agreed to resign from the school system.⁴⁸ After his resignation, the Flint schools accommodated him by agreeing not to disclose the allegations unless specifically asked about them.⁴⁹ Crear relocated to Dade County, Florida, and was rehired by Palmetto High School.⁵⁰ Crear is currently charged in Miami with having had sexual affairs with four teen-age students at the school.⁵¹ Unfortunately, as federal law stands today, if Crear is convicted and serves his time, there is noth-

⁴³ Kenneth Cole & Mark Hornbeck, *First of Two Parts; Secret Pacts Let Teachers Accused of Sexual Misconduct and Their Districts Off the Hook, but Put Students at Risk*, THE DET. NEWS, June 11, 1995, at A1.

⁴⁴ *Id.*

⁴⁵ *Id.* Without this condition of confidentiality, teachers would be unwilling to agree to resign quietly without bringing negative publicity to the school. *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

ing to stop him from relocating and being hired by another school district. A national system of registration and notification, whereby school administrators would automatically be notified of any teacher's conviction on child sexual abuse charges, would help solve this problem.

George Crear's story is the "tip of a small but growing iceberg of teacher sexual misconduct."⁵² The extent of teacher misconduct in Florida has reached astounding and incomprehensible levels.⁵³

The problem, however, has not just occurred in the Southeast.⁵⁴ In a second survey taken by the American Association of University Women, it was discovered that almost fifteen percent of students in grades eight to eleven had been sexually harassed by their teachers.⁵⁵

People are unwilling to acknowledge that sex between teachers and students is not an uncommon occurrence.⁵⁶ Responsible educators realize that teacher-student sex is always wrong — it is a betrayal of trust that harms the student and indicates an emotional defect in the teacher.⁵⁷ "[B]eing a teacher is a sacred trust, and you have to handle it like that."⁵⁸

In 1978, a young woman filed a civil claim against a teacher for sexual misconduct and sexual assault.⁵⁹ Because this was the first such case, the school district, unaccustomed to such charges, displayed a shocking standard of gross negligence.⁶⁰ This case epitomized the disregard by a school's administration of rumors about a teacher who was allegedly permitted to sexually molest female stu-

⁵² Editorial: *Improve Screening to Keep Out Teachers Who Molest Students*, SUN-SENTINEL, FT. LAUDERDALE FLA., June 4, 1995, at 4G.

⁵³ *Id.* "Every 72 hours, a Florida teacher sexually molests or harasses a student. During 1994, 65 Florida teachers were disciplined for sexually inappropriate behavior toward students, an increase of 39 cases - or 167 percent - from 1993." *Id.*

⁵⁴ *Id.* "A four-year nation-wide survey on school sexual abuse found one of 20 teachers had engaged in sexual misconduct, ranging from sexual flirting to actual intercourse." *Id.*

⁵⁵ *Id.* Broken down by gender, 25 percent of girls and 10 percent of boys had been sexually harassed by staff. *Report: 167% Increase in Teachers Punished for Sexual Misconduct. Most of the Cases Involved Sexually Suggestive Comments or Inappropriate Touching, A Newspaper Reported*, ORLANDO SENTINEL, May 30, 1995, at B3.

⁵⁶ Goldberg, *supra* note 7, at A19. "Thousands of girls and boys across the country have been sexually involved with teachers." *Id.* "The pain [which victims of teacher-student sexual abuse feel] is lifelong. They never are able to overcome the sense of betrayal over what happened. And they wrote to us about how they had trouble trusting, trouble believing, and trouble carrying on intimate relations as adults." *Id.* (quoting Charol Shakeshaft, author of a four-year study on school sexual abuse).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Stoneking v. Bradford Area School District*, 667 F. Supp. 1088, 1090 (W.D. Pa. 1987); see also Regotti, *supra* note 8, at 336.

⁶⁰ Regotti, *supra* note 8, at 337.

dents over the course of eight years.⁶¹ The outcome of the accusation of sexual assault was that the accuser, under pressure from academic authorities who convinced her that it would not be wise to pursue her complaint, was forced to publicly apologize to the teacher for making such an allegation.⁶² It took eight years and similar offenses against young female students for the school district to take some action against the same band teacher who had perpetrated the sex crime years earlier.⁶³ The administrators in the Bradford Area High School were grossly negligent in failing to fulfill their obligation and duty to protect students. Since then, other schools' administrators have acted in a similarly careless fashion and have failed to make every possible effort to protect the students who are in their schools.⁶⁴

It is clear that schools sometimes make decisions to keep secret records which indicate that a teacher has been dismissed for sexually abusing students. School administrators must be forthcoming about such incidents. States must prosecute these crimes so that teachers who sexually abuse their students are convicted and, when released, are subject to a teachers' registry and notification system, and subsequently barred from teaching. Schools have refrained from making such accusations public or from gathering information on the history of teachers to be hired, and should be "very concerned with the possibility of being sued for negligent hiring, retention, and supervision of teachers who sexually abuse their students."⁶⁵ If schools consistently and properly investigated and appropriately handled teachers' sexual misconduct, then children would be spared the humiliation and the physical and emotional scars.⁶⁶ Our society has an ethical duty to protect our children. It is essential that federal legislators create a national registration and notification system "to make sure teachers and other school employees convicted of sex . . . offenses don't go unnoticed and continue to work with children."⁶⁷

⁶¹ *Id.*

⁶² *Id.* at 336.

⁶³ *Id.* at 337. The band teacher, Mr. Wright, was finally suspended and later convicted of various sex crimes involving young students. *Stoneking*, 667 F. Supp. at 1091.

⁶⁴ *Id.* Their negligence did not end with this one particular incident or with this teacher. During the *Stoneking* trial, a social studies teacher in the same school was reported to the administration for allegedly sexually accosting another female student. Again, no disciplinary action was taken and the teacher suffered no repercussions. The student was convinced that it would be her word against that of the teacher and was intimidated into thinking that she would not be believed. *Id.* at 337.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Jean Latz Griffin, *Legislators Push County Agenda: Bills Tackle Molesters Who Teach and Township*, CHI. TRIB., Apr. 13, 1995, at 6.

III. SOME RESPONSES TO THE VOID LEFT BY SCHOOLS AND COURTS

In New York, the law established to track sex offenders is based on New Jersey's Megan's Law; however, it does have some notable differences.⁶⁸ New York's law incorporates a 900 telephone number to which citizens would have access so they could request information about people they suspect of being sex offenders.⁶⁹ Those who choose to call this number to gain access to the information would not be able to ask questions about anyone. In addition to supplying a name, they would have to give three pieces of information which describe the offender about whom they are inquiring.⁷⁰

When sex offenders are teachers, educators, and day-care workers, extra vigilance is warranted around the country. A similar type of national legislation pertaining to educators should be enacted because of the unique position that these professionals hold. Educators are in contact with children on a daily basis. The recidivous nature of a sex offender makes it imperative that a national registry and notification system be established.⁷¹ This system should alert school districts and parents nationwide of dangerous educators.⁷² While it is important to ensure that every citizen's rights are protected and that no privacy rights are infringed upon, it is crucial that the children in our fast-paced, highly technological country are given the best protection that the United States Consti-

⁶⁸ Kevin Sack, *Bill to Track Sex Offenders Nears Passage*, N.Y. TIMES, June 27, 1995, at B1, B4. In New Jersey, Megan's Law requires that the authorities inform communities of convicted sex offenders who are residing in their neighborhood. The New York law simply makes the information *available* to the public. *Id.* at B4. In addition, New York established a system whereby the convicted sex offender can be brought before various panels to determine what risk he poses to the public by being released. Symposium, *supra* note 4. This multi-tiered determination will also determine how much information is released about the offender. *Id.* Finally, New York's statute reaches back to cover only those offenders who are still within the criminal justice system, whereas New Jersey's Megan's Law applies to all sex offenders who have ever been convicted of a sex crime. *Id.*

⁶⁹ Symposium, *supra* note 4.

⁷⁰ *Id.* The three descriptive pieces of information provided by the caller must also meet certain criteria. These measures are taken to ensure that the privacy rights of offenders are not unnecessarily violated and that information is supplied only to those who have a legitimate safety interest at stake. *Id.*

⁷¹ Jerusalem, *supra* note 19. "Generally, statistics show a higher rate of recidivism by sex offenders than any other type of criminal." *Id.* at 220. Treatment experts contend that it is extremely difficult to arrive at precise recidivism rates. Not only are these rates often exaggerated, but in addition, several factors including the nature of the offense, how a relapse is defined, and whether any treatment has been given to the offender come into play in determining whether or not the offender poses a substantial risk of repeating his crime. Jan Hoffman, *Calls Surge for Law on Ex-Sex Offenders*, N.Y. TIMES, Aug. 4, 1994, at B1, B7. This is one of the reasons experts who oppose Megan's Law use to buttress their argument. *Id.* at B7.

⁷² Jerusalem, *supra* note 19.

tution can afford. A child's right to exist in safety takes precedence over a sex offender's right to a secret past.⁷³

It is important to consider the realistic harms which are posed by teachers who are sex offenders. After a thorough analysis of the inherent dangers that threaten the safety and security of our children, it becomes clear that a system which monitors teachers and other child-care professionals must be established. These offenders should be placed on a national list which should be available to schools and to parents who wish to inquire about the teachers in any school.

There are two main categories of opposition to registration and notification statutes. One is based on the day-to-day real life circumstances which arise for offenders and their families. It is possible that subjecting the offender to a registration and notification system may invite the public to harass or even threaten the offender and his family. There are also those offenders who may not pose enough of a threat to their communities to warrant them being placed on a list because their crimes are considered less serious than others. These offenders run the risk of being stigmatized and excommunicated by their neighbors. If everyone expects the offender to commit sex offenses, then, some argue, he will continue to prey on innocent victims.⁷⁴ This view supports the position that enacting a registration and notification law will not solve the problem of repeat sex offenders.⁷⁵ Rather, opponents claim that the type of statute in question is likely to produce an array of additional problems and harmful consequences.⁷⁶

⁷³ Peter Davis, *The Sex Offender Next Door*, N.Y. TIMES MAG., July 28, 1996, at 20, 24. David and Diane Smith live very close to a released sex offender and are enraged that "[o]ur children are guinea pigs helping him [the sex offender] with his therapy to see if he's cured! He's a time bomb. Community notification at least lengthens his fuse." *Id.*

⁷⁴ Jenny A. Montana, *An Ineffective Weapon in the Fight against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J.L. & POL'Y 569, 585 (1995). Ostracizing sex offenders may be counterproductive because the stress created for the offender may actually compel the offender to repeat his crimes. *Id.* "Studies indicate that certain emotions such as 'frustration, anger, or sadness,' trigger deviant behavior." *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* Among the negative results of community notification are:

- the encouragement of lawlessness against the offenders by citizens;
- the ability of communities with notification statutes to "force" offenders to leave and reside elsewhere;
- the inability of an offender to reassimilate and be given a second chance; and
- the false sense of security provided by the statutes will not prevent sex crimes against children.

Id.

See also, *infra* Part IV for elaboration on opposition to registration and notification laws.

It is argued by opponents of registration and notification statutes that a system like that recently enacted in New York will cause more harm than good.⁷⁷ The claim is that those who are intent on committing sex crimes will carry out their desires no matter what the law requires of them.⁷⁸

Additionally, opponents of registration and notification statutes claim that, not only will the law fail to prevent other similar crimes from occurring in specific communities, but laws of this nature may actually *increase* the number of sex offenders in other communities nation-wide.⁷⁹ In 1994, a notorious rapist was released from a California prison and paroled in the San Francisco Bay area.⁸⁰ When the local community protested that the convict would pose such a grave risk to the public's safety, Governor Pete Wilson assured the public that the rapist would be sent "out in the wilderness someplace."⁸¹ Subsequently, the rapist was carelessly relocated to a remote town which was home to a small college.⁸²

Another objection to registration and notification statutes is premised on constitutional grounds. These challenges to the notification statutes claim that the requirements sought to be imposed on convicted sex offenders constitute cruel and unusual punishment, and that they violate the Ex Post Facto Clause of the United States Constitution when they are applied retroactively.⁸³

The constitutional objections seem to be strongest not for the registration, but rather for the notification requirement.⁸⁴ In fact, opponents of the notification system agree that there *should* be a sex offender registry.⁸⁵ However, they assert that access to the registry should be limited to law enforcement officials so that they can better monitor sex offenders.⁸⁶

Teachers, educators and day-care workers are all people who see and deal with children every day. They are in a supervisory

⁷⁷ John Sullivan, *Sexual Attack on Youth Shows 'Megan's Law' Limit*, N.Y. TIMES, Aug. 1, 1995, at B5. The residents of a particular apartment complex knew that John Edward Greene was a convicted sex offender because he had registered with police as required by Megan's Law. However, this registration did not prevent him from perpetrating another violent sexual assault on a 15 year-old boy. *Id.*

⁷⁸ *Id.*

⁷⁹ Alice Vachss, *Megan's Law Won't Reduce Sex Crimes*, N.Y. TIMES, July 31, 1995, at A13.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Houston, *supra* note 30.

⁸⁴ The registration requirement is generally aimed at aiding law enforcement officials to prevent future crime, while notification, it is argued, does nothing more than punish the offender and violate his constitutional right to privacy.

⁸⁵ Abraham Abramovsky, *Megan's Law: Is It Constitutional? And Is It Moral?*, N.Y.L.J., July 11, 1995, at 3, 10.

⁸⁶ *Id.* at 10.

position and the schools and institutions who hire them should be fully responsible for their actions.⁸⁷ Because of the unique relationship between teachers and students, the districts which hire these teachers should choose "competent employees possessing the mental, moral and physical qualifications" who will be able to attend to their duties without endangering the well-being of children they supervise.⁸⁸

Although many object to notification for the general public, a closer and more focused look at the teaching profession in particular, as well as other related occupations which deal primarily with children, reveals the need for a registry and notification system for teachers and educators convicted of sex crimes. While it is important to carefully analyze the advantages and disadvantages of such a system, and to examine the rights of offenders, the interest in protecting children from imminent harm is paramount and should prevail.

IV. PROBLEMS WITH REGISTRATION AND NOTIFICATION STATUTES

A. *Constitutional Issues*

The constitutional challenges to the validity of criminal registration statutes have met with varying levels of success. The result of such a challenge often turns on whether the regulation in question is regulatory or punitive in purpose.⁸⁹ If the regulation is deemed to be punitive, then the legislation must be struck down. Conversely, if the legislation is found to be regulatory, then it will be upheld as constitutional.

In *Kennedy v. Mendoza-Martinez*,⁹⁰ the United States Supreme Court established several factors to be weighed to determine whether particular legislation is regulatory or punitive. Among the list of *Kennedy* factors to be considered are the following: first, it is necessary to determine whether the sanction proposed by the legislation involves an affirmative disability or restraint;⁹¹ second, the legislation must be examined to determine whether the measures to be taken have historically been regarded as punishment;⁹² third, whether the registration statute's operation will promote the tradi-

⁸⁷ Regotti, *supra* note 8, at 335.

⁸⁸ Martin R. Loftus, *Employer's Duty to Know Deficiencies of Employees*, 16 CLEV. MARSHALL L. REV. 145 (1967).

⁸⁹ See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) for guidance to determine whether a specific criminal registration statute is regulatory or punitive.

⁹⁰ *Id.*

⁹¹ *Id.* at 168.

⁹² *Id.*

tional aims of punishment and deterrence;⁹³ and fourth, whether the proposed legislation appears excessive in relation to the purpose assigned.⁹⁴ Lower courts have consistently followed the *Kennedy* factors to determine whether a constitutional challenge to a particular registration and notification statute has merit.⁹⁵

1. Ex Post Facto

By requiring convicted sex offenders to register with local authorities in which they reside and requiring surrounding communities to be notified of their presence, registration statutes seemingly expose sex offenders to retroactive punishment.⁹⁶ "The U.S. Constitution forbids the passage of ex post facto laws."⁹⁷ Recently, however, in *Doe v. Poritz*,⁹⁸ the Supreme Court of the State of New Jersey held that registration and community notification laws do not violate the Ex Post Facto Clause, Double Jeopardy Clause, or Cruel and Unusual Punishment Clause of the federal Constitution or any analogous state constitutional provision.⁹⁹ The court reasoned that a statute that can be characterized as remedial does not constitute punishment simply because the provisions have some adverse effects on an individual's rights. The law does not become punitive unless the only explanation for that negative impact is in fact an intent to punish.¹⁰⁰

The New Jersey Supreme Court essentially found that the Constitution does not prevent society from trying to protect itself from sex offenders who are released from prison after serving their jail term.¹⁰¹ The court continued that, "despite the possible severity of that impact [on offenders], sex offenders' loss of anonymity is no constitutional bar to society's attempt at self-defense."¹⁰² Fi-

⁹³ *Id.*

⁹⁴ 372 U.S. 144, 169 (1963).

⁹⁵ See text, *infra* this section for discussion of different constitutional challenges and their outcomes in different cases throughout the country.

⁹⁶ Abramovsky, *supra* note 85, at 3. "[T]he courts found that Megan's Law-type measures were an ex post facto addition to the sentences of offenders who already had been convicted or, in some cases, had already served their sentences." *Id.*

⁹⁷ *Id.* Article 1, § 10 of the Constitution denies states the power to enact ex post facto laws. These are laws which punish people for acts committed before the law's passage. *Id.*

⁹⁸ 662 A.2d 367 (N.J. 1995).

⁹⁹ *Id.* In addition, the court found that the acts do not deprive sex offenders of their privacy rights or their rights to equal protection under the laws. *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* The court specifically stated that it made absolutely no difference when the defendant was convicted, as long as the purpose of the statute was to protect the community, and the statute was indeed serving its purpose. *Id.*

¹⁰² *Id.* at 13. Society has the right to know of their presence not in order to punish them, but in order to protect itself. *Id.*

nally, the court reasserted that preventing danger to the community is a legitimate regulatory goal.

The constitutionality of registration and notification statutes has also been examined in the Federal District Court of New Jersey.¹⁰³ Federal District Court Judge John W. Bissell had previously blocked New Jersey's mandatory notifications while he weighed the law's constitutionality.¹⁰⁴ However, after considering contemporary concerns of public safety, he compared Megan's Law to "wanted posters for fugitives and dangerous suspects, alerts by the authorities about escaped prisoners, and the Federal Bureau of Investigation's use of television to inform the public about people on its 'Ten Most Wanted' list."¹⁰⁵ Ultimately, Judge Bissell found that the notification requirement of Megan's Law was intended to assist the public in protecting itself from those presenting a substantial risk of repeating acts of violence.¹⁰⁶

Similarly, in *State v. Noble*,¹⁰⁷ the Arizona Supreme Court upheld the state's sex offender statute against an ex post facto challenge by reasoning that the registration requirement for convicted sex offenders did not constitute a punitive measure.¹⁰⁸ The court considered whether the statute in question was intended to be punitive or regulatory in effect, and, using the factors enumerated in *Kennedy*, concluded that the registration statute was constitutional.¹⁰⁹ Although the court found that registration statutes are generally of a penal nature, the specific statute at issue did not amount to the necessary sort of affirmative disability or restraint

¹⁰³ Robert Hanley, *Judge Upholds Law Requiring Notice about Sex Offenders*, N.Y. TIMES, July 2, 1996, at B1, B5. The New Jersey statute contains two basic provisions: first, it requires registration with law enforcement authorities of certain convicted sex offenders and spells out the specific offenses that trigger the registration requirement. 64 U.S.L.W. 6, (Aug. 15, 1995). The second requirement provides for notice of the presence of such offenders in the community, depending on the substantiality of the risk that such offenders will commit another similar offense. *Id.*

Where the risk of such reoffense is low, only law enforcement authorities are notified (Tier One). Where it is moderate, institutions and organizations having the responsibility to care for and supervise children and women are notified (Tier Two). Finally, where the risk is high, those members of the community likely to encounter the offender are notified (Tier Three).

Id. In New Jersey, the county prosecutor follows the Attorney General's guidelines in order to determine when notification is appropriate. Patricia L. Petrucelli, Comment, *Megan's Law: Branding the Sex Offender or Benefitting the Community?*, 5 SETON HALL CONST. L.J. 1127, 1134 (1995).

¹⁰⁴ Hanley, *supra* note 103, at B5.

¹⁰⁵ *Id.*

¹⁰⁶ Judge Bissell included in his decision a ban on notifications until July 9, 1996, to give New Jersey's Office of the Public Defender time to appeal his decision to the Third Circuit Court of Appeals. *Id.* at B1.

¹⁰⁷ 829 P.2d 1217 (Ariz. 1992).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1221.

normally associated with criminal punishment.¹¹⁰ The court found that, since a convicted offender's information would be available only in specific areas of employment, and that the registration requirements were not excessive in relation to the act's nonpunitive purpose of facilitating law enforcement, the law was therefore regulatory and not punitive in effect.¹¹¹ Thus, the court found the overriding interest of facilitating law enforcement to be sufficient to avoid an *ex post facto* challenge.

Under similar circumstances in *State v. Manning*,¹¹² the Minnesota Court of Appeals was required to determine whether the registration form in question was intended to punish the convicted sex offender for a past act already committed or whether the restriction of the offender's rights surfaced as a relevant incident to the regulation of a specific situation.¹¹³ The court found that the registration requirement neither imposed an affirmative disability, nor advanced traditional notions of punishment.¹¹⁴ Finally the court concluded that the burden placed on convicted offenders to register was not excessive in relation to the important regulatory purpose served.¹¹⁵

The first federal court to consider the public notification statutes was the District Court of Alaska. In *Rowe v. Burton*,¹¹⁶ the court examined the Alaska Registration Act, which included a public notification provision.¹¹⁷ In that case, the legislature deemed its enacted statute to be regulatory in effect, and for the protection of the citizens of the state of Alaska.¹¹⁸ The court concluded otherwise. District Judge Sedwick found that, while the requirement that sex offenders register was not unduly burdensome on the criminals in comparison to the goal of reducing public exposure to criminal recidivous behavior, the same could not be said for the notification part of the statute.¹¹⁹ The court posited that the Alaska Registration Law which mandated public dissemination of information about the sex offender was excessive in relation to its legitimate non-punitive effect.¹²⁰

¹¹⁰ *Id.* at 1222-24.

¹¹¹ *Id.*

¹¹² 532 N.W.2d 244 (Minn. Ct. App. 1995).

¹¹³ *Id.* at 247.

¹¹⁴ *Id.* at 248.

¹¹⁵ *Id.* at 249.

¹¹⁶ 884 F. Supp. 1372 (D. Alaska 1994).

¹¹⁷ Abramovsky, *supra* note 85, at 10.

¹¹⁸ *Rowe*, 884 F. Supp. at 1375-76.

¹¹⁹ *Id.* at 1379.

¹²⁰ *Id.* at 1379-80. See also, *Artway v. Attorney General*, 876 F. Supp. 666, 689-91 (1995). The court in *Artway* found that disseminating such information would involve an affirma-

The *Rowe* Court made reference to several earlier state cases, including *State v. Costello*,¹²¹ *State v. Ward*,¹²² and *People v. Adams*.¹²³ In *Costello*, a New Hampshire court found that the registration statute was, "merely regulatory, providing a means for law enforcement agencies . . . to share information regarding the whereabouts of convicted sexual offenders."¹²⁴ The punitive effect of the registration requirement was determined to be *de minimis*.¹²⁵ In addition, the information provided about the sex offender was supplied only to law enforcement agencies.¹²⁶ The differences between the statutes in *Rowe* and *Costello* are clearly responsible for the opposite outcomes.

In *Ward*, the Washington Court of Appeals, Washington's highest court, announced that the registration statute in question was non-punitive.¹²⁷ Because the Washington statute limited public notification to cases in which the state had established the individual's probable danger to the community, "the statutory registration scheme [did] not impose additional punishment on registrants."¹²⁸ Again, this was a major difference in the statutory schemes of Washington and Alaska. Because the Alaska statute included a general public notification provision, it was struck down as excessive in relation to any non-punitive purpose for which it may have originally been intended.

In contrast, Washington's registration statute limited community notification to specific cases where a convict's danger to his community was properly established.¹²⁹ Washington's statute was much more specific, carefully constructed and narrowly tailored to serve the legitimate state purpose. Additionally, the court found that although registration might have the secondary effect of deterring future crimes, such positive effects were not punitive where the legislature's primary intent was to assist law enforcement agencies in protecting their communities. It is for this reason that the statute was upheld by the Washington Court of Appeals.

tive disability or restraint on the registrant's future, and that regardless of legislative findings to the contrary, the laws are punitive. *Id.*

¹²¹ 643 A.2d 531 (N.H. 1994).

¹²² 869 P.2d 1062 (Wash. 1994).

¹²³ 581 N.E.2d 637 (Ill. 1991).

¹²⁴ *Costello*, 643 A.2d at 533.

¹²⁵ *Id.*

¹²⁶ *Id.* This is unlike the *Rowe* case, in which the general public was allowed access to the registrant's "name, address, photograph, place of employment, date of birth, crime for which convicted, date of conviction, and length of sentence." *Rowe v. Burton*, 884 F. Supp. 1372, 1380 (D. Alaska 1994).

¹²⁷ *Ward*, 869 P.2d at 1069.

¹²⁸ *Id.*

¹²⁹ *Id.*

2. Cruel and Unusual Punishment

Cruel and unusual punishment¹³⁰ is evaluated using a proportionality analysis, in which a court ensures that the punishment being imposed or suggested is not excessive in relation to the gravity of the offense committed, and that the punishment is not disproportionate to other sentences imposed in other jurisdictions for similar crimes.¹³¹ The fundamental purpose of a national registration and notification statute is to ensure that children are protected from convicted child molesters.¹³² Mandatory registration statutes cannot be characterized as cruel and unusual punishment because the registration requirements are not out of proportion to the crimes committed.¹³³

Similarly, statutes requiring convicted drug offenders to register have survived Eighth Amendment challenges. In *People v. Kun*,¹³⁴ the court held that the cultivation of marijuana is a serious crime because it is the starting point of a process which ultimately leads to illegal drugs being placed in the hands of consumers.¹³⁵ The court found that the drugs cause deaths and serious injuries and transform recreational rural areas into "illegal armed camps posing a danger to innocent wanderers."¹³⁶ The court acknowledged that the defendant in this case posed a significant danger to society and that the legislature had determined that drug-related offenses had the potential to lead to a substantially higher number of victims than other crimes.¹³⁷ The court therefore found that mandatory registration did not constitute cruel and unusual punishment.

In *People v. Adams*,¹³⁸ a defendant attacked the Registration Act of Illinois on the basis that it constituted cruel and unusual punishment.¹³⁹ The Supreme Court of Illinois found that the legislative

¹³⁰ U.S. CONST. amend. VIII, made applicable to the states by U.S. CONST. amend. XIV.

¹³¹ See *State v. Lammie*, 793 P.2d 134 (Ariz. 1990) (concluding that the punishment of lifetime registration for attempted sexual assault was not excessive in relation to the gravity of the offense); *People v. Mills*, 81 Cal. App. 3d 171 (1978) (court did not label the state sex offender statute cruel and unusual punishment because its life-long requirements were applied to one convicted of lewd conduct with a child under fourteen years of age).

¹³² *Mills*, 81 Cal. App. 3d at 176.

¹³³ See *id.* at 171; *People v. Tate*, 164 Cal. App. 3d 133 (1985); *People v. Monroe*, 168 Cal. App. 3d 1205 (1985).

¹³⁴ 195 Cal. App. 3d 370 (1987).

¹³⁵ *Id.* at 375.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ 581 N.E.2d 637 (Ill. 1991).

¹³⁹ Matthew J. Herman, Note, *Are the Children of Illinois Protected from Sex Offenders?*, 28 J. MARSHALL L. REV. 883, 887 (1995).

intent was to make the registration law regulatory in effect.¹⁴⁰ The court found that the registration act in effect in Illinois did not constitute cruel and unusual punishment under the Eighth Amendment because the seriousness of the crime justified additional steps to protect children from sexual assault and abuse, and because the registration did not impose a severe disability.¹⁴¹ The court also held that there was no due process violation because "a statute does not violate due process requirements if the statute bears a rational relationship to a legitimate public interest and . . . the means utilized are reasonable in accomplishing the statute's objective."¹⁴² Finally, the *Adams* court held that state legislatures may indeed tailor legislation rationally related to its purpose and aimed specifically at a certain problem — here, the direct victimization of children by child molesters.¹⁴³ However, "while the Registration Act [of Illinois] may assist law enforcement officials in apprehending a suspect, the failure to release registration information does not allow parents, neighbors, and schools to protect children from sex offenders in the area."¹⁴⁴ The information obtained under the Registration Act is confidential and accessible only to law enforcement personnel, and therefore the law does nothing to prevent these convicted sex offenders from becoming teachers.¹⁴⁵

Illinois' continuing restrictive approach to disseminating information about paroled sex offenders leaves school children vulnerable. Administrators are not provided with the sex offender registration information about teachers.¹⁴⁶ Only when administrators are supplied with the proper tools can they effectively curb sex crimes perpetrated by teachers on students.

Finally, in the recent case *Doe v. Poritz*,¹⁴⁷ the New Jersey Supreme Court held that a statute that can be fairly characterized as remedial in purpose will not constitute cruel and unusual punishment even though its remedial measures have some deterrent impact.¹⁴⁸ Although a registration statute may indirectly, adversely and severely affect some of the convicted offenders subject to the

¹⁴⁰ *Adams*, 581 N.E.2d at 641. "Although the legislature took note of the [recidivous] nature of sex offenders, it included no provision in the statute mandating counseling or any other remedial measure particularly appropriate to pedophiles." *Id.*

¹⁴¹ *Id.*

¹⁴² Herman, *supra* note 139, at 888.

¹⁴³ *Id.* at 889.

¹⁴⁴ *Id.* at 886.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 910.

¹⁴⁷ 662 A.2d 367 (N.J. 1995).

¹⁴⁸ *Id.*

statute, the statute may still be considered remedial when measured against the severity of the crime at issue.¹⁴⁹

3. Equal Protection and Due Process

Two other constitutional arguments have been advanced against registration and notification statutes, namely the Equal Protection Clause¹⁵⁰ and the Due Process Clause,¹⁵¹ but both of these claims have been routinely rejected. For example, in *People v. Mills*,¹⁵² the court found that the degrees and gravity of danger to the public and the recidivous nature of sexual offenses were best left to the legislature's determination.¹⁵³ The court held that the registration statute in question had a rational basis, namely the state's legitimate interest in controlling crime and preventing sex offenses.¹⁵⁴ Thus, the statute was held to violate neither the Due Process Clause nor the Equal Protection Clause.¹⁵⁵

Similarly, in *People v. Adams*,¹⁵⁶ the Illinois Supreme Court noted that the broad purpose of the registration statute was to protect children from habitual child molesters.¹⁵⁷ The court found this evil to be rationally related to the legislature's requirement that child molesters register. The Illinois Supreme Court also held that a mandatory child sex offender registry did not violate due process guarantees.¹⁵⁸ The court concluded that the purpose of the registration statute was to assist law enforcement in protecting children and that there was no due process violation because the statute was reasonably related to its intended purpose by supplying information on known sex offenders.¹⁵⁹

4. Standards Applied to Teachers

Teachers convicted of sex offenses are likely to raise those constitutional challenges discussed above. While these are legitimate concerns, there are substantial competing concerns to be weighed against them. Each of the above cases analyzed constitutional is-

¹⁴⁹ *Id.*

¹⁵⁰ U.S. CONST. amend. XIV, § 1. ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law").

¹⁵¹ U.S. CONST. amend. XIV, § 1. ("[N]or deny to any person within its jurisdiction the equal protection of the laws").

¹⁵² 81 Cal. App. 3d 171 (1978).

¹⁵³ *Id.* at 177, 180.

¹⁵⁴ *Id.* at 181.

¹⁵⁵ *Id.*

¹⁵⁶ 581 N.E.2d at 637.

¹⁵⁷ *Id.* at 640.

¹⁵⁸ *Id.* at 642.

¹⁵⁹ *Id.*

sues raised by registration statutes, and each of them discussed the legitimate governmental and societal interests which frequently prevailed.

The recidivous nature of sex offenders demands a system whereby public safety is promoted and protected by the federal government through a federally-regulated system. This is especially true when the offenders are those who come into contact with children on a regular basis. "The public has a right to be informed of a sex offender's presence in their neighborhood so that they can take measures to protect themselves and their children."¹⁶⁰ When a sex offender is extremely likely to commit similar sex offenses in the future, the risk is so high that the job of "teacher" should not be an option for the offender. The public has a right to know that a convicted sex offender, who is more than likely to be a repeat offender,¹⁶¹ may be hired in its school district. Parents must be allowed to take steps to promote the safety of their children. Gary, a convicted child molester who has served nineteen years of his thirty year sentence, agrees that "[w]ith pedophiles, schools as well as police should know so they can be aware if a sex offender applies for a job around children."¹⁶² The public interest in child safety should take precedence over concerns of intrusion on sex offenders' lives.

In addition to the offenders' rights and the right of the public to know whether an offender will be teaching at a school, the government has an interest in maintaining the public's safety and protecting children from sexual predators in the classroom. By notifying school districts nation-wide about the criminal status of teachers who have been convicted of sex crimes against their students, law enforcement officials, school administrators, and parents can achieve the goal of protecting America's youth. This is a justifiable goal and should prevail over the sex offenders' interests in reestablishing themselves as trustworthy mentors and confidants in the classroom. A registration and notification system specifically designed to prevent convicted teachers from being hired in other school districts around the country should not be "the product of a lust for retribution; it [should be viewed as] a measured attempt to achieve remedial with attendant deterrent goals."¹⁶³

¹⁶⁰ Petrucelli, *supra* note 103, at 1159-60.

¹⁶¹ See Jerusalem, *supra* note 19.

¹⁶² Davis, *supra* note 73, at 26.

¹⁶³ Hanley, *supra* note 103, at B5.

The cases noted above place great emphasis on the regulatory effect of registration statutes and on their non-punitive nature.¹⁶⁴ Each court in the cases discussed above has concluded that a registration system is not unduly burdensome in comparison to the goal of reducing children's exposure to such recidivous crimes.¹⁶⁵ The combination of making a statutorily-required registry into a regulatory, non-punitive system for the specifically-tailored purpose of protecting our youth from teachers convicted of sex crimes against students justifies implementing such regulations.

Teachers' daily access to children warrants the extra precautionary measures to be taken in an effort to protect children. Notifying school districts and administrators of the status of a teacher convicted of sex crimes against students should be considered part of the regulatory system which numerous courts have found to be constitutionally permissible.

B. *Practical Policy Issues*

Those who are opposed to registration and notification laws raise practical policy reasons for their objections, in addition to the constitutional issues. The first of these objections is based on the public humiliation which the sex offenders' families may have to endure.¹⁶⁶ Some claim that after the identities of the offenders are exposed, their relatives will suffer "loss of employment, public ostracism and taunts."¹⁶⁷ It is hard to accept that legislation could be struck down because of the minimal negative effect it might have on relatives of sex offenders. When one considers that the ultimate purpose of such legislation is to protect America's youth from sexual abuse, the concern that offenders' families might be negatively effected by registration statutes is difficult to appreciate.

Another objection to community notification laws is the concern that the members of the notified communities may not be able to handle this information responsibly.¹⁶⁸ Although the statutes are designed to make the local communities more secure in their own neighborhoods, the legislation, which allows public access to names and information of offenders, may have the unintended effect of creating a high level of anxiety among local

¹⁶⁴ See *supra* notes 89-159 and accompanying text.

¹⁶⁵ See *supra* notes 89-159 and accompanying text.

¹⁶⁶ Abramovsky, *supra* note 85, at 10.

¹⁶⁷ *Id.*

¹⁶⁸ Montana, *supra* note 74, at 578.

residents.¹⁶⁹ There have been documented incidents where citizens have taken the law into their own hands and have threatened and physically assaulted offenders.¹⁷⁰ It is said that notification statutes "create a proven risk of vigilantism."¹⁷¹

While the risk of minor occurrences of vigilantism exist, this threat does not justify striking down a statute which protects our society at large. "Because we are a nation of laws, prosecution of any vigilante activity taken by private citizens should be vigorous and prompt. But the possibility of overreaction by the public should not be the basis of scuttling a procedure which could avoid the horror of another Megan case."¹⁷² If there are a few who choose to take the law into their own hands, then they should be dealt with swiftly and to the fullest extent of the law.¹⁷³ But to use the prediction of wide-scaled vigilantism to suffocate an effort to protect our children is to ignore the importance of children's safety.

A third policy objection to registration and notification laws is that convicted sex offenders may have trouble reassimilating into society because they will not be readily accepted as functional citizens.¹⁷⁴ There may be those who refuse to hire sex offenders, and neighbors who are opposed to their presence in the community. In fact, it is conceivable that a convicted sex offender may have to bear the burden of the consequences of his crime for a long period of time beyond his prison sentence.

This argument presents a problem that confronts all convicted felons. It is sometimes very difficult for them to find employment. The offenders may have trouble living in more rural neighborhoods, and therefore many convicted sex offenders are likely to migrate to larger and more densely populated cities.¹⁷⁵ Because the issue here is teachers convicted of sex crimes, the fact that they may be forced out of more rural areas and into urban life should not present them with an insurmountable problem. Teachers are

¹⁶⁹ Senator Franz S. Leichter, *Why I Oppose 'Megan's Law,'* RIVERDALE REVIEW, June 8, 1995, at 21.

¹⁷⁰ Abramovsky, *supra* note 85, at 10. The article gives a specific example of a man and his son who broke into a home which was listed as the address of a sex offender, and beat an innocent man. *Id.*

¹⁷¹ *Id.*

¹⁷² Goldfuss, *supra* note 22, at 8.

¹⁷³ Furthermore, in New Jersey, for example, Governor Whitman, Attorney General Deborah T. Poritz, and other law enforcement officials have repeatedly threatened to prosecute anyone who engages in criminal acts like vigilantism against paroled offenders subjected to community notifications. Hanley, *supra* note 103, at B5.

¹⁷⁴ Montana, *supra* note 74, at 584-85.

¹⁷⁵ *Id.* at 581-83.

well-educated and those who have been convicted of sexually abusing students should have less of a problem assimilating into a large city like New York, for example, and taking advantage of the many non-teaching employment opportunities that are available. Presumably, they will have a better chance of finding alternative kinds of employment than other released criminals *precisely* because teachers are educated. Arguments claiming that teachers will have difficulty reassimilating into society are thus shortsighted and naive.

V. PROPOSED SOLUTIONS

Current solutions for dealing with teachers who are child molesters are simply inadequate.¹⁷⁶ Even where school systems, day care centers, foster care programs, and city recreation centers screen all of their employees, there are still pedophiles who slip through the cracks and have very close contact with unsuspecting children.¹⁷⁷ The screening processes that schools currently use are not wholly effective at detecting teachers with pedophilic tendencies.¹⁷⁸ The reason for this is because of the secretive pacts which many teachers negotiate when they are dismissed from schools due to their questionable behavior. If schools are reluctant to report any sexual misconduct by teachers they have recently fired, then it becomes impossible for a screening process to uncover any controversy which might be a part of a teacher's history.

The National Association of State Directors of Teacher Education and Certification ("NASDTEC") does not provide adequate protection for America's youth. There is no federal mandate which requires teachers who have lost their licenses to be reported to this organization, and compliance with the list is voluntary on the states' part.¹⁷⁹ Also, the current list of teachers who have had their licenses revoked include many reasons for those revocations, whereas the system proposed in this Note is limited to convicted sex offenders.¹⁸⁰ This inevitably makes the current list too overbearing and burdensome, and it becomes more difficult to identify those specifically convicted of sex crimes — the most recidivous criminals.¹⁸¹ Additionally, while fingerprinting is a requirement

¹⁷⁶ Jeanne Malmgren, *Can I Protect My Child from Pedophiles?*, ST. PETERSBURG TIMES, Mar. 21, 1995, at 1A.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Interview with Bart Zabin, *supra* note 37.

¹⁸⁰ *Id.*

¹⁸¹ Jerusalem, *supra* note 19, at 220.

for everyone who teaches in New York City, it is not a requirement in the rest of New York State and other states around the country.¹⁸² Therefore, it becomes very difficult to monitor convicted sex offenders when there is no national standard which states are required to meet.

There are several ways that legislation could be drafted to better ensure the safety and security of our children. In addition to background checks on all school employees and child care workers prior to employment and licensing, a number of national safety measures should be taken which emanate from Megan's Law.

First, there should be federal legislation which mandates that information on teachers convicted of sex offenses against their students in one state be immediately accessible to other states' education departments through both individual Boards of Education and through law enforcement agencies. This national registry should allow access to any teacher's criminal records of all sexual assaults on children, and it should focus exclusively on sex offenders. In addition, each state in the nation should require every applicant for a teacher's license, as well as every current teacher, to be fingerprinted and tracked through a national computer system. This system would be more effective at tracking mobile sex offenders who move from state to state, and would ameliorate the problem created by states that do not require teachers to be fingerprinted. Consequently, teachers convicted of sex crimes in one state could more effectively be detected and prevented from being granted teacher's licenses in other states.

Second, teachers convicted of sex offenses against children must register in a central registry, which is made available via a national computer system to individual schools throughout the nation. The registry should describe the teacher specifically, display his or her photograph, and should indicate that there was a conviction for a specific sex crime. The information should be easily accessible so that those administrators interviewing potential teachers are given immediate feedback on the applicant's background. This would serve as a second level of protection for those who are somehow able to avoid detection during the investigation by the states' Boards of Education.

¹⁸² Interview with Bart Zabin, *supra* note 37. In a telephone interview with a member of Florida's Department of Education, Office of Professional Practices Service, Investigative Services, it was revealed that Florida requires everyone applying for a job as a teacher to be fingerprinted, and for those prints to be checked and cleared through the National Crime Information Center ("NCIC"). However, several states around the country, including New York State, have no such requirement. *Id.*

In New York's version of Megan's Law, a 900 telephone number was to be made available, which the public could call to obtain information about specific sex offenders who may have been released.¹⁸³ While this information would be available to the public, people would have access to the 900 number only if they already had information which could positively identify the suspect.¹⁸⁴ Similarly, there should be a number which school administrators could call to inquire about the history of all teachers applying for positions. However, the number should be made available only to school administrators, and not to the public at large. This will help reduce the number of sex offenders who are hired as teachers, and simultaneously pose very little risk of public panic.

VI. CONCLUSION

There are those who claim that, "while sex offenders should never forget about the crimes that they committed and those that they harmed, they deserve the chance to rebuild their lives."¹⁸⁵ They argue that community notification laws prevent the members of any community from accepting sex offenders back into society.¹⁸⁶ While a registration and notification system might cause sex offenders to be ostracized and placed in the difficult position of trying to reintegrate into the communities in which they live after their release, it is important to consider what the implications on potential victims would be if there were no registration and notification system.

Every day, millions of Americans send their children to school with hopes that educators will impart knowledge which the children can absorb and utilize to their own benefit. In the past, parents have not considered that the teachers to whom they entrust the safety, security and young minds of children may in fact be preying sexually on their children. School officials are warning today's parents that "no school is immune from predatory teachers."¹⁸⁷ While there are no annual compilations of sex offenses, the cases and surveys noted above indicate that there are incidents of child molestation by teachers occurring daily throughout the

¹⁸³ Sack, *supra* note 68, at B4.

¹⁸⁴ *Id.*

¹⁸⁵ Montana, *supra* note 74, at 585.

¹⁸⁶ *Id.*

¹⁸⁷ Jules Crittenden, *Several Teachers have Turned Predator in this Area*, BOSTON HERALD, Aug. 27, 1995, at 9.

country. "Schools would be foolish to ignore the message here."¹⁸⁸ Therefore it is important for education officials to be especially watchful in order to ensure that children are not unnecessarily exposed to sex offenders.¹⁸⁹

Typically, schools do not properly or effectively handle sexual assault cases.¹⁹⁰ Administrators should be performing thorough background checks, investigating rumors, and reporting cases of sexual assault to the proper authorities. Administrators fear, however, that negative publicity will hurt the school. They believe that it is easier to deal with the matter in a quiet, controlled forum in an effort to avoid the public eye and potential lawsuits.¹⁹¹ This is an ongoing problem, and it behooves us, as a society, to protect our children and protect their rights.¹⁹² They have the right to enjoy their childhood without experiencing the destruction that a teacher's sexual abuse can cause.

Sex offenders are arguably some of the most dangerous criminals in existence today. Reports indicate that sex offenders have the highest rates of recidivism of any group of criminals.¹⁹³

The fact that sex offenders can range from strangers to family members presents a difficult situation for children. For a child to be cautious of every person with whom he or she comes into contact is simply unrealistic. But when the individuals who are perpetrating these crimes on children are those who are designated to care for them, then the problem is limited to a specific group that is much easier to monitor for the benefit of the children. Children cannot be expected to look out for their own safety when the teachers they trust implicitly might shatter their lives.

"You do the best you can. You teach your kids how to cross a busy street and help them memorize their home phone. You tell them: Never talk to strangers. Then you send them off to school . . . [and] the news headlines are enough to make you wish you could wrap your children in armor every time you let them out the door."¹⁹⁴ Gene and Pam O'Brien have an eight year-old son with

¹⁸⁸ *Id.* (quoting David Johnson, a former Phillips Exeter Academy spokesman who was involved in a 1992 case against a Phillips Exeter drama teacher who was convicted of sexually assaulting a student).

¹⁸⁹ Crittenden, *supra* note 187.

¹⁹⁰ *See, e.g.*, Regotti, *supra* note 8.

¹⁹¹ *Id.* at 333. There is a reluctance on the part of schools which have previously employed sex offenders to give detailed and documented information about the dismissed teacher, because schools wish to avoid defamation suits. *Id.*

¹⁹² Wendy Witherspoon, *Closer Scrutiny; Recent Cases of Alleged Sexual Misconduct May Prompt County Coaches to Polish Up a Tarnished Image*, LOS ANGELES TIMES, Oct. 3, 1995, at 1.

¹⁹³ Houston, *supra* note 30, at 731.

¹⁹⁴ Malmgren, *supra* note 176, at 1A.

Down's Syndrome who recently started protesting that he did not want to go to school, and at night he refused to remove his underpants.¹⁹⁵ The school in which he was enrolled would not comment, other than to reassure his parents that everything was fine and that they should not worry — their son was probably going through a phase that he would outgrow.¹⁹⁶ Later, Mr. and Mrs. O'Brien saw a news story about a man arrested for molesting young girls.¹⁹⁷ This was the same man who had been their son's group leader at school.¹⁹⁸ "It's bad enough that you can't send your kids out to play on the street, but now at school?"¹⁹⁹

This scenario is steadily unfolding in schools across the United States. Schools are not reporting cases of child molestation by teachers for various reasons. But ultimately, while the reputations of the schools and the sex offenders are safeguarded by keeping the news quiet, children are paying the price by being exposed on a daily basis to pedophiles.²⁰⁰ Were the proper tools supplied to administrators, they could more effectively curb sex crimes perpetrated on students.

If school districts were given copies of a national registry of teachers convicted of sexually molesting students, administrators could be more confident that the people they are hiring are not convicted sex offenders. There would be fewer mistakes made by schools, and administrators could not say that they had no prior knowledge of a sex offender's criminal history. Without a federally-mandated registry, however, administrators have no way of knowing that potential teachers may be former convicted sex offenders. A national registry requiring convicted sex offenders to register would provide every state, and in turn, the individual schools with the knowledge necessary to avoid hiring such a teacher.

Some sex offenders readily admit that they are dangerous people — too dangerous to be left alone, unsupervised, with a defenseless child. "I'm not denying it. I know if I start to feel down and not wanted, and there's a child around, yes, I could very well do it again [Referring to sex offense against a child]. . . . Love your kids. Talk to them and listen to them. Because if you don't somebody

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Julie Tamaki & Beth Shuster, *Teacher Served Time for Child Abuse, Church Says*, LOS ANGELES TIMES, Mar. 16, 1995, at 3.

²⁰⁰ See, e.g., Regotti, *supra* note 8, at 336.

like me will."²⁰¹ When a convicted offender admits his inclination to repeat the crime, it is chilling to think of the consequences if he were a teacher. It is glaringly apparent that the government must take action to prevent this.

The combination of the seriousness of a sex offense and the recidivous nature of such a crime compels society to demand a national registration and notification system for any teacher convicted of a sex offense against a student. "The purest thing that exists in our world is a child's innocence. When somebody takes that away, it's the cruelest thing."²⁰² Offenders know how to manipulate children and undermine the warnings that parents give their children. Given the easy access offenders have to children and the failure of school administrators to take action, a national registry is necessary to protect our children. Authorities should also notify all schools throughout the country of any teacher's delinquent past.

Teachers are entrusted with a responsibility to care for our children. They are beacons of authority with the power to influence and mold young minds, shaping their futures and positively impacting their worlds. When a teacher betrays a child's trust, that teacher loses his or her coveted status as mentor and friend and becomes a destructive force. National legislation to prevent sexual assaults by teachers is essential, and the best interests of our children supersede the legitimate concerns of the few reformed, repentant offenders.

It is imperative that the federally-mandated system proposed above be enacted and utilized by all states. Teachers who are pedophiles must be excluded from the profession. Inaction is tantamount to ignoring the rights of children. Adults must avoid placing defenseless, unsuspecting minors under the daily influence of authority figures who are covert instruments of danger. Society clearly owes its greatest protection to its most naive and vulnerable members — its children.

Eric J. Kuperman

²⁰¹ Malmgren, *supra* note 176, at 1A. Roy, a former sex offender, is now receiving therapy to try to discover what leads him to prey on children. His message to parents is to keep the lines of communication open with their children, so that they feel loved and know that they do not have to go elsewhere for the love and affection they need and crave. *Id.*

²⁰² *Id.* (quoting Gene O'Brien, the father of the eight-year-old Down's Syndrome boy who recently started protesting that he did not want to go to school).