The Dismissal of Public Schoolteachers for Aberrant Behavior

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THE DISMISSAL OF PUBLIC SCHOOLTEACHERS FOR ABERRANT BEHAVIOR

I. INTRODUCTION

A. The Influence of the Teacher on the Student's Sexual Attitudes

The public schoolteacher has traditionally been regarded as a moral exemplar for his students. A cornerstone of American public education has been the assumption that students, in order to become well-balanced human beings and stable members of the community, must be taught to discern moral values. According to several respected educators, the teacher must be sensitive to the morality of his own life because his behavior will often be emulated by the students in his classroom. Because sexual ethics is a particularly delicate aspect

1 Purifoy v. State Bd. of Educ., 106 Cal. Rptr. 201 (Ct. App. 1973); Gover v. Stovall, 35 S.W.2d 24 (Ky. 1931); See also, P. May, Moral Education in School 10 (1971).

2 Kentucky recognized this assumption in 1946 when a committee was appointed by the State Board of Education to explore the problem of teaching morals in the public schools. E. Hartford, Moral Values in Public Education: Lessons from the Kentucky Experience 42 (1958):

The first principle is a reaffirmation of the responsibility of the public school to teach moral and spiritual values. This is a perpetual task of the school as an agent of society. All societies develop values capable of being taught to individuals through the work of educative agencies.

See W. Bower, Moral and Spiritual Values in Education (1952). In the introduction to this book, Herman Lee Donovan, former President of the University of Kentucky, envisioned a need for moral education in the actual curriculum of the public schools.

A prime purpose of all education is good character. . . . During the eighteenth and nineteenth centuries, and reaching into the first decade of the twentieth century, the curriculum of our schools was heavily loaded with materials that emphasized moral and spiritual values. Bible readings, Aesop's Fables, the McGuffey readers, carefully selected gems from literature which emphasized fundamental virtues—these became the core of instruction in reading, exerting a powerful influence on the lives of children. But with the passing of time . . . the content of the curriculum in the public schools was broadened, and gradually less emphasis was placed upon moral and spiritual values. Id. at xiii.


of individual morality for children in their formative and adolescent years, it seems sensible that with respect to sexual values, a public schoolteacher should be mindful of the influence he may exert on his pupils. Empirical studies on creativity show that students unconsciously absorb a teacher's attitudes and beliefs, and at least one writer has raised the possibility that a student can absorb even a teacher's unstated moral beliefs. Therefore, in light of these traditional values and empirical studies, it is understandable that many states partially predicate the hiring and allow for the dismissal of public school teachers on the basis of sexual conduct.

Case law has always recognized a teacher's potential for affecting a student's attitudes, and several well-established tenets demonstrate this recognition in a concise syllogism. First, teachers are in a position to affect the unformed sexual values of their students. Second, school children are entitled to protection by the state from teachers who would distort those values. Third, because the development of a student's attitudes could be affected by scandal within the school community, the hiring and dismissal of public school teachers on the basis of sexual conduct is understandable.

The Kentucky statutes on teacher hirings and dismissals are illustrative. Ky. Rev. Stat. § 161.040 (1950) [hereinafter cited as KRS].

The scope of this discussion will be limited to sexual conduct widely classified as violative of community mores. For cases outside the scope of sexual conduct, yet still classified as socially reprehensible, see Williams v. School Dist. No. 40 of Gila County, 417 P.2d 376 (Ariz. 1966) (drunk and disorderly conduct); Scott v. Board of Educ. of Alton, 156 N.E.2d 1 (Ill. 1959) (continued public drunkenness); Tracy v. School Dist. No. 22, Sheridan County, Wyo., 243 P.2d 932 (Wyo. 1952); Horosko v. School Dist. of Mount Pleasant Tp., 6 A.2d 866, cert. denied, 308 U.S. 553 (1939) (acting as waitress and part time bartender in a beer garden run by the teacher's husband).

See generally Thompson v. Pendleton County Bd. of Educ., 81 S.W.2d 863 (Ky. 1935); Gover v. Stovall, 35 S.W.2d 24 (Ky. 1931).


Board of Educ. of El Monte School Dist. v. Calderon, 110 Cal. Rptr. 916, 920-21 (Ct. App. 1974). Here a teacher acquitted of a criminal sex offense was nevertheless fired by a school board. The court emphasized that there was a "possible detrimental influence" to school children, and upheld the dismissal.


6 Comment, Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct, 61 Cal. L. Rev. 1442, 1461 (1973).

7 The Kentucky statutes on teacher hirings and dismissals are illustrative. Ky. Rev. Stat. § 161.040 (1950) [hereinafter cited as KRS].

8 KRS § 161.120; KRS § 164.230 (University of Kentucky); KRS § 164.360 (for state colleges and universities other than the University of Kentucky).

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munity, the teacher must adversely affect neither faculty members nor the reputation of the school through his own sexual conduct. Therefore, the state should be able to place limitations on any sexual conduct of a teacher which has public ramifications, and if those limitations are breached, the teacher should be dismissed.

It is difficult to determine whether conduct is moral. In order for a school board's dismissal action to be valid it has been held that there must generally be a connection between the alleged misconduct and its harmful effect on the school community. When this connection is nonexistent or virtually invisible, school boards could dismiss a teacher without justification. The body of case law on the subject presents variations on what constitutes sufficiently unusual sexual conduct by schoolteachers to provide the connection. As one judge has stated, "Undoubtedly some school superintendents believe the drinking of alcohol, the smoking of tobacco, or the playing of cards is immoral; others believe it immoral to serve in the military forces, and still others believe it immoral to refuse to...

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12 Board of Trustees of Compton Junior College Dist. v. Stubblefield, 94 Cal. Rptr. 318, 321 (Ct. App. 1971). Here a junior college teacher was discovered by a policeman in a parked car with a female student. Both he and the student were partially undressed. After a high speed chase through the center of town, the policeman stopped the teacher. Subsequently the teacher was dismissed for immoral conduct. The court, in upholding the dismissal, emphasized that the integrity of school grading systems were threatened by such teachers. The inference was that teachers would reward students with high grades in return for extracurricular thrills. Id. at 323.
19 See Part IV, infra.
serve . . . [T]here is [an equally] wide divergence of views on sexual morality."\textsuperscript{20}

B. *The Legal Issues*

Because the phrase "moral conduct" is subject to divergent interpretation, it is possible that statutes authorizing the dismissal of teachers solely for "immoral conduct" may be too vague. Because sexual activity is generally private in character, arguably school boards and administrators have no business intruding in the private lives of their employees. Because of this, two constitutional issues immediately arise, either of which could prevent a teacher from being dismissed for his sexual activity.

The first is whether state statutes permitting dismissal of teachers for immoral conduct are unconstitutionally vague and hence represent denials of the right to due process given to public school teachers by the fourteenth amendment. If found unduly vague, a statute could be voided by a court.

The second issue is whether such statutes are unconstitutional invasions of a possible right to privacy encompassing sexual activity engaged in by the teacher. If this right to privacy encompassing sexual activity is found to exist, school boards will have to show a "compelling state interest"\textsuperscript{21} in order to invade that right, and standards to justify such an interest will have to be formulated. In the event a right to privacy is found not to exist, these standards will be used to determine whether a school board should dismiss a teacher for publicly known sexual conduct, so that the decision will not be regarded as an "arbitrary and capricious" denial of due process.\textsuperscript{22} This search for standards constitutes an additional issue arising from teacher dismissal actions.


II. VAGUENESS

A. Introduction

Statutes authorizing the dismissal of teachers for "immoral conduct" are among those that have been attacked as being unconstitutionally vague.\[^{22}\] The doctrine of statutory vagueness has been deemed a "makeweight" used to place a buffer zone of added protection at the peripheries of guaranteed constitutional freedoms.\[^{24}\] Vagueness claims arise out of the due process clause of the fourteenth amendment, for teachers will usually argue that the unduly vague language of the statute gave them no notice as to the kind of conduct required or prohibited. Furthermore, they will argue that such statutes, due to their lack of specificity, allow school administrators and the judiciary unjust discretionary power in the application of such laws.\[^{28}\] For example, a district court voided an Oregon statute authorizing the dismissal of a teacher for immoral conduct on the grounds that it failed to give notice of the kind of conduct expected, and that it allowed too much latitude for arbitrary and discriminatory enforcement.\[^{28}\]

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\[^{28}\] Id. (Ms. Burton had acknowledged that she was a "practicing homosexual.")
It has been argued that it is impossible to discern legislative intent from unduly vague statutory language, so that school administrators, judges, and juries attempting to apply the statute do not know what kinds of conduct the legislature intended to proscribe. What one legislator intended to prohibit as immoral conduct for a schoolteacher might differ widely from the views of another legislator sitting in the same session and voting for the same bill. The motivations of a legislature sitting 50 years ago authorizing the dismissal of a teacher for immoral conduct might not be the same as those of a legislature voting on the same issue today.

B. Recent Supreme Court Treatment of Vagueness

In light of three recent Supreme Court cases the arguments mentioned above are less persuasive. While the facts on which these three cases were decided are unrelated to teacher dismissal statutes, taken together the cases support the inference that statutes authorizing the dismissal of teachers for immorality will not be declared unconstitutionally vague.

In Colten v. Kentucky, the plaintiff was arrested and fined $10 under a disorderly conduct statute for arguing with a state trooper and thereby congesting traffic. The Supreme Court, holding that the statute was not unconstitutionally vague, stated that "the root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convey into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited."
Under similar reasoning, a teacher dismissal statute covering a wide range of "immoral conduct" could not easily be drafted to "provide fair warning that certain kinds of conduct are prohibited."\(^3\)

*United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO,\(^3\) held that § 9(a) of the Hatch Act,\(^3\) which severely limits the right of federal employees to participate in politics, was neither an unconstitutional abridgment of the respondent's first amendment privileges, nor was it unconstitutionally vague. As in *Colten*, the Court recognized the semantic problems inherent in drafting statutes and stated that "there are limitations in the English language with respect to being both specific and manageably brief . . . ."\(^3\)

In addition, the Court set out a broad standard holding that allegedly vague statutes will not be voided if "... they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."\(^3\)

This standard was reiterated in a 1974 case, *Arnett v. Kennedy.*\(^3\) A federal employee made recklessly false accusations and defamatory statements about several fellow employees. He was dismissed under the Lloyd-La Follette Act\(^4\) which provides for the removal of federal employees "only for such cause as will promote the efficiency of the service."\(^5\) The Court held that the statute was not unconstitutionally vague.\(^6\) The facts in *Arnett* are similar to the situation of a teacher being dismissed for unusual sexual activity known to the public, under the authority of a state statute, in that both situations

\(^{31}\) *Id.*

\(^{32}\) 413 U.S. 548 (1973).


\(^{34}\) *United States Civil Service Comm'n v. National Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 578-79 (1973).*

\(^{35}\) *Id.*


\(^{38}\) *Id.*

\(^{39}\) 416 U.S. 134 (1974). Although it was a plurality opinion for another reason (whether the dismissal statute was an unconstitutional denial of due process because it failed to provide for a preremoval hearing), six of the nine justices (Burger, C.J., Rehnquist, Stewart, Powell, Blackmun, White JJ.) supported the holding that the statute was not overly vague.
involve discharged public servants. Providing administrative agencies with wide flexibility to supervise the conduct of their employees underlies the holding in *Arnett.* It may be inferred that because school boards are administrative agencies, they too should have wide flexibility in governing employee conduct. Such flexibility allows administrative agencies to deal more easily with unforeseen employee offenses than would a more specific dismissal statute. In addition, a broad statute allows administrators to maintain their authority through the threat of dismissal, to maintain high professional standards of conduct, and to regulate conduct without becoming entangled by elaborate rules. Of course, the possibility of administrative abuse exists within the broad mandates of such a statute.

*Arnett* explicitly stated as one caveat to its holding that where a public servant is dismissed under a conceivably vague statute for conduct that is constitutionally protected, the statute will be held unconstitutionally vague as to the conduct at issue but not in its entirety. Protected rights of speech and association cannot be abridged by administrators seeking to dismiss employees for the exercise of such rights. Because it is unclear whether private sexual conduct between consenting adults is protected by the Constitution, it is possible that statutes allowing the dismissal of school teachers for "immoral conduct" will not be declared void for vagueness in light of the caveat in *Arnett.*

C. *Wishart v. McDonald, an Elaboration of Arnett*

A decision dealing with a teacher dismissal statute, *Wishart v. McDonald,* followed the reasoning of *Arnett.* For several weeks at night a sixth grade school teacher carried a
dressed mannequin onto his well-lit lawn. In full view of scandalized neighbors, he undressed the mannequin and proceeded to perform unnatural acts upon it. He was dismissed by the school board for conduct unbecoming a teacher.

Undaunted, Wishart sued on the theory that his right to privacy had been violated and that the dismissal statute was unconstitutionally vague. The First Circuit Court of Appeals held that his claim under the vagueness doctrine was foreclosed by *Arnett v. Kennedy.* Even though the statute gave no notice as to the type of misconduct justifying dismissal, "[the conduct] was sufficiently odd and suggestive that the ordinary person would know, in advance, that his image as an elementary school teacher would be gravely jeopardized." Furthermore, the court implied that had Wishart undressed his mannequin inside his home rather than in his front yard, his conduct might have been protected by the constitutional right of privacy. Because his conduct was not behind closed doors, the statute could not be declared void for vagueness on this basis either.

*Wishart* illustrates the application of the *Arnett—Letter Carrier's—Colten* vagueness rationale to teacher dismissals for unusual sexual activity known to the public. The standard set up by those cases is based on conduct that the ordinary person using ordinary common sense would consider to violate public standards of decency. Under this vagueness rationale, an immorality statute will be declared void as a denial of due process only when it violates a constitutionally protected right. However, it is unclear whether the unusual sexual conduct of a teacher will be protected within a right to privacy.

### III. Privacy

In a seminal article co-authored while he was still in law school, Mr. Justice Brandeis delineated a "general right to pri-

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52 Id. at 1113-14.
53 Id. at 1116.
55 500 F.2d 1110, 1116 (1st Cir. 1974).
grounded in the common law, and covering "the right to be let alone." More recently, psychologists and legal writers interested in the psychological aspects of privacy have found it to be essential to the mental and emotional stability of the individual. Privacy is generally recognized as a necessary context in which human values such as love and freedom may grow, and as a necessary means by which people can control information about themselves, thus protecting their self images. Yet privacy, while recognized as a desirable value, has not been made an absolute in either statutory or case law. As Mr. Justice Rehnquist has stated in a recent article:

"Privacy" in today's lexicon is a "good" word; that which increases privacy is considered desirable, and that which decreases it is considered undesirable. It is a "positive" value. . . . Just as no thinking person is categorically opposed to "privacy" in the abstract, it seems to me that no careful student of the subject would suggest that the claim of privacy ought to prevail over every other societal claim whatever the fact situation may be.

It is possible that the right to privacy as enunciated in Griswold v. Connecticut and subsequent cases may not be extended to include all consensual adult sexual activity. These cases must be examined in order to understand the lack of clarity that has led to contradictory decisions by courts attempting to determine whether a teacher’s sexual involvements are protected by such a right to privacy.

57 Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 198 (1890).
58 Id. at 193.
60 Note, Privacy, 82 Yale L. J. 1462, 1466 (1973).
62 Id. at 2.
63 See Part III(A), infra.
64 381 U.S. 479 (1965).
66 See Part III(B), infra.
A. The Supreme Court Privacy Cases and Consensual Sexual Conduct

In *Griswold v. Connecticut*, it was found that marriage is a relationship protected by a constitutional zone of privacy, and that a Connecticut law banning the use of contraceptives unnecessarily interfered with that protected zone. The Court's opinion, authored by Mr. Justice Douglas, stated that the right to privacy was created by the penumbras of the first, third, fourth, fifth and ninth amendments. This case made it clear that the institution of marriage and the right of married couples to obtain contraceptives were protected within the zone of privacy; the fact that no one joined in Mr. Justice Douglas' opinion, and that there were three separate concurring opinions and two dissents make any further interpretation difficult. Mr. Justice Harlan authored a much quoted concurrence in which he based the right to privacy on the substantive due process doctrine of the fourteenth amendment. Under this interpretation a right to privacy exists if the conduct from which the privacy claim arises is "fundamental" and "implicit in the concept of ordered liberty." The grounding of a right of privacy in the substantive due process clause of the fourteenth amendment has been elaborated in subsequent cases.

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67 381 U.S. 479 (1965).
68 Id. at 484:
Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one . . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
69 The concurrences were written by Goldberg, J. joined by Warren, CJ., and Brennan, J.; Harlan, J.; and White, J. The dissents were penned by Black and Stewart, JJ., each joining the other.
In *Eisenstadt v. Baird*, the Court indicated through dictum that the right to privacy, in certain circumstances, might be extended to unmarried as well as married individuals. The Court reversed the conviction of Baird for distributing a contraceptive to an unmarried woman in violation of a Massachusetts statute on an equal protection rather than a privacy theory.

It remained for *Roe v. Wade* to crystalize the dictum of *Eisenstadt* and extend the right to privacy beyond institutional marriage to the individual. An unmarried pregnant woman challenged the constitutionality of the Texas criminal abortion statutes, and the Court held that such statutes infringed upon a woman's private decision to end her pregnancy. Mr. Justice Blackmun, for the majority, found such a private decision to be "implicit in the concept of ordered liberty," thus using the reasoning of the Harlan concurrence in *Griswold*. In addition, the Court unequivocably stated that any attempt by the state to regulate an area encompassed by the right to privacy would have to be justified by a "compelling interest." In this instance it was held that such an interest existed soon after the first trimester of pregnancy because the state had an interest in preserving the health of the mother and an interest in preserving human life.

In *Paris Adult Theater I v. Slaton*, the Court elaborated upon the right to privacy, although this time an obscenity issue was involved. The Court held that an injunction against showing an obscene film in a theater open to the public did not violate the prospective viewer's right to privacy. Critical to the Court's reasoning was that no intimate relationship such as marriage was involved, as was the situation in *Griswold*, and that the film was not shown in the intimacy of a private home. Previously, the Court had held in *Stanley v.*

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73 405 U.S. 438 (1972).
71 Id. at 446-48.
72 410 U.S. 113 (1973).
76 Id. at 152-56.
78 410 U.S. 113, 162-64.
79 Id. at 163.
80 413 U.S. 49 (1973).
81 Id. at 65.
82 Id.
Georgia\textsuperscript{39} that obscene film strips shown inside a home were protected under the emerging right to privacy, and that a statute forbidding them was invalid. The Court in Paris limited the Stanley holding to its facts, stating that all it stood for was the proposition that "a man's home was his castle."\textsuperscript{84}

In addition, the Paris Court in dictum seemed to limit the right of privacy to the confines of the home and to certain intimate relations as long as they occur in locations closely associated with the nature of the relationship:

Our prior decisions recognizing a right to privacy guaranteed by the fourteenth amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' Palko v. Connecticut, 302 U.S. 319, 325 (1937)." Roe v. Wade, 410 U.S. 113, 152 (1973). This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.\textsuperscript{85}

Clearly, the home is protected by the right to privacy,\textsuperscript{86} and the intimately personal decisions of whether to use contraceptives\textsuperscript{87} or to obtain an abortion\textsuperscript{88} also fall within its confines. It has been argued that these protections are based broadly enough so that all consensual sexual relations are included.\textsuperscript{89} This contention is based on the assumptions that all sexual activity within the home is protected,\textsuperscript{90} that sex is the ultimate personal intimacy and is protected even when conducted outside of the home in "locations closely associated with the na-
ture of the relationship," and that if an unmarried woman can constitutionally use a contraceptive or have an abortion then, implicitly, sexual activity is included in the right to privacy.

Presently, this contention is subject to criticism. In McLaughlin v. Florida, decided one year before Griswold, a statute punishing interracial cohabitation out of wedlock was declared unconstitutional as a violation of equal protection. The decision, however, included the dictum that state laws regulating sexual activity were constitutional if they did not distinguish between races. The Court stated that "[t]hose provisions . . . which are neutral as to race express a general and strong state policy against promiscuous conduct . . . . These provisions, if enforced, would reach illicit relations of any kind and in this way protect the integrity of the marriage laws of the state . . . ." This language indicates that the Court believed states may regulate some sexual conduct to preserve the sanctity of marriage.

Even though the privacy cases beginning with Griswold have protected some behavior that was within the home or within certain relationships, there was dicta in these cases indicating that the holdings were not to be extended to all private consensual sexual conduct. The Supreme Court repudiated the argument that "one has an unlimited right to do with one's body as one pleases" in Roe v. Wade. This language, coupled with Mr. Justice Goldberg's warning in his Griswold concurrence that the right of married couples to obtain contraceptives did not interfere " . . . with a State's proper regulation of sexual promiscuity or misconduct," indicates that the constitutional doctrine of privacy has boundaries, outside of which consensual sexual behavior having public ramifications may fall.

On March 29, 1976, the Supreme Court affirmed the decision of a three-judge district court in Doe v. Commonwealth's

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94 Id. at 196.
Attorney for City of Richmond. The male homosexual plaintiffs sought to have Virginia's sodomy law declared unconstitutional when it was applied to private consensual conduct. The district court held that the statute was not an unconstitutional denial of the right to privacy, and stated that precedents cited to the court rested “. . . exclusively on the precept that the Constitution condemns State legislation that trespasses upon the privacy of the incidents of marriage, upon the sanctity of the home, or upon the virtue of family life.” The court then stated that there was “. . . no authoritative judicial bar to the proscription of homosexuality—since it is obviously no portion of marriage, home or family life . . . .” Thus the Supreme Court in its memorandum decision upheld a lower court decision implicitly agreeing with the dicta in previous cases that all private consensual sexual conduct does not fall within the right of privacy, and specifically holding that sodomy statutes forbidding homosexual conduct between consenting adults are constitutional. It remains to be seen whether other forms of sexual activity will be found to lie outside the right to privacy.

B. Privacy and the School Teacher

The only safe statement that can be made as to whether the private sexual conduct of a teacher is protected against state regulation is that courts differ. Because privacy is still a hazy constitutional principle, judges have enormous room to "value sculpt." They have the power to determine whether certain conduct is "fundamental" and "implicit in the concept of ordered liberty," and if they find that certain conduct is

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98 Va. Code Ann. § 18.1-361(1975): Crimes against nature. If any person shall carnally know in any manner any brute animal, or carnally know any male or female person by the anus or by or with the mouth, or voluntarily submit to such carnal knowledge, he or she shall be guilty of a . . . felony.
100 403 F. Supp. 1199, 1200.
101 Id. at 1202.
103 Id.
constitutionally protected under those standards, they still have enormous discretion in designating state interests as “compelling.”\textsuperscript{104}

Examination of several lower court cases indicates the extent of this latitude. In \textit{Fisher v. Snyder},\textsuperscript{105} a female school-teacher was dismissed for having a male teacher, a friend and contemporary of her son, stay overnight as a guest on several different occasions. Evidence that a sexual involvement existed was scanty. The court reinstated the teacher, basing its reasoning on the proposition that association of persons within one’s home is protected within the meaning of the right to privacy.\textsuperscript{106}

In \textit{Acanfora v. Board of Education of Montgomery County},\textsuperscript{107} a court held that a teacher could not be dismissed from his position merely on the grounds that he was a homosexual. The court stated that homosexuality was an activity protected by the right to privacy,\textsuperscript{108} but affirmed the dismissal on other grounds.\textsuperscript{109} Both of these cases indicate that private consensual sexual conduct involving teachers falls within the zone of privacy. Neither court considered whether the state had a compelling interest justifying interference.

However, one court has found no privacy right to exist with respect to teachers’ sexual activity. In \textit{Jerry v. Board of Education of City School District of Syracuse},\textsuperscript{110} the New York Court of Appeals upheld the dismissal of a high school guidance counselor who had intercourse with an 18-year-old female student whom he was counseling. Emphasizing that there was no absolute right to privacy, the court stated:

\begin{quote}
In our view what might otherwise be considered private conduct beyond the scope of licit concern of school officials ceases to be such in at least either of two circumstances—if the conduct directly affects the performance of the professional responsibilities of the teacher, or if, without contribution on the part of school officials, the conduct has become the subject of such public notoriety as significantly and rea-
\end{quote}

\textsuperscript{104} \textit{Id.} at 1046.
\textsuperscript{106} \textit{Id.} at 400.
\textsuperscript{108} \textit{Id.} at 851.
\textsuperscript{109} \textit{Id.} at 856.
sonably to impair the capability of the particular teacher to discharge the responsibilities of his position.\textsuperscript{111}

None of the cases mentioned above, with the exception of \textit{Jerry}, attempted to define the right to privacy as it relates to teacher dismissal on grounds of sexual misconduct. Not one case mentioned that sexual conduct was "implicit in the concept of ordered liberty," and neither of the cases affirming a right to privacy examined whether there was a "compelling state interest" in regulating the conduct. Rather, the cases illustrate wide judicial discretion, inevitable because of the incomplete elucidation of the problem by the Supreme Court, in determining what conduct is and is not protected by the right to privacy.

\section*{IV. Standards Used in Dismissal Actions}

Most courts reviewing teacher dismissals for sexual conduct have completely avoided the privacy issue.\textsuperscript{112} Instead, they have formulated varying criteria for determining the degree of conduct which justifies the dismissal of a teacher. Even if the Supreme Court were ever to find that consensual adult sexual behavior was protected by the Constitution, the courts' criteria would still determine whether the state had a compelling interest in dismissing teachers for engaging in conduct of widespread public notoriety.

\subsection*{A. The Values of the Judge Determining the Outcome of the Case}

There must be a connection between the teacher's act complained of and its alleged detrimental effect on the school system.\textsuperscript{113} Dismissal actions can be neither arbitrary nor

\textsuperscript{111} \textit{Id.} at 111.


capricious. The determination of such a connection and the requisite standards for dismissal, however, has led to disparate results among courts, and these results rest on the values of the judge deciding the case. Implicit in the decision will be the judge's concepts of morality, and whether he believes that a teacher's allegedly immoral conduct is harmful, or even potentially harmful, to the students, to other teachers, or to the reputation of the school.

Results reached in two recent federal cases decided in the same month are illustrative of the disparity. In Sullivan v. Meade County Independent School District No. 101, a


115 The Kentucky case law is illustrative. In Thompson v. Pendleton County Bd. of Educ., 81 S.W.2d 863 (Ky. 1935), a married principal was dismissed for making advances toward three different women. The dismissal was upheld, even though no proof of actual immoral conduct existed, on the grounds that the principal had not acted with "discretion and exemplary conduct." Id. at 864.

Gover v. Stovall, 35 S.W.2d 24 (Ky. 1931) upheld the dismissal of a public high school teacher and football coach who went with three young ladies into an unlit school building at night, for approximately 45 minutes to an hour. The proof introduced at trial showed absolutely no evidence of any sexual activity; however, the Court reasoned at page 26 that sufficient "suspicions of immorality" existed to justify the dismissal.

Both Thompson and Gover indicate extremely protective attitudes toward Kentucky school children by the Kentucky Supreme Court. See Crawford v. Lewis, 186 S.W. 492 (Ky. 1916); Bowman v. Ray, 80 S.W. 516 (Ky. 1904). The mores of the Court may have changed somewhat with the passage of 40 years, although there is no case law to indicate such a trend.


117 Governing Bd. of Nicasio School Dist. of Marin County v. Brennan, 95 Cal. Rptr. 712 (Ct. App. 1971) (where a teacher was dismissed after submitting an affidavit to a trial court in the marijuana prosecution of a friend, stating that she (the teacher) had been smoking marijuana since 1949 almost daily with only beneficial results); In re Grossman, 316 A.2d 39 (N.J. 1974) (where the dismissal of a teacher who underwent a sex change operation was upheld).


teacher was dismissed from her job in a small South Dakota town after a petition signed by parents and interested citizens was submitted which demanded her dismissal because she was living out of wedlock with her boyfriend. The federal district court upheld the dismissal by classifying her conduct as immoral and stating that "It would seem reasonable for the school board to conclude that controversy between the plaintiff and the parents and community members of this locale would make it difficult for Miss Sullivan to maintain the proper educational setting in her classroom."121 In *Andrews v. Drew Municipal Separate School District*,122 the Court of Appeals for the Fifth Circuit held that an unwed mother could not be dismissed from her job in the public school system because it is a denial of due process to presume that a teacher is immoral simply because she is an unwed mother.123 In both cases, school boards attempted to dismiss the teachers because they were believed to be immoral and therefore bad influences on the students. In both cases, there was an alleged connection between the conduct complained of and its effect on the students. Yet in these cases two entirely different results were reached. This disparity might be explained most easily by the different value judgments of the courts making the decisions.

Some judges are swayed by the notion that school boards and administrators have the expertise necessary to ascertain the effect of a teacher’s sexual habits on public school children, and hence are reluctant to overturn dismissal actions.124 As a result, these judges will develop less stringent standards than will those who are more influenced by claims that schoolteachers have a right to privacy in their sexual lives, even though the law on which such claims are based is questionable.125 For example, courts have upheld teacher dismissals if

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121 Id. at 1247.
122 507 F.2d 611 (5th Cir. 1975).
123 Id. at 614-15.
125 See Part III, infra.
there is "possible impairment of teaching ability" rather than actual impairment,\textsuperscript{126} if the conduct of the teacher has become sufficiently notorious so that the teacher's effectiveness is lessened in the school,\textsuperscript{127} or even in the community,\textsuperscript{128} or if the morals of the community are affected by the conduct.\textsuperscript{129}

Decisions which give school administrators wide latitude to judge the behavior of their employees are open to criticism. Such criticism includes the fear that school administrators can examine the private lives of all employees to search for instances of conduct which might be considered violative of community mores,\textsuperscript{130} that they can "roam at will" in their search for such conduct\textsuperscript{131} and look for past incidences of sexual involvement bearing no relation to the teacher's current fitness to teach, that vast numbers of teachers could be dismissed,\textsuperscript{132} that many potentially good teachers would be discouraged from entering the profession\textsuperscript{133} due to a reluctance to have their private lives examined by school officials, that school administrators could fire any teacher with whom they disagreed in matters totally unrelated to that teacher's conduct on the basis of a discovery of socially disapproved conduct on that teacher's part,\textsuperscript{134} and that school boards do not have the ability and

\textsuperscript{126} Board of Trustees of Compton Junior College Dist. v. Stubblefield, 94 Cal. Rptr. 318, 322 (Ct. App. 1971).


\textsuperscript{128} Comment, Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct, 61 CAL. L. REV. 1442, 1450 (1973).

\textsuperscript{129} Under this view, the teacher is seen as an agent of the state charged with the authority to teach commonly held moral principles to his students. A classic debate between two eminent legal scholars, H. L. A. Hart and Lord Patrick Devlin, has centered on the issue of whether societies should attempt to enforce commonly held moral principles. See H. Hart, LAW, LIIERTY & MORALITY (1963); P. Devlin, THE ENFORCEMENT OF MORALS (1965); Comment, Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality, 14 U.C.L.A. L. REV. 581 (1967).


\textsuperscript{132} Willemsen, Sex and the School Teacher, 14 SANTA CLARA LAW. 839, 844-46 (1974).

\textsuperscript{133} Comment, Legislative Developments—Teacher Dismissal Legislation: The Nevada Approach, 6 HARV. J. LEGIS. 112, 122 (1968).

\textsuperscript{134} Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 DUKE
critical judgment to determine what conduct is harmful to the students. Because it is difficult for a teacher to obtain employment elsewhere after a dismissal by a school district,\(^{135}\) these criticisms are serious indeed.

Clearly, if a court upholds a dismissal action on the assumption that the school administrators have enough expertise to determine the necessity of that action, there is a possibility of abuse in dismissal determination. In recognition of this danger, some courts and commentators have formulated standards which attempt to make the effect of the teacher's sexual activities on his teaching performance the determinative factor in dismissal proceedings. These standards still give the judiciary wide discretion in upholding a dismissal.

B. Standards of Dismissal

The factors used to decide if a teacher should be dismissed for sexual conduct vary widely from state to state and from community to community. What might be considered reprehensible conduct in one city or geographical region might not be considered such in another locality. This geographical factor may be one way to explain the wide disparity in dismissal actions. The assumption is that a wider range of sexual behavior will be tolerated by school boards in a cosmopolitan area than more provincial localities would allow. A more fundamental reason, however, is that there is no uniformly consistent view of morality in America today. A Victorian ethos with standards of moral conduct relatively fixed no longer pervades this society. However, determinative factors in making dismissal decisions which can be culled from the case law are the status of the parties involved, the proximity or remoteness in time of the misconduct in question, the degree of notoriety which the misconduct has attained, its likelihood of repetition, and the nature of the offense.

1. Status of the Participants in the Sexual Activity

Courts will pay close attention to the status of the persons

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involved in the sexual activity.\textsuperscript{136} Invariably, teacher dismissals for becoming sexually involved with a student,\textsuperscript{137} even when the student is not taught by the teacher,\textsuperscript{138} have been held valid. On the other hand, when the activity is with other teachers,\textsuperscript{133} or with adults outside the school community,\textsuperscript{140} dismissals have not inevitably been upheld.

One factor related to status is the age level of the students who are taught by the teacher.\textsuperscript{141} If they are in elementary, junior high, or even senior high school, they are arguably more in need of protection than are students in college\textsuperscript{142} because they are more impressionable. As one commentator has stated, "... [A]t some point, perhaps at the high school or university level, the private activities of the teacher should become almost wholly irrelevant, as long as they do not impinge on classroom behavior or directly affect the students."\textsuperscript{143}

Another status-related factor is the subject which is taught by the schoolteacher. Some teachers, because of the type of subject they teach, will have limited effect on a student's values, and, as a result, sexual conduct by those teachers may not merit dismissal.\textsuperscript{144} For example, a mechanical drawing, shop, or typing teacher will have much less influence over the moral values of a student than would an athletic coach or a humanities instructor.

\textsuperscript{136} Morrison v. State Bd. of Educ., 461 P.2d 375, 386-87, 82 Cal. Rptr. 175, 186-87 (1969).


\textsuperscript{141} The use of expert psychological testimony at the trial should be introduced in order to ascertain the effect of the conduct in relation to the age level of the students taught.

\textsuperscript{142} But see Board of Trustees of Compton Junior College Dist. v. Stubblefield, 94 Cal. Rptr. 318 (Ct. App. 1971).


2. *Proximity in Time*

The period of time which has lapsed between the conduct and the time of the dismissal action is also an important element for a school board deciding whether to dismiss a teacher, as well as a judge deciding whether to uphold that dismissal. If the conduct were an isolated occurrence several years earlier, it is less likely that a court would uphold the dismissal than if the conduct occurred only months previously. The rationale is that school boards should not be able to dredge up indiscretions from years past to dismiss a teacher.

3. *Likelihood of Repetition*

Courts are interested in the likelihood that the conduct will recur. The rationale behind this factor, once again, is the protection of students and faculty members. Two determinative factors used in deciding the probability of repetition are the number of times the conduct has occurred and the length of time over which the conduct has extended. Furthermore, courts will give great weight to psychiatric or psychological testimony as to whether the conduct is likely to be repeated.

4. *Degree of Notoriety*

The fourth factor examined in a teacher dismissal action is the degree of notoriety which the teacher's conduct has attained. In one case involving the dismissal of a homosexual teacher, the court held that homosexuality was not sufficient grounds to dismiss a teacher, but because the teacher had at-

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147 Id. at 391.
148 Id.
149 See e.g., Wishart v. McDonald, 500 F.2d 1110, 1112 (1st Cir. 1974); Morrison v. State Bd. of Educ., 461 P.2d 375, 391, 82 Cal. Rptr. 175, 191 (1969): The board called no medical, psychological, or psychiatric experts to testify as to whether a man who had had a single isolated, and limited homosexual contact would be likely to repeat such conduct in the future.
tracted widespread public attention to his sexual preference by a number of local and national television and radio shows, his conduct had attained a degree of notoriety sufficient to warrant his dismissal.151

The underlying rationale in examining the notoriety of the conduct is that the teacher's effectiveness in the classroom would be impaired if the community reacted negatively to the conduct. Retention of the teacher could provoke community disapproval of the school system. Such community disapproval could cause pupils to lose their respect for that teacher and their desire to learn from him or her. In summarizing the effect of a teacher's notoriety, a recent article has stated:

Co-workers might become resentful or antagonistic, thus making administrative and collegial relations unproductive. Parents might lose faith in the school system. Voters might reject school bonds necessary to supply critically needed funding. Moreover, it can be argued that refusal to honor community or parental sentiments by dismissal of the offending teacher can lead to an erosion of trust and support for the educational system, in turn adversely affecting the learning process in the schools.152

5. Nature of the Offense

Where a teacher has been convicted of a criminal offense,153 or where criminal charges are pending,154 it is probable that he will be dismissed and that his dismissal will be upheld by the reviewing court. If the conduct is non-criminal, the values of the school administrators and those of the judges reviewing the dismissal decision will prevail.

152 Comment, Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct, 61 Cal. L. Rev. 1442, 1450 (1973).
Teachers occupy a sensitive position in society. They teach impressionable children who have yet to form their own moral values. Teachers should be, and are, held to a higher standard of conduct than are other governmental employees, because they are close to young people. For this reason, school authorities should have wide flexibility in determining what conduct merits dismissal.

In light of Arnett v. Kennedy, it is reasonable to assume that statutes allowing dismissal of teachers on grounds of sufficiently unusual sexual conduct will not be found unconstitutionally vague. Statutory language can be drafted in broad terms to include a wide range of sexual conduct. As a result, school boards have enormous discretion in determining what kinds of sexual conduct to proscribe.

It is doubtful that a teacher will have a protected right of privacy to engage in sexual conduct in all circumstances. If in the future courts decide that all sexual conduct is protected, states could still attempt to show a compelling state interest to infringe that right in order to protect school students. If courts decide that all sexual conduct is not enveloped in a zone of privacy, school officials will be able to dismiss teachers for such conduct as long as such dismissals are neither arbitrary nor capricious.

To prevent a dismissal action from being arbitrary and capricious, school officials bringing the action and judges reviewing the dismissals will look to a multiplicity of factors. These include the status of the participants involved in the sexual activity, the proximity or remoteness in time of the misconduct, the degree of notoriety which the misconduct has attained, its likelihood of repetition, and the nature of the offense. These factors will provide some degree of protection to

\[122\] See generally Emerson & Haber, Academic Freedom of the Faculty Member as Citizen, 28 LAW AND CONTEMP. PROB. 525 (1963); Van Alstyne, The Constitutional Rights of Teachers and Professors, 1970 DUKE L.J. 841.


school teachers, but will leave a wide range of flexibility for school officials charged with the responsibility of protecting impressionable young people.

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