

LEGISLATING TO KEEP CHILDREN SAFE AT SCHOOL: ARE SEX OFFENDERS REALLY WORSE THAN MURDERERS?

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INTRODUCTION

In recent years, the media has barraged the public with countless stories of teachers caught sexually assaulting their students,¹ sparking understandable alarm and outrage. In an effort to allay concerns and calm the frenzy, many states have passed legislation aimed at teacher-student sex abuse.² Most recently, in June 2008, the New York state legislature enacted a statute that requires the Education Commission to automatically and immediately revoke the teaching license and certification of any teacher convicted of a sex offense.³ Several other states have passed similar measures.⁴

According to New York Senate Majority Leader Joseph Bruno, the New York statute is simply a matter of “commonsense.”⁵ New York Governor Da-

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1. See, e.g., Peter Simon, *Fondling Allegation Leads to Dismissal: Top School Official Accused of Laxity*, BUFFALO NEWS, Mar. 14, 2008, at D1; Peter N. Spencer, *Sex Fiends Slip Through Loopholes: The Laws are Lacking When Employers Seek to Probe Backgrounds*, STATEN ISLAND ADVANCE, Apr. 13, 2008, at A1.

2. See Andrew Johnson, *Teacher Scandals Mirror Trend*, PITTSBURGH TRIB.-REV., Jan. 27, 2007, available at http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_490572.html.

3. S.B. 8553, 230th Legis Sess. (N.Y. 2007); Assemb. B. 11500, 230th Legis. Sess. (N.Y. 2007). The bill eventually became parts of N.Y. EDUC. LAW §§ 305-7-a, 3020-a(2)(b) (McKinney 2008) and N.Y. CRIM. PROC. LAW § 380.95 (McKinney 2008).

4. See, e.g., CAL. EDUC. CODE § 44425 (West 2008); MINN. STAT. § 609B.122 (2008); WIS. STAT. §§ 115.31, 118.19(4), 973.135 (1991).

5. Press Release, N.Y. State Senate, Senate Passes Bills to Keep Convicted Felons Out of Schools (June 19, 2008), <http://www.senate.state.ny.us/pressreleases.nsf/2e0e86fa9105ed5a85256ec30061c0be/539fd0b109a0abd68525746d005ce733?OpenDocume>

vid Paterson described the statute as a necessary measure in “mak[ing] sure that sex offenders are not in a classroom setting that may put our children in harm’s way.”⁶

The New York statute is indeed “commonsense,” insofar as it accomplishes three legitimate goals cited by the New York legislature as motivations for the statute. First, by revoking a teacher’s license without delay upon conviction, the statute makes it less likely that another school district will fail to discover the prior conviction and unintentionally re-hire the convicted teacher.⁷ Second, because it is often difficult to get a teaching certificate reinstated after a conviction, the statute limits the opportunity for recidivism.⁸ Finally, and importantly, the statute improves upon prior New York law, which required the Education Commission to conduct a costly and time-consuming separate administrative hearing before revoking a teacher’s credentials—even after the teacher was found guilty “beyond a reasonable doubt” with the stringent due process protections available in a criminal proceeding.⁹

Although the statute may be a matter of “commonsense,” this Note proposes that it is not “commonsense” to limit the statute to sex offenses. Heightened media attention surrounding sex crimes, in combination with the general public perception that sex offenses are more heinous than other crimes, likely influenced the New York legislature to single out sex offenses for special treatment under the law. This Note argues that New York ought to expand the statute to provide for the automatic revocation of a teacher’s license upon conviction, not only of sex offenses, but also of similarly serious crimes that put children at risk of psychological or physical harm. For example, a teacher should lose his or her teaching certificate automatically for crimes such as murder, assault or battery, and kidnapping.

I. LEGISLATIVE HISTORY AND PURPOSE

The New York statute, which was introduced and sponsored in the Assembly by Ms. Cathy Nolan (Democrat, Queens)¹⁰ and in the Senate by Mr. Stephen Saland (Republican, Poughkeepsie),¹¹ reflected a three-way agreement

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6. Debra Myers, *Teachers Having Sex with Students Now Illegal*, DIGITAL J., June 20, 2008, available at <http://www.digitaljournal.com/article/256367>.

7. See *infra* notes 18-22 and accompanying text.

8. See *infra* notes 23-25 and accompanying text.

9. See *infra* notes 28-35 and accompanying text.

10. Press Release, N.Y. State Assembly, Assembly Approves Bills to Automatically Revoke Licenses of Any Teacher Convicted of Registrable Sex Offenses and Administrators Convicted of Defrauding the Government (June 19, 2008), <http://www.senate.state.ny.us/pressreleases.nsf/2e0e86fa9105ed5a85256ec30061c0be/539fd0b109a0abd68525746d005ce733?OpenDocument&Click=>.

11. Press Release, N.Y. State Senate, *supra* note 5.

between the Assembly, the Senate, and the Governor.¹² On June 18, 2008, both the Assembly and the Senate passed the bill (AB 11500 and SB 8553), and less than one month later, Governor Paterson signed it.¹³

The statute is straightforward: It automatically and immediately decertifies teachers and other educators who are convicted of any sex offense.¹⁴ A “sex offense” is defined by the statute to include “an offense committed in any jurisdiction for which the offender is required to register as a sex offender in New York.”¹⁵ Logistically, in order to achieve its purpose, the statute requires district attorneys to promptly notify the State Education Department whenever a teacher is convicted of a sex offense as defined by the statute.¹⁶ Then, the statute requires the State Education Department, once notified, to promptly revoke that convicted teacher’s certification.¹⁷

Legislative history and public statements by those who supported the law reveal at least three motivations for the statute, and, for the most part, the statute is effective in implementing those three legitimate motivations. First, New York legislators saw the statute as a necessary protection against the unintentional re-hiring of convicted sex offenders.¹⁸ Many school districts fail to conduct thorough background checks before hiring a teacher, and a teacher’s lack of a teaching license is presumably more likely to tip off the hiring district than the previous conviction alone.¹⁹ This risk of re-hire is more than theoretical, since many schools have, in fact, hired previously convicted sex offenders without ever discovering the conviction.²⁰ These unknowing re-hires often lead to repeat offenses and consequent bad publicity for the school districts that hire

12. *See id.*

13. *See* N.Y. State Assembly, Bill Summary of A11500 (on file with author).

14. N.Y. EDUC. LAW § 305-7-a(a) (McKinney 2008). The bill was enacted together with another bill containing a comparable provision, not discussed here, that automatically revokes the license of any school administrator convicted of a felony fraud conviction (e.g., for deliberately misusing or misapplying school funds). S.B. 8554, 230th Legis. Sess. (N.Y. 2007); Assemb. B. 11513, 230th Legis. Sess. (N.Y. 2007).

15. N.Y. EDUC. LAW § 305-7-a(b)(2) (McKinney 2008).

16. *Id.* § 305-7-a(d).

17. *Id.* § 305-7-a(c).

18. For example, Governor Paterson stated: “This legislation will close gaps that have made it possible for teachers who commit crimes to remain on a school district payroll or to be hired by another school district.” *See* Myers, *supra* note 6 (emphasis added).

19. *See* Eric J. Kuperman, *The Mark of Cain: No Second Chance for Teachers Convicted of Sex Offenses Against Students*, 3 CARDOZO WOMEN’S L.J. 491, 496-97 (1996).

20. *See id.* at 496 (confirming that there are numerous cases where school districts fail to properly investigate a teacher’s past before offering him or her a position at the school); accord Teachers and Trash Education, <http://teachertrash.blogspot.com/2007/01/mamaroneck-new-york.html> (Feb. 8, 2007, 12:37 EST). When a teacher does not lose his or her certification and is consequently hired in another district, this is known as “passing the trash.” *See* Kuperman, *supra* note 19, at 498.

previously convicted sex offenders without informing parents and other community members of the risk posed by such teachers.²¹ Arguably, a school district may have legitimate reasons for wanting to hire a teacher despite a previous conviction for a sex offense. However, if the school district never discovers the previous conviction in the first place, it is incapable of making an informed decision that weighs the risk of re-offense and consequent public outrage with the possibility of the teacher's rehabilitation and positive contributions to the classroom. Moreover, at least according to several New York legislators, it is likely a rare case in which a school district would know of a previous sex offense conviction and decide to hire the teacher anyway. Assembly Speaker Sheldon Silver, for instance, stated that, "Those who are in this registry [of sex offenders] have no place teaching in our schools and potentially threatening the safe environment in which our students learn and grow, free from victimization."²²

Second, and relatedly, the statute was motivated by the belief and worry—frequently touted—that sex offenders are more likely than other criminals to repeat their crimes.²³ The statute is effective in mitigating the risk of recidivism. Because it is often difficult and burdensome for a convicted sex offender to get his or her teaching credentials reinstated, the statute makes it less likely that a convicted teacher will ever be placed back in the classroom—a setting that poses an elevated risk of re-offense.²⁴ Representing this view, Assembly Speaker Silver asserted: "It is entirely unacceptable that sex offenders—a class of criminal [sic] that poses a high risk of re-offense—should have any access to young people in our classrooms."²⁵ Again, one might object to the statute for being over-inclusive. Certainly, not all sex offenders repeat their offenses and many are capable of being fully rehabilitated.²⁶ However, given the high likelihood of re-offense and the difficulty of determining *ex ante* which teachers are capable of rehabilitation, it is prudent to err on the side of caution with a

21. See *Doe v. Durtschi*, 716 P.2d 1238 (Idaho 1986) (presenting an example of a case in which a teacher was dismissed from one school for sexual abuse and then hired by another school where the teacher again sexually abused students).

22. Press Release, N.Y. State Assembly, *supra* note 10. Similarly, Governor Paterson stated: "We have to do everything in our power to protect our children and communities from sexual predators. . . . With this bill, we provide another tool to make sure that sex offenders are not in a classroom setting that may put our children in harm's way." Myers, *supra* note 6.

23. See Kuperman, *supra* note 19, at 494-95 ("[I]ndividuals who commit [sex] crimes are the most likely of all criminals to repeat their crimes in similar acts of violence.").

24. See *id.* at 492 (arguing that society bears a special responsibility to detect teachers who are sex offenders, since the classroom offers a unique opportunity for offense and daily access to children).

25. Press Release, N.Y. State Assembly, *supra* note 10.

26. See Jeffrey C. Sandler et al., *Does a Watched Pot Boil?*, 14 PSYCHOL. PUB. POL'Y & L. 284, 285 (2008).

default rule that previously convicted sex offenders are not fit to teach: “[Protecting America’s youth] is a justifiable goal and should prevail over the sex offenders’ interests in reestablishing themselves as trustworthy mentors and confidants in the classroom.”²⁷ Moreover, automatically losing one’s teaching license does not preclude one from getting that teaching license reinstated in exceptional circumstances, such as when a teacher can demonstrate that he or she has been rehabilitated and unlikely to recommit a sexual offense.

Third and finally, the statute was intended to “close gaps [in the law] that have made it possible for teachers who commit crimes to remain on a school district payroll.”²⁸ Prior to the statute’s enactment, a teacher convicted of a sex offense was nonetheless entitled to an administrative hearing to determine whether she should be able to retain her teaching certification.²⁹ These hearings are duplicative and mostly unnecessary, since the teacher already received due process by being found guilty beyond a reasonable doubt in a criminal proceeding.³⁰ As mentioned, it is theoretically possible for an administrative hearing to result in a determination that despite a previous conviction for a sex offense, the teacher is nonetheless fit to teach. However, in practice, such a determination is highly unlikely.³¹ Moreover, these hearings are lengthy and expensive, often keeping already-convicted employees on the payroll for extended periods of time, with taxpayers picking up the tab.³² According to one estimate, the administrative hearing process costs taxpayers about \$150,000 per case,³³ as teachers wait for hearings for up to five and a half years, while being paid annual salaries of up to \$95,000.³⁴ The New York statute “streamline[s]” this process by eliminating the administrative hearing entirely for teachers convicted of sex offenses.³⁵

II. PUBLIC PERCEPTIONS OF SEX OFFENDERS

Partly as a result of the substantial media attention on sex crimes, the pub-

27. See Kuperman, *supra* note 19, at 512.

28. Myers, *supra* note 6.

29. See Press Release, N.Y. State Senate, *supra* note 5.

30. See N.Y. State Assembly, Bill Summary of A11500 (on file with author). In an effort to anticipate and address another potential objection, the statute also includes safeguards to protect against instances of mistaken identity or an overturned conviction. See Press Release, N.Y. State Assembly, *supra* note 10.

31. See Erin Einhorn, “Rubber Rooms” That Cost \$65M: Teachers in Trouble Spending Years in Limbo, N.Y. DAILY NEWS, May 4, 2008, at 4.

32. See *id.*

33. See Michael Gormley, *Bill Targets Educators Guilty of Crimes*, ALBANY TIMES UNION, May 22, 2008, at A3.

34. See Einhorn, *supra* note 31, at 4.

35. N.Y. State Assembly, Bill Summary of A11500 (on file with author).

lic has come to believe that sex offenses are more common than other crimes and that sex offenders are more despicable than other criminals, particularly when the victim is a child. In examining why sex offenders—particularly those who perpetrate their offenses against children—are treated differently than other criminal offenders, Professor Lester aptly describes the public’s perceptions of sex offenders:

Sex offenders are a special cast of criminals that excite the general public more than other run-of-the-mill criminals. The combination of sex and violence makes for a story line that sells. Readers and viewers are titillated by those often NC-17 rated stories. Throw a story line that includes children into the mix with sex and violence and you have a potential to create a lynch mob. Stories of just a few abused children can unite the public to demand change. Media attention can blow a situation out of proportion so that it appears that isolated events are really an epidemic. . . . Crimes involving sex, especially when the victim is a child, are perceived as more heinous crimes. . . . Sex offenders are not even honored among thieves. . . especially if the crime involved a minor.³⁶

As one particularly poignant anecdote shows, sex crimes are so stigmatic that a mother requested a change in Illinois classification law so that her son, who murdered a child, would be classified as a “murderer” instead of a “sex offender.”³⁷

It is likely that, in deciding to subject only sex crimes to automatic revocation, the New York legislature shared in or was influenced by these public perceptions. It is not infrequent for legislators to take a particularly strong stand against sex offenses in order to gain political favor: “Politicians across the country will approve almost any measure that deals with sex offenders to appear strong on crime.”³⁸ Indeed, the New York statute—like similar laws in other states—passed effortlessly. The statute received bipartisan support, with both Democratic and Republican sponsors,³⁹ and received unanimous approval in both the Assembly⁴⁰ and the Senate.⁴¹ After all, as Justice Stevens once

36. Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 345-48 (2007) (citations omitted).

37. *See id.* at 348.

38. *Id.* at 340 (citing Lee Rood, *New Data Shows Twice as Many Sex Offenders Missing*, DES MOINES REG. & TRIB., Jan. 22, 2006, at 1A); *see also id.* at 339 (“There are times when politicians are hostages to the lusts of their constituents.”).

39. *See* Press Release, N.Y. State Assembly, *supra* note 10; Press Release, N.Y. State Senate, *supra* note 5.

40. N.Y. State Assembly, Bill Summary of A11500 (on file with author).

41. N.Y. State Senate, Legislative Information, <http://public.leginfo.state.ny.us/menugetf.cgi> (last visited Jan. 10, 2009). In at least one state, a similar statute passed without any lobbyist opposition even from the largest teachers union. *See* Blake Nicholson, *N.D. Teachers Can Lose License Without Sex Conviction*, BISMARCK TRIB., Oct. 21, 2007, available at <http://www.bismarcktribune.com/articles/2007/10/21/news/state/141321.txt>.

quipped, "There is obviously little legislative hay to be made in cultivating the multiple murderer vote,"⁴² and so it is with the sex offender vote.

III. POLICY IMPLICATIONS: EXTENDING THE STATUTE TO REACH OTHER SERIOUS CRIMES

The fact that a democratically elected legislative body and governor supported a law that addressed a timely and controversial issue in response to public demands is not a particular source of concern. Nonetheless, it is useful to take a step back from the frenzy surrounding sex offenses to rationally reflect on whether sex offenses really are unique or more vile than other crimes in a way that justifies subjecting them—and only them—to automatic revocation of teaching credentials upon conviction.⁴³ This Note concludes that they are not, and consequently, proposes extending the New York statute to reach other serious crimes. To clarify, this Note does not suggest that sex offenders should not be subject to harsh sanctions and prohibitions under the law, only that they should not be subject to *harsher* sanctions and prohibitions under the law relative to other, similar criminals. In other words, the New York law is not a bad law; rather, it is not the best possible law.⁴⁴

Logically, the three motivations for the New York statute as applied to sex offenders apply with equal force to other criminal offenders who similarly place children at psychological or physical risk. First, automatically revoking the teaching credentials of other felons similarly reduces the risk of unintentional re-hire by school districts that are sloppy in performing background checks. Second, contrary to popular belief, a number of empirical studies have established that recidivism rates for sex crimes are no worse than recidivism rates for other crimes; in fact, they are lower.⁴⁵ Accordingly, just as it is important to ensure that sex offenders cannot easily return to classrooms, so too is it important to ensure that other criminals cannot easily return to classrooms.⁴⁶ Finally, in New York school districts, criminal offenders who do not have their

42. Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 522 (1995) (Stevens, J., dissenting).

43. See Lester, *supra* note 36, at 340 ("When it comes to laws that involve sex offenders, the passions of the majority must be tempered with reason.")

44. In so clarifying, I am conscious of avoiding the perfectionist fallacy, which erroneously rejects a policy or proposal simply because it does not accomplish its goals to perfection. See Pseudoreasoning, Chapter 6: Lesson 12, <http://military.coastline.edu/classes/philosophy115/lessons/chapter6lesson12.htm>.

45. See Lester, *supra* note 36, at 349 (relying on data collected by the U.S. Department of Justice).

46. See, e.g., Gary Hopkins, *Is the Teacher in the Classroom Next Door a Convicted Felon?*, EDUC. WORLD, Sept. 20, 1999, http://www.educationworld.com/a_admin/admin129.shtml ("Discovering that felons work in school systems happens more often than one might wish.").

teaching licenses automatically revoked also waste taxpayer money, collecting teaching salaries as they await the completion of their administrative hearings.⁴⁷

In light of the above reasons, the New York statute ought to be extended to provide for automatic revocation of teaching certification for teachers convicted of serious crimes in addition to sex offenses.⁴⁸ In fact, at least two other states have enacted statutes of this sort. For example, a Wisconsin statute⁴⁹ provides for the automatic and immediate revocation of the certification of a teacher convicted of various sex offenses *or* of other crimes, including first-degree intentional or reckless homicide, second-degree intentional or reckless homicide, battery, taking hostages, kidnapping, stalking, and physical abuse of a child, among others.⁵⁰ Similarly, California has enacted a statute that provides for automatic revocation upon conviction of both sex offenses and certain felony drug offenses.⁵¹

Admittedly, it may be difficult to draw the line between crimes deserving automatic revocation and crimes not deserving automatic revocation. For instance, a teacher convicted of murder probably ought to have his or her teaching license revoked, while a teacher who receives a speeding ticket probably ought not to have his or her teaching license revoked. But what about the gray area in between? Should a teacher convicted of marijuana possession have her or his teaching license revoked? The California and Wisconsin statutes are representative of this line-drawing problem. Arguably, California's statute does not go far enough and ought to provide for automatic revocation for additional crimes other than sex offenses and felony drug convictions. Conversely, the Wisconsin statute perhaps goes too far, resulting in automatic revocation in certain controversial cases, such as for abortion under certain circumstances and for assisting suicide.⁵²

Nonetheless, the ever-present line-drawing problem should not act as a

47. See Einhorn, *supra* note 31.

48. At least one commentator agrees:

One law that every state should have is the automatic revocation of a teaching certification when an educator is convicted of any kind of sex crime. But such a statute should also include any conviction that involves incarceration. There is absolutely no sensible reason why an educator should be collecting a paycheck while he or she is sitting behind bars.

Daniel Muniz, *Firing Teachers: States Need New Tenure Reforms*, NAT'L SUMMARY, http://www.nationalsummary.com/Articles/Education/education_firing_teachers.htm (last visited Jan. 10, 2009). He argues that states are not providing for automatic revocation for any conviction involving incarceration primarily as a result of the lobbying strength of the teachers unions. See *id.*

49. See WIS. STAT. §§ 115.31, 118.19(4), 973.135 (1991).

50. See *id.*

51. See CAL. EDUC. CODE § 44425 (West 2008).

52. See WIS. STAT. §§ 115.31, 118.19(4), 973.135, 940.04, 940.12 (1991).

complete barrier to extension of the statute to crimes other than sex offenses. In deciding which crimes should result in automatic revocation of a teacher's license, the New York legislature should consider whether the crime is one which poses a high risk of psychological or physical harm to children (such as violent crimes) and has a high risk of re-offense (such as crimes in which the victim is a minor). In weighing these considerations and, of course, considering the needs and values of its own constituents, the New York legislature can improve upon its "commonsense" but incomplete statute.

CONCLUSION

Heightened media coverage of shocking sex offenses perpetrated by teachers against young students has rightly angered the public and triggered a legislative response. Children do, indeed, need to be protected from sexual abuse. But children also need to be protected from murder, physical assault, and kidnapping, to name a few examples. Because there is no rational reason for the law to single out sex offenses for harsher treatment, this Note recommends that the New York legislature extend its current statute in order to automatically revoke the certification of any teacher convicted not only of sex offenses but also of other serious crimes that put students in physical or emotional danger.

