Secretly Falling in Love: America's Love Affair with Controlling the Hearts and Minds of Public School Teachers

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I. INTRODUCTION

American schools began as Protestant institutions and for many decades, teaching was almost exclusively a female profession. The Christian origins of schools’ rigid gender roles and obsolete legal doctrines combined to create a stringent moral code for teachers that regulated highly personal aspects of a teacher’s private conduct. For instance, a typical early 20th century teaching contract forbade female teachers from riding in cars with men who were not their relatives, secretly marrying, or falling in love.

The history of American schools is largely a history of a Protestant institution. While modern schools are increasingly secular, the Protestant influences persist. Major curriculum and student conduct battles were fought in the last century so that now, any hint of religion is regarded as suspicious in public schools. However, Judeo-Christian standards of moral conduct have continued to control the private lives of public school teachers.

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5. See, e.g., id. at 851–54.
For instance, recently, a Florida teacher started his class by performing a thirty-second magic trick. He thought it would be a good way to get the students’ attention, but he was discharged after parents accused him of “wizardry.” In Arizona, a local news station aired a segment encouraging parents to conduct their own cyber-sleuthing to discover as much as possible about the private lives of their children’s teachers.

In 1890, when modern technology was in its infancy, Justice Brandeis cautioned that “numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’” But respect for teachers’ privacy has lagged behind respect for other citizens’ privacy because of the long history of community-prescribed conduct and identity for teachers. And today, communities can monitor their teachers in infinite ways.

Recent technological advances like the Internet have ushered in a new era of public scrutiny of the private lives of school teachers, marked by the ease of obtaining information. Now teachers are facing renewed intrusions into their private lives from parents and community members seeking to monitor their private, off-duty conduct, through the use of the social networking web sites, online public records, and drug testing requirements.

Justifying encroachment on teachers’ privacy rights because teachers are expected to act as role models is not only an historical problem. Even in this era of increasing recognition of individual liberty and privacy, the public continually circumscribes teachers’ private conduct as new social problems manifest in public schools.

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8. Id.
This article explores restrictions on teachers’ lives in the historical context of American public schools as religious institutions created to inculcate children with Christian values, teaching as an historically female profession, and America’s information-addicted culture in which citizens have come to demand, in fact, feel entitled to increasing amounts of information about teachers’ private conduct.

Section I offers an historical perspective on how the Protestant foundation of American public schools, the feminization of teaching, and women’s lack of legal identity contributed to a stringent moral code for teachers which regulated many aspects of their private lives. Section II discusses the Morrison nexus requirement that mandates disciplinary agencies make a fitness-to-teach determination before discharging teachers for immoral conduct. Section III argues that courts have not lived up to the promise Morrison offered, especially when the notoriety of the teachers’ alleged conduct satisfies the nexus requirement. Section IV argues that continuing to allow community control over teachers’ private lives hinders legitimate pedagogical goals of teaching tolerance in our increasingly secular and pluralistic society and puts schools officials at risk of violating teachers’ constitutional rights.

II. EARLY AMERICAN PUBLIC SCHOOLS AND THE MORAL TEACHER REQUIREMENT

American public schools began as private Protestant institutions created to inculcate Christian values into pilgrim children.\textsuperscript{14} In the modern schools, discerning any trace of these origins is a difficult task,\textsuperscript{15} except for the continued insistence on rigid moral standards for teachers.

A. The Origins of American Public Schools

The term “public schools” arose as a necessity in the nineteenth century to distinguish state-run schools from the progenitor parochial

\textsuperscript{14} See James W. Fraser, Between Church and State: Religion and Public Education in a Multicultural America 10 (1999).

\textsuperscript{15} See, e.g., Lee v. Weisman, 505 U.S. 577, 599 (1992) (holding nonsectarian invocation at a school’s graduation exercises violated Establishment Clause); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963) (holding Pennsylvania statute requiring schools to begin each school day with the Lord’s Prayer and a Bible reading violated the Establishment Clause); Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding New York law requiring schools children to recite a nonsectarian prayer at the start of each school day violated the Establishment Clause).
schools. The earliest schools primarily functioned as a means to indoctrinate the colonies’ children in the founders’ theology. For example, the Virginia Charter prescribed that the Christian faith must be “preached, planted, and used . . .” The state neither established nor managed Virginia’s schools; however, the legislature passed a law imposing civil fines for not “indoctrinating” one’s children and servants. Because religious training was the primary purpose of schools, who taught the children was just as important as what was being taught and this was especially true in the early colonial period.

I. The Early Colonial Period the 1780s–1830

Historian James Fraser studied the origin of American schools and noted no secular schools were operated until the nineteenth century. He noted the earliest legislation creating schools entertained no separation of church and state and all schools were founded with a religious purpose. For example, in 1787, Congress passed the Northwest Ordinance, which stated that because “religion, morality, and knowledge” were necessary to “good government” and, therefore, “schools and the means of education shall forever be encouraged.”

Additionally, individual colonies made similar policy statements about the religious purpose of schools. For example, the Massachusetts colony passed a law requiring a school in every town with more than fifty homesteads to counteract the “chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures . . .” The religious influence of the earliest schools persisted into the common schools era.

16. See Fraser, supra note 14, at 27 (contrasting Horace Mann’s vision of a “noble system of Free Schools for the whole people” with “that rival system of Parochial or Sectarian Schools”).
17. See id. at 15.
18. Id. at 15 (quoting Sidney Mead, The Lively Experiment: The Shaping of Christianity in America 17 (1963)).
19. See id. at 11.
22. Id. at 10–11.
23. Id. at 23 (quoting Northwest Ordinance, § 14, art. 3 (1787)) (emphasis added).
25. Fraser, supra note 14, at 10.
26. See, e.g., Greenawalt, supra note 20, at 14.
One of the main functions of the early public schools was to establish a Protestant culture in the American colonies. Schools were primarily Protestant institutions. Indeed, pilgrims specifically built the first schools to raise a new generation of adherents who could carry on the religious traditions of the colonists. The question was not whether religion would be integral to the schools, but rather, which religious sect would control the schools.

2. The Development of the Common Schools: The 1830s and Beyond

School reformer, Horace Mann, was at the center of the religion in public schools debate. He was the architect of the modern American school system and coined the term “common schools.” Mann sought to devise a system of nonsectarian, Protestant public schools for all of Massachusetts. Religious historian Winthrop Hudson called the common schools the “new Protestant establishment” because “schools fulfilled many of the roles that were previously assigned to the established church.” Mann was wary of the political pitfalls involved in trying to persuade individual Protestant sects to give up their small schools and buy into a state-wide non denominational school system. Mann assured that the common schools would inculcate religious and moral values, and to mollify his critics, he advocated reading the Bible without a sectarian interpretation.

Some critics called Mann’s policy “questionable” and insisted that moral training and values inculcation were rights “exclusively and jealously reserved by our laws to every parent . . . .” For the most part, however, the disagreement was between various orthodoxies, each

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27. See Fraser, supra note 14, at 23–24.
28. See id.
29. See id.
31. See Fraser, supra note 14, at 25.
32. Id.
33. Id. at 45 (quoting Winthrop Hudson, The Great Tradition of the American Churches 108 (1963)).
34. See id. at 26.
35. Id. at 26. Fraser described Massachusetts in the early 1800s as a religiously diverse state with Baptists, Methodists, Catholics, Protestants, Calvinists, and Episcopalians all represented. Id. at 28–29.
36. Id. at 30.
resenting Mann’s desire to “establish a genial Unitarian faith” using the common school system.\(^{37}\)

Although Mann had his detractors, he had powerful allies too. Chief among them were Evangelical Christians who placed themselves in the forefront of developing American schools in the nineteenth century.\(^{38}\) As historians David Tyack and Elisabeth Hanson concluded, “[T]he common-school crusaders regarded themselves as God’s chosen agents.”\(^{39}\) Fraser also confirmed the Evangelical Protestant ministers and their congregations “worked enthusiastically” to support the creation of the public schools\(^{40}\) and argued this enthusiasm was linked to their “confidence in the Protestant nature of the public school movement.”\(^{41}\)

Mann and his evangelical allies were eventually successful, and the American common schools idea became a reality nationwide by the 1880s.\(^{42}\) The common schools flourished, especially in the prairies during America’s westward expansion, and became an edifying and unifying force in American history.\(^{43}\)

A national textbook, McGuffey’s readers, and the ideal of a moral and chaste female school teacher\(^{44}\) were the chief unifying forces among the schools in the developmental period. McGuffey’s Readers were the “most consistent element in the mid- to late- nineteenth century common schools classrooms. . . . [McGuffey’s Readers] were handbooks of the common morality, testaments to the Protestant virtues.”\(^{45}\) According to the McGuffey Museum, more than 122 million copies of the Readers

\(^{37}\) Id. at 28. See also, DAVID TYACK & ELISABETH HANSOT, MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820–1980, 61 (1982) (describing Catholic leaders’ opposition to Mann’s vision of a Protestant Unitarian school system).

\(^{38}\) See, e.g., GREENAWALT, supra note 20, at 13–23.


\(^{40}\) See FRASER, supra note 14, at 33.

\(^{41}\) Id.

\(^{42}\) See MARY HURLBURT CORDIER, SCHOOLWOMEN OF THE PRAIRIES AND PLAINS (1992) (describing the considerable presence and organization of common schools on the Western frontier by the 1880s).

\(^{43}\) See JAMES DAVISON HUNTER, DEATH OF CHARACTER: MORAL EDUCATION IN AN AGE WITHOUT GOOD OR EVIL 40 (2000) (noting that interdenominational cooperation was absolutely necessary to cement community bonds and provide schools on the frontier).

\(^{44}\) See infra Part IIB for a discussion about developing the early female teachers’ identities.

\(^{45}\) FRASER, supra note 14, at 40. See also, NILA BANTON SMITH, AMERICAN READING INSTRUCTION (2002) (noting that McGuffey’s Readers were the most popular readers in nineteenth century America).
were purchased by 1920. The early schoolrooms, with their McGuffey’s Readers, were incubators of virtue and contributed to cultural homogeneity by transmitting to young readers a “white middle-class Protestant morality.” Despite the efficacy of McGuffey’s Readers in creating homogeneous Protestant classroom experiences for America’s public school children, the Protestant influence would eventually wane in the mid-twentieth century when religious groups lost major battles over school prayer and science curriculum. These were acrimonious battles because Protestants had much to lose. For over a century, American public schools had been Protestant institutions.

3. The Modern Era and the Decline of Protestant Influence

The increasing secularization of schools in the twentieth century was threatening to Protestants precisely because schools began as Protestant institutions. However, the waning Protestant influence on curriculum and devotional activities did not correspond with a loosening hold of Protestant values on the public school teachers. Courts have long since insisted on secular curriculum and abolished all forms of school prayer. Nevertheless, school boards still discharge teachers for violating community-determined, Judeo-Christian moral standards.

47. See HUNTER, supra note 43, at 4.
48. See FRASER, supra note 14, at 41.
49. See, e.g., Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (holding as unconstitutional a statute prohibiting teaching Evolutionary theory because it “contrary to the mandate of the First [Amendment]” and violated the Fourteenth Amendment); Engle v. Vitale, 370 U.S. 421, 424 (1962) (holding compulsory prayer in school violates the Establishment Clause).
50. See FRASER, supra note 14, at 47.
51. See Moore, supra note 39, at 1581 (noting secularization of American schools actually began with the pan-denominational common schools movement).
52. See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315–16 (2000) (holding that a democratically elected student prayer leader could not offer prayer at the start of high school football games, even if a majority of the students had voted for such prayer at any given game); Lee v. Weisman, 505 U.S. 577, 599 (1992) (holding a nonsectarian prayer spoken at a high school graduation violated the establishment clause in part because it was coercive because, given the importance of the event, not attending the high school graduation to avoid the prayer was no real choice); Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (holding that a moment of silence at the beginning of each school day for voluntary prayer or meditation was a coercive establishment of religion).
53. See, e.g., Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1291 (C.D. Utah 1998) (reinstating teacher after the school board discharged her for answering affirmatively when a student asked whether she was gay).
However, the Christian origins of the public schools are only one factor in the development of the moral codes for teachers’ private lives. Historically, teaching has been a female profession and the social and legal treatment of women contributed to these moral codes at least as much as schools’ Christian origins.\textsuperscript{54}

B. Developing the Identity of the Public School Teacher

Most early American public school teachers were women. Between 1870 and 1900, the number of female teachers grew until three-fourths of all school teachers were women.\textsuperscript{55} Public school reformers who sought to develop a nationwide system of free public schools tapped into the largely under-utilized resource of female workers, willing to work for little or no pay.\textsuperscript{56} Because these earliest teachers were predominately female, the architects of the school system felt permitted to create an identity for the public school teacher\textsuperscript{57}

1. The Model Teacher: Self-Sacrificing, Patient, Docile, and Female

The schools’ early religious purpose necessitated strict moral codes and dictated qualifications of teachers, the majority of whom were women.\textsuperscript{58} “The ideal school teacher of the mid 1800s . . . was an educated, un-married [sic] lady who was ‘already qualified intellectually to teach, and possessed of missionary zeal and benevolence . . . .’”\textsuperscript{59} Additionally, the founders of the school system purposely promoted the identity of the school teacher as a woman who “embodied self-sacrifice, sentimentality, patience, and docility.”\textsuperscript{60} These qualities enabled reformers to build schools “on the backs of women while simultaneously appearing to assist women’s progress toward economic opportunity.”\textsuperscript{61}


\textsuperscript{56} See id at 27.

\textsuperscript{57} Id.

\textsuperscript{58} See, e.g., EDWARDS, supra note 54.

\textsuperscript{59} CORDIER, supra note 42, at 29 (quoting CATHERINE BEECHER, ADDRESS ON THE EVILS SUFFERED BY AMERICAN WOMEN AND AMERICAN CHILDREN, 1846, in WOMAN’S “TRUE” PROFESSION: VOICES FROM THE HISTORY OF TEACHING 51 (Florence Howe & John A. Rothermich eds., 1981)).

\textsuperscript{60} CARTER, supra note 55, at 27 (quoting Jill K. CONWAY, POLITICS, PEDAGOGY AND GENDER, 116 DAEDALUS 137, 150–51 (1987)).

\textsuperscript{61} Id.
According to Patricia Carter, by 1850, hiring female teachers was “the answer to escalating school enrollments and reluctant taxpayers. School leaders counted on women’s social consciousness, passivity and sense of duty to God and country to subdue their desire for equitable salaries.” Further more, the Civil War created a shortage of male teachers, thereby creating another reason to hire female teachers.

Immediately prior to the Civil War, while school masters enlisted, the population of female teachers escalated sharply, and when the men returned from war, they were uninterested in what had become the low paying woman’s work of the teaching profession. Carter suggests the classification of teaching as women’s work justified the community-created identity of the female, moral school teacher and was another incident of the patriarchy that governed all aspects of women’s lives in that era.

Carter’s feminist exploration of the lives of early teachers concluded that the lack of social equality for women ensured the “ghettoization of women’s work-lives and the suppression of their wages.” The fact that many more women sought teaching positions than were available was also a contributing factor to pay inequality between occupations traditionally held by men and those traditionally held by women. Those males who were teachers received substantially more pay than female teachers. School boards justified this gross lack of parity by rationalizing that male teachers were actually in training for future administrative positions. Additionally, traditional gender roles created the presumption that male teachers had the burden of supporting their families, while burdening women with such responsibility was inconceivable.

Women were not in leadership positions in any sphere of life and, therefore, were unable to affect pay inequality or shape the standards of conduct for the nascent teaching profession. Mary Cordier observed that “definitions of teacher and womanhood of the late nineteenth and early twentieth centuries rarely included leadership and administrative

62. Id. at 36.
63. See Cordier, supra note 42, at 25.
64. See id.
66. Id. at 5.
67. Id. at 4–5.
68. See id. at 14.
69. Id.
70. See id. at 19.
71. See Cordier, supra note 42, at 27.
ability outside the home . . . .”72 These entrenched gender roles made women’s ability to mature into administrative or decision-making roles within the schools difficult.73 One state education official recognized this problem as early as 1901, reporting that “more than ninety-five per cent of the teaching . . . is done by women, and more than ninety-five per cent of the administration and leadership is by men.”74

Teaching became defined as a female profession in part because it was one of the only jobs available to women, given the labor market and gender roles that limited a woman’s influence outside the home.75 If a woman was employed, she was likely employed as a teacher.76 In Iowa for example between 1880 and 1882, thirty-five per cent of all female workers were teachers.77

Just as gender was a salient characteristic of early teachers, so was their marital status. Strong fiscal motives induced schools to primarily employ unmarried women.78 Schools routinely paid unmarried women less than men because unmarried women were thought to bear only the burden of supporting themselves, while married men had to support their entire family.79 Schools employed far fewer married women because society believed they belonged in the home with their husbands and children.80 Lower pay for female teachers “subsidized the education of children while upholding a canon of womanhood.”81 This canon, of course, was based on the belief that women were selfless, externally oriented, and expected to sacrifice for the good of her husband, family, or community.82

Pay inequality and restrictions on marital status represent the context in which the earliest female teachers found themselves entering the workforce. They acquiesced to employment contracts that denied them

72. Id. at 35.
73. See id.
74. Id. at 37 (quoting Seventeenth Biennial Report of the State Superintendent of Public Instruction of the State of Nebraska for the Years 1901–1902, at 134 (1903)).
75. See id. at 26.
76. See id. at 28.
77. Id.
78. See, e.g., Cordier, supra note 42, at 34 (noting Horace Mann promoted the ideas that “most women teachers were or should be unmarried” and female teachers “should be paid less than men teachers who might have a family to support”).
79. See id. at 19.
80. See id. at 27.
81. Id. at 19.
82. See, e.g., Edwards, supra note 54, at 8.
privacy, shaped their public identity, and imposed a stringent moral code upon them.

2. Early Female Teachers’ Lack of Legal Identity Created Community Ownership of the Teacher

Margot Mendelson wrote that law is a “creative force, constructing and imposing identities and experiences.” In her study exploring the impact of immigration, domestic violence, and driver’s licensing laws on undocumented battered women in California, she concluded law not only shapes women’s legal identities, but also their relationships, entitlements, and opportunities. This likely was true for female teachers throughout the history of American schools as well.

The earliest teachers were predominately female and lacked any real influence outside of the traditional female sphere of home and hearth. Three obsolete legal doctrines of male-only suffrage, coverture, and the marital rape exemption highlight this point by illustrating how early female teachers lacked agency, autonomy, and protection under the law.

a. Suffrage denied meant women could not shape the laws that governed them

Male-only suffrage is an example of women’s lack of agency during the developmental period of American public schools. Women did not succeed in winning the right to vote until 1920, and earlier arguments based on the Fourteenth Amendment failed; therefore, for much of the history of American schools, the majority of the people charged with teaching and inculcating community values were unable to meaningful-

84. Id. at 206, 211–12.
85. See Cordier, supra note 42, at 27 (noting that teaching was one of the means women were able to expand their sphere of influence “beyond the confines of the home”).
86. See Mendelson, supra note 83, at 139 (noting “social structures construct identities and shape the lives of individuals on whom those identities are conferred”).
87. See, e.g., Carter, supra note 55, at 79-81 (discussing female teachers’ inability to gain even local suffrage or impact school board elections).
88. See Minor v. Happersett, 88 U.S. 162, 178 (1875) (recognizing that women born on American soil are citizens but that the privileges and immunities guaranteed to her under the Fourteenth Amendment did not translate into a right to vote).
ly participate in the political processes that debated and codified those values. This denial of meaningful participation translated into a lack of control over their public lives and working conditions and manifested itself in the stringent moral codes regulating off-duty conduct.

However, the connection between suffrage, school teachers, and the restrictions on their private lives is more complicated than it would seem. In some localities, women could vote and vie for school board positions but this occurred in an overwhelming minority of school districts.

Although these local voting rights acknowledged in a small way that women could influence life outside of the home, the effect was not far reaching because the schoolhouse was seen simply as an extension of the nursery. Therefore, female influence over policy and practice in the schoolhouse was compatible with the predominant view of women as belonging in, and being capable of managing only matters of the hearth and home.

Unfortunately, even the suffragists arguing for an expansive view of women’s role in society may have contributed to the creation of strict moral codes imposed upon teachers. Many teachers were reformers and suffragists, and while those teacher-activists were not passive subjects of the patriarchy, they often used “the moral edge of motherhood” to argue

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89. See, e.g., Patricia Carter, Becoming the ‘New Women’: The Equal Rights Campaigns of New York City Schoolteachers 1900–1920, in The Teacher’s Voice: A Social History of Teaching in Twentieth Century America 40, 43 (Richard J. Altenbaugh ed., 1992) (noting that nineteenth century female teachers were generally unable to influence working conditions or pay equality through their professional associations, and because of their organizing, faced being terminated, demoted or ostracized).

90. See, e.g., David Sadker & Ellen S. Silber, Gender in the Classroom: Foundations, Skills, Methods, and Strategies Across the Curriculum 4–5 (2007). Miller and Sadker excerpted a North Carolina teacher contract from 1920:

   I promise to not go out with any young man except as it may be necessary to stimulate Sunday School work. I promise not to fall in love, become engaged or secretly married. I promise to remember I owe a duty to the town people who are paying my wages, that I owe respect to the school board and the superintendent that hired me, and that I shall at all times consider myself the willing servant of the school board and townspeople.

   (quoting Charles R. Kniker & Natalie A. Naylor, Teaching Today and Tomorrow 20 (1981)).

91. See Carter, supra note 55, at 80.

92. See id. at 81 (noting also that although “school suffrage . . . introduced the concept of women as political beings” the net effect was not large, in part because of a complicated voter qualification process).

for an expanded role in society. "As mothers, they argued they had a right and obligation to ensure a proper education for their children." Ultimately, using the maternal role as a form of leverage to demand the vote likely had the effect of entrenching the idea of women as the moral mentors of children and teachers as substitute mothers.

Not all female teachers were suffragists, however, and one of the most influential public school architects viewed women’s role as purveyor of Christian morals as properly limited to the home and school. Catharine Beecher was one of the leading public school reformers and she was opposed to women’s suffrage. The title of one of her books proclaims as much: Woman’s Profession As Mother and Educator: With Views in Opposition to Woman’s Suffrage. In her 1875 book, Beecher argued female suffrage was “contrary to the customs of the Christian people” and women were suited only for the “lighter labor and care of the family state.” The roles of homemaker and school teacher were so unified in Beecher’s mind that she thought every teacher who “train[ed] her pupils to value home labor and to do all woman’s proper work in the best manner” was exemplary.

The lack of suffrage, however, was not the only operative force in relegating teachers to selfless lives of public scrutiny. For example, the doctrine of coverture was an equally powerful force in early female teachers’ lives because coverture resulted in married women’s contractual incapacity and inability to own property.

b. Coverture and the inability to contract often precluded hiring married female teachers

The disability imposed on women by coverture is another example of the lack of women’s separate identity. One scholar aptly summarized the doctrine, “[A]n adult single woman could own, manage and transfer property . . . sue and be sued . . . earn money and enjoy it as her own.”

94. See CARTER, supra note 55, at 81.
95. See id. at 81.
96. See id. at 79–80 (discussing female teachers’ unsuccessful use of the “moral edge” to gain local suffrage and positions on school boards).
97. See CATHARINE E. BEECHER, WOMAN’S PROFESSION AS MOTHER AND EDUCATOR: WITH VIEWS IN OPPOSITION TO WOMAN SUFFRAGE (1878).
98. Id. at 1.
99. Id. at 5.
100. Id. at 56.
However, once she married, “coverture subsumed her legal identity into her husband’s.”

A married woman was not capable of making contracts that bound herself or her husband without her husband’s consent. This was thought to be an extension of the natural law that held the “paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother.” The idea that a wife would have a career independent from her rightful place in her husband’s home was “repugnant,” and women’s work outside the home was seen as temporary and contingent upon her having no familial obligations.

Only in the late twentieth century did state legislatures begin to abrogate coverture; this “archaic remnant of a primitive caste system” perpetuated by the “common-law fiction that the husband and wife are one.” Because coverture was so extensively established, early female school teachers were affected by the reality that if they married, they would lose their autonomy and legal personhood. This undoubtedly affected the way the early teachers thought of themselves and denied them a sense of agency in separating their private and public lives. While coverture and male-only suffrage denied the early female teachers a sense of identity and agency, the law also failed to protect them from the most personal of invasions and codified the view of women as objects.

c. The marital rape exemption as another incident of ownership

The lack of legal identity was not limited to property ownership, but rather, women themselves could be owned in a way. Husbands could not

102. Id.
103. See Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (holding the Equal Protection Clause did not require women to be admitted to the Illinois Bar).
104. Id. at 141 (“[A] married woman is incapable, without her husband’s consent, of making contracts which shall be binding on her or him.”).
105. See, e.g., id. at 114. (“The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.”).
106. CORDIER, supra note 42, at 88.
108. See CARTER, supra note 55, at 100 (discussing cases in which courts upheld the dismissal of female teachers based on their status as married women).
109. See Mendelson, supra note 83, at 140 (discussing the development of identity for women in the multidimensional context of legal personhood and social constructs).
110. Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88 CAL. L. REV. 1373, 1379 (2002) (“[W]omen’s subordination was ultimately rooted in the structure of marital relations . . . .”)

be prosecuted for raping their wives because of the marital exemption.\textsuperscript{111} Jill Hasday, a scholar who examined the intersection of suffrage, coverture, and marital rape wrote that the marital rape exemption was an “instrument of women’s legal subordination.”\textsuperscript{112} Still another feminist historian, Lisa Eskow, wrote that the Judeo-Christian tradition allowed for the acquisition of wives by purchase, rape, or contract.\textsuperscript{113} This is likely the origin of the marital exemption\textsuperscript{114} and the reason legislatures and courts did not recognize the crime of spousal rape until the late twentieth century.\textsuperscript{115}

By marrying, a woman’s consent to sexual contact with her husband was “irrevocable.”\textsuperscript{116} Society did not believe a married woman was capable of denying consent.\textsuperscript{117} It was not hers to give because she was, in a sense, her husband’s property.\textsuperscript{118} The experience of being owned and defined by patriarchy was familiar to early female teachers and likely contributed to their acquiescence to being owned and defined as school teachers by the public at large.

Patriarchy can be seen in these three obsolete legal doctrines that reflected the codification of the archaic, Christian gender roles operative in the earliest teachers’ lives. Patricia Carter described patriarchy as “rule by the fathers.”\textsuperscript{119} Patriarchy in American history meant women developed no sense of autonomy or separate identity apart from their socially prescribed gender roles of daughter, wife, or mother.\textsuperscript{120} This sense of being owned by the husband or father, which is at the heart of patriarchy,\textsuperscript{121} facilitated the transition from being owned privately as wives and daughters to being owned publicly as school teachers.\textsuperscript{122}

\begin{itemize}
\item \textsuperscript{111} Id. at 1380.
\item \textsuperscript{112} Id.
\item \textsuperscript{114} See id. at 679 (discussing a father’s property rights and the commodification of the daughter’s chastity).
\item \textsuperscript{115} See, e.g., Merton v. State, 500 So. 2d 1301 (Ala. 1986), abrogated on other grounds by Hawkins v. State, 549 So. 2d 552 (Ala. Crim. App. 1989) (holding the marital rape exemption violates the Equal Protection Clause and conferring the protection of the rape statutes to married and unmarried women alike).
\item \textsuperscript{116} Eskow, supra note 113, at 680.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} Carter, supra note 55, at 30 (noting from the beginning, schools were patriarchal structures that perpetuated women’s subservient role).
\item \textsuperscript{120} Id.
\item \textsuperscript{121} See id. at 31.
\item \textsuperscript{122} See id. at 30–31 (but also noting the possibility that “at least some teachers reproduce and accommodate the hegemony while also questioning, resisting, and trying to change it”).
\end{itemize}
Female teachers entered the world without separate identity, but quickly found society had imposed upon them an identity of the chaste, moral, and self-sacrificing woman school teacher. The community, however, did respect this persona, viewing teachers as role models and community leaders.

3. The teacher as a community leader and public figure

At least some evidence shows that some female teachers happily accepted their role as moral leaders held to a higher standard. For example, in her book on the history of women educators, Mary Hurlburt Cordier excerpted the resolution of the 1860 Teachers’ Class of Osceola, Iowa. That resolution acknowledged “a good education” is the “surest means of . . . elevating morals” and teaching is a profession “second to none in importance, influence, and responsibility . . . .” Additionally, diaries and correspondence of early teachers of the plains and prairies from the years 1860–1920 revealed many of these women acknowledged their status as leaders and found that teaching traditional subjects, as well as Christian values, was a “moral imperative” and a higher calling.

In many rural localities, the schoolhouse served as a gathering place for a variety of social and political programming for all residents and was the center of community activity. Therefore, viewing the woman in charge of and at the center of this institution as a moral role model, charged with the task of shaping young minds was natural. For example, Cordier noted, “Because communities expected teachers to live exemplary lives, they were forbidden to court or to marry in some parts of the United States.”

In addition, the school teacher was likely one of the only educated persons in rural towns and, therefore, she was also considered a role model. The teacher became almost a public figure because of her

123. Cordier, supra note 42, at 34.
124. Id. at 32.
125. Id.
126. Id.
127. Id.
128. Id. at 175–76 (quoting the diary and correspondence of Sara Jane Price, a teacher who taught in Ohio, Indiana, Iowa, and Nebraska during the years 1841–1920).
129. Id. at 11.
130. Id. at 34.
131. Id.
132. Id. at 32.
status as an educated person who was charged with the important task of inculcating morals.\textsuperscript{133} Cordier illustrated how issues of public concern became centered in the school house: “The children and the teacher were neighbors and often part of the same extended family, thus family and community concerns and mores were part of the school setting along with the charge to teach reading, writing, and arithmetic.”\textsuperscript{134}

Not surprisingly, female teachers have experienced the largest impact of moral standards held for teachers in general. Unfortunately, disciplinary actions, such as dismissing female teachers for being pregnant, unmarried and unwilling to resign\textsuperscript{135} and cohabitating with a member of the opposite sex,\textsuperscript{136} garnered judicial approval well into the late 1970s. Homosexual teachers have also borne the brunt public morality enforced against private conduct. But with a 1969 landmark California case, \textit{Morrison v. State Board of Education},\textsuperscript{137} involving a gay teacher discharged for “immoral conduct,” courts began to acknowledge teachers’ privacy and due process rights.\textsuperscript{138}

\section*{III. THE CURRENT STANDARD FOR TEACHER DISCHARGE CASES—\textit{Morrison}’S \textsuperscript{139} NEXUS REQUIREMENT}

We require something more than pedagogical excellence from our public teachers, in part, because most people still feel that teachers should be role models who provide “character education.”\textsuperscript{140} Courts have also endorsed the conception of teachers as “leaders and role models” who, because of their educational status, have “the duty to implant basic

\footnotesize{133. \textit{Id.} at 34.} \\
\footnotesize{134. \textit{Id.} at 30.} \\
\footnotesize{135. \textit{See} Brown v. Bathke, 416 F. Supp. 1194 (D. Neb. 1976), \textit{rev’d}, 566 F.2d 588 (8th Cir. 1977).} While the Nebraska district court determined the board of education was allowed to consider the plaintiff’s out-of-wedlock pregnancy as an appropriate reason for discontinuing her employment, 416 F. Supp. at 1198–99, the Eighth Circuit did not address the issue, 566 F.2d at 591. \\
\footnotesize{136. \textit{See} Sullivan v. Meade Indep. Sch. Dist., 530 F.2d 799 (8th Cir. 1976).} \\
\footnotesize{137. 461 P.2d 375, 394 (Cal. 1969).} \\
\footnotesize{138. \textit{Id.}} \\
\footnotesize{139. \textit{Id.}} \\
\footnotesize{140. \textit{See} Jason R. Fulmer, \textit{Dismissing the “Immoral” Teacher for Conduct Outside the Workplace—Do Current Laws Protect the Interests of Both School Authorities and Teachers?}, 31 J.L. \& EDUC. 271 (2002) (discussing the growing popularity of character education and the persistent demand that teachers conduct themselves as moral role models).}
societal values and qualities of good citizenship in their students.” The nineteenth century idea of the teacher as a public figure and role model eventually became codified in statutes and administrative codes, and currently, all states grant power to boards of education to revoke a teacher’s certificate based on immoral conduct or conduct unbefitting a teacher.

Unfortunately for teachers, exactly what a school board considers “immoral conduct” varies with locality and tends to reflect the social and political views of the community in which the school is located. When the community determines what is considered immoral conduct, teachers may not have adequate notice about what conduct will lead to discipline. In 1969, one case started a trend giving more respect for teachers’ privacy by imposing a limiting construction on the term “immoral conduct,” but the decision may have turned out to be an empty promise.

A. Morrison v. State Board of Education

In 1969, the California Supreme Court issued the Morrison decision. Morrison was a landmark case that afforded more protection for teachers’ privacy and due process rights. The opinion advanced the notions that teachers do have private lives outside of school and that the school board must do more than label teachers’ conduct “immoral” before discharging them. These were groundbreaking assertions because they controverted the almost 200 years of developmental histo-
ry of American public schools during which the community defined and
owned the public teacher.

In the *Morrison* decision, the California Supreme Court held that
before teachers are dismissed for immoral conduct, they are “entitled to
a careful and reasoned inquiry into his fitness to teach . . . ”.149 This fit-
ness inquiry created a nexus requirement and imposed a duty on school
boards to link the alleged immoral conduct to teachers’ classroom per-
formance before they can be dismissed.150 To the court, the term
“immoral conduct” was so vague that it offended due process notions of
fairness and constituted an unwarranted intrusion on teachers’ privacy
rights, unless it was given a limiting construction.151 Today, *Morrison*
is widely cited, and a majority of jurisdictions have accepted the nexus
requirement *Morrison* compels.152

1. The Facts

Marc Morrison was a veteran teacher with no complaints against him
when his former male lover, Fred Schneringer, reported their affair to the
superintendent of Morrison’s school district.153 At the superintendent’s
request, Morrison resigned and his teaching credentials were revoked for
immoral conduct.154 Morrison then brought an action against the State
Board of Education for reinstatement of his lifetime teaching credentials.155

Morrison’s alleged immoral conduct was a brief, “limited, non-criminal
physical”156 affair with another male. Morrison’s paramour, Schneringer,
was a married man and friend whom Morrison was counseling during a
period of separation from his wife.157 The court was careful to characterize
the conduct as “non-criminal” to distinguish the offense from sodomy or
exhibitionism.158 This distinction was important because Morrison was
never charged with a crime and conviction of a sexual-related offense

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149. *Id.*
150. See *Id.* at 386–87.
151. *Id.* at 389.
152. See *Fulmer*, *supra* note 140, at 284–85 (noting most jurisdictions follow *Morrison’s*
nexus requirement and conduct a fitness-to-teach determination).
153. 461 P.2d at 378.
154. *Id.*
155. *Id.* at 377.
156. *Id.* at 378.
157. *Id.* at 377.
158. *Id.* at 377 n.4.
would have undermined Morrison’s due process claim, resulting in an automatic revocation of his license to teach.\textsuperscript{159}

The court took pains not to signal approbation of homosexuality while simultaneously minimizing Morrison’s homosexual conduct. This is evident in what the court presented as key facts: (1) the affair was brief—one week long; (2) Morrison had neither before nor since had “any abnormal activities or desires;”\textsuperscript{160} and (3) Morrison and Schneringer had met on numerous occasions after the affair and “nothing untoward occurred.”\textsuperscript{161} The court also relied on the fact that Morrison later suggested women Schneringer could date once he became separated from his wife.\textsuperscript{162} Despite the court’s efforts to minimize Morrison’s homosexual conduct, it still carefully considered his facial attack on the education code and ultimately found the statute was not unconstitutionally vague when narrowly construed to include only immoral conduct that impacts a teacher’s fitness to teach.\textsuperscript{163}

\textbf{2. Teacher Morrison’s Privacy Rights}

The court acknowledged that investigation and dismissal for private conduct, considered by some to be immoral, could result in an unlawful invasion of a teacher’s privacy.\textsuperscript{164} Signaling an interest in protecting teachers’ privacy, the court noted, “It is true that an unqualified proscription against immoral conduct would raise serious constitutional problems.”\textsuperscript{165} The court reasoned unless it narrowly construed the statute to include only conduct that impacts teachers’ job performance, school officials “might be inclined to probe into the private life of each and every teacher, no matter how exemplary his classroom conduct.”\textsuperscript{166} Further, the court recognized without limiting the statutory construction, school officials might “search for ‘telltale signs’ of immorality in violation of the teacher’s constitutional rights.”\textsuperscript{167}

\textsuperscript{159} Id. (noting that “[c]onviction of certain sex crimes entails automatic dismissal”).
\textsuperscript{160} Id. at 378.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 387–89.
\textsuperscript{164} Id. at 390.
\textsuperscript{165} Id. (emphasis added).
\textsuperscript{166} Id.
\textsuperscript{167} Id. (citing Griswold v. Connecticut, 389 U.S. 471 (1965)).
Relying on earlier precedent, the court quoted *Jarvella v. Willoughby-Eastlake School District*,\(^{168}\) for the proposition that a public school teacher’s “freedom of action” could be “partly hedged by . . . his [teaching] contract,” but that does not mean the teacher “waives his right to privacy, his right [to be] free from unwarranted intrusion.”\(^{169}\)

To bolster the assertion that the potential privacy intrusion cannot be based on an abstract notion of immorality, the court quoted *Norton v. Macy*,\(^{170}\) stating that “to enforce the majority’s conventional codes of conduct in the private lives of its employees” is an inappropriate function of bureaucracy and to do so would be “at war with elementary concepts of liberty, privacy, and diversity.”\(^{171}\)

Nevertheless, the court agreed teachers’ privacy interests must be balanced with the public’s interest in competent, qualified teachers, stating, “The limit of a private right is reached where public injury begins.”\(^{172}\) However, in light of considerations of teachers’ due process rights, deciding what exactly may be deemed a public injury is not completely within the discretion of the school officials.\(^{173}\)

### 3. Due Process, the Nexus Requirement, and Fitness to Teach

Teacher Morrison claimed the educational statute that allowed for his discharge for “any act involving moral turpitude”\(^{174}\) was so vague that it violated his due process rights.\(^{175}\) The court agreed with his claim that “terms such as ‘immoral,’ ‘unprofessional,’ and ‘moral turpitude’ constitute only lingual abstractions” unless they are applied to a “specific


\(^{169}\) *Morrison*, 461 P.2d at 391 n.38 (quoting *Jarvella*, 233 N.E.2d at146). In *Jarvella*, the court found that a teacher was wrongfully discharged after an obscene, private letter to an eighteen-year-old, former student was discovered by the student’s mother. The court held that the teacher’s privacy in correspondence was protected by the First, Fourth, Ninth, and Fourteenth Amendments of the United States Constitution. *Jarvella*, 233 N.E.2d at 146.

\(^{170}\) 417 F.2d 1161 (D.C. Cir. 1969).

\(^{171}\) *Morrison*, 461 P.2d at 391 n.38 (quoting *Norton*, 417 F.2d at 1164). In *Norton*, the District of Columbia Circuit Court of Appeals overturned a Civil Service Commission’s decision to terminate an employee for immoral conduct based on his private, off-duty homosexual conduct. *Norton*, 417 F.2d at 1168.

\(^{172}\) *Morrison*, 461 P.2d at 391 n.38 (quoting *Jarvella*, 233 N.E.2d at 146).

\(^{173}\) *Id.* at 377.

\(^{174}\) *Id.* at 377.

\(^{175}\) *Id.* at 387.
occupation and given content by reference to fitness for the performance of that vocation." 176

The court bolstered the vagueness analysis by noting that in America’s pluralistic, secular society, deciding which set of morals to enforce is a difficult task. 177 “Whose morals shall be enforced? There is a tendency to say public morals should be enforced. But that just begs the question. Whose morals are the public’s morals?” 178 The court acknowledged the history of Protestant morals and values that gave rise to the moral teacher ideal and rejected it in favor of a nexus requirement. 179

The court imposed a nexus requirement; it interpreted the statute to contain a limiting construction that imposed a duty on school officials to link the alleged immoral conduct to the teacher’s classroom performance, thereby saving the statute of providing for due process notions of fairness 180 In essence, school boards would now be required to assess the conduct and its impact on classroom performance.

4. Fitness Factors and Notoriety

To help assess and determine teacher conduct and its impact on classroom performance, the court suggested a nonexhaustive list of factors school officials could consider when making a fitness determination, including:

(1) the likelihood that the conduct may have adversely affected 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. 181

176. Id. at 394.
177. See id. at 384.
178. Id. (quoting Robert N. Harris, Jr., Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality, 14 U.C.L.A. L. Rev. 581, 582 (1967)).
179. Id.
180. Id. at 394.
181. Id. at 386–87 (numbering added).
The court stated these eight factors were to assist school officials in “determining whether the teacher’s future classroom performance and overall impact on his students are likely to meet the board’s standards.”

A factor not listed by the *Morrison* court was the notoriety of the alleged immoral conduct. Notoriety is a major issue in teacher termination cases and a source of unfair treatment. Morrison’s conduct was not known in the community so the court did not address this issue. However, the court indicated that if Morrison’s behavior had been significantly well-known in the community, the school board may have legitimately considered that factor in its disciplinary decision.

The court expressed “no opinion” about whether a teacher could be discharged “merely because he persistently and publicly violated important and universally shared community values” because no evidence showed that Morrison’s conduct had “received any publicity prior to the board’s action.” Although the court purported to express no opinion about notoriety as a factor, in the very next line of its opinion, the court left open the possibility that continued “public violation” of “universally shared community values” may be committed in such a manner to “demonstrably . . . handicap his relations with, or control over, his students.” With this statement, the court seemingly created a loophole for school boards to use the notoriety of the conduct as the sole factor in the fitness-to-teach determination so long as the notoriety “demonstrably” affected the classroom performance.

Ultimately Morrison’s case was remanded to the trial court for the application of the “fitness” factors. The result for teacher Morrison is unknown but most courts nationwide require a nexus, apply *Morrison*’s fitness factors, and narrowly construe morality-based educational statutes.

182. Id. However, the court used permissive language indicated that the list was not exhaustive when it stated, “[T]he board may consider such matters as . . . .” Id. at 386.

183. See infra Part IV (discussing notoriety as a determinative factor that creates a way to circumvent *Morrison*’s due process mandates).


185. Id.

186. Id.

187. Id.

188. Id.

189. See id. at 394 (concluding “[f]inally, we do not, of course, hold that homosexuals must be permitted to teach in the public schools of California . . . only that the board properly find, pursuant to the precepts set forth in this opinion, that an individual is not fit to teach”).

190. See Fulmer supra note 140, at 283.
Morrison symbolized a monumental shift in terms of recognizing that teachers do have private lives away from school that cannot be completely regulated by the community. However, Morrison is an empty promise for many teachers in at least two ways. First, a minority of jurisdictions have yet to adopt Morrison’s nexus requirement.\footnote{Id.} Second, even when some courts purport to apply the Morrison factors, the notoriety of an alleged incident sometimes seems to obscure the court’s view of the other Morrison factors.\footnote{See, e.g., Lehto v. Bd. of Educ., 962 A.2d 222, 227 (Del. 2008) (affirming a teacher’s dismissal for sexual contact with a seventeen-year-old because it undermined his role model status and therefore impacted his fitness to teach, not because he may be a pedophile); Thompson v. Sw. Sch. Dist., 483 F. Supp. 1170, 1184 (W.D. Mo. “1980) (reinstating a teacher suspended for notoriously cohabitating because she subsequently married her paramour).} When notoriety is the determinative factor, school boards unwittingly create a “don’t ask, don’t tell, and hope they don’t find out” policy that neither embraces diversity nor respects a teacher’s privacy and due process rights.

IV. MORRISON’S FAILED PROMISE AND THE NOTORIETY FACTOR IN TEACHER DISCHARGE CASES

While Morrison represented a significant advancement in protecting teachers’ privacy and due process rights, the Morrison court may have created a loophole that results in differential treatment for nonconforming teachers based on the amount of publicity or notoriety their conduct garnered.\footnote{See infra Part IV.B.}

Morrison was not a panacea, especially for female teachers, as traditional gender roles continued to govern teacher discipline cases.\footnote{See, e.g., Sullivan v. Meade Indep. Sch. Dist., 530 F.2d 799 (8th Cir. 1976) (discussing school board’s ability to terminate an unmarried female teacher for cohabitating with a male person who was not her husband).} The ideal of the chaste female teacher persisted.\footnote{Id.} Even after Morrison, school boards sometimes successfully discharged female teachers for becoming pregnant while unmarried,\footnote{See Brown v. Bathke, 416 F. Supp. 1194, 1198 (D. Neb. 1976) (holding the school board was “within the realm of propriety” when it determined that allowing a pregnant and unmarried teacher to continue teaching “would be viewed by the students as a condonation by the plaintiff and the school board of pregnancy out of wedlock.”), rev’d on procedural grounds by Brown v. Bathke, 566 F.2d 588, 593 (8th Cir. 1977).} spending the night at a male
friend’s home, cohabitating with a male friend, or divorcing her husband. The commonalities among all of these cases are the notoriety of the conduct and the public’s subsequent outcry.

A. Notoriety As a Basis for Discharge Reflects Historical Insistence on Orthodoxy and Conformity

Unfortunately, courts in some jurisdictions consider the notoriety of the conduct as an indicium of fitness to teach. Their reasoning is that notoriety about an event leads to a fallen role model, and therefore, diminished classroom effectiveness. And classroom efficacy, as Professor Karst has observed, includes the ability to inculcate children with the dominant group’s morals.

When disciplinary agencies rely on the notoriety of a teacher’s alleged behavior as determinative of fitness to teach, however, teachers are transported to the pre-Morrison era when teachers could be summarily discharged because the community loudly disapproved of a teacher’s off-duty behavior. An example of one such case follows.


Kathleen Sullivan, an unmarried female teacher was discharged for notoriously cohabitating with a male friend in a small, rural South Dakota community. The Eighth Circuit held that even though the teacher ultimately offered to move ten miles away from the school, “so much notoriety” had been created that students and parents would “continue to be aware of the situation with the same effect on her classroom teaching.”

198. Sullivan, 530 F.2d 799.
199. Littlejohn v. Rose, 768 F.2d 765 (6th Cir. 1985).
200. See, e.g., Sullivan, 530 F.2d 799.
201. Id.
202. See Kenneth Karst, Law, Cultural Conflict, and the Socialization of Children, 91 CAL. L. REV. 967, 993 (2003) (describing the American public school as a battleground and that those who “capture the schools” are able to assure their group’s “status dominance as the true Americans”).
203. See, e.g., Sullivan, 530 F.2d 799.
204. Id.
205. Id. at 807 n.10 (although her cohabitation was well-known in the community, the school board instituted proceedings only after receiving petitions circulated by a parent, the parent’s minister, and several church members).
206. Id. at 802 n.5.
The court upheld Sullivan’s termination based on the finding that “[t]he personal life engaged in by Miss Sullivan and admitted by her constitutes a bad example for her students who are taught by example as well as by lecture.”207 The court arrived at this conclusion despite evidence that demonstrated her had “generated deep affection from her students,”208 had demonstrated an “overall superior performance,” and the children’s “interest in school and rate of learning had markedly improved” since her arrival at the school.209 Oddly, the school board used Sullivan’s level of connection with her students and superior record against her by arguing she had such great influence over her children that her cohabitation was more harmful to them than if she were less influential.210

In Sullivan, the Morrison nexus requirement was totally eclipsed by considerations of the notoriety of the teacher’s behavior.211 No evidence showed the teacher’s cohabitation had affected her ability to control her classroom;212 the board seemingly based its decision on community protestation.213 The board discharged Sullivan based on Sullivan’s violating a community standard and the speculation that her students would not respect her, not because Sullivan’s conduct actually affected her fitness to teach.214 The court found her continued cohabitation was “likely to cause disciplinary problems in the teacher’s classroom and will affect her ability to teach.”215

The court acknowledged the case raised “difficult constitutional issues” but doubted Sullivan had a right to “live with Mr. Dragon in a nonmarital status.”216 The court seemed more sympathetic to Sullivan’s

207. Id. at 803.
208. Id. at 804.
209. Id.
210. Id. at 807 n.8 (“Several parents testified that their children admired and respected her and were likely to regard her as a role model. Dr. Hague presented expert testimony that emulation was likely.”).
211. See id. (although the opinion below mentioned Morrison’s nexus requirement, Sullivan v. Meade Indep. Sch. Dist., 387 F. Supp. 1237, 1247 (D.S.D. 1975), the appellate opinion contains no discussion of nexus per se).
212. See id. at 804 (noting the students had shown increased interest in school and were learning at a faster rate since Ms. Sullivan’s arrival).
213. Id. at 802 n.5.
214. Id. at 803.
215. Id. (the use of the future tense “will” indicates the speculative nature of the court’s finding) (emphasis added).
216. Id. at 804, 808.
procedural due process claim\textsuperscript{217} than any possible privacy claim, finding she had been afforded a fair hearing and an opportunity to resolve this situation before she was discharged.\textsuperscript{218}

2. Ms. Sullivan’s Notoriety and Defiance: Challenging the Patriarchy

Aside from the fact that the court neither applied any objective criteria nor followed the \textit{Morrison} nexus requirement,\textsuperscript{219} the case is disturbing for at least two other reasons. First, the case demonstrates how the degree of urbanization in a community can affect the notoriety factor. Sullivan taught in a rural area with only 100 people in the school district,\textsuperscript{220} and the board’s expert offered testimony that if Sullivan had been living in a larger municipality, her conduct may not have resulted in her discharge.\textsuperscript{221} This illustrates how a subjective community standard creates a situation in which respect for teachers’ privacy and due process rights depends on whether the school is in a rural or urban area.

Second, \textit{Sullivan} illustrates the backlash teachers can face when they openly violate community norms and do not have the decency to be ashamed of their noncompliance. Both the trial court and the appellate decisions are patriarchal in tone.\textsuperscript{222} Both opinions indicate Ms. Sullivan may have suffered a different fate had she demonstrated the decency to attempt to conceal her cohabitation or express shame about it when confronted.\textsuperscript{223} For example, the court emphasized the fact that Ms. Sullivan

\begin{footnotesize}
\begin{itemize}
\item[217.] See id. at 802 (focusing on the fact that Ms. Sullivan had been given several chances to live apart from her boyfriend and continue teaching before being terminated).
\item[218.] Id. at 808 (“Even assuming that Ms. Sullivan is constitutionally entitled to follow her own lifestyle, the record clearly and unequivocally demonstrates that the members of the school board acted in complete good faith and with concern for Ms. Sullivan’s constitutional rights. Thus, they cannot be held liable for damages.”).
\item[219.] See id. at 799 (neither the word nexus nor fitness appears in the decision). The opinion below, Sullivan v. Meade Indep. Sch. Dist., 387 F. Supp. 1237 (D.S.D. 1975), purported to consider the nexus between Ms. Sullivan’s cohabitation and her ability to teach but ultimately decided the cohabitation was “an affront to moral standards of the Union Center community” and, therefore, related to her teaching because “it sets a bad example for the young impressionable people she is teaching.” Id. at 1247.
\item[220.] Sullivan, 530 F.2d at 802.
\item[221.] Id. at 808 (“If she had been living in Rapid City (a larger town) under these circumstances it would have made a difference how she would have related to her students at Union Center.”) (ellipses omitted).
\item[222.] See, e.g., id. at 801 (characterizing the issue on appeal as “whether the school board violated the constitutional rights of a single young woman elementary teacher” who was discharged because she “insisted upon sharing her dwelling located within the school community with a single man”) (emphasis added).
\item[223.] Missing footnote!
\end{itemize}
\end{footnotesize}
“made no attempt whatsoever to hide [her boyfriend’s] presence from [the school children].” 224 And further, that Ms. Sullivan “freely admitted when asked by any of the members of the community or the School Board, that she was living with Mr. Dragon, and that he was her ‘boy friend’ [sic].” 225

If Ms. Sullivan had been willing to admit she was not living up to the ideal of the chaste school teacher, the court, and the school board may have been more sympathetic. 226 Instead, Ms. Sullivan “[confirmed] her boyfriend was in fact living with her” and had the audacity to insist that her cohabitation was “a matter concerning her private affairs and not subject to the scrutiny of the school authorities.” 227

The school board’s findings also reveal Sullivan’s lack of contrition was a critical factor in its determination. 228 In addition to finding the notorious cohabitation objectionable, the fact that Ms. Sullivan cohabitated “under the claim that it was not wrong to do so” was also highly offensive. 229 The board further found that her lack of shame constituted an “open and public affront to community mores of the rural area of the Meade Independent School District” offensive. 230

Even, as in Sullivan, when courts purport to adhere to Morrison’s nexus requirement and explain they are applying the Morrison factors, the reality is that the notoriety of the teacher’s conduct continues to be a major factor in disciplinary decisions. 231 Aside from the unfairness inherent in being judged by varying community standards, considering noto-
riety as a factor yields surprising and inconsistent results from a child protection standpoint.232

B. Considering Notoriety in the Fitness-to-Teach Determination Results in Illogical and Inconsistent Results

Using the notoriety of a teacher’s conduct to satisfy Morrison’s nexus requirement can yield surprising results. For example, Florida law provides for the discharge of teachers when the immoral conduct is “sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individual’s service in the community.”233 Because schools are used as a tool to inculcate societal values in children and children are the charges of schools, such statutes should be viewed, at least in part, from a child protection perspective. However, courts construing this statute often reach illogical results.

Sometimes conduct that occurs at school and arguably presents a danger to children is not grounds for termination when the conduct is not sufficiently notorious.234 On the other hand, even when children are not involved in the conduct, some courts will uphold terminations based on notoriety alone.235 Furthermore, Morrison is no help for teachers when a

232. Compare Clark v. Sch. Bd., 596 So. 2d 735 (Fla. Dist. Ct. App. 1992) (reversing a teacher’s termination for an alcohol binge and sexual impropriety because the events “were not widely known” and, therefore, the teacher’s “effectiveness in the school system would not have been impaired due to public perception”), with Sherburne v. Sch. Bd., 455 So. 2d 1057, 1060 (Fla. Dist. Ct. App. 1984) (reversing a teacher’s termination for sexual impropriety because “no Board’s witness was able to testify” that the illicit relationship had become “a matter of public knowledge”).


234. See, e.g., McKinney v. Castor, 667 So. 2d 387, 389 (Fla. Dist. Ct. App. 1995) (finding insufficient evidence that an administrator’s conduct of twice soliciting prescription medications at school was “sufficiently notorious” to bring the administrator and the education profession “into public disgrace or disrespect and impair [the administrator’s] service in the community. . . .”) (internal quotations and citation omitted); Tenbroeck v. Castor, 640 So. 2d 164, 164, 167 (Fla. Dist. Ct. App. 1994) (holding that a forty-eight-year-old male teacher could not be terminated for marrying his sixteen-year-old former student because “there [was] no evidence that the two were seen together in public until after their marriage,” rather, the court only found that several witnesses were able to testify to having seen the teacher and student “together an unusual amount of the time . . . and that this caused the teachers and administrators at [the school] to suspect wrongdoing”).

235. See, e.g., Hoffman v. State Bd. of Educ., 763 N.E.2d 210, 212 (Ohio Ct. App. 2001) (upholding discharge for a teacher’s consensual sexual contact in an adult bookstore although the “incident did not occur on school grounds, during school hours or involve students, it received media attention and impacted his professional life”).
trial court’s failure to apply *Morrison*’s nexus requirement is remedied by the appellate court supplying a nexus post hoc.236

However, notoriety can cut in favor of the teacher, which could yield inconsistent results among jurisdictions.237 Some teachers advocate for themselves by garnering community support. When courts are willing to consider notoriety as a positive factor, the emphasis incorrectly remains on public opinion, rather than child protection considerations.238

In addition to inconsistent, illogical results, notoriety cases also illustrate the subjectivity of the term immoral. Immoral is defined as “contrary to the welfare of the general public.”239 But this definition begs the question, “What conduct can be deemed hostile to the welfare of the general public?” Conduct not in conformity with a community’s traditional gender and sexual norms could be deemed hostile to the welfare of the general public simply because it makes some people uncomfortable and forces parents and school administrators to acknowledge the diversity that exists across all human populations. One scholar, Rachel Knight, believes this to be the operative factor.240 Knight studied cases of public employees in role model positions who were discharged for immoral conduct.241 She determined that “the rhetoric of protecting children from corruption is merely a pretext for the project of protecting adults’ rigid senses of morality and appropriate behavior,” and in the end, role models are used for social control purposes rather than “as a way of inspiring and motivating youth.”242

The notoriety cases are problematic too because they assume damage to a teacher’s reputation in the community impairs teaching ability or that the role model position is solely an “emblem for a set of values soci-

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236. See, e.g., id. at 213 (acknowledging the trial court failed to apply *Morrison*’s nexus requirement but upholding the teacher’s discharge because when the teacher solicited letters of support from parents and students, he, himself, had created the critical nexus).

237. Compare id. (upholding teacher’s discharge for sexual impropriety because he created a nexus by soliciting support from community), with *McNeill* v. Pinellas County Sch. Bd., 678 So. 2d 476, 478 (Fla. Dist. Ct. App. 1996) (reversing teacher’s discharge for sexual impropriety because he solicited community support that tended to show he was fit to teach).

238. See *McNeill*, 678 So. 2d at 478 (finding teacher arrested for lewd conduct with undercover police officer should not have been discharged because the “outpouring of support” from his colleagues, community, and students was evidence that the notoriety of the conduct had not impaired his fitness to teach).


240. See Knight, supra note 226.

241. Id.

242. Id. at 521.
ety deems worthy of replication.” Certainly public schools’ Protestant origins are a factor in requiring conformity among teachers, but so is the likelihood that heterogeneity in teachers’ backgrounds threatens to force parents to have frank discussions about differing life choices, life styles, and competing ideologies and belief systems.

The outlook, however, is not entirely bleak. Examples of communities and schools embracing differences and teaching tolerance do exist. One school district chose to help students cope with human variation by dealing with the principal’s sex reassignment surgery openly. The school gave students information about transgendered people and provided advance notice about the transition. Another school district chose to embrace one teacher’s transition from male to female gender by collaborating with the teacher and other community members like students’ parents, the parent teacher association, legal counsel, and psychologists. These examples may illustrate the best model for preparing students for life outside the schoolhouse in an increasingly secular and pluralistic society.

V. ENFORCING COMMUNITY-DEFINED MORALITY STANDARDS HINDERS PEDAGOGICAL GOALS AND ENCOURAGES INTRUSIONS ON TEACHER PRIVACY

If a valid goal of education is to help children develop the necessary life skills to interact in a multicultural, diverse society, then requiring conformity and valuing homogeneity among teachers defeats this goal. Furthermore, discharging teachers for nonconformist, yet legal conduct perpetuates the sentiment that the community somehow owns the teacher. This practice also leaves school districts open to suits by

243. Id. at 487. Knight argues that people like Sullivan, who are willing to assert their rights, are actually the kind of “authentic” role models that should be mentoring children. Id. at 526.


245. Id.

246. Cruzan v. Special Sch. Dist., 294 F.3d 981, 983 (8th Cir. 2002) (holding that allowing male-to-female transgendered teacher to use the women’s restroom did not constitute gender discrimination against the plaintiff teacher).


248. See supra notes 121–22 and accompanying text.
teachers alleging constitutional rights violations and facilitates a trend of increased cyber-sleuthing and prying. 249

A. Increased Tolerance of Nonconformist Teachers Furthers Legitimate Pedagogical Goals

One commentator, Eva DuBuisson, acknowledged teachers are “role models and purveyors of society’s values” and argued for more protection for gay teachers who choose not to conceal their sexual orientation. 250 In the past, this approach may have seemed paradoxical given the American school’s historical value system that does not tolerate homosexuality. However the key issue is determining whose values the teachers should be imparting. If the goal of public education is simply to impart the puritanical values held by the founders of the American public schools, then allowing teachers more protection for their private lives may be inconsistent with that goal. But, if the goal, as DuBuisson argued, is to encourage tolerance for diversity, then tolerating teachers’ unpopular or nonconformist conduct furthers the school’s educational mission. 251

The United States Supreme Court has also endorsed tolerance as an educational goal. In *Bethel School District v. Fraser*, 252 the Court noted American public schools must “prepare pupils for citizenship in the Republic,” and that the way to achieve that goal is to encourage the “habits and manners of civility essential to a democratic society,” including tolerance for “unpopular” and “divergent political and religious views.” 253

Furthermore, protecting and tolerating diverse views as a public education ideal has been a tenet in the Court’s First Amendment jurisprudence for over sixty-five years. In *West Virginia Board of Education v. Barnett*, 254 the Court invalidated a policy requiring compulsory recitation of the Pledge of Allegiance. 255 The Court recognized that educating students to become future citizens in the democracy required “scrupu-

251. Id. at 348.
253. Id. at 681.
254. 319 U.S. 624 (1943).
255. Id. at 638.
lous protection of Constitutional freedoms of the individual”256 and counseled against government-prescribed orthodoxies.257 The alternative, the Court stated, would be to “strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.”258

While Barnette and Bethel express laudable encouragement for tolerance in a pluralistic society, they do not cure the problem of majoritarian Puritan values controlling the private conduct of school teachers. Recently, at least one justice recognized the overweening influence of the local community in a free speech case. Justice Alito, concurring in Morse v. Frederick,259 cautioned that justifying speech restrictions in a school setting based on a school’s educational mission is an argument that “can easily be manipulated in dangerous ways.”260 Justice Alito further explained that the educational mission of some schools is defined by a select group of community members and this mission tends to reflect “whatever political and social views are held by the members of these groups.”261

The social and political views of those few in charge of the school’s educational mission may be so conservative or narrow that students suffer for it. One study estimates approximately five to six percent of students are lesbian, gay, or bisexual.262 Consequently, schools should foster increased tolerance for diversity, especially for sexual minorities, because gay and lesbian youth are at a significantly greater risk for suicide than their heterosexual peers.263 When school districts choose to discharge or discipline teachers based on their private, sexual conduct, administrators may be sending a message to their students that their non-conforming behavior or identity is unacceptable.

256. Id at 637.
257. See id. at 642 (stating that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .”).
258. Id. at 637.
260. Id. at 423 (Alito, J., concurring).
261. Id.
A diverse faculty helps to ensure a tolerant school. Because students are a diverse group, having diverse teachers on staff helps these students find role models and mentors. Achieving this goal requires schools to limit condemnation of nonconforming teacher conduct. Official disapproving messages, such as firing teachers for being gay and, thereby limiting the amount and types of mentors available to students, inflicts harm on non-conforming students. Paradoxically, courts permit students to bring suit against school districts for tolerating harassment on the basis sexual orientation yet uphold the termination of teachers for homosexual conduct.

Harassment of nonconformist students is widespread. Those students especially vulnerable to harassment are gay students and courts are beginning to recognize that tolerating harassment may lead to poorer performance for students. For example, in a recent case on sexual orientation harassment in schools, Judge Posner wrote, “[A]dolescent students subjected to derogatory comments about such characteristics may find it even harder than usual to concentrate on their studies and perform up to the school’s expectations.”

Some schools are adopting antiharassment policies and are starting to exhibit a more open attitude about human variation in sexuality, sometimes in response to previous litigation and a consent decree. The Chicago school board, for example, successfully defended its policy of allowing benefits for teachers’ same-sex partners in an effort to recruit gay teachers who could serve as role models for students, offer gay students

264. See Irizarry v. Bd. of Educ., 251 F.3d 604, 606 (7th Cir. 2001) (noting with approval the school board’s articulated reason for extending health benefits to same-sex domestic-partners but not opposite-sex domestic-partners was to provide sexual minority students with role models who can support them and help diminish violence targeting gay students).

265. See Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1167 (N.D. Cal. 2000) (denying summary judgment to the school district and permitting plaintiff’s Title IX claim alleging harassment based on his perceived homosexuality and his mother’s physical appearance as a transgendered female).


267. BOCHE NEK & BROWN, supra note 262, at 1–3.

268. See, e.g., Nuxoll v. Indiana Prairie Sch. Dist., 523 F.3d 668 (7th Cir. 2008).


270. See Morrison v. Bd. of Educ., 521 F.3d 602, 605 (6th Cir. 2008) (holding a school’s policy of prohibiting “students from making stigmatizing or insulting comments regarding student’s sexual orientation” did not violate a student’s free speech).
support, and foster tolerance of sexual minorities.\textsuperscript{271} By taking a more open-minded approach, schools can become leaders in the toleration of diverse lifestyles and the community may be more inclined to respect teachers’ privacy rights, which is certainly a step in the right direction.

\textbf{B. The Internet Increases Teacher Privacy Intrusions and Reinforces the Notoriety Factor in Termination Decisions}

With the urbanization that occurred in America in the last thirty to forty years, teachers gained more respect for their privacy because they were not scrutinized so closely by the community at large.\textsuperscript{272} However, the increasing popularity of social networking web sites and availability of public records and imaging technology online combine to increase the amount of information available about all of us.\textsuperscript{273} Teachers are particularly vulnerable to these electronic incursions because American society has consistently allowed for public examination of teachers’ private lives.\textsuperscript{274}

Concerns about child safety have also led local news media to air segments on how parents can investigate their child’s teacher using Internet search engines and social networking sites.\textsuperscript{275} Even the print media is involved in the cyber-sleuthing trend. One newspaper published an article about how easily “questionable” content on local public school teachers’ personal social networking web sites can be located.\textsuperscript{276}

Reaction over what teachers post on their personal social networking web sites can border on hysteria. For example, one British Columbia administrator was terminated after a parent called school district officials to report viewing one nude photo of him “among hundreds of travel pictures he had displayed on his personal website for viewing by friends and family.”\textsuperscript{277} The school board ordered an investigation, and

\begin{footnotesize}
\textsuperscript{271} See Irizarry v. Bd. of Educ. of Chicago, 251 F.3d 604, 606 (7th Cir. 2001).
\textsuperscript{272} See Fernando N. Dutile, Sex, Schools and the Law 104 (1986) (noting parents know much less about their children’s teachers now than in the past due to “large cities,” “sprawling suburbs,” “modern roads,” “consolidated schools,” and the “automobile”).
\textsuperscript{273} See Irizarry, 251 F.3d at 606.
\textsuperscript{274} See, e.g., Thompson v. Sw. Sch. Dist., 483 F. Supp. 1170, 1173–74 (W.D. Mo. 1980) (The school board suspended a teacher for cohabitation based on evidence the principal gathered “while driving by [the teacher’s] home on several occasions in July of 1979 early in the morning and late in the evening” observing paramour’s car in front of teacher’s home. Neither the school board nor the court questioned the propriety of the principal’s investigative techniques.).
\textsuperscript{275} See, e.g., CBS 5 News Report, supra note 9.
\textsuperscript{276} Private on Facebook Pages, S. FLA. SUN-SENTINEL, June 1, 2008, at 1A.
\textsuperscript{277} Janet Steffenhagen, Warning for Teachers: Facebook Can Kill Career, GAZETTE, Mar. 17, 2008, at A2.
\end{footnotesize}
the administrator was labeled as a potential child abuser; however, once the investigation was complete and parents learned of the innocent nature of the photo and the circumstances surrounding it, they “generally agreed there was no cause for alarm” and the school board chairman classified the incident as a “stupid mistake.”

Finally, given the ease of access to information on the Internet, notoriety may also be a factor in these examples of electronic surveillance of teachers, and school districts perhaps feel compelled to discharge teachers for notorious, nonconforming conduct because of public disapproval. However, this practice discharging teachers based solely on notoriety leaves schools open to civil rights litigation.

VI. CONCLUSION

The teaching profession comes with at least two centuries of Puritan-influenced gender roles and sexual mores that contributed to the community feeling as if it owned its female teachers and was thus justified in denying them private and legal identities. Furthermore, leadership roles have been thrust upon school teachers since the establishment of the first American schools. These Puritan-influenced gender roles and sexual mores for teachers persist, and their continued presence suggests that the community’s sense of teacher ownership is deep-seated, and will not easily be eradicated.
American public schools will always be a locus of contemporary social, political, and moral debates because children are impressionable and vulnerable. Perhaps the prescribed rigid moral codes coupled with the leadership roles imposed on teachers help parents feel better about entrusting their susceptible children to the school system. But simply because teachers hold a position of trust, does not mean their private morality should be subjected to closer scrutiny than other members of the community.

Continuing to discharge and discipline teachers based on a term as indefinable and subjective as “immorality” invites homogeneity among the teacher ranks and subverts the important pedagogical goals of promoting tolerance for diversity and the ability to function effectively in a pluralistic society. Furthermore because morality varies with locality, some teachers will endure more encroachment on their private lives than others. Also, Morrison’s nexus requirement is no life raft when the notoriety of the teacher’s conduct is a major factor in the fitness-to-teach calculus. Finally, other solutions to problematic teacher conduct exist. Criminal proscriptions against sexual conduct with minors and child endangerment laws are adequate to protect children from teachers who would harm them, and schools can always discharge teachers for almost any criminal behavior or explicitly proscribe worrisome conduct in a teacher’s contract.

Although the deeply entrenched social mores and gender roles will not easily be eradicated, society should not yield in its attempt to protect teachers’ individual rights. Persistence is especially critical in this technological era when parents can use the Internet to scrutinize their children’s teachers with unprecedented ease and rapidity—paradoxically from the privacy of their own homes.

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282. See State v. Truby, 29 So. 2d 758, 765 (La. 1947) (holding the term “immoral” is “vague, indefinite, uncertain” and subject to variance by locality).