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MORALS CLAUSES FOR EDUCATORS IN SECONDARY
AND POSTSECONDARY SCHOOLS:
LEGAL APPLICATIONS AND CONSTITUTIONAL
CONCERNS

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“A teacher affects eternity; he can never tell where his influence stops.” – Henry Adams¹

I. INTRODUCTION

Teachers have an extraordinary opportunity to impact the lives of their students on both the secondary and postsecondary level. Because of this unique role, teachers are frequently required to agree to morals clauses as a condition of employment. In general, morals clauses in employment contracts allow an employer to terminate employment when an employee’s conduct is potentially detrimental to the employer’s

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1. HENRY BROOKS ADAMS, *THE EDUCATION OF HENRY ADAMS* 300 (Modern Library 2000) (1918). Modern conventions on the use of gender neutral language as adopted by the major citation systems and writing guides, such as *The Bluebook* system of citation and the *Publication Manual of the American Psychological Association*, apply to the text of this article. However, many of the sources cited before these conventions took hold do not maintain gender neutrality. Citing to these sources is by no means an endorsement of gender-biased language.

interest.² Within the educational sector, morals clauses are commonly imposed upon teachers through state statutory provisions requiring that teachers do not engage in “immoral conduct.”³ Occasionally, morals clauses are imposed upon teachers through contractual provisions requiring that they comply with prescribed moral standards.⁴

Recent media reports describing teachers engaging in drug use, sexual misconduct with students, and felonious criminal behavior would suggest that there is a need to require morally appropriate behavior from secondary and postsecondary school educators.⁵ Should a teacher be allowed to remain in his or her position if he or she engages in “immoral conduct”? Many secondary and postsecondary schools (both public and private) are answering this question in the negative, and are enforcing morals clauses against teachers who have demonstrated allegedly immoral behavior.⁶ Moreover, some schools have taken mandatory morality as a condition of employment a step further by implementing policies to “deter immorality,” such as guidelines governing the relationship between students and teachers⁷ and procedures for compulsory drug testing of

2. See Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235 (2005).

3. See, e.g., ALASKA STAT. § 14.20.170(a)(2) (2008) (stating that “[a] teacher, including a teacher who has acquired tenure rights, may be dismissed at any time . . . for . . . immorality”).

4. See, e.g., Howard M. Smulevitz, *School Chief Gets Longer Contract*, INDIANAPOLIS STAR, May 2, 2002, at B3 (describing how it is standard practice for all educational contracts in an Indiana school district to contain morals clauses).

5. See, e.g., Nichole Dobo, *Three County Teachers Lose Certification*, YORK DAILY RECORD (York, Pa.), Apr. 6, 2008, at 1 (describing how in 2004, a high school social studies teacher resigned from the Dallastown Area School District in Pennsylvania after being accused of having a sexual relationship with a student and misusing a district computer and how, in 2006, a reading teacher resigned from the West Shore School District in Pennsylvania after the teacher allegedly attempted to kill her terminally ill husband, and pled guilty to reckless endangerment and drunk driving); see also Delano R. Massey, *Ex-Teacher Pleads to Lesser Sex Counts: Faced Felony Charges of Abusing 3 Males in 70's, 80's*, LEXINGTON HERALD-LEADER, Dec. 15, 2007, at A1; Joe McDonald, *ESU Professor Guilty of Sex Assault Against Student; Is Acquitted of Rape Charge. Lesser Crime Can Mean 10-Year Term*, MORNING CALL (Pa.), Sept. 11, 2007, at B6; Carla Rivera & Jason Song, *Schools Try to Ease Fears After Arrests; Pasadena and Lynwood Campuses Respond When Two Veteran Teachers are Nabbed in Internet Child Porn Sting*, LOS ANGELES TIMES, Dec. 2, 2007 at B3; *Substitute Teacher Facing Porn Charge*, TULSA WORLD, Dec. 8, 2007, at A5.

6. See, e.g., James Roland, *Popular Coach Let Go: A Baby Out of Wedlock Violates the Morals Clause*, SARASOTA HERALD-TRIBUNE, May 28, 2002, at A1.

7. See, e.g., *UC Regents Approve Ban on Faculty Dating Students*, SAN MATEO DAILY JOURNAL, July 18, 2003, at 1.

teachers.⁸

There are, however, constitutional uncertainties that exist when morality is a condition of employment. In these instances, many questions arise, such as: how is immorality defined; when does it apply; how much of a teacher's life can be regulated; and when has the school crossed the zone of privacy? Thus, the inclusion of morality as a condition of maintaining employment and the emerging policies discouraging immoral behavior raise significant constitutional concerns regarding their validity.

This article will examine the influence of educators and their positions as role models, the legal applications of statutory morality provisions for secondary and postsecondary school teachers, and the implications of contractual morals clauses for secondary and postsecondary school teachers. Finally, the paper will analyze the overriding constitutional implications of imposing these morals clauses upon teachers.

II. THE INFLUENCE OF TEACHERS AND THEIR POSITIONS AS ROLE MODELS

In 2007, approximately 4.6 million teachers throughout America taught over 73 million students.⁹ These statistics are important because teaching is not just a "rote, mechanical conveyance of factual information from one mind to another."¹⁰ Rather, teaching is an important profession, in which the educator may serve as a role model, mentor, friend, and/or parental figure.¹¹ Indeed, teachers have an extraordinary responsibility: they "leave indelible impressions on the minds of their young students, because they are entrusted with the safe keeping and education of children during their most impressionable and formative years."¹² In explaining the

8. See, e.g., Angela Mack, *Pender Schools to Drug Test: System Takes Lead in Area for Screening All New Employees*, STAR-NEWS (Wilmington, N.C.), May 10, 2005, at 1B.

9. See U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, PROJECTIONS OF EDUCATION STATISTICS TO 2016, TABLE 1 (2007), available at http://nces.ed.gov/programs/digest/d07/tables/dt07_001.asp?referrer=report (last visited May 3, 2008).

10. *Rogliano v. Fayette County Bd. of Educ.*, 347 S.E.2d 220, 226 (W. Va. 1986) (Neely, J., dissenting).

11. See, e.g., *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 384 (6th Cir. 1998).

12. *Id.*

essential role of teachers, the United States Supreme Court has stated:

A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.¹³

As such, through the presentation of course material, teachers have a unique opportunity to influence students.¹⁴ Further, the mere presence of the teacher in the classroom sends a message to students in that the teacher “exert[s] a subtle but important influence over [the students’] perceptions and values.”¹⁵ Students, in part, acquire their social attitudes and other important behaviors by emulating their teachers’ attitudes and by absorbing the substantive lessons of their teachers.¹⁶ Thus, given their influence on students, “[teachers] are intended by parents, citizenry, and lawmakers alike to serve as good examples for their young charges.”¹⁷

This expectation for educators is by no means a new proposition; historically, courts have noted that “it has always been the recognized duty of the teacher to conduct himself in such a way as to command the respect and good will of the community.”¹⁸ In fact, “[w]hen public schools were established

13. *Adler v. Bd. of Educ. of City of N.Y.*, 342 U.S. 485, 493 (1952) (reasoning that the Board of Education, as a municipal employer, was not precluded from inquiring of its employees as to matters that could prove relevant to their fitness and suitability for public service).

14. *See Ambach v. Norwick*, 441 U.S. 68, 78–79 (1979) (stating that “through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen’s social responsibilities”).

15. *Id.*; *see also Bd. of Educ. of Cape Girardeau Sch. Dist. No. 63. v. Thomas*, 926 S.W.2d 163, 164–66 (Mo. Ct. App. 1996) (upholding the termination of a high school teacher for immoral conduct after she allegedly shot her estranged husband, which was based in part on a finding that the teacher’s “actions contradicted the message sent by the school district, presenting a ‘do as I say, not as I do’ dilemma for her students”).

16. *See Ambach*, 441 U.S. at 79; *see also Skoros v. City of N.Y.*, 437 F.3d 1, 19 (2d Cir. 2006) (stating that New York City schools “play a particularly important role in teaching these essential elements of pluralism to future generations of Americans”).

17. *Faulkner v. New Bern-Craven County Bd. of Educ.*, 316 S.E.2d 281, 291 (N.C. 1984); *see also Barringer v. Caldwell County Bd. of Educ.*, 473 S.E.2d 435, 440–41 (N.C. Ct. App. 1996).

18. *Horosko v. Sch. Dist. of Mount Pleasant Twp.*, 6 A.2d 866, 868 (Pa. 1939).

in the United States in the eighteenth and nineteenth centuries, one of their stated missions was to teach moral virtues.”¹⁹ In the early history of American education, teachers “were expected to teach and discipline their students to be respectful of authority and responsible in completing their lessons.”²⁰ By the early twentieth century, ardent calls for moral development and character education within the public schools came from a broad spectrum of educational philosophers, ranging from John Dewey to William Hutchins.²¹

As the twentieth century progressed, these calls were heeded by state legislatures, which passed both character education statutes and educator employment statutes that required morality among teachers.²² The continued implementation of such legislation demonstrates that the historical, public expectations that teachers be morally upright individuals remain fundamentally the same today. Essentially, “[b]ecause of teachers’ influential role[s] in the lives of young people, the public still expects teachers to display behaviors reflective of moral virtues, such as fairness and honesty, and to adhere to professional codes of conduct.”²³

III. STATUTORY MORALS CLAUSES FOR SECONDARY AND POSTSECONDARY EDUCATORS

For secondary and postsecondary school educators employed by public institutions, morals clauses are generally imposed through state statutes prohibiting the teachers from engaging in conduct that is criminal, immoral, or unbecoming.²⁴ While courts may consider the educational level

19. Angela Lumpkin, *Teachers as Role Models Teaching Character and Moral Virtues*, J. PHYSICAL EDUC., RECREATION & DANCE, Feb. 2008, at 45 (citing SCHOOL: THE STORY OF AMERICAN PUBLIC EDUCATION (Sarah Mondale & Sarah B. Patton eds., 2001); Young Jay Mulkey, *The History of Character Education*, J. PHYSICAL EDUC., RECREATION & DANCE, Nov./Dec. 1997, at 35, 35–37); see also Perry L. Glanzer & Andrew J. Milson, *Legislating the Good: A Survey and Evaluation of Character Education Laws in the United States*, 20 EDUC. POL’Y 525, 527–29 (2006).

20. Lumpkin, *supra* note 19, at 45.

21. See, e.g., Mulkey, *supra* note 19, at 35–37.

22. See, e.g., 70 OKLA. STAT. § 6-101.22(A)(7) (2008) (stating that “[s]ubject to the provisions of the Teacher Due Process Act of 1990, a career teacher may be dismissed or not reemployed for . . . commission of an act of moral turpitude”); see also Glanzer & Milson, *supra* note 19, at 529–42.

23. Lumpkin, *supra* note 19, at 45.

24. See generally John D. Copeland & John W. Murry, Jr., *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L.

(secondary or postsecondary) involved in determining whether grounds for discipline or dismissal exist, both secondary and postsecondary teachers have been disciplined or terminated pursuant to the enforcement of state morality statutes for behavior that includes sexual misconduct, corruption, drug use, abusive language, lying, criminal activity, and felony convictions.²⁵

A. Statutory Provisions Governing Morality for Secondary School Teachers

In many states, if a secondary school teacher engages in immoral behavior, this behavior constitutes grounds for disciplining the teacher.²⁶ The discipline can result in severe penalties, including suspension or revocation of the teaching certificate.²⁷ Pursuant to certain state statutory schemes, immoral behavior also can constitute sufficient cause for terminating or suspending tenured teachers or teachers under a definite term contract.²⁸

Despite the panoply of state statutes that allow for the discipline and dismissal of secondary school educators based on immoral behavior, relatively few jurisdictions have statutes

REV. 233, 259–60 (1996); Jason R. Fulmer, *Dismissing the “Immoral” Teacher for Conduct Outside the Workplace—Do Current Laws Protect the Interest of Both School Authorities and Teachers?*, 31 J.L. & EDUC. 271, 272–73 (2002).

25. See Fulmer, *supra* note 24, at 271; Robert W. McGee, *Academic Tenure: Should It Be Protected By Law?*, 20 W. ST. U. L. REV. 593, 596 (1993).

26. See, e.g., ALASKA STAT. § 14.20.030(a)(2) (2008); CAL. EDUC. CODE § 44421 (2007); FLA. STAT. § 1012.795(1)(c) (2008); 105 ILL. COMP. STAT. 5/21-23(a) (2008); IND. CODE ANN. § 20-28-5-7(1) (2008); KAN. STAT. ANN. § 72-1383 (2006); S.D. CODIFIED LAWS § 13-42-9 (2008); WASH. REV. CODE § 28A.410.090(1) (2008); W. VA. CODE § 18A-3-6 (2007); WYO. STAT. ANN. § 21-2-802(c) (2007).

27. See, e.g., ALASKA STAT. § 14.20.030 (a)(2) (providing that “[t]he commissioner or the Professional Teaching Practices Commission may revoke or suspend a certificate [for] . . . immorality, which is defined as the commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude”).

28. See, e.g., ALA. CODE § 16-24-8 (2008); CAL. EDUC. CODE § 44427 (2007); COLO. REV. STAT. § 22-63-301 (2007); DEL. CODE ANN. tit. 14 §§ 1411, 1420 (2008); GA. CODE ANN. § 20-2-940(a)(4) (2007); HAW. REV. STAT. § 302A-609 (2008); 105 ILL. COMP. STAT. ANN. 5/10-22.4 (2008); IND. CODE ANN. § 20-28-7-1(a)(1) (2008); KY. REV. STAT. ANN. § 156.132(1) (2008); LA. REV. STAT. ANN. § 17:443(A) (2008); MD. CODE ANN. EDUC. § 6-202(a)(1)(i) (2008); NEV. REV. STAT. § 391.312 (2007); N.C. GEN. STAT. § 115C-325(e)(1)(b) (2007); OHIO. REV. CODE ANN. § 3319.16 (2008); 24 PA. STAT. ANN. § 11-1122(a) (2007); S.C. CODE ANN. § 59-25-430 (2007); S.D. CODIFIED LAWS § 13-43-6.1 (2008); TENN. CODE ANN. § 49-5-511(a)(2) (2008); VT. STAT. ANN. Tit. 16 § 1752 (2007); VA. CODE ANN. § 22.1-307(A) (2008); WIS. STAT. ANN. § 118.23(3) (2007); WYO. STAT. ANN. § 21-7-110(a) (2007).

that actually define what constitutes such behavior.²⁹ Alaska is one of the few jurisdictions that has actually defined immoral conduct that is a basis for teacher dismissal. In Alaska, such conduct is defined as the “commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude.”³⁰ Similarly, Louisiana’s statute on removal of teachers for immoral conduct limits its definition of immorality to “conviction of a felony offense affecting the public morals” as enumerated under Louisiana law.³¹ For the most part, however, statutory provisions governing morality for secondary school teachers are usually broad or undefined.³² In fact, some states have left the definition of immorality to the discretion of the school board (if such definition is warranted by the facts and has a reasonable legal basis).³³

B. Statutory Provisions Governing Morality for Postsecondary School Teachers

In general, colleges and universities regulate the employment of their faculty through tenure policies and procedures.³⁴ In most public institutions of higher learning, tenure is governed by statute; in most private postsecondary educational institutions, tenure is regulated by contract.³⁵ Once tenure is created, it is “implemented by institutional regulations.”³⁶ For example, Chapter VI, Section 602 of the

29. See, e.g., WYO. STAT. ANN. § 21-7-110(a).

30. ALASKA STAT. § 14.20.170(A)(2) (2008).

31. LA. REV. STAT. ANN. § 17:443(C).

32. See e.g., GA. CODE ANN. § 20-2-940(a)(4); HAW. REV. STAT. § 302A-609; 105 ILL. COMP. STAT. ANN. 5/10-22.4; KY. REV. STAT. ANN. § 156.132(1); MD. CODE ANN. § 6-202(a)(1)(i); NEB. REV. STAT. § 79-827(1)(h) (2007); N.C. GEN. STAT. § 115C-325(e)(1)(b); OHIO. REV. CODE ANN. § 3319.16; TENN. CODE ANN. § 49-5-501(3)(A) (2008); VA. CODE ANN. § 22.1-307(A); WIS. STAT. ANN. § 118.23(3).

33. See, e.g., *Ricci v. Davis*, 627 P.2d 1111, 1118–19 (Colo. 1981) (construing the statutory predecessor of COLO. REV. STAT. § 22-63-301 (2007) and stating that “in view of the variousness of human behavior, ‘it would be folly to suggest that . . . [I]mmorality’ rendering one unfit to teach is a standard so clear as to leave no leeway in determining whether the facts of a particular case meet that standard’ A school board’s application of the standard to a specific instance of teacher conduct will therefore be sustained by a reviewing court if it is warranted in the record and has a reasonable basis in law”) (quoting *Blair v. Lovett*, 582 P.2d 668, 672 (Colo. 1978)).

34. See Mary Hora, *Chalk Talk: The Court and Academia: Tenure Discrimination Claims Against Colleges and Universities*, 30 J.L. & EDUC. 349, 350 (2001).

35. *Id.*

36. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment”*, 99 YALE L.J. 251, 265 (1989).

University of North Carolina Code of the Board of Governors³⁷ governs academic tenure for the University of North Carolina system, which is comprised of sixteen constituent institutions.³⁸ According to the academic tenure policy, each constituent institution prescribes the procedures “by which decisions concerning appointment, reappointment, promotion, and the conferral of permanent tenure shall be made.”³⁹

An award of tenure is given to a professor after he or she has completed a set period of employment and met certain criteria.⁴⁰ Throughout this time of employment service, “the university has the opportunity to assess the professor’s competence.”⁴¹ Specifically, the university, in its deliberation on tenure, will often consider “[l]ength of service (commonly six years), teaching ability, research productivity, collegiality, and service to the university and community.”⁴² The award of tenure is a grant of an important property right,⁴³ after a faculty member has been awarded tenure, he or she may only be dismissed for sufficient cause, financial exigency, or an unavoidable change in university programs.⁴⁴

The University of North Carolina’s provisions governing

37. Chapter VI, § 602 of the University of North Carolina Code of the Board of Governors (2004), available at http://www.northcarolina.edu/content.php/policies/CHAPTER_VI_only_web.htm#Section602 (last visited Oct. 18, 2008) [hereinafter UNC Code].

38. See Constituent Universities of The University of North Carolina, available at <http://www.northcarolina.edu/content.php/campus/campusmap.htm> (last visited May 3, 2008). The sixteen constituent schools in the University of North Carolina system are: Appalachian State University, East Carolina University, Elizabeth City State University, Fayetteville State University, North Carolina Agricultural and Technical State University, North Carolina Central University, North Carolina School of the Arts, North Carolina State University at Raleigh, The University of North Carolina at Asheville, The University of North Carolina at Chapel Hill, The University of North Carolina at Charlotte, The University of North Carolina at Greensboro, The University of North Carolina at Wilmington, The University of North Carolina at Pembroke, Western Carolina University, and Winston-Salem State University.

39. UNC Code, *supra* note 37.

40. Daniel E. Hall, *The First Amendment Threat to Academic Tenure*, 10 U. FLA. J. L. & PUB. POL’Y 85, 88 (1998); Hora, *supra* note 34, at 350; see, e.g., ARK. CODE ANN. § 6-63-104 (2008); TENN. CODE ANN. § 49-8-301 (2008).

41. Hora, *supra* note 34, at 350.

42. Hall, *supra* note 40, at 88.

43. See, e.g., Gray v. Bd. of Regents of the Univ. Sys. of Georgia, 150 F.3d 1347, 1352–53 (11th Cir. 1998) (outlining the distinction between the grant of tenure as a property right entitled to protection under the Fourteenth Amendment and the untenured status as lacking the creation of a protected property interest).

44. Hall, *supra* note 40, at 88.

academic tenure provide that:

A faculty member, who is the beneficiary of institutional guarantees of tenure, shall enjoy protection against unjust and arbitrary application of disciplinary penalties. During the period of such guarantees, the faculty member may be discharged or suspended from employment or diminished in rank only for reasons of incompetence, neglect of duty, or *misconduct of such a nature as to indicate that the individual is unfit to continue as a member of the faculty.*⁴⁵

In essence, the policies of the University of North Carolina allow for the possibility of the discharge or suspension of a tenured professor for immoral conduct, if such conduct is “of such a nature as to indicate that the individual is unfit to continue as a member of the faculty.”⁴⁶ North Carolina is not the only state that allows for the possibility of immorality constituting sufficient grounds for terminating or suspending tenured, public university professors. Other states, like California, have tenure policies for their public, postsecondary institutions that embrace immorality as a basis for terminating or dismissing tenured employees.⁴⁷

Akin to the use of the term immorality in statutes governing secondary schools, the definition of immorality is not always clear in postsecondary school statutes or policies either.⁴⁸ Therefore, the application of this standard has often been left to the judicial system. Courts have upheld immorality as grounds for dismissal in cases of “dishonesty, sexual harassment and extreme vulgarity.”⁴⁹ For example, in *Korf v. Ball State University*,⁵⁰ a tenured professor was terminated based on ultimate findings that he made sexual advances toward his students that resulted in some accusations of sexual harassment.⁵¹ The allegations of sexual harassment included claims that the professor had made unwelcome sexual

45. UNC Code, *supra* note 37, at § 603(1) (emphasis added).

46. *Id.*

47. *See, e.g.*, CAL. EDUC. CODE ANN. § 87732(a) (2007) (providing that tenured community college employees may be dismissed for immoral or unprofessional conduct); CAL. EDUC. CODE ANN. § 89535(a) (2007) (providing that tenured California State University employees may be dismissed for immoral conduct).

48. *See, e.g.*, CAL. EDUC. CODE ANN. § 87732(a); CAL. EDUC. CODE ANN. § 89535(a).

49. *See* McGee, *supra* note 25, at 596.

50. 726 F.2d 1222 (7th Cir. 1984).

51. *Id.* at 1224–25.

overtures and offered students good grades in exchange for sexual acts.⁵² After his termination, the tenured professor brought suit against the university, pursuant to 42 U.S.C. § 1983, claiming that the termination of his employment violated his “constitutional rights to substantive and procedural due process, equal protection, free speech, freedom of association, and privacy.”⁵³ The federal district court granted the defendants’ summary judgment motion, based on the Eleventh Amendment and qualified immunity.⁵⁴

On appeal, the Seventh Circuit addressed the substantive merits of the plaintiff’s claims; affirmed the district court’s decision; and ultimately upheld the professor’s dismissal, finding that the tenured professor was discharged from his employment for engaging in the unethical conduct of exploiting students for his private advantage, which qualified as proscribed conduct by the Faculty Handbook.⁵⁵ Further, the court determined that the university’s action in dismissing the teacher was “rationally related to its responsibility to establish and maintain high ethical standards within the University in order to maintain a proper academic environment.”⁵⁶

In the *Korf* case, the judicial system provided the contours of a definition for immoral or unethical conduct that could provide a sufficient basis for termination of a tenured postsecondary educator. However, overall, judicial interpretations of the statutory provisions governing educator morality have provided a less than consistent approach on the definition of immoral conduct.

C. The Legal Standard Applied for Statutory Provisions Governing Educator Morality

Most jurisdictions require that, in order for statutory morals clauses to be enforced against secondary and postsecondary school educators as a basis for termination, there must be a “nexus” between the challenged conduct of the teacher and the teacher’s duties.⁵⁷ Some courts have referred to

52. *Id.* at 1224.

53. *Id.* at 1225.

54. *Id.*

55. *Id.* at 1227–30.

56. *Id.* at 1229.

57. See, e.g., *Morrison v. State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969). However, not all jurisdictions apply this nexus test, as will be outlined towards the end of this

the nexus required to justify a school's decision of taking adverse action against an educator for immorality as a "rational nexus,"⁵⁸ a "sufficient nexus,"⁵⁹ or a "substantial nexus."⁶⁰ Regardless of the classification used, most courts will not uphold the discipline or dismissal of a teacher for immorality unless the alleged immoral conduct has a relation to or affects the teacher's work.⁶¹

The California case of *Morrison v. State Board of Education* serves as substantial precedent for these types of findings.⁶² In *Morrison*, the California Supreme Court reversed and remanded a lower court decision affirming a school board's decision to revoke a teacher's license on the ground of immoral and unprofessional conduct and acts of moral turpitude after a male public school teacher became involved for one week in a physical (but non-criminal) homosexual relationship with another teacher in the public school system.⁶³ The court determined that the Board of Education could not characterize the conduct in the case as "immoral," "unprofessional," or "involving moral turpitude within the meaning of [the state's education code,] unless that conduct indicate[d] that the [teacher was] unfit to teach."⁶⁴

The criteria that the *Morrison* court used in determining whether the teacher's conduct had a "nexus" to his duties were: (1) the likelihood that the conduct may have adversely affected

section.

58. *Golden v. Bd. of Educ. of County of Harrison*, 285 S.E.2d 665, 668 (W.Va. 1981) (finding that a school board's dismissal of a high school guidance counselor for felony shoplifting, pursuant to a state statute that allowed for dismissal for immorality, was improper because there was no proof of a "rational nexus" between the conduct and her duties); see also *Rogliano v. Fayette County Bd. of Educ.*, 347 S.E.2d 220, 224 (W.Va. 1986).

59. *Lile v. Hancock Place Sch. Dist.*, 701 S.W.2d 500, 506 (Mo. Ct. App. 1985) (finding a "sufficient nexus" between sexual abuse engaged in by a fourth-grade teacher and his responsibilities as a teacher such that his termination was justified under an immorality state statute).

60. *Rado v. Bd. of Educ. of Borough of Naugatuck*, 583 A.2d 102, 108 (Conn. 1990) (finding a "substantial nexus" between a high school teacher's intentional tampering with the school telephone system and his duties at the school, which sufficiently established termination grounds).

61. See, e.g., *Rogliano*, 347 S.E.2d at 225 (reversing the dismissal of a permanent substitute teacher for immoral conduct based on a misdemeanor charge for possession of a small amount of marijuana in his home as there was an insufficient nexus between this conduct and his occupational responsibilities).

62. 461 P.2d at 375.

63. *Id.* at 377-78.

64. *Id.* at 386 (internal quotations omitted).

students or fellow teachers; (2) the degree of such adversity anticipated; (3) the proximity or remoteness in time of the conduct; (4) the type of teaching certificate held by the party involved; (5) the extenuating or aggravating circumstances, if any, surrounding the conduct; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of the recurrence of the questioned conduct; and (8) the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.⁶⁵ Notably, these oft-cited *Morrison* criteria, which can be used to determine whether a “nexus” exists, are not based exclusively on a teacher’s classroom proficiency.⁶⁶

Although many jurisdictions utilize the *Morrison* factors in their determinations of nexus requirements,⁶⁷ not all jurisdictions require that an applied “nexus” exist between the allegedly immoral behavior of the teacher and his or her ability to perform the job.⁶⁸ Oftentimes, this lack of an explicit nexus requirement is justified by a finding of an implicit connection between the severity of the conduct at issue and the educator’s lack of fitness to teach.⁶⁹ For example, in *Denton v. South Kitsap School District*, the school board discharged a teacher who had sexual relations with a student resulting in the student becoming pregnant and the teacher subsequently marrying the student.⁷⁰ The *Denton* Court explained that it declined to set a requirement of showing an adverse effect upon the “fitness to teach” by the alleged conduct “where the sexual misconduct complained of directly involves a teacher and a minor student.”⁷¹

A review of the statutory provisions regarding the morality of secondary and postsecondary educators (and the cases that construe such provisions) demonstrates the variety of approaches that states and courts have taken in regulating

65. *Id.* at 386.

66. *See id.*

67. *See, e.g.,* Briggs v. Bd. of Dirs. of Hinton Cmty. Sch. Dist., 282 N.W.2d 740, 742–43 (Iowa 1979); Fisher v. Indep. Sch. Dist. No. 622, 357 N.W.2d 152, 155–56 (Minn. Ct. App. 1984).

68. *See e.g.,* Hainline v. Bond, 824 P.2d 959 (Kan. 1992); Denton v. S. Kitsap Sch. Dist., 516 P.2d 1080 (Wa. Ct. App. 1973).

69. *Denton*, 516 P.2d at 1080.

70. *Id.* at 1081.

71. *Id.* at 1082.

educator conduct. Because jurisdictions have not been completely consistent in their implementation and application of these statutes, many schools (both public and private, secondary and postsecondary) are choosing to use employment contracts as another basis for enforcing educator morality.

IV. APPLICATIONS OF CONTRACTUAL MORALS CLAUSES FOR SECONDARY SCHOOL EDUCATORS

Teachers and other secondary school authorities stand *in loco parentis*, and thus they bear “the responsibility of the duty to protect students.”⁷² The conditions in which educators are deemed to be *in loco parentis* depend, in part, on the nature of the secondary school and on the educational activity at issue.⁷³ “When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them.”⁷⁴ Generally, public secondary schools do not “have such a degree of control over children as to give rise to a constitutional ‘duty to protect’”;⁷⁵ however, “for many purposes, ‘school authorities act *in loco parentis*’ . . . with the power and indeed the duty to ‘inculcate the habits and manners of civility.’”⁷⁶

In light of this *in loco parentis* responsibility, many secondary schools (both public and private)⁷⁷ are instituting safeguards for students through a contractual morals clause requirement as a condition of teacher employment and retention.⁷⁸ The inclusion of these types of clauses in

72. Todd A. DeMitchell, *The Duty to Protect: Blackstone’s Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L.J. 17, 26 (2002). *In loco parentis* is defined as standing “in the place of a parent.” See BLACK’S LAW DICTIONARY 803 (8th ed. 2004).

73. See, e.g., Anne-Marie Harris & Kenneth B. Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Education Amendments of 1972 for Student and Faculty Sexual Harassment*, 8 AM. U. J. GENDER SOC. POL’Y & L. 575, 619 (2000).

74. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

75. *Id.* at 655 (quoting *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989)).

76. *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 684 (1986)).

77. Examples of such contractual morals clauses can be found in both the public and private secondary school context. However, recent media coverage of such clauses demonstrates that these types of contractual clauses tend to be more prevalent in private schools.

78. See, e.g., Smulevitz, *supra* note 4, at B3 (describing how it is standard practice

educational contracts has resulted from both internal⁷⁹ and external⁸⁰ calls for reform. Oftentimes, these employment conditions are supplementary to or reflective of the governing state's statutory scheme or a state administrative agency's regulatory structure that imposes certain implied morals requirements on all secondary school teachers.⁸¹

As a result of this institution of morals clauses as a condition for employment and retention, many secondary school teachers have been discharged or disciplined for conduct that has taken place both on and off school grounds.⁸² The enforcement of these contractual morals clauses often mirrors how school systems have enforced statutory morality requirements for employment.⁸³ As such, it is important to

for all educational contracts in an Indiana school district to contain morals clauses); *but see* Sandi Switzer, *Residents Petition for Firing of Danby Principal*, RUTLAND HERALD (VT), Nov. 16, 2005 (stating that no educational contracts in the state of Vermont contain morals clauses).

79. *See, e.g.*, Tustin Amole, *Academy Board Agrees to Amend Morals Clause – Intent Wasn't to Follow Teachers into the Bedroom, Chairman Says*, ROCKY MOUNTAIN NEWS (Colorado), Apr. 12, 1995, at 13A (explaining a charter school board's decision to amend a contractual morals clause that defined immorality as "evidence of sexual behavior outside of holy wedlock or legal matrimony; or felonious conduct."); *see also* Mede Nix, *Rojas Suggests Morals Clause in Contract*, FORT WORTH STAR-TELEGRAM, May 4, 1999, at 4 (outlining how a Dallas school superintendent finalist, Bill Rojas, with two past DWI arrests, suggested the insertion of an alcohol-related morals clause into his contract if hired); Linda K. Wertheimer, *DISD Board Hires Rojas as Superintendent*, DALLAS MORNING NEWS, May 26, 1999, at 1A (describing how the self-suggested morals clause was inserted into the contract upon Rojas' hiring as Dallas Schools' Superintendent).

80. *See, e.g.*, Renate Robey, *Ouster Bid Splits School-Eaglecrest Principal Assailed Over Affair*, THE DENVER POST, Apr. 24, 1991, at 1B (stating that parents "suggested that a 'morals' clause be added to [a school] district's personnel policies" after the revelation of an extra-marital affair between a high school principal and music teacher).

81. *See, e.g.*, N.C. GEN. STAT. § 115C-325 (e)(1)(b) (providing that "[n]o career employee shall be dismissed or demoted or employed on a part-time basis except for one or more of the following . . . immorality."); *Morrison*, 461 P.2d at 377 (construing California's state educational code in a determination of whether a teacher's engagement in a homosexual relationship constituted moral turpitude).

82. *See, e.g.*, Joe Sylvester & Ed Fletcher, *Critics, Friends See Jerrytone as Man of Many Faces – The Local Teacher Faces Court Action on Drug-Related and Sex Harassment Charges*, TIMES LEADER (Wilkes Barre, PA), May 28, 2000, at 1A (discussing how a secondary school teacher's contractual morals clause might be implicated if he were to be convicted of allowing controlled substances in the classroom and sexual harassment); Rod Thomson, *Popular Coach Broke His Contract, as an Employee and as a Role Model*, SARASOTA HERALD-TRIBUNE (Fla.), May 31, 2002, at BS1 (describing how a physical education teacher and coach was fired from his position at a Catholic school after fathering a child out of wedlock pursuant to a contractual morals clause).

83. John Trebilcock, Comment, *Off Campus: School Board Control Over Teacher*

briefly summarize the most prevalent cases in which educators have lost secondary school employment for statutory “immorality” or “moral turpitude.”⁸⁴ There have been a multitude of cases in which courts have found conviction of criminal activity to be a sufficient trigger for the dismissal or sanction of teachers under state statutory schemes.⁸⁵ Arrests for criminal activity have also provided the impetus for disciplinary conduct under state statutes.⁸⁶ Furthermore, certain sexual activity has constituted a reason for the discipline or firing of secondary school teachers per immorality statutes.⁸⁷ Other schools have justified dismissal decisions based on dishonest conduct engaged in by secondary school teachers.⁸⁸

As previously explained, although many courts—in order to uphold a dismissal based on statutory immorality or moral turpitude—require a rational nexus⁸⁹ between the allegedly immoral activity at issue and the teacher’s performance in the

Conduct, 35 TULSA L.J. 445, 453-60 (2000).

84. 70 OKL. STAT. § 6-101.22(A)(7).

85. See, e.g., *Kenai Peninsula Borough Bd. of Educ. v. Brown*, 691 P.2d 1034, 1041 (Alaska 1984) (upholding the substantive determination of the school board that the conviction of a high school teacher of diversion of electricity constituted a crime of moral turpitude, which served as the basis for the teacher’s dismissal); *McCullough v. Illinois State Bd. of Educ.*, 562 N.E.2d 1233, 1238 (Ill. App. Ct. 1990) (affirming the dismissal of a teacher based on multiple criminal convictions for failure to pay taxes); *Chicago Bd. of Educ. v. Payne*, 430 N.E.2d 310, 317 (Ill. App. Ct. 1981) (affirming the dismissal of secondary school teacher who pled guilty to misdemeanor possession of marijuana); but see *Hoagland v. Mount Vernon Sch. Dist.*, 623 P.2d 1156, 1159 (Wash. 1981) (remanding for evidentiary hearing a dismissal of a secondary school teacher based on a conviction for grand larceny through the purchase of a stolen motorcycle).

86. See, e.g., *Dan McFeely, Principal Will Respond to Theft Charge Today*, INDIANAPOLIS STAR, Mar. 20, 2000, at B1 (describing how a secondary school educator was placed on administrative leave after being arrested for shoplifting curtains); *Paul Riede & Edwin Acevedo, Baldwinville School Chief Resigns*, POST-STANDARD (Syracuse, NY), Aug. 6, 2002, at A1 (stating that school superintendent resigned after arrest for public lewdness despite the lack of a morals clause in his contract).

87. See, e.g., *Toney v. Fairbanks N. Star Borough Sch. Dist. Bd. of Educ.*, 881 P.2d 1112, 1116 (Alaska 1994) (affirming the dismissal of a teacher for statutory immoral conduct where the teacher had engaged in a sexual relationship with a minor in another state prior to his employment, which constituted a crime in both Alaska and in the other state); *In Re Etienne*, 460 N.W.2d 109, 113 (Minn. Ct. App. 1990) (affirming a school board’s decision to discharge a secondary school teacher based on allegations of sexual activity with a student).

88. See, e.g., *Swinderman v. Dover City Sch. Dist. Bd. of Educ.*, No. 91AP110092, 1992 Ohio App. LEXIS 2187, at *8–10 (Ohio Ct. App. Apr. 20, 1992) (affirming school board’s termination decision of secondary school teacher based on falsification of sick leave).

89. *Stelzer v. State Bd. of Educ.*, 595 N.E.2d 489, 492 (Ohio Ct. App. 1991).

school,⁹⁰ such a showing of a nexus is not a requirement in all states or courts.⁹¹ Because various court decisions potentially require a showing of a nexus requirement, arguably such a requirement might also be imposed upon any school system that seeks or has sought to terminate an employee pursuant to a contractual morals clause. However, the expansive principles of freedom of contract, which generally allow “parties [to] contract as they wish,”⁹² which “courts will enforce . . . without passing on their substance,”⁹³ and which are “rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs,”⁹⁴ provide a strong argument in the alternative. An examination of how secondary schools are actually utilizing contractual morals clauses as conditions of initial and continued employment of teachers illustrates that most of these cases fall on the side of broad freedom of contract rather than on the side of a process nexus requirement.

Secondary schools have sought dismissal or discipline of educators, pursuant to contractual morals clauses, for a broad range of “immoral” conduct. The breadth of the conduct, which is regulated by contractual morals clauses that are used as conditions for employment for secondary school instructors, has led to employment disputes.⁹⁵ Some conduct would likely

90. See, e.g., *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 377, 386–87 (Cal. 1969).

91. See, e.g., *Stelzer*, 595 N.E.2d at 492 (stating that the *Morrison* nexus requirement has not been adopted by the Ohio Supreme Court in interpreting the state’s educational dismissal immorality statute); but see *Freisthler v. State Bd. of Educ.*, No. 1-02-36, 2002 Ohio App. LEXIS 4975, at *14–15 (Ohio Ct. App. Sept. 20, 2002) (finding that “implicit in the wording ‘conduct that is unbecoming to the person’s profession,’ . . . is a requirement that the conduct in some way affect the individual’s ability to *teach*. To decide what constitutes conduct unbecoming a teacher without any regard to teaching, is to base the decision solely on the Board’s determination of what is unacceptable behavior and ‘such a statute, unless narrowed by clear and well-known standards, affords too great a potential for arbitrary and discriminatory application and administration’” (quoting *Morrison*, 461 P.2d at 383, n.15).

92. RESTATEMENT (SECOND) OF CONTRACTS ch. 8, introductory cmt. (1981).

93. *Id.*

94. *Id.*

95. See Lawrence Goodman, *Archdiocese Hit on Morals Clause in Teacher Pact*, NEW YORK DAILY NEWS, Sept. 9, 1996, at 25 (detailing a protest of a secondary school teachers’ union of the Archdiocese of New York’s attempt to insert a morals clause into employment contracts that would give it the right to fire teachers if “they violated official Catholic dogma in their private lives”); see also John McGourty, *Teachers Picket in Bristol*, TIMES (Trenton, N.J.), Sept. 5, 1997, at A2 (discussing how a rewording of a contractual morals clause in private high school teachers contracts was one issue of a labor dispute between a teachers’ union and the Camden Diocese).

qualify, without argument, as a violation of morality clauses. However, in many other instances, secondary schools have exercised such expansive authority in their determinations of what could be considered breaches of contractual morals clauses that arguments could be made that such dismissals constitute breaches of contract on the part of the school systems. For example, a private high school art and religion instructor, “who pose[d] nude for figure drawing studies in a private Toledo studio, [was] asked by school officials to resign because they sa[id] he [was] violating a morals clause in his contract.”⁹⁶ Such an operation of a contractual morals clause might be the basis for litigation; however, given the American judicial system’s reliance on the key principle of freedom of contract and the fact that the school in question was a private school, such litigation might be quickly dismissed.

Other conduct that has been the basis for termination of secondary employment poses some similarly problematic aspects. Several secondary educators have faced dismissal from their private school positions as a result of parenting children out of wedlock.⁹⁷ One such educator was offered a new position as a coach and social studies teacher at a nearby public high school within two months of his firing, highlighting the potential differences between the exercise and construction of contractual morals clauses by a private secondary school versus that of a public secondary school.⁹⁸

Interestingly, some secondary schools have extended the limit of morals clauses to apply, not only to the educator, but to the students for whom the educator has responsibility. One such example took place when a public high school principal allegedly demanded that a football coach and teacher sign a contract that contained a morals clause with respect to the conduct of football players (both on and off campus), which would allow for the coach’s discipline if any of his eighty-five football players engaged in misconduct.⁹⁹ Rather than agree to

96. *Art Teacher’s Ouster Sought on Moral Grounds*, JOURNAL GAZETTE (Fort Wayne, Ind.), June 13, 1996, at 1C.

97. See, e.g., Roland, *supra* note 6, at A1; Dan Ventura, *Daddy’s Got a New Job, Baby - Norton Welcomes Coach Fired as Unwed Father*, THE BOSTON HERALD, May 27, 2006, at 6.

98. See Ventura, *supra* note 97, at 6.

99. See Brian McCreedy, *Gridders at Foran Push for Coach’s Return*, NEW HAVEN REGISTER (Conn.), Apr. 13, 2002, at B2.

such a contractual requirement, the coach quit his position.¹⁰⁰ Although the coach then immediately reapplied for his position with overwhelming community support, another individual was hired as his replacement.¹⁰¹ It seems that this type of morals clause may constitute the outermost bounds with respect to the use of these contractual clauses as conditions for employment in a secondary school context.

However, a recent case of morals clauses and secondary school employment seemingly pushes these limits even further. A Wisconsin French teacher, Kelly Romenesko, was fired from her position at a private, Catholic secondary school in 2004 due to an alleged violation of her contractual morals clause; the claimed violation was that Romenesko had “undergone in vitro fertilization, a procedure the [Catholic] church opposes.”¹⁰² Romenesko filed suit against the school system, claiming that the system had violated the state Fair Employment Act by discriminating against her on the basis of sex, because she was pregnant.¹⁰³ In January 2007, “an administrative law judge found probable cause that [the school system] discriminated against Romenesko because she was pregnant.”¹⁰⁴ After negotiations between the parties floundered,¹⁰⁵ a three-day hearing was scheduled before an administrative law judge of the state Department of Workforce Development.¹⁰⁶ However, before the hearing began and before a decision on the merits was made, Romenesko settled with the school system.¹⁰⁷ So, whether or not this type of enforcement of a contractual morals clause would be upheld by a court will have to be determined in another case.

A review of the use of contractual morals clauses as a basis

100. See Brian McCready, *Foran Coach Who Quit Wants to Return to Job; Charges School Principal Forced Him from Post*, NEW HAVEN REGISTER (Conn.), Apr. 12, 2002, at C6.

101. See Manuela Da Costa-Fernandes, *Belor Loses Bid for Coaching Job*, NEW HAVEN REGISTER (Conn.), May 17, 2002, at B1.

102. Susan Squires, *Former ACES Teacher Wins In Vitro Probable-Cause Ruling*, POST-CRESCENT (Appleton, Wis.), Feb. 22, 2007, at 1A.

103. See *id.*

104. J.E. Espino, *Talks Fail in In Vitro Case*, POST-CRESCENT (Appleton, Wis.), Mar. 6, 2007, at 1C.

105. See *id.*

106. See *Appleton Teacher Who Had In Vitro Gets Hearing*, CAPITAL TIMES (Madison, Wis.), June 4, 2007, at B1.

107. See Susan Squires, *Romenesko Relieved That Ordeal is Over*, POST-CRESCENT (Appleton, Wis.), Aug. 29, 2007, at 2A.

for termination of secondary school educators demonstrates that the morals clause serves as another device to be used by a school system when an adverse employment decision must be made. The inclusion of morals clauses within education contracts bolsters the power that many secondary schools already have, pursuant to a state statutory scheme, when an educator engages in immoral conduct. However, the extent of enforcement of these types of contractual clauses may prove to be the source of future litigation in the secondary educational context.

V. APPLICATIONS OF CONTRACTUAL MORALS FOR POSTSECONDARY SCHOOL EDUCATORS

Just as in the secondary school context, contractual morals clauses are increasingly becoming used as a condition of employment for postsecondary educators.¹⁰⁸ Also akin to the morality requirements for secondary school instructors, postsecondary school employees' dismissals based on contractual morals provisions often echo dismissals based on statutory definitions of immorality.¹⁰⁹ The problematic nature of these statutory definitions for secondary school teachers equally apply to postsecondary schoolteachers. Essentially, immorality has been a "justifiable reason for firing a tenured professor, but what constitutes immorality is not always clear."¹¹⁰ So, a concise review of cases in which university and college educators have been discharged pursuant to state statute is merited.

Postsecondary institutions have determined that criminal convictions qualify as immoral conduct to justify dismissal of

108. *See, e.g.,* Jim Leggett, *LC Policy Encourages Alcohol Abstinence*, ALEXANDRIA DAILY TOWN TALK (La.), Apr. 13, 2006, at 1-3A (describing how the contracts for Louisiana College, a private, Baptist college, would contain a new clause stating that employees are "expected to abstain from serving, using or advocating the use of alcoholic beverages in public and/or in settings in which students are or are likely to be present except in the case of communion").

109. *See, e.g.,* Copeland & Murry, *supra* note 24 at 233.

110. McGee, *supra* note 25, at 596 (stating that "courts have upheld dishonesty, sexual harassment and extreme vulgarity as valid grounds for dismissal [of tenured professors]," but that "other courts have struck down immorality as grounds for dismissal because 'immorality means different things to different people, and its definition depends on the idiosyncrasies of the individual school board members'" and because "the potential for arbitrary and discriminatory enforcement is inherent in such a statute").

educators under state statutory schemes.¹¹¹ There also have been instances in which universities have sought the dismissal of professors based upon somewhat ambiguous claims of violation of “trust,” rather than on direct claims tied to criminal convictions.¹¹² Further, like secondary educational cases, certain sexual activity has served as a basis for the termination of employment of postsecondary educators.¹¹³ Additionally, plagiarism and dishonest conduct have been interpreted to meet statutory immorality requirements in the dismissal of postsecondary educators.¹¹⁴

Interestingly, some courts have made specific distinctions with respect to conduct that could constitute a valid basis for dismissal at the secondary level, but not at the postsecondary level. In *Texton v. Hancock*,¹¹⁵ a tenured instructor was discharged from a junior college for “immorality, misconduct in office and willful neglect of duty.”¹¹⁶ Specifically, findings were made that the instructor “discussed the personal problems and grades of students with other members of the class; advised her students to overrule another teacher; used profanity in the presence of a student; [and] made general statements . . . that all men are inadequate.”¹¹⁷ Additionally, findings were made that:

Texton requested that a student have an affair with her ex-husband; that she gave a class party and was seen there drinking a beer; that she visited the home of a student after midnight, bringing along her husband and two other men and carrying beer; [and] that she ‘passed out’ in the student’s

111. *Id.*

112. *See, e.g.*, Joseph Kirby & V. Dion Haynes, *Teachers Find Public Eye Doesn’t Blink - Educators Say They’re Held to Higher Standard*, CHICAGO TRIBUNE, Feb. 28, 1992, at 1 (outlining how the Provost of Northwestern University sought the dismissal of a tenured professor after said professor pled guilty to a felony embezzlement conviction for cashing Social Security checks for his deceased mother, not because of the admission to the felony, but because the professor “breached the faculty-student trust”).

113. *See, e.g.*, *Lehmann v. Bd. of Trustees*, 576 P.2d 397, 399 (Wash. 1978) (affirming the dismissal of a tenured faculty member at a private college for sexual misconduct).

114. *See, e.g.*, *Yu v. Peterson*, 13 F.3d 1413, 1417 (10th Cir. 1993) (affirming the dismissal of a tenured professor for plagiarism); *Jawa v. Fayetteville State Univ.*, 426 F. Supp. 218 (E.D.N.C. 1976) (affirming the dismissal of a tenured faculty member at a public university for engaging in dishonest conduct with his superiors).

115. 359 So. 2d 895 (Fla. Ct. App. 1978).

116. *Id.* at 896.

117. *Id.*

living room after drinking beer.¹¹⁸

Because of these findings, the College Board of Trustees discharged Texton; this discharge was sustained by the state Department of Education.¹¹⁹ Texton appealed and the Court of Appeal of Florida ordered the reversal of the discharge. In its decision of reversal, the court specifically stated:

If a school teacher is responsible for teaching students in their formative years and commits acts of immorality after school hours, such acts may be indirectly related to misconduct in office. . . . Here Ms. Texton's conduct must be judged in the context of her more liberal, open, robust college surroundings. She is not teaching children of tender years in an elementary school. Her acts have little or no connection whatsoever with morality, misconduct in office or willful neglect particularly when considering that the complainants were junior college students, many of them older and working full-time, attending classes part-time or at night.¹²⁰

While courts, like the *Texton* court, have stated limits to the imposition of morality statutory requirements as conditions of employment for postsecondary instructors, scenarios that involve contractual morals clauses as conditions of similar employment tend to have much more extensive reach. With respect to the use of contractual morals clauses as a basis for termination or discipline of postsecondary educators, the triggering conduct can be much broader than the conduct that is at issue in a statutory dismissal. For example, allegations of criminal activity, even if ultimately found to be without merit by a court, may be a sufficient basis for dismissal pursuant to a contractual morals clause.¹²¹ Allegations of academic fraud may also suffice for the operation of a contractual morals clause and the termination of postsecondary educators.¹²²

While this type of conduct may lead to a valid termination

118. *Id.*

119. *Id.*

120. *Id.* at 897.

121. See Andrew Miller, *Citadel, Taaffe Settle Lawsuit*, POST AND COURIER (Charleston, S.C.), May 7, 1997, at C1 (describing how the Citadel fired the football head coach for a violation of his morals clause related to two DUI charges, of which the coach was eventually acquitted, how the coach brought a breach of contract suit following his termination, and how the lawsuit was eventually settled).

122. See, e.g., *Report: Minn. Staff Fabricated Grades*, PHILADELPHIA DAILY NEWS, Apr. 15, 1999, at 85 (discussing how allegations of faculty awarding false grades to college athletes were being investigated by outside law firms and implying that disciplinary action could result based on said allegations).

of an employment contract in a postsecondary setting, the dearth of case law on this precise subject matter should urge caution for postsecondary institutions that wish to utilize morals clauses as conditions for employment. Unlike the secondary school examples of terminations based on morals clause violations, the postsecondary educational context lacks a substantial amount of precedent in this field. It appears, however, that as more universities and colleges adopt morals clauses as contractual requirements, the body of case law will concomitantly expand as well. Further, the constitutional limitations of these moral requirements will cabin the powers of secondary and postsecondary administrators.

VI. CONSTITUTIONAL LIMITATIONS OF REQUIRING MORALS CLAUSES FOR SECONDARY AND POSTSECONDARY EDUCATORS

As demonstrated, ambiguity and uncertainty as to the validity of a school's actions of terminating or disciplining a teacher for moral misconduct may arise whether such action is based on statutory or contractual provisions. This ambiguity can become especially pointed when the school's action poses an alleged conflict between the teacher's work life and her personal life.¹²³ Additionally, a multitude of questions are raised by requiring teachers to comply with morality clauses, which include: (1) what conduct constitutes immoral behavior, and who makes the judgment call as to whether the teacher's behavior is considered immoral?; (2) how far can a school delve into the personal lives of teachers in order to actually enforce these morals clauses?; and (3) is there a realm of privacy that a teacher in fact has, where his or her conduct should not constitute "immoral behavior"? These questions demonstrate the fact that enforcing morals clauses against teachers carries a potential of infringing upon their constitutional rights.

Despite their position and influence as role models, teachers "are not relegated to a watered-down version of constitutional rights."¹²⁴ They maintain the constitutional

123. See, e.g., *Pettit v. State Bd. of Educ.*, 513 P.2d 889 (Cal. 1973) (upholding the revocation of an elementary school teacher's license based on her sexual activity in a "swingers club" outside of work, and that did not involve any students). It is important to note that, though the court does reason into the conflict between the teacher's work life and her personal life, the court also faces a situation where the teacher's sexual activity was allegedly illegal. *Id.* at 890-92.

124. *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

rights available to all individuals. Clearly, these constitutional rights are available to educators in public institutions.¹²⁵ In order for teachers employed by private schools to demonstrate that the private schools' actions violated their constitutional rights, the teachers must prove that the schools' actions constituted state action.¹²⁶ "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."¹²⁷

This conduct is not easily determined.¹²⁸ However, private schools that "clearly perform functions governmental in nature, such as providing higher education to and exercising substantial dominion over its students . . . may be constrained . . . by the requirements of the Constitution."¹²⁹ Moreover, courts have stated that "support to [private schools] 'through any arrangement, management, funds, or property' would [seemingly] inject state action into [the school's] conduct".¹³⁰ As to the validity of constitutional claims brought by teachers who have willingly entered into contracts with terms requiring that they refrain from immoral behavior, these claims seem uncertain given that parties have the freedom to contract as they wish and courts usually enforce these provisions.¹³¹

In most cases where claims of constitutional violations resulting from enforcing statutory morals clauses upon teachers have been raised, the following rights have been implicated: due process, privacy, freedom of speech, freedom of association, and equal protection. The effect of requiring teacher morality on each of these constitutional rights will be discussed separately.

125. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (stating that teachers do not "shed their constitutional rights . . . at the schoolhouse gate").

126. See *Buckton v. Nat'l Collegiate Athletic Ass'n*, 366 F. Supp. 1152, 1156 (D. Mass. 1973).

127. *Evans v. Newton*, 382 U.S. 296, 299 (1966).

128. See *id.* ("What is 'private' action and what is 'state' action is not always easy to determine.").

129. *Buckton*, 366 F. Supp. at 1156.

130. See *id.* (quoting *Cooper v. Aaron*, 358 U.S. 1, 19 (1958)).

131. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 93, at ch. 8, introductory cmt.

A. Due Process Rights

Teachers possess important due process rights under the Constitution.¹³² The Fifth and Fourteenth Amendments provide that no person shall be deprived of “life, liberty, or property, without due process of law.”¹³³ The Supreme Court has interpreted this clause as containing both a substantive and a procedural component.¹³⁴

1. Procedural due process

Procedural due process challenges focus on whether the government has followed adequate procedures in depriving a person of life, liberty, or property.¹³⁵ The property interests required for due process consist of more than abstract needs, desires, or unilateral expectations of benefits or privileges.¹³⁶ Instead, a person must have “a legitimate claim of entitlement” to a benefit to have a property interest in that benefit.¹³⁷ As such, a nontenured educator has no constitutional right, flowing from procedural due process, to a pre-termination hearing at the end of an employment contract period unless there is a loss of “liberty” or “property.”¹³⁸ Conversely, a “tenured university professor has a property interest in his position, and thus cannot be deprived of that position without due process.”¹³⁹

Furthermore, courts have held that once an existing property or liberty right has been established, procedural due process requires that an educator with such a right be given adequate notice and an opportunity to be heard.¹⁴⁰ For instance, in *Stovall v. Huntsville City Board of Education*, even

132. See Fulmer, *supra* note 24, at 283.

133. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

134. See, e.g., *Reno v. Flores*, 507 U.S. 292 (1993) (stating that the Fifth and Fourteenth Amendments’ guarantees of “due process of law” includes a procedural component and substantive component).

135. See Erwin Chemerinsky, *Procedural Due Process Claims*, 16 *TOURO L. REV.* 871, 871 (2000).

136. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972) (finding no Fourteenth Amendment property interest sufficient to grant a procedural hearing where a university declined to renew a contract of a nontenured faculty member).

137. *Id.*

138. *Id.*

139. *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1134 (3d Cir. 1992).

140. *Stovall v. Huntsville City Bd. of Educ.*, 602 So. 2d 407, 408–09 (Ala. Civ. App. 1992).

an untenured teacher had a property right entitling him to procedural due process.¹⁴¹ In *Stovall*, an untenured teacher was arrested for possession of crack cocaine, the school system superintendent recommended that the teacher's employment contract be cancelled, a hearing was held, and subsequently, the school system Board of Education (the "board") voted to affirm the cancellation of the contract.¹⁴² As a result, the teacher filed a lawsuit claiming that his due process rights were violated.¹⁴³ The court reasoned that, although the board was entitled to dismiss or suspend the teacher for immorality under a state statute, the teacher had a one-year contract and had an expectation of one year's employment that constituted a property interest.¹⁴⁴ This property interest entitled the non-tenured teacher to procedural due process.¹⁴⁵ However, the court found that the board fulfilled these procedural due process requirements by giving the teacher notice of the grounds for the proposed dismissal and of his right to a hearing before the board, at which he could present evidence, as well as an opportunity to be heard.

Consistent with the findings of *Stovall*, courts hold that once an existing property or liberty right has been established, procedural due process requires that an educator with such a right be given adequate notice and an opportunity to be heard.¹⁴⁶ The opportunity to be heard must be provided "at a meaningful time and in a meaningful manner."¹⁴⁷

Generally, this means that a hearing must be conducted before a property or liberty right is terminated.¹⁴⁸ A procedural due process challenge on this point was raised in *Ashlie v. Chester-Upland School District*, where a teacher had been employed by a school district prior to her sex change operation transforming her from a man to a woman.¹⁴⁹ When the teacher returned for the next school year as a woman, the school

141. *Id.*

142. *Id.*

143. *Id.* at 409.

144. *Id.*

145. *Id.*

146. *Brown v. Bathke*, 566 F.2d 588, 591 (8th Cir. 1977) (stating that a teacher's one-year contract created a property interest subject to procedural due process protections).

147. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

148. *See Roth*, 408 U.S. at 570 n.7.

149. No. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *1 (E.D. Pa. May 9, 1979).

district, in compliance with Pennsylvania law, dismissed her for incompetency, immorality and other improper conduct that was potentially psychologically damaging to students, without a pre-dismissal hearing.¹⁵⁰ The court found that the state law allowing termination of the teacher without the benefit of a prior hearing was unconstitutional, and, as a result, the teacher's procedural due process rights were violated.¹⁵¹ The *Ashlie* court determined that the school district, not the court, was the appropriate entity to determine whether the teacher should be terminated and ordered that a hearing be held by the school district so that this determination could be made.¹⁵² Further, the court ordered, "at the minimum, reinstatement [of the teacher] to a suspended status with back pay pending the outcome of the school board hearing" as a cure for the procedural due process defect.¹⁵³

In addition to the general requirements of notice and an opportunity to be heard, to avoid procedural due process challenges, statutory and contractual morals clauses for teachers cannot be unconstitutionally vague; that is, they must: (1) be sufficiently clear as to give fair warning of the conduct and (2) provide a standard or guide against which conduct can be uniformly judged by the courts and administrative agencies.¹⁵⁴ However, statutory provisions imposing morality upon teachers have been challenged as being unconstitutionally vague.¹⁵⁵ In particular, arguments have been made that these statutory morality clauses do not provide an opportunity to know what conduct is prohibited, so as to avoid that type of conduct.¹⁵⁶ In response to such arguments, while some courts have upheld these statutory morals clauses based on a determination that they are not unconstitutionally

150. *Id.* at *2.

151. *Id.* at *6.

152. *Id.* at *9-10.

153. *Id.* at *11.

154. *See Morrison v. State Bd. of Educ.*, 461 P.2d 375, 387 (Cal. 1969) ("Civil as well as criminal statutes must be sufficiently clear as to give a fair warning of the conduct prohibited, and they must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies").

155. *See, e.g., Ambus v. Utah State Bd. of Educ.*, 858 P.2d 1372, 1375 (Utah 1993) (discussing a terminated teacher's claim that the state's morality statute was unconstitutionally vague as applied to his termination for an arrest for distributing marijuana, which was eventually expunged).

156. *See Thompson v. Sw. Sch. Dist.*, 483 F. Supp. 1170, 1178 (W.D. Mo. 1980); *Ambus*, 858 P.2d at 1375.

vague,¹⁵⁷ other courts have held statutory morals clauses to be unconstitutionally vague, as they fail to give notice as to the immoral conduct that is prohibited under the statutes.¹⁵⁸ One such case is *Burton v. Cascade School District Union High School No. 5*, where a teacher was dismissed from her teaching position at a public high school on grounds that she was a homosexual, which allegedly constituted immoral conduct under Oregon's statute governing grounds for dismissals of teachers.¹⁵⁹ The *Burton* court found that the statute vested in the school board the power to dismiss teachers for immorality, but failed to define immorality.¹⁶⁰

As the court explained:

Immorality means different things to different people and its definition depends on the idiosyncrasies of the individual school board members. It may be applied so broadly that every teacher in the state could be disciplined. The potential for arbitrary and discriminatory enforcement is inherent in such a statute.¹⁶¹

The court determined that the statute was so broad as to make those "charged with its enforcement the arbiters of morality for the entire community."¹⁶² In conclusion, the court held that the statute was unconstitutionally vague because it failed to give fair warning of what conduct was prohibited, and because it permitted "erratic and prejudiced exercises of authority."¹⁶³

Rather than finding entire statutory morals clauses unconstitutionally vague, like the *Burton* court, other courts have found that such statutes do not violate procedural due

157. See, e.g., *Sullivan v. Meade County Indep. Sch. Dist. No. 101*, 387 F. Supp. 1237, 1247 (D.S.D. 1975) (finding that a statute pursuant to which a teacher was dismissed for immorality as a result of living with her boyfriend was not so vague as to violate the due process clause); see also *San Filippo*, 961 F.2d at 1127 (stating that "provisions permitting discharge for immoral conduct, just cause or conduct unbecoming a teacher . . . have been upheld against void for vagueness attacks in cases involving the discharge of teachers, professors and other public employees").

158. See *Burton v. Cascade Sch. Dist. Union High Sch. No. 5*, 353 F. Supp. 254, 254-55 (D. Or. 1973) (construing Oregon's statute that provided in pertinent part that "[d]uring the period of the contract . . . the district school board shall dismiss teachers only for . . . immorality").

159. *Id.*

160. *Id.* at 255.

161. *Id.*

162. *Id.*

163. *Id.*

process, through a narrow construction of said statutes.¹⁶⁴ Specifically, these courts have found a legislative intent “to allow dismissal only in instances where immoral conduct adversely affected a teacher’s performance.”¹⁶⁵ In these cases, claims of vagueness are “resolved by a more precise judicial construction and application of the statute in conformity with legislative objectives.”¹⁶⁶

Although there has been some variance with respect to courts’ decisions on procedural due process claims regarding the discipline or termination of secondary and postsecondary educators, several unifying principles are clear. First, in order for an educator to be entitled to procedural due process, that educator must have “a legitimate claim of entitlement” to a benefit—in other words, the educator must have a legitimate property or liberty interest at stake.¹⁶⁷ Tenure has been held to constitute a valid property interest to necessitate the requirements of constitutional procedural due process.¹⁶⁸ However, tenure is not the only constitutional property interest for educators.¹⁶⁹ Once a sufficient constitutional interest has been established, procedural due process requires that the educator be given adequate notice and an opportunity to be heard.¹⁷⁰ Finally, due process requires that the morals clause at issue, whether statutory or contractual, not be unconstitutionally vague.¹⁷¹ As such, state legislatures, governmental attorneys, and educational agencies should be mindful of all of these requirements in drafting statutes, contracts, or new school policies if such entities wish to avoid a potential finding of a Fifth or Fourteenth Amendment violation.

2. *Substantive due process*

Educational morals clauses have also been challenged on

164. See, e.g., *Thompson*, 483 F. Supp. at 1178; *Weissman v. Bd. of Educ. of Jefferson City. Sch. Dist.*, 547 P.2d 1267 (Colo. 1976).

165. *Thompson*, 483 F. Supp. at 1178.

166. *Morrison*, 461 P.2d at 390.

167. *Roth*, 408 U.S. at 577.

168. *San Filippo*, 961 F.2d at 1134.

169. See, e.g., *Stovall*, 602 So. 2d at 407 (considering expectancy of employment as a property interest).

170. See, e.g., *Armstrong*, 380 U.S. at 552.

171. See *Burton*, 353 F. Supp. at 254–55.

the grounds that they violate substantive due process.¹⁷² This component of due process requires that the termination of a secondary or postsecondary educator's property interest not be "arbitrary, capricious, or without a rational basis."¹⁷³ Additionally, dismissal or discipline of an educator will be deemed to violate substantive due process if such action "is trivial, or is unrelated to the educational process or to working relationships with the education institution, or is wholly unsupported by a basis or fact."¹⁷⁴

To illustrate, in *Fisher v. Snyder*, a school board's refusal to renew a nontenured high school teacher's contract was held to violate her substantive due process rights because such refusal was arbitrary and capricious in nature.¹⁷⁵ The teacher was a middle-aged divorcee who lived by herself in a one-bedroom apartment.¹⁷⁶ On "several occasions, young ladies, married couples, and young men who were friends of her son" stayed overnight at the teacher's apartment.¹⁷⁷ Subsequently, the school board dismissed the teacher for unbecoming conduct outside the classroom.¹⁷⁸ The school board justified the dismissal with a claim that the teacher's actions of allowing overnight guests in her home could potentially lead to sexual misconduct.¹⁷⁹ However, the board did not accuse the teacher of immoral conduct, and there was no proof of improper conduct.¹⁸⁰ As such, the "district court held the dismissal impermissible as arbitrary and capricious in violation of [the teacher's] right to substantive due process," and the district court's decision was upheld on substantive due process grounds by the United States Court of Appeals for the Eighth Circuit.¹⁸¹

The courts will, however, be less inclined to find that the enforcement of a morals clause violates the substantive due process rights of a secondary or postsecondary educator if no

172. See, e.g., *Hainline*, 824 P.2d at 959.

173. *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 528 (10th Cir. 1998). Moreover, while "a school board may legitimately inquire into the character and integrity of its teachers," the decisions made in such an inquiry cannot be arbitrary or capricious. *Fisher v. Snyder*, 476 F.2d 375, 377 (8th Cir. 1973).

174. *Fisher*, 476 F.2d at 377.

175. *Id.* at 376.

176. *Id.*

177. *Fisher*, 476 F.2d at 376.

178. *Id.*

179. *Id.* at 377.

180. *Id.*

181. *Id.* at 376.

constitutionally protected right is involved, as was the case in *Hainline v. Bond*.¹⁸² The teacher in *Hainline* claimed, somewhat enigmatically, that the school board's actions of suspending his teacher's license, pursuant to a statutory morality clause, after he was arrested for burglary and theft, deprived him of substantive due process.¹⁸³ The *Hainline* court, in finding that no substantive due process violation existed, noted that there was no argument that the burglary and theft involved some constitutionally protected right of conduct like free speech or free association.¹⁸⁴

As such, these two sample cases demonstrate that termination based on "immoral conduct" can form the basis for a successful substantive due process claim if (1) a constitutionally protected right is at issue in the case, and (2) the school acted in an arbitrary and capricious manner. Future court cases, based on statutory and contractual morals clauses, will no doubt define the contours of the substantive due process standard.

B. Privacy Rights

A recurring controversy involving morals clauses for teachers is whether a particular statutory or contractual morality provision violates the teacher's fundamental right of privacy. The constitutional right of privacy, stemming from the Fourteenth Amendment, refers to "a right of personal privacy, or a guarantee of certain areas or zones of privacy."¹⁸⁵ Rights of personal privacy include "the interest in independence in making certain kinds of important decisions."¹⁸⁶ Specifically, the fundamental, constitutional right of privacy protects individuals against government interference in personal decisions in marriage,¹⁸⁷ procreation,¹⁸⁸ contraception,¹⁸⁹ child rearing and education.¹⁹⁰

182. 824 P.2d at 959.

183. *Id.* at 963.

184. *Id.* at 964.

185. *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("The Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

186. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

187. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

188. *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

189. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

190. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

Morals clauses for teachers have been held to violate some of these constitutionally protected areas, like the right to obtain a divorce¹⁹¹ and the right to procreate.¹⁹² For example, in *Ponton v. Newport News Schools*, the plaintiff teacher claimed that the school violated her constitutional right to privacy “by forcing her to take a leave of absence from her teaching position because she was single and pregnant.”¹⁹³ This leave of absence was pursuant to a personnel “policy” regarding unwed, pregnant teachers, in which these teachers could “(1) get married, (2) take a leave of absence, or (3) resign.”¹⁹⁴ The Court held that the “plaintiff’s constitutional right of privacy was violated when she was forced to take the leave.”¹⁹⁵

Although there have been cases in which an educator’s right to privacy has been violated pursuant to the exercise of educational morals clauses, it is important to keep in mind that the right of privacy, like other constitutional rights, is not absolute.¹⁹⁶ State regulations that engage areas addressed by the constitutional right to privacy may be permissible if such regulation is justified by a compelling state interest.¹⁹⁷ Further, as with substantive due process claims, courts are less inclined to find that morality as a condition of employment violates a teacher’s privacy rights if no fundamental right is involved.¹⁹⁸ Clearly, the claims of infringement of secondary and postsecondary educators’ constitutional, fundamental rights to privacy will continue to be litigated under the statutory and morals clause context. How these rights will be defined, expanded, or restricted in both the public and private

191. In *Littlejohn v. Rose*, 768 F.2d 765 (6th Cir. 1985), a nontenured teacher brought an action for reinstatement of her job after she was terminated based on her decision to seek a divorce. The Court held that a material question existed as to whether the refusal to rehire the teacher was based on her constitutionally protected decision to seek a divorce and reversed the directed verdict of the trial court.

192. *Ponton v. Newport News Sch.*, 632 F. Supp. 1056 (E.D. Va. 1986).

193. *Id.* at 1058.

194. *Id.* at 1059.

195. *Id.* at 1063.

196. *See Carey v. Population Servs. Int’l*, 431 U.S. 678, 686 (1977).

197. *See id.*

198. *See Lile*, 701 S.W.2d at 506. In *Lile*, a tenured teacher was terminated for immoral conduct after a sexual abuse complaint was filed against him. The teacher claimed that his constitutional right to privacy was violated as the alleged conduct took place within his home, where he had a legitimate expectation of privacy. The court rejected this claim and found no violation of the teacher’s constitutional right to privacy as the conduct for which the teacher sought protection did not involve a fundamental right.

school arenas will be of key interest to all involved in education.

C. Freedom of Speech

The constitutionally protected right to free speech may be regulated in “carefully restricted circumstances.”¹⁹⁹ However, this does not preclude the potential of freedom of speech issues arising when there is a requirement that teachers comply with moral clauses for continued employment. Indeed, “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.”²⁰⁰

The specific issue of whether enforcement of a morals clause violates a teacher’s First Amendment free speech rights was addressed by the Supreme Court in *Pickering v. Board of Education*.²⁰¹ In *Pickering*, the Board of Education of an Illinois school district dismissed a high school teacher for writing and publishing in a local newspaper a letter regarding “a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools.”²⁰² The dismissal resulted from a post-hearing Board determination that the letter was “detrimental to the efficient operation and administration of the schools.”²⁰³ The dismissed teacher brought suit, claiming that his First Amendment rights had been violated.²⁰⁴ The Supreme Court agreed, stating that teachers may not be constitutionally compelled to relinquish the First Amendment rights they would otherwise enjoy as non-teacher citizens.²⁰⁵ Consequently, the Court determined that the school district’s actions violated the teacher’s right to exercise free speech.²⁰⁶

However, if the court determines that the teacher’s

199. *Tinker*, 393 U.S. at 513.

200. *Id.* at 506.

201. 391 U.S. 563 (1968).

202. *Id.* at 564.

203. *Id.*

204. *Id.*

205. *Id.* at 568.

206. *Id.* at 574 (“[A]bsent proof of false statements knowingly or recklessly made . . . a teacher’s exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.”).

behavior is outside of the protection provided for under the First Amendment, the free speech claim will not be successful.²⁰⁷ The case of *Palo Verde Unified School District v. Hensey* demonstrates this point. In *Hensey*, a permanent junior college professor was dismissed for immoral conduct, which included stating to his philosophy class that the district superintendent spent too much time “licking up the board” and, in connection with this statement, licking the classroom wall with his tongue in an up and down manner to show that the school superintendent would rather curry favor with his superiors than perform his duties.²⁰⁸ The court determined that the teacher’s actions were not protected under the First Amendment as they “passed the limits of bad taste and vulgarity” and constituted an obscene incident that indicated both “immorality” and “evident unfitness.”²⁰⁹ In examining the case law regarding the interrelationship between educator disciplinary action, morality, and First Amendment speech rights, one can note the demarcation of limits of protection for educators in this arena, similar to due process and privacy rights.

D. Freedom of Association

Although a school board may legitimately inquire about the character and integrity of teachers,²¹⁰ imposing morals clauses on teachers as a condition of employment can elicit concerns about constitutional violations of the right of freedom of association. Freedom of association has two different meanings.²¹¹ “Under the personal liberty prong of freedom of association, ‘choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State.’”²¹² The relationships that have been deemed to carry the highest, constitutional protection are “those that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and

207. See, e.g., *Palo Verde Unified Sch. Dist. v. Hensey*, 9 Cal. App. 3d 967 (1970).

208. *Id.* at 969, 974.

209. *Id.* at 974–75.

210. *Fisher*, 476 F.2d at 377.

211. *Weeks v. City of Plano*, No. 88 C 0518, 1988 U.S. Dist. LEXIS 8914, at *6 (Aug. 6, 1988).

212. *Id.* (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 617–18 (1984)).

cohabitation with one's relatives."²¹³ Conversely, employer-employee relationships are not entitled to constitutional protections of freedom of association.²¹⁴

Non-marital relationships have been held to be entitled to an intermediate level of constitutional protection between those relationships warranting maximum constitutional protection and those requiring no constitutional protections.²¹⁵ The court in *Sullivan v. Meade County Independent School District* was presented with the issue of whether the constitutional rights of an unmarried teacher were violated when she was dismissed from employment for cohabitation with her boyfriend.²¹⁶ The court, employing the intermediate level of scrutiny for this type of association, determined that the teacher's constitutional rights were not violated because the teacher's conduct had a relationship to her fitness to teach.²¹⁷

The other prong of associational freedom involves the "right to associate for the purpose of engaging in those activities protected by the First Amendment such as speech, assembly, petition for the redress of grievances, and the exercise of religion."²¹⁸ A violation of this prong will exist when a secondary or postsecondary educator is compelled "to disclose his every associational tie."²¹⁹ An illustration of such a violation is *Shelton v. Tucker*, where the court held unconstitutional an Arkansas statute that required teachers to disclose any and all organizations with which they had been affiliated within the past five years.²²⁰

E. Equal Protection

Finally, requiring that teachers satisfy certain moral standards in order to maintain employment may infringe upon the teachers' equal protection rights. The guarantee to equal

213. *Roberts*, 468 U.S. at 619.

214. *Id.* at 620.

215. *See id.*; *see also* *Kukla v. Vill. of Antioch*, 647 F. Supp. 799, 808 (N.D. Ill. 1986).

216. 387 F. Supp. at 1238.

217. *Id.* at 1247. Although the *Sullivan* case involved an elementary school teacher, this case could have a potential impact on cases involving secondary and postsecondary educators.

218. *Roberts*, 468 U.S. at 618.

219. *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960).

220. *Id.* at 490.

protection under the law means that "no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty, and property and in their pursuit of happiness."²²¹

A typical scenario involving equal protection challenges for requiring morals clauses for teachers has involved the fundamental right to procreate.²²² This right to procreate usually involves teachers that become parents out of wedlock, as in *Avery v. Homewood City Board of Education*, where a school board discharged an unwed teacher after she informed the board that she was pregnant.²²³ However, the enforcement of morals clauses after a teacher has exercised his or her fundamental right to procreate is not only limited to unwed teachers as the case involving Kelly Romenesko illustrates—as previously discussed in Part IV.²²⁴ No doubt this area of jurisprudence will be expanded as contractual morals clauses proliferate as conditions of secondary and postsecondary education.

VII. CONCLUSION

Morals clauses are regularly enforced upon teachers of secondary and postsecondary schools through state statutes. However, these clauses are occasionally created through contractual provisions where the teacher agrees to comply with prescribed moral standards. In certain instances, morals clauses can benefit all of the parties involved in the educational process such as a situation where it is used to protect students from environments where teachers misuse their power to commit criminal or harmful acts against the students. Also, morals clauses can act as protectors of the reputation of the

221. *Purifoy v. State Bd. of Educ.*, 106 Cal. Rptr. 201, 206-07 (Cal. Ct. App. 1973).

222. See, e.g., *Avery v. Homewood City Bd. of Educ.*, 674 F.2d 337, 342 (5th Cir. 1982) (holding that the district court should have determined whether a school board had proven by a preponderance of the evidence that they would have discharged a teacher even in the absence of the impermissible ground for discharge, which was that she had an out of wedlock pregnancy); *Andrews v. Drew Mun. Separate Sch. Dist.*, 507 F.2d 611, 613-14 (5th Cir. 1975) (holding that a school district's employment rule against employing female parents of illegitimate children without any exceptions violated the Equal Protection clause); Roland, *supra* note 6, at A1; Ventura, *supra* note 98, at 6.

223. *Avery*, 647 F.2d at 337.

224. Squires, *supra* note 103, at 1A.

teaching profession and as protectors of the financial interests of schools.

Nevertheless, morals clauses can significantly limit a teacher's activity including activity conducted in their private lives. The vexing question of whether a teacher bargained for an around the clock job as a role model has been posed with differing responses. Some would argue that the right to delve into the personal lives of teachers comes concomitantly with the job itself since they serve as role models to the students. On the other hand, others would argue that the right to limit a teacher's behavior should end when the teacher leaves the school grounds.

No matter which position is taken, courts will not uphold a morals clause that violates a teacher's constitutional rights, such as the rights to due process, privacy, freedom of speech, freedom of association, and equal protection. Given the constitutional implications that can arise, schools must proceed cautiously when enforcing morals clauses and moral-based polices against secondary and postsecondary educators.