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Beyond Nexus: A Framework for Evaluating K-12 Teacher Off-Duty Conduct and Speech in Adverse Employment and Licensure Proceedings

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BEYOND NEXUS: A FRAMEWORK FOR EVALUATING K-12 TEACHER OFF-DUTY CONDUCT AND SPEECH IN ADVERSE EMPLOYMENT AND LICENSURE PROCEEDINGS

*John E. Rumel**

I. INTRODUCTION

Seldom does a week pass without the popular press reporting on teacher off-duty conduct or speech that causes a stir in the local community and triggers adverse employment or licensure consequences for K-12 teachers.[1] In 2009, a Georgia teacher was forced to resign—an employment consequence which was later upheld by a court—after a parent objected to a photo she posted to Facebook showing her holding a drink while on vacation in Europe and school officials concluded that the posting "promoted alcohol use."[2] That same year, a Wisconsin teacher was placed on leave for posting a photograph of herself looking down the barrel of a rifle on her Facebook page.[3] And, in August 2011, a Florida "Teacher of the Year" was terminated because he expressed harsh views about gay marriage and same-sex unions.[4]

Regarding a seemingly unrelated aspect of teacher conduct, educator Charlotte Danielson wrote an influential work on teacher evaluation in the mid-1990s entitled *Enhancing Professional Practice: A Framework for Teaching*.[5] Through the use of various domains and rubrics, Danielson developed an evaluative model which "identifies those aspects of a teacher's responsibilities that have been documented through empirical studies and theoretical research" as they specifically

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1. *See, e.g.*, Jonathan Turley, *Teachers under a Morality Microscope*, L.A. TIMES (Apr. 2, 2012), http://articles.latimes.com/2012/apr/02/opinion/la-oe-turley-teachers-under-scrutiny-20120402.

2. *Id.*

3. *Id.*

4. *Id.*

5. (1st ed. 1996). A Second Edition of Danielson's Framework was published in 2007. CHARLOTTE DANIELSON, ENHANCING PROFESSIONAL PRACTICE: A FRAMEWORK FOR TEACHING (2d ed. 2007)

related to improving student learning.[6] In so doing, Danielson took important steps toward objectifying what had often been a highly subjective aspect of administrator practice concerning teacher fitness (and, perhaps later, school board and/or arbitral or judicial scrutiny of that same issue).[7]

This Article does not intend to revisit Danielson's seminal work on teacher evaluation. Indeed, it recognizes that Danielson's framework, although addressing teacher professional responsibility, does not address teacher off-duty behavior. The Article will, however, borrow from Danielson conceptually as it addresses the above-mentioned issue of significant importance to teachers and the communities they serve, i.e. teacher off-duty conduct and speech and their relation to adverse employment or licensure action against teachers. Specifically, the Article will attempt to make two contributions to the existing scholarship and judicial treatment concerning that topic: first, it will discuss in detail the similar or parallel treatment which has been, and should continue to be, utilized by the courts—particularly in the nexus and relationship to work areas—in evaluating teacher off-duty conduct and off-duty speech; and, second, it will propose a framework which will likewise attempt to make more objective the current nexus standard utilized by most states in evaluating teacher off-duty conduct and by the Supreme Court in evaluating teacher off-duty speech as they both relate to fitness to teach.[8]

Part II of this Article will discuss the evolution of case law concerning the regulation of teacher off-duty conduct and speech not involving students where such behavior by teachers is arguably unrelated to the teacher's employment.[9] In particular, Part II will focus on the shift from an unadorned and vague "immorality" standard to the development and adoption of a nexus requirement by most courts concerning both teacher and/or public employee off-duty conduct and speech as they pertain to teacher fitness.[10] Part II will also explore the strengths and weaknesses of the nexus standard, which requires proof

6. CHARLOTTE DANIELSON, THE FRAMEWORK FOR TEACHING EVALUATION INSTRUMENT 3 (2013).

7. *See* LAUREN SARTAIN, SARA RAY STOELINGA, & EMILY KRONE, RETHINKING TEACHER EVALUATION: FINDINGS FROM THE FIRST YEAR OF THE EXCELLENCE IN TEACHING PROJECT IN CHICAGO PUBLIC SCHOOLS 1 (2010) (internal citation omitted), *available at* https://ccsr.uchicago.edu/sites/default/files/publications/Teacher%20Eval%20Final.pdf.

8. The use of the term "teacher" is a short hand expression for professional and certificated educator. As such, it includes all categories of professional and certificated K-12 educators, including administrators (principals and vice-principals), classroom teachers, librarians, counselors and the like.

9. *See infra* notes 19–166 and accompanying text. The term "behavior" will likewise be a short hand for both conduct and expression, the latter including speech, association and other forms of expression.

10. *Id.*

that a teacher's off-duty behavior makes them unfit to teach.[11] In so doing, it will conclude that, although the nexus standard constituted a welcome and appropriate development delimiting the authority of school boards and teacher licensing bodies to take adverse action against teachers based on their off-duty conduct and speech, that same standard continues to suffer from certain deficiencies that can be remedied by the adoption of a framework for evaluating teacher off-duty behavior.[12]

Part III of this Article will delineate that proposed framework.[13] Specifically, Part III will divide teacher off-duty conduct and speech into two general categories, i.e., lawful off-duty conduct and speech and unlawful off-duty conduct or unprotected speech.[14] It will conclude that the former is presumptively not a basis for adverse employment or licensure action against a teacher, while the latter causes mixed employment or licensure results depending on, among other things, the seriousness of the offense and the relationship (or lack thereof) of the teacher's conduct or speech to their job responsibilities, their colleagues, and the students in their charge.[15]

Part IV of the Article will discuss the proposed framework in more detail.[16] Specifically, Part IV will analyze the existing case law and statutory authority relevant to each category of the proposed framework and will discuss the rationale for proposing lesser or no employment or licensing consequences for certain types of off-duty teacher conduct or speech, while proposing harsher or permanent adverse employment or licensing consequences for other, more objectionable off-duty behavior.[17]

Part V of the Article will conclude by suggesting that judicial adoption of the proposed framework will augment the nexus standard and properly protect teachers' off-duty conduct, associational and speech rights, while still providing school districts and teacher licensing boards authority to take adverse action against teachers where their off-duty behavior makes them unfit to teach.[18]

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11. *Id.*

12. *Id.*

13. *See infra* notes 167–73.

14. *Id.*

15. *Id.*

16. *See infra* notes 174–338.

17. *Id.*

18. *See infra* note 338 and accompanying text through the end of the Article. The framework proposed in this Article addresses those circumstances where, either due to a statute, code of ethic provision or contract, a school board or teacher licensing body must have cause—often referred to as just or good cause—or some other legitimate basis for taking adverse employment or licensure action against a teacher. It does not address or pertain to circumstances where a teacher—often a new or probationary teacher—whose employment with a school district is at will or does not require cause to not renew his or her teaching contract.

II. THE EVOLUTION OF CASE AUTHORITY CONCERNING THE REGULATION OF TEACHERS' OFF-DUTY CONDUCT AND SPEECH UNRELATED TO THEIR EMPLOYMENT

A. Conduct

1. Teachers as Exemplars/Role Models

During the early years of the Republic, community schools throughout the colonies generally, but particularly in the North, were predominantly Protestant-controlled or Protestant-influenced institutions.[19] As a result, teachers employed in those schools were charged with inculcating Protestant values, including "religion, morality, and knowledge"[20] and, specifically, "knowledge of the Scriptures."[21] From the later Colonial period and throughout the nineteenth century, the common school movement precipitated a shift from sectarian to secular/public education.[22] During this period, teachers increasingly were held to the standard of role model for the communities and students that they served.[23]

Thus, in the late-nineteenth century, the Illinois Appellate Court, in upholding a school's termination of the employment contract of a teacher charged with, among other things, immoral conduct, stated that "[i]f suspicion of vice or immorality be once entertained against a teacher, his influence for good is gone. The parents become distrustful, the pupils contemptuous and the school discipline essential to success is

19. CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY, 1780-1860 3 (1983); LAWRENCE A. CREMIN, TRADITIONS OF AMERICAN EDUCATION 12–13 (1977); JAMES W. FRASER, BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN MULTICULTURAL AMERICA 47 (1999); Kent Greenawalt, Secularism, Religion and Liberal Democracy in the United States, 30 CARDOZO L. REV. 2383, 2387–88 (2009). For an informative point-counterpoint discussion concerning the degree of Protestant control over Colonial period and nineteenth century schools, see Kristin Shotwell, *Secretly Falling in Love: America's Love Affair with Controlling the Hearts and Minds of Public School Teachers*, 39 J.L. & EDUC. 37, 37, 39–43 (2010) (characterizing and emphasizing Colonial period and nineteenth century schools as "Protestant institutions" or "private Protestant institutions"); *but cf.* Todd A. DeMitchell, *Immorality, Teacher Private Conduct, and Adverse Notoriety: A Needed Recalculation of Nexus?*, 40 J.L. & EDUC. 327, 329–31 (2011) (agreeing with Shotwell that early period schools were "Protestant-influenced," but disagreeing that they were "Protestant institutions" and emphasizing secular influences on schools during that time period).

20. FRASER, *supra* note 19, at 23 (quoting the Northwest Ordinance Sec. 14, art. 3 (1787)).

21. *Id.* at 10 (quoting the Old Deluder Satan Act of 1647 adopted by the Massachusetts Colony).

22. Ian Burtrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840-1842*, 3 N.Y.U. J. L. & LIBERTY 267, 271–85 (2008), *citing* JOEL SPRING, THE AMERICAN PUBLIC SCHOOL 1642-1993 (3d ed. 1994).

23. DAVID B. TYACK & ELISABETH HARISOT, MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820-1980 174 (1982), cited in Trebilcock, *Off Campus: School Board Control over Teacher Conduct*, 35 TULSA L. J. 445, 448 (2000) and Todd A. DeMitchell, *Private Lives: Community Control vs. Professional Autonomy*, 78 ED. L. REP. 187, 190 (1993).

at an end."[24] Around that same time, the Missouri Court of Appeals upheld the dismissal of a teacher who was accused by his wife of various acts of adultery, stating that:

> There may be causes for the removal of a teacher affecting the discipline of the school over which he presides, entirely outside of any question of his learning, ability, power of enforcing discipline, or moral qualities, and outside of his own acts. As in the present instance. It was not for the board of directors to prejudge, or even to examine, the charges brought against this teacher by his wife; but the mere fact that charges of this character were brought against him, and that the fact had become notorious, rendered it highly inexpedient that he should remain as a teacher of higher classes frequented by youths between the ages of fourteen and twenty. It is unnecessary to dwell upon this. Such would be the common sense of all fathers and mothers having a parental regard for the morals of their children.[25]

Moving into the twentieth century, "[t]he nineteenth century idea of the teacher as a public figure and role model eventually became codified in statutes and administrative codes. . . ."[26] In addition to these statutory and regulatory provisions, school districts occasionally inserted moral clauses in employment contracts with teachers.[27] By the mid-twentieth century, virtually all states granted power to state boards of education to suspend or revoke a teacher's certificate based on immoral conduct, moral turpitude, or conduct unbecoming of a teacher.[28] Likewise, under a number of state statutes, that same immoral behavior could also constitute sufficient cause for terminating the employment contract of or suspending tenured teachers or teachers under contracts for a fixed

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24. Tingley v. Vaughn, Ill. App. 347, 351 (1885).

25. McLellan v. Bd. of Presidents, etc. of Pub. Schs. of St. Louis, 1884 WL 9294, 15 Mo. App. 362, 365–66 (1884).

26. Shotwell, *supra* note 19, at 54.

27. Marka B. Fleming, Amanda Harmon Cooley & Gwendolyn McFadden-Wade, *Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Implications and Constitutional Concerns*, 2009 B.Y.U. EDUC. & L. J. 67, 80 ("[T]hese employment conditions [were] 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."). Indeed, those schemes and structures often impose express morals requirements and apply to primary school teachers as well. *See infra* notes 28 and 29 and statutory provisions listed therein.

28. *See, e.g.*, ALASKA STAT. § 14.20.030(a)(2) (2008); CAL. EDUC. CODE § 44421 (2007); FLA. STAT. § 1012.795(1)(d) (2008); 105 ILL. COMP. STAT. 5/21-23(a) (2008); IND. CODE § 20-28-5-7(1) (2008); KAN. STAT. § 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. § 21-2-802(c) (2007) (cited in Fleming et al., *supra* note 27, at 72 n.26 and accompanying text); *see also* Shotwell, *supra* note 19, at 54 n.142 and accompanying text.

term.[29]

Although certainly applicable to a teacher's on-duty immoral conduct, such as improper relationships or interactions with students at school,[30] statutory and regulatory moral provisions, as well as morals clauses in teaching contracts, had and continue to have a significant, if not greater, application concerning teacher off-duty conduct.[31] Two scholars have pointed out that "[e]vidence abounds that townspeople kept a vigilant eye on the out-of-class behavior of educators, and that the moral 'lapses' resulted in firings more often than did incompetence in the classroom."[32] Thus, because of their exemplar status in the communities they served, teachers were not allowed to court or marry in some parts of the country.[33] In addition, "activities [such] as dancing, smoking, drinking, divorce, marriage, dating and pregnancy were looked at askance by school authorities and frequently any indulgence in these activities brought about disciplinary action."[34] One teacher explained during the 1930s that "[h]ow I conduct my classes seems to be of no great interest to the school authorities, but what I do when school is not in session concerns them tremendously."[35]

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29. *See, e.g* ., ALA. CODE § 16-24-8 (2008); CAL. EDUC. CODE § 44427 (2007); COLO. REV. STAT. § 22-63-301 (2007); DEL. CODE tit. 14 §§ 1411, 1420 (2008); GA. CODE § 20-2-940(a)(4) (2007); HAW. REV. STAT. § 302A-609 (2008); 105 ILL. COMP. STAT. 5/10-22.4 (2008); IND. CODE § 20-28-7-1(a)(1) (2008); KY. REV. STAT. § 156.132(B)(1) (2008); LA. REV. STAT. § 17:443(A) (2008); MD. CODE 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 § 3319.16 (2008); 24 PA. STAT. § 11-1122(a) (2007); S.C. CODE § 59-25-430 (2007); S.D. CODIFIED LAWS § 13-43-6.1 (2008); TENN. CODE § 49-5-511(a)(2) (2008); VT. STAT. tit. 16 § 1752 (2007); VA. CODE § 22.1-307(A) (2008); WIS. STAT. § 118.23(3) (2007); WYO. STAT. § 21-7-110(a) (2007) (cited in Fleming et al., *supra* note 27, at 72 n.8).

30. *See, e.g.*, Gover v. Stovall, 35 S.W.2d 24, 25–26 (Ct. App. 1931) (where teacher was in school building at night with another man and three young women one of whom was a pupil in the school, keeping the lights off and the meeting a secret for several days, teacher's dismissal was upheld because his conduct invited criticism and produced suspicions of immorality), *superseded by statute as stated in* Bd. of Educ. of Fayette v. Hurley-Richards, 396 S.W.3d 879, 885 n.8 (Ky. 2013); Clarke v. Bd. of Educ., 338 N.W.2d 272, 273, 278 (1983) (teacher's use of racial epithet directed at black students in a racially-mixed classroom constitute "immorality" under state statute sufficient to justify immediate termination).

31. *See* DeMitchell, *supra* note 23, at 190 n.22 and accompanying text; *see also* Shotwell, *supra* note 19; Ruth L. Davison, John L. Strope, Jr. & Donald F. Uerling, *The Personal Lives and Professional Responsibilities of P-12 Educators: Off-Duty Conduct as Grounds for Adverse Employment Acton*, 171 ED. L. REP. 691 (2003); Jason R. Fulmer, *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, 284 (2002); Clifford P. Hooker, *Terminating Teachers and Revoking their Licensure for Conduct Beyond the Schoolhouse Gate*, 96 ED. L. REP. 1 (1995).

32. Tyack & Hansot, *supra* note 23, at 174.

33. MARY HURLBUT CORDIER, SCHOOL WOMEN OF THE PRAIRIES AND PLAINS 34 (1992) (quoted in Shotwell, *supra* note 19 at 52); *see also* Backie v. Cromwell Consol. Sch. Dist. No. 133, 242 N.W. 389, 390–92 (Minn. 1932) (court upheld teacher termination under School Board policy granting Board discretion to nullify single female teachers' contracts upon marriage).

34. DeMitchell, *supra* note 23, at 190.

35. HOWARD K. BEALE, ARE AMERICAN TEACHERS FREE? AN ANALYSIS OF RESTRAINTS UPON

In a well-known Pennsylvania case from that time period,[36] a local school board, relying on a statute allowing for the termination of a teacher's contract for immorality, incompetency, or intemperance, dismissed a teacher whose husband owned a restaurant across the street from the school after the teacher was observed by her students several times drinking beer, playing pinball, and shaking dice with customers at the restaurant.[37] The Pennsylvania Supreme Court reinstated the trial court's order upholding the school board's decision, initially stating as follows:

> If the fact be that she "now commands neither the respect nor the good will of the community" and if the record shows that effect to be the result of her conduct . . . it will be conclusive evidence of incompetency. It has always been the recognized duty of the teacher to conduct himself in such way as to command the respect and good will of the community, though one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations. Educators have always regarded the example set by the teacher as of great importance, particularly in the education of the children in the lower grades such as those attending the school in which this teacher had been employed. . . . [38]

The Pennsylvania high court continued by defining the statutory terms broadly, concluding that: (1) immorality was not confined to sexual immorality, but would include "any course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and to elevate;"[39] (2) intemperance was not limited "strictly to overindulgence in alcoholic liquors;"[40] and (3) "incompetency as a teacher" was not limited to "the [in]ability to teach the 'Three R's.'"[41] Applying these broad definitions, the court concluded by agreeing with the trial court's decision that the teacher had engaged in immoral conduct while frequenting the restaurant, thereby rendering her incompetent as a teacher.[42]

THE FREEDOM OF TEACHING IN AMERICAN SCHOOLS 395 (1936).

36. Horosko v. Sch. Dist. of Mount Pleasant Twp. 6 A.2d 866 (Pa. 1939).

37. Id. at 867–68.

38. *Id.* at 868.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 869. The Court, citing to both standard and legal dictionaries, stated that "incompetency" had been defined variously as "lack of... fitness to discharge the required duty," "want of ...fitness," and "[g]eneral lack of capacity of fitness." *Id.* at 869–70. The Court, however, did not expressly require any connection between the teacher's conduct and lack of fitness to teach.

Similarly, in *Scott v. Board of Education of Alton Community Unit School Dist. No.11*,[43] a teacher was arrested for public intoxication on several occasions.[44] Although apparently no convictions had occurred and the teacher denied the charges, the school board terminated her contract for cause on the statutory ground that the interests of the school required such action.[45] An Illinois appellate court upheld the school board's decision, finding and concluding that:

> . . . a teacher is something of a leader to pupils of tender age, resulting in admiration and emulation, and that the Board might properly fear the effect of social conduct in public, not in keeping with the dignity and leadership they desired from teachers. Therefore, the decision was not without foundation, nor contrary to the manifest weight of the evidence, and this court cannot hold the decision should be set aside.[46]

Likewise, in *Sullivan v. Meade Independent School Dist. No. 101*,[47] a school board terminated the employment of an unmarried female teacher after it became known that she was living together with a man in a dwelling within the school district boundaries.[48] The teacher brought suit against the school district and its board of trustees alleging that the termination violated her constitutional rights.[49] The Eighth Circuit Court of Appeals disagreed, rejecting the teacher's constitutional arguments and finding that:

> . . . the Board had before it evidence that Ms. Sullivan's conduct violated local mores, that her students were aware of this, and that, because of the size of the town, this awareness would continue. The Board considered the unrefuted testimony of a professional educator that teachers teach by example as well as by lecture. Ms. Sullivan was shown to have generated deep affection from her students, increasing the probability of emulation. Also, it was shown that because of the isolation of Union Center, students are required to leave home at age 14 to attend high school in Sturgis, some 60 miles away. Thus, local parents believe that early proper moral training for youngsters is particularly crucial in

43. 156 N.E.2d 1 (Ill. App. 1959).
44. *Id.* at 2.
45. *Id.* at 2–3.
46. *Id.* at 3.
47. 530 F.2d 799 (8th Cir. 1976).
48. *Id.* at 801–02.
49. *Id.* at 801.

Union Center.[50]

And, in *Brown v. Bathke*,[51] a federal district court judge upheld a school board's termination of a teacher based on the teacher having become pregnant out-of-wedlock.[52] In so holding, the judge found and concluded that the teacher was a role model for her students and that the school district's interest in its teachers maintaining that status outweighed the constitutional considerations asserted by the teacher:

> The evidence is persuasive that a junior high school teacher who develops a good relationship with the students is likely to be a model to those students in wide-ranging respects, including personal values. The plaintiff had developed such a relationship with the students. Many of them knew that she was not married; some of them by April, 1973, had observed that she probably was pregnant and some had asked her about it, but she had given them no definitive answer. Under those circumstances, the board of education was within the realm of propriety in considering that its permitting the plaintiff to continue to teach would be viewed by the students as a condonation by the plaintiff and the school board of pregnancy out of wedlock. There is a rational connection between the plaintiff's pregnancy out of wedlock and the school board's interest in conserving marital values . . .
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> * * *
>
> Fully considered, I conclude that the interests of the plaintiff in determining her own familial relationships and associating with whom she chooses do not outweigh the interests of the school in providing the kind of teachers it chooses for imparting social values and educational subject matter to junior high school students.[53]

The above-discussed judicial decisions balanced the interests of schools, patrons and the local communities that they served against the privacy and associational rights of teachers in a way that substantially favored the schools and their constituents over the teachers whom they employed. In other words, very little weight was placed on the teachers' side of the scale. However, the judicially-spawned "Rights Revolution" of the late-1960s and early-1970s signaled increases in the property,

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50. *Id.* at 804.

51. 416 F. Supp. 1194 (D. Neb. 1976), *rev'd on other grounds*, 566 F.2d 588 (8th Cir. 1977).

52. *Id.* at 1196–1200.

53. *Id.* at 1198 and 1200. The Eighth Circuit reversed on procedural due process grounds, *Bathke v. Brown*, 566 F.2d 588, 591–93 (8th Cir. 1977), but did not address the legal sufficiency of the Board's reasons for terminating the teacher's contract.

liberty, privacy, speech and associational rights of individuals in the public employment setting and elsewhere, as well as a concomitant reduction in the power of the government to deprive public employees and other individuals of those same rights.[54] For teachers, this shift toward greater recognition of employee rights in the workplace manifested itself most notably in the judicial recognition of rights in three areas: property and procedural due process rights in public employment;[55] speech rights related to matters of public concern;[56] and the adoption of a nexus standard in termination and/or licensure matters. It is to the nexus requirement that this Article will now turn.

2. The Nexus Requirement

In *Morrison v. State Board of Education*,[57] the California Supreme Court took up the issue of whether a state board of education could take adverse action against a teacher's professional license when the teacher engaged in legal conduct which the board considered immoral and unprofessional under state law.[58] In *Morrison*, the teacher (Morrison) engaged in noncriminal homosexual conduct[59] with a male colleague (Schneringer) for a short period of time—four times in one week—when Schneringer and his wife were having marital and financial difficulties.[60] Morrison had not engaged in similar conduct before—and did not engage in similar conduct after—the encounter with his colleague.[61] Schneringer eventually reported the conduct to the School District superintendent and, as a result, Morrison resigned from employment.[62] Almost two years later, the State Board of Education (SBE) brought charges against Morrison and sought to revoke his

54. *See* Daniel F. Piar, *A Welfare State of Civil Rights: the Triumph of the Therapeutic in American Constitutional Law*, 16 WM. & MARY BILL OF RIGHTS J., 649, 659–72 (2008) (Contrasted with Protestant culture, "[t]he 'rights revolution' ... has ostensibly expanded individual freedoms. Persons, activities, and interests that once were suppressed or punished now receive the full protection of law."); *see also* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990).

55. *See* Trebilcock, *supra* note 23, at 449–50, discussing seminal Supreme Court procedural due process decisions in the educational employment setting in Roth v. Bd. of Regents, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972).

56. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

57. 461 P.2d 375 (Cal. 1969).

58. *Id.* at 377.

59. *Id.* at 377–78. Morrison was neither charged with nor convicted of sodomy, oral copulation or lewd conduct—each of which was a felony in California at the time and conviction of any of which would have led to "mandatory" and "automatic" revocation of a teaching certificate under California law. *See id.* at 378 n.6.

60. *Id.* at 377.

61. *Id.* at 377–78.

62. *Id.* at 378.

teaching certificates on the grounds that Morrison's conduct constituted immoral and unprofessional conduct and moral turpitude under California statutory law.[63] After a hearing, the SBE revoked Morrison's certificates on those grounds.[64] The trial court refused to grant Morrison a writ of mandate compelling the SBE to set aside its decision and restore his teaching certificates.[65]

The California Supreme Court reversed.[66] The Court, after discussing previous California, federal, and out-of-state cases interpreting provisions similar or identical to those under which Morrison had been charged,[67] held "that the Board of Education cannot abstractly characterize the conduct in this case as 'immoral,' 'unprofessional,' or 'involving moral turpitude' within the meaning of section 13202 of the Education Code unless that conduct indicates that the petitioner is unfit to teach."[68]

Simultaneously applying principles of due process and statutory interpretation, the Court first justified its narrowing interpretation of the California statute as follows:

> By interpreting these broad terms to apply to the employee's performance on the job, the [prior judicial] decisions . . . give content to language which otherwise would be too sweeping to be meaningful. Terms such as "immoral or unprofessional conduct" or "moral turpitude" stretch over so wide a range that they embrace an unlimited area of conduct. In using them the Legislature surely did not mean to endow the employing agency with the power to

63. *Id.* at 378–79. In *Morrison*, teaching licenses or certificates were referred to as "life diplomas." *Id.*, (citing CAL. EDUC. CODE §13202).

64. *Id.* at 378–79.

65. *Id.* at 377.

66. *Id.* at 395.

67. *Id.* at 379–85 (citing, *inter alia*, Hallinan v. Comm. of Bar Exam'rs, 421 P.2d 375 (1966); Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969); Jarvella v. Willoughby-Eastlake City Sch. Dist., 233 N.E.2d 143 (1967)).

68. *Id.* at 386. The Court painted further gloss on the newly-enunciated standard, stating that:

> In determining whether the teacher's conduct thus indicates unfitness to teach the board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and 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. These factors are relevant to the extent that they assist the board in determining a teacher's fitness to teach, i.e., in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the board's standards.

Id.

> dismiss any employee whose personal, private conduct incurred its disapproval. Hence the courts have consistently related the terms to the issue of whether, when applied to the performance of the employee on the job, the employee has disqualified himself.
>
> In the instant case the terms denote immoral or unprofessional conduct or moral turpitude of the teacher which indicates unfitness to teach. Without such a reasonable interpretation the terms would be susceptible to so broad an application as possibly to subject to discipline virtually every teacher in the state. In the opinion of many people laziness, gluttony, vanity, selfishness, avarice, and cowardice constitute immoral conduct.[69]

The Court, pointing to the shifting and varied meaning of morality and the arguably more workable concept of fitness to teach, further explained:

> Nor is it likely that the Legislature intended . . . to establish a standard for the conduct of teachers that might vary widely with time, location, and the popular mood. One could expect a reasonably stable consensus within the teaching profession as to what conduct adversely affects students and fellow teachers. No such consensus can be presumed about "morality." "Today's morals may be tomorrow's ancient and absurd customs." And conversely, conduct socially acceptable today may be anathema tomorrow. Local boards of education, moreover, are authorized to revoke their own certificates and dismiss permanent teachers for immoral and unprofessional conduct . . . an overly broad interpretation of that authorization could result in disciplinary action in one county for conduct treated as permissible in another . . . . A more constricted interpretation of "immoral," "unprofessional," and "moral turpitude" avoids these difficulties, enabling the State Board of Education to utilize its expertise in educational matters rather than having to act "as the prophet to which is revealed the state of morals of the people or the common conscience."[70]

And, the Court rejected contentions raised by Morrison concerning the constitutionality of the above-discussed Education Code provisions, concluding that the narrowing interpretation placed on those terms saved

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69. *Id.* at 382-83 & n.15, (citing Robert N. Harris, Jr., Note, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. REV. 581, 582 (1967)).

70. *Id.* at 383–84 (citations omitted).

them from running afoul of due process[71] and privacy[72] concerns.[73]

The Court next restated and refined the newly-enunciated nexus standard, for the first time raising notoriety considerations and framing the question before the Court as follows:

> . . . [T]he statutes, properly interpreted, provide that the [SBE] can revoke a life diploma or other document of certification and thus prohibit local school officials from hiring a particular teacher only if that individual has in some manner indicated that he is unfit to teach. Thus an individual can be removed from the teaching profession only upon a showing that his retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher . . . . Petitioner's conduct in this case is not disputed. Accordingly, we must inquire whether any adverse inferences can be drawn from that past conduct as to petitioner's teaching ability, or as to the possibility that publicity surrounding past conduct may in and of itself substantially impair his function as a teacher.[74]

Applying the refined standard and several of the factors identified previously,[75] the Court found there was no evidence in the record to support a determination that Morrison was unfit to teach.[76] In particular, the Court pointed to the lack of any expert testimony suggesting that

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71. *Id.* at 387–90 ("This construction [requiring proof of a nexus between immoral conduct and fitness to teach] gives section 13202 the required specificity. Teachers, particularly in the light of their professional expertise, will normally be able to determine what kind of conduct indicates unfitness to teach.").

72. *Id.* at 390–91 ("By limiting the application of . . . section 13202 to conduct shown to indicate unfitness to teach, we substantially reduce the incentive to inquire into the private lives of otherwise sound and competent teachers.").

73. Morrison also argued that the SBE decision could not stand "because his questioned conduct [did] not rationally relate to his duties as a teacher." *Id.* at 391. The Court, relying on substantive due process and First Amendment case law, rejected Morrison's argument—again on the grounds that its narrowing construction of section 13202 remedied this potential infirmity. *Id.* at 391.

74. *Id.* at 391 (citations omitted). Significantly influenced by the California Supreme Court's decision in *Morrison*, a majority of courts has adopted the nexus standard in evaluating actions against a teacher's certificate by a state educational agency based on allegations of immorality, unprofessional conduct, conduct unbecoming a teacher and the like and adverse employment actions against teachers on the same grounds by school districts. *See* Robinson v. Ohio Dep't of Educ., 971 N.E.2d 977, 985 (Ohio App. 2 Dist. 2012); Lehto v. Bd. of Educ., 962 A.2d 222, 226–27 & nn.14 and 17 (Del. 2008); Alford v. Ingram, 931 F. Supp. 768, 772–73 (M.D. Ala. 1996); Thompson v. Sw. Sch. Dist., 483 F.Supp. 1170, 1181 (W.D.Mo. 1980); Winters v. Ariz. Bd. of Educ., 83 P.3d 1114, 1119 (Kan. Ct. App. 2004) Weissman v. Bd. of Educ., 547 P.2d 1267, 1272–73 (Colo. 1976); Hainline v. Bond, 824 P.2d 959, 967 (Kan. 1992); Clark v. Ann Arbor Sch. Dist., 681, 344 N.W.2d 48 (Mich. App. 1983); Ross v. Robb, 662 S.W.2d 257, 259 (Mo. 1983); Erb v. Iowa State Bd. of Public Instruction, 216 N.W.2d 339, 343 (1974); Barringer v. Caldwell Cnty. Bd. of Educ., 373, 473 S.E.2d 435, 439 (N.C. App. 1996); Powell v. Paine, 655 S.E.2d 204, 209 (W. Va. 2007); *see also* Fulmer, *supra* note 31, at 284.

75. *See Morrison*, 461 P.2d at 386.

76. *Id.* at 391–92.

Morrison posed a risk of harm to students, the lack of evidence indicating that Morrison's encounters with Schneringer diminished his (Morrison's) ability to effectively teach students and maintain good relations with his co-workers, and the relative lack of notoriety that the events had engendered.[77]

In sum, the California Supreme Court's adoption of the nexus standard in its seminal *Morrison* decision signaled a major shift from the role model/exemplar rationale concerning evaluation and scrutiny of teacher off-duty conduct.[78] This Article will next explore a similar shift in the area of teacher off-duty speech, expressive conduct and association.

B. Speech and Expressive Conduct/Association

1. The Unconstitutional Conditions Doctrine/Rights-Privilege Distinction and Teachers as Role Models/Exemplars

Late-nineteenth through mid-twentieth century cases involving the dismissal of teachers for off-duty speech and association were premised on the notion that, because public employment was a privilege, states and school districts could place conditions on a teacher's continued employment by imposing limits on their constitutional speech and associational rights, subject only to the limitation that the conditions were reasonable.[79] Thus, in upholding the dismissal of teachers for their

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77. *Id.*

78. *See* Davison et. al *supra* note 31 at 704. This is not to say, however, that the judicial view of teachers as role models or exemplars disappeared from the legal landscape. The Supreme Court, in the late 1970s stated that "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values." Ambach v. Norwick, 441 U.S. 68, 78–79 (1979). Indeed, in 2011, the California Court of Appeal, applying *Morrison*, stated that " '[a] teacher . . . in the public school system is regarded by the public and pupils in the light of an exemplar, whose words and actions are likely to be followed by the [students] coming under [his] care and protection.'" San Diego Unified Sch. Dist. v. Comm'n on Prof'l Competence, 194 Cal.App.4th 1454, 1463–64 (2011) (quoting Board of Trustees v. Stubblefield, 16 Cal.App.3d 820, 824 (1971)) (ellipsis in original). And, as recently as 2014, a federal magistrate judge, upholding the dismissal of a teacher based on off-duty conduct, stated that "while plaintiff's conduct outside the workplace may not have jeopardized the safety of her students or affected her ability to help students reach their educational goals, her actions not only created negative publicity, but compromised her ability to serve as a role model." DePrima v. N.Y.C. Dept. of Educ., No. 12 CV 3626(MKB)(LB), 2014 WL 1159, at *10 n.18 (E.D.N.Y. 2014), *adopted as modified in* 2014 WL 1155282 (E.D. N.Y. 2014). It is just that the vast majority of courts, when faced with a choice between evaluating teacher off-duty conduct under a role model standard derived from a statutory morals provision or under a nexus standard, has opted for the nexus standard. See, e.g., Thompson v. Wis. Dept. of Pub. Instruction, 541 N.W.2d 182, 186–87 (Wisc. App. 1995).

79. Adler v. Bd. of Educ. of N.Y.C., 342 U.S. 485, 492 (1952), (cited in *Constitutional Protection of Substantive Rights*, 81 HARV. L. REV. 1065, 1065 n.1 (1968); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1595 (1960)) ("Conditioning the extension of a governmental benefit or 'privilege' upon the surrender of constitutional rights has long appealed to Congress and the

off-duty speech and associational activities, both the United States and the Pennsylvania Supreme Courts relied on then-Judge (later Justice) Holmes's pithy dictum in an 1892 case concerning another group of public employees, stating that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[80] Or, as stated by one noted constitutional scholar, the rights-privilege distinction in public employment was "a specific application of the larger view that no one has a constitutional right to government largess."[81]

An early decision involving the unconstitutional conditions doctrine/rights-privilege distinction in the teacher off-duty speech and association context occurred in *McDowell v. Board of Education of City of New York*.[82] There, the teacher (McDowell), having been called before the local school board, informed the board that because she was a Quaker, she opposed the United States' ongoing hostilities with Germany during World War I.[83] The board then terminated McDowell's employment, determining that her beliefs constituted conduct unbecoming of a teacher under New York statutory law.[84] Rejecting McDowell's constitutional challenges to her dismissal, the trial court upheld the board's decision.[85] The court squarely held that a teacher's expression of her religious beliefs, occurring outside of the classroom and not directed at students, could serve as the basis for dismissal, stating as follows:

> The petitioner asserts that she was not guilty of any misbehavior or misconduct within the meaning of the statute. She says that her offense, if any, was to disclose the state of her mind, her beliefs, and that there is no element of behavior or conduct in a mere belief. She claims the board of education should not have condemned her until her beliefs had been translated into action in the classroom.
>
> This contention is unsound . . . . [T]he petitioner was charged with entertaining certain beliefs and declaring certain intentions that may very well be regarded as clearly showing her to be both incompetent and inefficient as a teacher . . . . The substance of the

state legislatures as a means of regulating private conduct.").

80. McAuliffe v. Mayor of City of New Bedford, 29 N.E. 517, 517 (Mass. 1892) (cited in *Adler*, 342 U.S. at 492).

81. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442 (1968).

82. 172 N.Y.S. 590 (N.Y. Sup. Ct. 1918).

83. *Id.* at 591.

84. *Id.* at 591–92.

85. *Id.* at 592–93.

> finding of the board of education is that the petitioner is unfit to remain a teacher in our public schools, and this court will not, under the circumstances, undertake to say that the board is in error.[86]

The Court concluded by making clear that a teacher's beliefs and speech, like his or her conduct, could serve as a basis for dismissal by undermining the teacher's status as a role model:

> The contention that the petitioner, in spite of her views, may still be able to do her full duty as a teacher in the classroom cannot be upheld. The grounds of removal contemplated by the statute may in a given instance be wholly unrelated to the discharge of the scholastic duties, and a teacher may be both incompetent and inefficient, even though her class shows most gratifying results in the ordinary subjects of the curriculum. It is of the utmost importance to the state that the association of teacher and pupil should tend to inculcate in the latter principles of justice and patriotism and a respect for our laws. This end cannot be accomplished, if the pupil finds his teacher unwilling to submit to constituted authority.[87]

Similarly, in *State ex rel. Schweitzer v. Turner*,[88] a teacher made public statements that he was a pacifist and would not serve the United States government and military in any way during World War II.[89] Upon learning this information, the school board terminated the teacher's employment under a statutory provision allowing for removal of teachers for, among other things, immorality or incompetency.[90] Without discussing First Amendment speech concerns and acknowledging "that, professionally," the teacher (Turner) was "well qualified, conscientious, and experienced and [was] highly esteemed in Dade County,"[91] the Florida Supreme Court affirmed a lower court's decision upholding the School Board's termination decision.[92] Again stressing the need for teachers to "inculcate" values to students by example, the Florida high court stated that state statutory law made it

> the duty of a teacher to labor faithfully and earnestly for the advancement of the pupils in their duties, deportment and morals,

86. Id. at 592.
87. *Id.* at 592.
88. 19 So.2d 832 (Fla. 1944).
89. *Id.* at 832.
90. *Id.* at 832–33.
91. *Id.* at 832.
92. *Id.* at 834.

> and embrace every opportunity to inculcate by precept and example the principles of truth, honesty and patriotism and the practice of every Christian virtue. It was the conclusion of the [school board] . . . that the conduct and attitude of the appellant was not only inimical to the responsibilities of good citizenship, but his manifested ideals were detrimental to the minds of the students and welfare of the public school system.[93]

The Court concluded that the school board had correctly decided that the teacher's beliefs caused him to be incompetent to be a teacher, stating as follows:

> The Statute . . . imposed the duty to teach the students of Dade County by precept and example "honesty and patriotism," and the true test of patriotism, can accurately be measured by the willingness of the citizen to bear arms and fight in the defense of his Country. The relator's qualifications, as clearly manifested by the record, failed to conform with the requirements of our law and the respondent Board's conclusions are within the spirit of the law . . . , when by resolutions adopted the appellant was declared incompetent to teach in the public schools . . . [94]

The unconstitutional conditions doctrine/rights-privilege distinction, insofar as it concerned public employment and, specifically, public school teaching, reached its apogee in the 1950s. During that time period, the United States Supreme Court upheld potential or actual teacher dismissals based on off-duty speech or associational activities in two cases: *Adler v. Board of Education of City of New York*[95] and *Beilan v. Board of Higher Education*.[96] In *Adler*, New York City school teacher Irving Adler brought a declaratory relief action challenging the constitutionality of a New York statute making ineligible for employment as a public school teacher any person advocating, or belonging to organizations advocating, overthrow of government by force, violence or unlawful means.[97] The Supreme Court rejected Adler's challenge, first articulating the unconstitutional conditions doctrine that had held jurisprudential sway in the public employment setting for many years:

> It is clear that such persons [employed or seeking employment in the public schools] have the right under our law to assemble,

93. *Id.* at 833.

94. *Id.* at 833–34.

95. 342 U.S. 485 (1952).

96. 357 U.S. 399 (1958).

97. 342 U.S. at 486–91.

> speak, think and believe as they will. . . . It is equally clear that they have no right to work for the State in the school system on their own terms. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.[98]

The Court went on to bolster its decision by noting the significant impact that teachers have on the development of students' attitude and values, stating as follows:

> 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. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate.[99]

Likewise, in *Beilan*, the Court was faced with a constitutional challenge by a teacher in Philadelphia who had been dismissed from employment by a school board on the ground of incompetency based on his refusal to answer any questions concerning his past affiliation with the Communist party.[100] The Court rejected the teacher's challenge, disingenuously framing the case as one involving insubordination, rather than association and disloyalty.[101] The Court then quoted both the *Adler*

98. *Id.* at 492.

99. *Id.* at 493.

100. 357 U.S. at 400–03.

101. *Id.* at 404. One commentator noted that the Court's willingness in *Beilan* and other cases to allow public employers to fire employees based on their being "insubordinate" when refusing to answer questions about their affiliations with alleged subversive organizations constituted "disingenuous thinking." Note, *Loyalty Oaths*, 77 YALE L.J. 739, 765 (1968). More recently, a respected teacher speech scholar pointed out that the Court majority's decision to frame the issue as involving the ability of a school board to dismiss Beilan for insubordination, rather than for exercising his associational rights, allowed the Court to avoid inquiry into First Amendment and academic freedom issues. Scott R. Bauries, *Individual Academic Freedom: An Ordinary Concern of the First Amendment*, 83 MISS. L.J.

court's statement about the role of teachers in developing the minds of impressionable students[102] and the Pennsylvania Supreme Court's statement in *Horosko* concerning the effect of teacher conduct on his or her ability to maintain the respect and goodwill of the community while serving as a role model for students.[103]

2. The Waning and Demise of the Unconstitutional Conditions Doctrine/Rights-Privilege Distinction and the Rise of the Nexus Requirement for Off-Duty Speech, Expressive Conduct and Association

Slightly over two years after the Supreme Court's decision in *Beilan*, the Court again took up teacher off-duty associational issues in *Shelton v. Tucker*.[104] In *Shelton*, an Arkansas statute compelled every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he or she had belonged or regularly contributed within the preceding five years.[105] Two teachers challenged the statute on First Amendment freedom of association grounds applicable to the states under the Fourteenth Amendment.[106] Pulling back from its broad holdings in *Adler* and *Beilan* allowing for significant limitations on teacher's associational rights, the Supreme Court reversed decisions of the lower court upholding the statute.[107]

The Court began its analysis by affirming two principles enunciated in *Adler* and *Beilan*, i.e., that the state has a strong interest in teacher competency and fitness because of the effect that teachers have on students,[108] and that the assessment of teacher fitness is not limited to the teacher's classroom conduct.[109] However, in an "about face" to those prior two decisions, where the government's interest held primacy and readily trumped the rights of teachers, the Court waxed eloquently about the rights and needs of teachers for associational privacy:

> It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association,

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677, 706–07 (2014).

102. 357 U.S. at 405 (quoting *Adler*, 342 U.S. at 493); *see supra* note 98 and accompanying text.

103. 357 U.S. at 406–07 (quoting Horosko v. Sch. Dist. of Mount Pleasant Twp., 6 A.2d 866, 868, 869–70 (Pa. 1939); *see supra* note 38 and accompanying text.

104. 364 U.S. 479 (1960).

105. *Id.* at 480.

106. *Id.* at 480, 484–85.

107. *Id.* at 490.

108. *Id.* at 485 (quoting Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952)).

109. 364 U.S. at 485 (quoting Belian v. Bd. of Pub. Educ., 357 U.S. 399, 406 (1958)).

> a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. . . . Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made—those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain.
>
> . . . [T]he pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty.[110]

Having previously refused to protect teachers' constitutional rights under the "rights-privilege distinction," the Court concluded by stating that the need to protect speech and association rights was at its highest concerning teachers when compared to any other profession:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation.[111]

If the Supreme Court had mortally wounded the unconstitutional conditions doctrine/right-privilege distinction in *Shelton*, the Court

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110. *Id.* at 485–87.

111. *Id.* at 487; *see also* Bruce Beezer, *School Employee's Dismissal for Violation of Desegregation Patronage Policy*, 37 ED. L. REP. 763, 764 (1987) (noting the change from *Adler* to *Shelton* and stating that "[t]he Court began to acknowledge that public employees could retain their constitutional rights in the employment setting."). The jurisprudential arc of the Court's decisions in the associational rights area can be fairly described as an initial adoption and subsequent refutation of the excesses of McCarthyism. *See* JoNel Newman, *Will Teachers Shed Their First Amendment Rights at the Schoolhouse Gate? The Eleventh Circuit's Post-*Garcetti *Jurisprudence*, 63 U. MIAMI L. REV. 761, 763–64 (2009); William T. Mayton, *"Buying Up" Speech: Active Government and the Terms of the First and Fourteenth Amendments*, 3 WM. & MARY BILL RTS. J. 373, 374 n.4 (1994); Richard H. Hiers, *Academic Freedom in Public Colleges and Universities: O Say Does that Star-Spangled First Amendment Banner Yet Wave?* 40 WAYNE L. REV. 1, 6–12 (1993).

buried it seven years later in *Keyishian v. Board of Regents.*[112] There, the Court was faced with a First Amendment challenge by several public university faculty members to portions of the same New York law requiring disclosure of membership in alleged subversive organizations that the Court had adjudicated fifteen years earlier in *Adler.*[113] Quoting its decision in *Shelton* about the need for constitutional protection in public schools,[114] the Court struck down the law on First Amendment grounds.[115] Further, the Court left no doubt that the unconstitutional conditions doctrine/rights-privilege distinction was a dead letter in the public employment context, stating:

> . . . [T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. . . . Indeed, that theory was expressly rejected in a series of decisions following *Adler*. . . . It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[116]

One year after the Supreme Court's decision in *Keyishian*, the Court issued its seminal decision in *Pickering v. Board of Education.*[117] *Pickering* first reiterated the Court's holdings in *Shelton* and *Keyishian*, noting that "[t]o the extent that [the lower court's] . . . opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy . . . it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court."[118] *Pickering* also expanded teachers' First Amendment rights by: (1) recognizing that teachers must be free from retaliatory adverse employment actions by school boards when speaking as citizen on matters of public concern; and (2) establishing a balancing test concerning the rights of teachers and the interests of school districts in efficiently operating an educational enterprise.[119] Subsequent Supreme Court decisions placed additional judicial gloss on teacher and public employee speech rights in the workplace but, with

112. 385 U.S. 589 (1967).

113. *Id.* at 592-93.

114. *Id.* at 603 (quoting *Shelton*, 364 U.S. at 487).

115. *Id.* at 609-10.

116. *Id.* at 605–06 (citations omitted).

117. 391 U.S. 563 (1968).

118. *Id.* at 568 (citing, *inter alia*, Shelton v. Tucker, 364 U.S. 479 (1960); Keyishian v. Bd. of Regents, 385 U.S. 589 (1967)).

119. *See id.* at 568 ("The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

one partial exception, did not address teacher off duty speech unrelated to the teacher's employment.[120] Instead, that case (and subsequent Supreme Court cases) was to come in the broader public employee context.

3. The Nexus Requirement for Off-Duty Speech, Unrelated to the Public Employee/Teacher's Employment

In *United States v. National Treasury Employees Union* (NTEU),[121] the Supreme Court evaluated, as against a First Amendment challenge, the constitutionality of a Congressional ban on receipt of honoria for public speaking or writing by federal government employees.[122] A majority of the Court, with Justice O'Connor concurring and dissenting, concluded that the ban did not comport with, and, indeed, ran afoul of, the requirements of the First Amendment.[123]

The majority opinion, authored by Justice Stevens, first noted that "[t]he prohibition applie[d] even when neither the subject of the speech or article nor the person or group paying for it ha[d] any connection with the employee's official duties."[124] After determining that the government employee speech constituted comment as citizens on matters of public concern, rather than employee speech on workplace matters, the majority further reiterated that "[t]he speeches and articles for which [the employees] received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment."[125] Under these circumstances, the majority concluded that the government had not satisfied its burden under the *Pickering* balancing test of justifying what amounted to a significant restriction on both its

120. *See, e.g.*, Connick v. Myers, 461 U.S. 138 (1983) (further defining what constitutes a matter of public concern in the context of complaints about the workplace and holding that whether a matter is of public concern is a threshold inquiry); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410 (1979) (making clear that a teacher's private conversation with her principal about a matter of public concern —her belief that the school district's employment policies were racially discriminatory—constituted protected speech); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (enunciating a shifting burden of proof on causation in First Amendment retaliation cases in a case involving a teacher's speech concerning school district dress and appearance policy); *but cf.* Rankin v. McPherson, 483 U.S. 378 (1987) (protecting on-duty speech of a clerical worker in a constable's office unrelated to employment, but derogatory toward the President as a matter of public concern and concluding that *Pickering* balancing test weighed in employee's favor).

121. 513 U.S. 454 (1995).

122. *Id.* at 457. Section 501(b) of the Ethics Reform Act of 1989 provided that, with several exceptions, "[a]n individual may not receive any honorarium while that individual is a Member, officer or employee" of the federal government. 5 U.S.C. app. 501(b) (2012).

123. *Id.* at 457; *id.* at 480 (O'Connor, J. concurring in part and dissenting in part).

124. *Id.* at 457.

125. *Id.* at 466.

employees' expressive activities and the public's right to hear and read what the employees would have said or written.[126] In particular, the majority noted that, primarily because the employee speech occurred outside of and was unrelated to government employment, the government had not demonstrated that the ban on honoraria was necessary to prevent "immediate workplace disruption" or to protect "operational efficiency" in government service.[127] The majority concluded by rejecting the government's request for a narrowing interpretation of the honoria ban that would save the statute from constitutional infirmity.[128] Specifically, the majority declined to engage in what it referred to as "judicial legislation" by refusing to impose a nexus requirement that would save the statute where there was a connection between the speaker's official duties and either the subject matter of the expressive activities or the identity of the individual or group paying the honorarium.[129]

Justice O'Connor concurred in the result.[130] She further noted that, unlike most of the Court's earlier decisions which addressed government employee speech at or concerning the workplace, "this case presents no . . . question whether the speech is of public, or merely private, concern. Respondents challenge the ban as it applies to off-hour speech bearing no nexus to Government employment—speech that by definition does not relate to 'internal office affairs' or the employee's status as an employee."[131] Applying *Pickering*, Justice O'Connor agreed with the majority that the employee's interest in speaking outweighed the government's interest in regulating employee speech.[132] Thus, Justice O'Connor "agree[d] with the Court that § 501 is unconstitutional to the extent that it bars this class of employees from receiving honoraria for expressive activities that bear no nexus to Government employment."[133] However, Justice O'Connor disagreed with the majority concerning its refusal to impose a nexus requirement, indicating that she would have upheld the statute as constitutional in cases where the employees' expressive activities were related to their official duties.[134]

The Supreme Court next took up the question of whether and how the

126. *Id.* at 465–70 (citing *Pickering*, 391 U.S. at 568).

127. *Id.* at 470–74.

128. *Id.* at 479.

129. *Id.*

130. *Id.* at 480 (O'Connor, J. concurring in part and dissenting in part).

131. *Id.*

132. *Id.* at 481–85.

133. *Id.* at 485.

134. *Id.* at 486.

off-duty or on-duty context and workplace-related or workplace-unrelated content of public employee speech or expressive conduct affects First Amendment analysis in an employee termination case in *City of San Diego v. Roe*.[135] In *Roe*, a San Diego police officer made a video showing himself stripping off a police uniform and masturbating.[136] He then sold the video, among other items, on the adults-only section of eBay.[137] The uniform was not the specific uniform worn by the San Diego police, but it was clearly identifiable as a police uniform.[138] Roe's eBay user profile also identified him as employed in the field of law enforcement.[139] Roe's supervisors discovered Roe's activities and an investigation ensued.[140] When the investigation revealed that Roe's conduct violated specific police department policies, including conduct unbecoming of an officer, outside employment, and immoral conduct, the department ordered Roe to cease and desist from his on-line activities;[141] however, Roe failed to fully comply with the order.[142] The police department further cited Roe for violating or disobeying lawful orders and began termination proceedings.[143] The proceedings resulted in Roe's dismissal from the police force.[144]

The Supreme Court upheld Roe's dismissal in a per curiam opinion.[145] As a threshold matter, the Court treated Roe's video as expressive conduct protectable under the First Amendment.[146] Next, the Court, drawing on the distinction discussed by Justice O'Connor in her concurrence and dissent in *NTEU*, articulated differing legal standards

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135. 543 U.S. 77 (2004).

136. *Id.* at 78.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 78–79.

141. *Id.* at 79.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 78, 85.

146. *Id.* at 83, 84. The Supreme Court has long held that conduct, without more, is not protected under the First Amendment. *See, e.g.*, Colten v. Kentucky, 407 U.S. 104, 109 (1972). The Court has also held, however, that expressive conduct may be protected as speech under that constitutional provision. Virginia v. Black, 538 U.S. 343, 358 (2003). "In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," the Court has "asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405,410–11 (1974)) (internal quotations omitted). In a related context to the facts in *Roe*, the Court has held that nude dancing is expressive conduct that "falls within the outer ambit of the First Amendment's protection." City of Erie v. Pap's A. M., 529 U.S. 277, syllabus (2000) (citations omitted).

for regulating public employee speech depending on whether the expressive activity occurred in the on-duty or off-duty context and involved workplace-related or workplace-unrelated content:

> A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. . . . On the other hand, a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public. The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment. See *Connick, supra; Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). Outside of this category, the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification "far stronger than mere speculation" in regulating it. *United States v. Treasury Employees,* 513 U.S. 454, 465, 475, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995) *(NTEU).*[147]

Addressing the *NTEU* line of authority first, the Court noted that Roe's expressive conduct was both related to his employment and harmful to his employer, stating that:

> Although Roe's activities took place outside the workplace and purported to be about subjects not related to his employment, the [police department] demonstrated legitimate and substantial interests of its own that were compromised by his speech. Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer. The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as "in the field of law enforcement," and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and

147. *Roe*, 543 U.S. at 80 (*Keyishian* citation omitted). Commenting favorably about the Supreme Court's decision in *Roe*, Professor Estlund stated that "[t]he good news is that if an employee's speech is unrelated to the employment—if it takes place outside the workplace and its content is not related to the job—then the speech is not subject merely to the limited protections of the *Connick-Pickering* test but rather enjoys something like the full protection of the First Amendment." Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1467–68 (2007).

> the professionalism of its officers into serious disrepute.
>
> The present case falls outside the protection afforded in *NTEU*. The authorities that instead control, and which are considered below, are this Court's decisions in *Pickering, supra, Connick,* 461 U.S. 138, 103 S.Ct. 1684, and the decisions which follow them.[148]

Turning to the *Pickering* line of authority, the Court quickly dispatched Roe's arguments, concluding that "there is no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test. He fails the threshold test and balancing does not come into play." [149]

C. Summary

In both the teachers' off-duty conduct and speech/expressive conduct and association contexts, the evolution of Supreme Court and state law case authority has been marked by a move toward greater protection of teachers' right through judicially-created nexus requirements. Although speech and conduct are generally treated differently for purposes of First Amendment analysis,[150] it is not surprising that the analysis concerning teacher off-duty conduct and speech would converge toward a nexus requirement since both categories of activity/expression implicate constitutional rights: principles of privacy and notice and vagueness under the due process clause when conduct is involved[151] and principles of freedom of speech, expression and association when speech and expressive conduct are involved.[152] By

148. *Roe*, 543 U.S. at 81–82. Professor Estlund viewed this aspect of the Court's decision in *Roe* less favorably, opining that "[t]he bad news for employees lies in the Court's unanimous holding that Roe's pornographic videos were not unrelated to his employment, and therefore did not qualify for the broader and more robust protection." Estlund, *supra* note 147, at 1468. Another respected scholar has expressed similar chagrin concerning *Roe*'s unduly expansive view concerning whether expressive conduct is related to employment. Mary-Rose Papandrea, *The Free Speech Rights of Off-Duty Government Employees*, 2010 B.Y.U. L. REV. 2117, 2160 [hereinafter Papandrea I] ("Interpreting 'work related' in the broad manner Roe suggests threatens to swallow all of the expressive activities of public employees, at least as soon as the public at large learns the identity of the speaker, and places employees in perpetual danger of losing their jobs for anything they say, even outside of the workplace.").

149. *Roe*, 543 U.S. at 84.

150. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) ("[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct."); *see also* Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 110 (1989) (arguing attempt to distinguish between speech and conduct is "doomed to failure") and discussion at *infra* notes 290–300, 316–30, 333 and 337–38 and accompanying texts.

151. *See supra* notes 53–78 and accompanying text.

152. *See supra* notes 79–149 and accompanying text.

cabining the grounds upon which school districts and teacher licensing boards may take adverse employment and licensing action against teachers, this evolution has laudably protected teachers' rights in the above-mentioned areas and given teachers better notice of the kind of conduct and speech or expressive activities that will legitimately lead to adverse action against them.[153] At the same time, the nexus requirement has continued to allow districts and licensing boards sufficient discretion and power to take action against teachers who, by their off-duty conduct, are unfit to teach, or, by their off-duty speech or expressive conduct, impermissibly put their interests ahead of their school district employers and the students they both serve.

Although an improvement over unadorned statutory terms such as "immorality" or "conduct unbecoming of a teacher," and more likely to provide teachers with fair notice of prohibited conduct and speech,[154] the nexus requirement and the principle of fitness to teach remain subject to legitimate criticism. Notwithstanding that courts have upheld the term "unfitness to teach" as against due process vagueness challenges,[155] the term is vague in that it requires teachers to predict whether his or her conduct or speech will offend local community standards and punishes them when they are incorrect in that assessment—assuming the teacher has engaged in such calculation.[156] Thus, one commentator has correctly pointed out that immorality statutes, even when narrowed by a "fitness to teach" construction,

> . . . require those who enforce them to read an unstated "community standard" into the statute. For example, two courts may interpret "immorality" as encompassing different conduct: a liberal, tolerant community conceivably might not find anything wrong with a teacher who is homosexual; yet a rural town in the Bible belt may have grave difficulty in accepting this teacher in its

153. Fulmer, *supra* note 31, at 287 ("[R]equiring a showing of proper nexus between the conduct and the teacher's fitness to teach makes vague statutes based on mere "immorality" fundamentally more fair.").

154. See *supra* notes 70–71 and accompanying text.

155. *See, e.g.*, Morrison v. State Bd. of Educ., 461 P.2d 375, 387-90 (Cal. 1969).

156. See Amber Fischer, *"Immoral Conduct": A Fair Standard for Teachers?*, 28 J. L. & EDUC. 477, 483 (1999) ("By incorporating standards less vague than 'immoral conduct' and 'unfitness to teach,' legislatures will better inform teachers of the behavior expected of them. If a teacher knows his conduct might be a basis for his termination, he will be less likely to engage in it."). In addition, the California Supreme Court stated in *Morrison* that, although the statutory "immorality" provision, when construed to mean "fitness to teach," was "not unconstitutional on its face[, t]his construction does not mean that the statute will always be constitutional as applied. There may be borderline conduct which would justify a finding of unfitness to teach but about which a teacher would not have a sufficiently definite warning as to the possibility of suspension or revocation." 461 P.2d at 389 n.36.

schools.[157]

Similarly, another commentator has stated "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."[158] And, other commentators have likewise opined that "[c]ommunity standards are important to a court's consideration of whether a teacher's behavior is immoral. Moral standards vary from community to community and what may be tolerated or overlooked in one area may be used as a reason for discharge in another."[159] Yet, it is undeniable "that parents and the community have a legitimate concern about the qualifications and actions of those individuals the school district places in positions of power and trust over their children. . . . Standing in place of the parent [under the in loco parentis doctrine] while a child is at school has meaning. The public cannot be left out of the public school."[160]

In addition, *Morrison*'s and other courts' use of notoriety as a factor in determining fitness to teach is problematic on several levels. First, focusing on notoriety in determining whether teacher conduct (or speech) may properly lead to adverse employment or licensure action tends to revive the bare "immorality" or "conduct unbecoming of a teacher" standard prevalent during the pre-nexus period. It does so by shifting the inquiry back to public opinion and community standard analysis with the concomitant risk to teachers' privacy and associational rights.[161] Stated another way, asking whether a teacher's conduct has become well known amongst students and patrons in the community necessarily asks whether a sufficient number of community members have been offended by the conduct such that a teacher's fitness to teach has been significantly or irreparably brought into question.

Second, the notoriety of a teacher's conduct or misconduct leads to arbitrary and inconsistent results. Assume that two teachers have

157. Fulmer, *supra* note 31, at 275.

158. Shotwell, *supra* note 19, at 63. Shotwell also correctly suggests that assessing and disciplining teacher conduct by local community standards may inferentially suggest that the school district does not respect diversity, including racial, ethnic, religious and sexual orientation diversity, in its student body. *Id.* at 69. Thus, as Shotwell points out "[w]hen 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 nonconforming behavior or identity is unacceptable." *Id.* at 69. *Accord, see* DeMitchell, *supra* note 19, at 328 n.6.

159. John C. Walden and Renee Culverhouse, *Homosexuality and Public Education*, 55 ED. L. REP. 7, 15 (1989).

160. DeMitchell, *supra* note 19, at 337-338.

161. Shotwell, *supra* note 19, at 66 ("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.").

engaged in and been convicted of the same criminal behavior—say, driving under the influence or being intoxicated in public; however, one teacher's conviction is publicized in the local newspaper or in the blogosphere and the other teacher is fortunate enough to completely avoid publicity. The first teacher is more likely to suffer employment or licensure consequences than the second teacher.[162]

Third, when evaluating the notoriety issue in a teacher dismissal case, courts quite properly attempt to parse causation and allocate blame between the teacher and the school district, viewing notoriety as a negative factor for the teacher when the teacher's conduct or the teacher him/herself has caused the notoriety, but discounting the existence of the notoriety when the school district itself has publicized the teacher's conduct.[163] On one level, this approach is appropriate in the sense that a teacher should not suffer the consequences of notoriety that he or she did not cause; however, on another level, to the extent that the notoriety of a teacher's conduct or misconduct may be germane to assessing a teacher's fitness to teach, the cause of the notoriety is of little moment, since its existence will presumably undermine a teacher's effectiveness regardless of its source.[164]

Unlike some, this Article does not suggest that the nexus standard be banished from all consideration in evaluating teacher off-duty conduct or speech. It does, however, take the position that notoriety considerations should be minimized or eliminated.[165] The key, ultimately, is to use those factors within a framework of analysis and in a more limited fashion when other, more explicit, indicators of community standards—such as state statutory law, Codes of Ethics for

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162. *See, e.g.*, *Scott*, 156 N.E.2d at 3 (teacher dismissal affirmed after his public intoxication became well known in the community); *see also* McCullough v. Ill. State Bd. of Educ., 562 N.E.2d 1233, 1237 (Ill. App. Ct. 1990) (same result where teacher's conviction for tax evasion became well-publicized).

163. *See, e.g.*, Rogliano v. Fayette Cnty. Bd. of Educ., 347 S.E.2d 220, 225 (W.Va. 1986) (cited in Chester M. Nolte, *Establishing the Nexus: A School Board Primer*, 38 ED. L. REP. 1, 8 (1987)).

164. Particularly when a school district has caused the notoriety concerning a teacher's conduct—but also in any instance where a teacher will be returning to the classroom under circumstances where his or her absence due to suspension, placement on leave or dismissal has caused negative publicity or speculation about the reasons for the absence or the teacher's fitness to teach—the teacher and the school district should consider whether a public statement by the school district, or by the school district and the teacher jointly, about the teacher's return would mollify the impact of the teacher's conduct and/or absence.

165. As alluded to above, Shotwell suggests that both the nexus and notoriety requirements from the California Supreme Court's decision in *Morrison* and its progeny should be eliminated—primarily because they promote conformity, open up teachers' lives to unwarranted scrutiny and are potentially at odds with promoting and accepting diversity amongst public school students. *See* Shotwell, *supra* note 19, at 73. Professor DeMitchell disagrees, primarily because of the community's legitimate expectation that teachers should serve as role models, although he does agree with Shotwell "that exemplar can be an unwarranted and an undeserved burden on educators." DeMitchell, *supra* note 19, at 335.

the teaching profession,[166] and school board policy—have not been enunciated or cannot be gleaned. Similarly, as to speech and expressive or associational conduct, this Article does not intend to jettison the nexus requirement concerning public employee off-duty speech and expressive conduct recently fashioned by the Supreme Court in *NTEU* and *Roe*. Rather, this Article will likewise place those two Supreme Court decisions and other teacher-specific lower court decisions relying on them within the above-mentioned framework, suggesting only minor revisions to the Supreme Court's off-duty public employee speech jurisprudence.

The Article will turn now to a summary of that proposed framework, followed by a more detailed discussion and analysis of existing case law and other examples and their place within that framework.

III. THE PROPOSED FRAMEWORK SUMMARIZED

In evaluating adverse employment or licensure action taken by school boards or state licensing agencies against teachers based on their off-duty conduct or speech unrelated to their employment, courts and those administrative decisionmakers should apply the following standards:

A. Lawful off-duty conduct or speech, expressive conduct or association not involving students should be presumed to have no effect on a teacher's fitness to teach, and, except in unusual circumstances, should not serve as a basis for adverse employment or licensure action;[167]

B. Unlawful off-duty conduct or unprotected speech, i.e. conduct or speech proscribed by federal or state statutory law, the Code of Ethics for the teaching profession adopted in the state, or local school board policy, may or may not render a teacher unfit to teach, and, as such, may or may not constitute sufficient grounds for adverse employment or licensure action;[168]

Evaluation of teacher fitness under these circumstances should include the following criteria:

1. Relatively minor unlawful off-duty conduct (such as misdemeanor offenses) and certain categories of

166. A recent empirical study indicates that approximately two-thirds of the states have adopted codes of ethics for educators, with most of those having the force of law. Perry A. Zirkel, *State Ethical Codes for School Leaders*, 43 J. L. & EDUC. 503, 529 (2014).

167. *See infra* notes 174–264 and accompanying text.

168. *See infra* notes 265–338 and accompanying text.

unprotected/misdemeanor off-duty speech will not generally have a sufficient nexus to teacher fitness and will not constitute a basis for adverse employment or licensure action unless such conduct or speech relates to the teacher's employment or involves students;[169]

2. Significant unlawful off-duty conduct (such as felony offenses) and speech not otherwise protected under the First Amendment and typically subject to felony criminal sanctions (obscenity, fighting words and true threats) will usually have a sufficient nexus to teacher fitness to constitute a basis for adverse employment or licensure action;[170]

3. Serious off-duty felonious conduct exploiting children or speech/expressive activities doing the same will be presumed to render a teacher unfit to teach and, except in unusual circumstances, will constitute grounds for adverse employment or licensure action;[171] and

4. Serious off-duty felonious conduct involving crimes against children or speech/expressive activities involving harm to children will per se render a teacher unfit to teach and will constitute for permanent adverse employment and licensure action.[172]

Having set forth a bare-bones outline of the proposed framework, the Article will now turn to a more detailed explication of the framework.[173]

169. *See infra* notes 265–300 and accompanying text.

170. *See infra* notes 301–30 and accompanying text.

171. *See infra* notes 331–33 and accompanying text.

172. *See infra* notes 334–38 and accompanying text.

173. A noted First Amendment, social media and national security scholar has recently proposed a new framework for evaluating teacher speech cases. *See generally* Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment,* 90 N.C.L. REV. 1597 (2012) [hereinafter Papandrea II]. Professor Papandrea's framework, while extremely helpful and well-thought out, is focused on teacher lawful speech cases— primarily in the context of off-duty social media use. Although Professor Papandrea's framework adopts the nexus requirement from the modern teacher conduct cases, it explores teacher conduct cases only in passing. Likewise, another commentator has proposed a new framework for analyzing off-duty speech by public employees generally, but again, does not addresses off-duty public employee or teacher conduct. *See generally* Jeffrey A. Shooman, Comment, *The Speech of Public Employees Outside of the Workplace: Toward a New Framework,* 36 SETON HALL L. REV. 1341 (2006). In addition, neither Papandrea nor Shooman addresses off-duty teacher speech which violates the criminal law and/or is not protected by the First Amendment.

IV. THE PROPOSED FRAMEWORK EXPLICATED

A. Off-Duty Lawful Teacher Conduct or Speech not Involving Students

1. Off-Duty Lawful Conduct

When a teacher engages in lawful off-duty conduct that does not involve students, a school district or state licensing board has very little legitimate interest in regulating the teacher's conduct. The conduct rarely impacts students and, even if students learn about it, the teacher's right to engage in conduct within the bounds of the law and right to not suffer adverse employment or licensure action when doing so clearly outweighs the government employer's or state's interest in regulating teachers. Under these circumstances, a rebuttable presumption should arise in the teacher's favor that the teacher remains fit to teach and, therefore, not subject to adverse employment or licensure action on these grounds.[174]

The best example of the proper judicial approach to a school district's attempt to take adverse employment action against a teacher under these circumstances is *Land v. L'Anse Creuse Public School Board of Education*.[175] There, a school board fired a female teacher after a video taken without the teacher's knowledge showing her simulating fellatio on a male mannequin while attending a combined bachelor/bachelorette party on a boat during a day off from school was posted on the internet

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174. A presumption has been defined as "a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted. . . . A legal device which operates in the absence of other proof to require that certain inferences be drawn from the available evidence." BLACK'S LAW DICTIONARY 1185 (6th Ed. 1990). Both federal and a number of state rules of evidence provide that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption." FED. R. EVID. 301; *see also* MD. EVID. R. 5-301; IND. EVID. R. 301.

The author is not aware of any reported decisions discussing or establishing a rebuttable presumption in favor of teachers under these circumstances. However, as discussed below, courts and commentators have opined that public employee, including teacher, off-duty speech unrelated to work should be presumptively entitled to First Amendment protection. Locurto v. Guiliani, 447 F.3d 159, 172 (2d Cir. 2006) (public employees); Papandrea I, *supra* note 148, at 2120-21 (same); Papandrea II, *supra* note 172, at 1630 (teachers); *see* discussion *infra* at note 206 and accompanying text. Moreover, at least one jurisdiction has established the converse of this presumption in the teacher conduct area, i.e. that where a teacher engages in unlawful, sexually provocative or exploitative conduct with students, "a strong presumption of unfitness arises against the teacher." Ricci v. Davis, 627 P.2d 1111, 1120 (Colo. 1981) (en banc) (quoting Weissman v. Bd. of Educ., 547 P.2d 1267, 1273 (Colo. 1976)); *see* discussion *infra* at note 320 and accompanying text. Accordingly, both as a matter of legal symmetry and so as to more clearly explicate the nexus requirement, a teacher's lawful off-duty conduct not directed at students and unrelated to his or her employment should correspondingly receive a presumption in favor of the teacher's fitness to teach.

175. No. 288612, 2010 WL 2135356 (Mich. Ct. App. 2010).

without her consent.[176] The board made the decision to fire the teacher on the grounds that her conduct constituted "lewd behavior contrary to the moral values of the educational and school community, which undermined her moral authority and professional responsibilities as a role model for students."[177] After the State Tenure Commission reversed the decision of an administrative law judge and reinstated the teacher, the School Board appealed.[178]

The Michigan Court of Appeal affirmed.[179] The Court first noted the lack of judicial authority relating to the issue before it, stating that "no appellate cases involve a teacher's termination based on lawful, off-duty conduct occurring off school premises, not involving students."[180] The Court then characterized the nature of the facts before it and rendered its decision under the legal standard governing the board's appeal:

> . . . [T]he conduct complained of did not involve students, was not committed while the teacher was performing duties for the school, and was not intended to be seen, known, or discussed with students. Given the lack of binding precedent on this issue and the requirement that reasonable and just cause "be shown only by significant evidence proving that the teacher is unfit to teach," the commission's decision to reinstate petitioner cannot be deemed in excess of its authority, arbitrary or capricious, or contrary to law.[181]

The Court went on to discuss the specific facts in the case, restating its decision as follows:

> Examination of the entire record reveals that the photographs engendered widespread gossip and some students and parents lost respect for petitioner. Further, there was expert testimony that the conduct depicted in the photographs would tend to cause students to lose respect for their teacher, and could adversely affect learning. However, some parents testified that while the internet posting of the photographs was unfortunate, they had not lost respect for petitioner as a teacher or a person. Moreover, there was overwhelming evidence that petitioner was an excellent teacher who went above and beyond her responsibilities to assist her students to learn and enjoy the material, and to assist students and

176. *Id.* at *1.

177. *Id.*

178. *Id.* Indeed, in *Morrison*, the paradigmatic off-duty conduct nexus case, the California Supreme Court emphasized that Morrison was never charged with or convicted of a crime concerning his homosexual conduct. 461 P.2d at 378 n.6. *See also supra* note 59 and accompanying text.

179. 2010 WL 2135356 at *8.

180. *Id.* at *6.

181. *Id.* at *7.

> parents with other issues that might arise. . . . [W]e conclude that the commission did not act arbitrarily or capriciously in deciding that, where there is no professional misconduct, the notoriety of a tenured teacher's off-duty, off-premises, lawful conduct, not involving students or school activities, by itself, will not constitute reasonable and just cause for discipline.[182]

Several states have taken a step further than the *Land* court. These states have enacted statutes effectively codifing the legal doctrine and result articulated by the court in *Land* by making it unlawful, except in limited circumstances, for public employers, including school districts, from taking adverse employment action against employees, including teachers, based on their having engaged in lawful off-duty conduct.[183]

Yet, not all courts have been so sanguine about lawful teacher off-duty conduct. In *Wishart v. McDonald*,[184] another off-duty conduct case involving a teacher and a mannequin, the First Circuit upheld a school board's dismissal of a teacher with a diagnosed personality disorder for engaging in conduct unbecoming of a teacher when he dressed a mannequin in a negligee and paraded around outside of his residence undressing and fondling his inanimate companion.[185] Although the Court acknowledged that the teacher's conduct "was probably not criminal, nor . . . seriously disruptive" and the undisputed testimony of the teacher's psychiatrist was that the personality disorder would not affect the teacher's classroom performance, role model and notoriety considerations lead the Court to affirm the teacher's dismissal.[186]

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182. *Id.* In contrast, where teacher off-duty conduct involved unlawful conduct, i.e. posting of nude or obscene photographs, and/or the teacher displayed the photos himself or did not expeditiously remove them from the internet when displayed by others, courts and arbitrators have properly upheld termination of teachers on nexus/unfitness to teach grounds. *See, e.g.*, San Diego Unified School Dist. v. Comm'n on Prof'l Competence, 194 Cal.App.4th 1454 (2011), Phoenix City Bd. of Educ., 125 Lab. Arb. 1473 (Cal. 2009) (Baroni, Arb.); Warren City Bd. of Educ., 124 Lab. Arb. 532 (2007) (Skulina, Arb.); Mark Paige & Todd A. DeMitchell, *Arbitration Litigation Concerning Teacher Discipline for Misuse of Technology: A Preliminary Assessment*, 296 ED. L. REP. 22, 32–37 (2013) (citing above cases).

183. *See, e.g.*, CAL. LAB. CODE § 96(k) (West 2011) (protecting "discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises"); COLO. REV. STAT. § 24-34-402.5 (2008) (providing a civil action for damages to public employees who are discharged "due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours" unless one of two exceptions applies); *see also* Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L. J. 75, 85 n.60 (2012) (discussing above statutes). In some jurisdictions, similar statutes were written more narrowly to protect employees from being fired or discriminated against for smoking cigarettes during their off-duty time and away from the workplace. *Id.* at 85 n.58.

184. 500 F.2d 1110 (1st Cir. 1974).

185. *Id.* at 1113–16.

186. *Id.*

In *Kinser v. West Branch Local School Dist., Board of Education*,[187] a teacher (Kinser) and her husband were both charged with multiple counts of felonious cultivation and possession of marijuana after police had raided their residence.[188] Based on the charges, the school board suspended Kinser pending a decision on her termination.[189] The charges against Kinser were eventually dropped after her husband agreed to plead guilty to two felony counts.[190] This fact notwithstanding, the school board continued to pursue Kinser's dismissal.[191] A referee appointed by the school board recommended Kinser's reinstatement to her teaching position based on his determination that the board had not presented sufficient evidence to support a finding and conclusion of "good and just cause" for Kinser's termination.[192] The school board, however, rejected the referee's recommendation and terminated Kinser's employment.[193] The trial court upheld the board's decision.[194]

The Ohio Court of Appeals affirmed.[195] The appellate court noted that the referee's findings that Kinser had not smoked marijuana in a number of years and did not condone her husband's marijuana use were not against the weight of the evidence.[196] The court further noted that "the evidence does not support any violation of the drug laws by plaintiff but that the evidence does establish that plaintiff was aware and condoned her husband's cultivation of marijuana plants even though she did not approve of such conduct. . . ."[197] Significantly, the appellate court also concluded that "[i]f the violation of the law committed by plaintiff's husband in this case was limited to the use and possession of minor amounts of marijuana, we would hold that that fact alone would be insufficient to terminate plaintiff's employment as a teacher."[198] Although sympathetic to Kinser's plight, the appellate court, citing to the Supreme Court's decisions in *Belian* and *Adler* concerning the effect of a teacher's off-duty conduct on her fitness to teach, affirmed the trial court's decision.[199] In so holding, the Ohio appellate court concluded as follows:

187. No. 78 C.A. 57, 1978 WL 215086 (Ohio Ct. App. 1978).
188. *Id.* at *2.
189. *Id.* at *1.
190. *Id.* at *2.
191. *Id.* at *1.
192. *Id.* at *5.
193. *Id.*
194. *Id.*
195. *Id.* at *13.
196. *Id.* at *8.
197. *Id.* at *9.
198. *Id.*
199. *Id.* at *11–12.

> . . . [N]either the personal guilt of plaintiff nor her role as a wife are the issues in this case.
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> ***
>
> After reviewing the entire case we find that plaintiff's conduct in condonation of her husband's felonious violation of the state drug laws by his cultivation of marijuana and possession of marijuana and continuous residence with him and her daughter with the foreseeable results . . . [of eventual search of their property, their arrests with publication in the news media and adverse public reaction] was a serious matter and that the decision of defendant that such conduct extinguished plaintiff's effectiveness as a teacher in the West Branch School District is supported by the evidence and is not against the weight of the evidence.[200]

The *Land* case was correctly decided while the *Wishart* and *Kinser* cases were incorrectly decided under the framework proposed in this Article. Specifically, the court in *Land* correctly held that the teacher, having engaged in lawful off-duty conduct, was entitled to a presumption of continued fitness to teach and that any notoriety related to her conduct did not rebut that presumption. In contrast, the courts in *Wishart* and *Kinser*, by failingly to adhere to a presumption of fitness under circumstances where the teacher had not engaged in illegal conduct, improperly discounted the teacher's lawful conduct and improperly elevated notoriety considerations in reaching that result.

Assigning a presumption of fitness to teach when a teacher faces adverse employment or licensure action based on his or her lawful off-duty conduct unrelated to students is appropriate for several reasons. First, it provides notice to teachers (and school districts and teacher licensing boards) concerning the type of conduct in which they (teachers) may engage without fear of possible adverse professional consequences, thereby combatting the chilling effect on the exercise of constitutional behavior identified by the California Supreme Court in *Morrison*.[201] Second, it puts a more meaningful gloss on the immorality and nexus standards by identifying explicit and ascertainable community standards under positive law—state and federal laws, codes of ethics for the teaching profession, and school board policy[202]—to which teachers must conform their conduct.[203] Third, it will make it more difficult for

200. *Id.* at *12.

201. *See* Morrison v. St. Bd. of Educ. 561 P.2d 375 (Cal. 1969).

202. "Positive law" is defined as "enacted law—the codes, statutes, and regulations that are applied and enforced in the courts." BLACK'S LAW DICTIONARY 1280 (9th ed. 2009).

203. Of course, the mere existence of a state or federal law, code of ethics provision or school board policy is not in itself sufficient to establish a community standard, the violation of which will

overzealous community members, parents, and school board members and administrators to prevail on adverse employment or licensure actions against teachers who have acted inconsistent with some stakeholders' view of morality, but still within the bounds of the law. Indeed, these circumstances will require leadership—often, courageous leadership—by school administrators and board members and teacher licensing decisionmakers to refrain from initiating adverse employment or licensure action against teachers—and to explain their reasons for refraining from doing so—to hostile stakeholders. And fourth, it would allow—indeed, require—legislative or quasi-legislative administrative bodies, such as local school boards and state boards of education, to formulate and expressly articulate constitutionally-defensible policy concerning teacher off-duty conduct if they wish to rely on such grounds to terminate the employment or revoke the license of a teacher.[204]

Because of the ability of legislatures, state boards of education, and local school boards to speak for the community by enacting public policy proscribing teacher off-duty conduct, the above-discussed presumption of fitness would be strong. However, the presumption

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provide a basis for the determination that a teacher is unfit to teach. As discussed in cases such as *Morrison* and *NTEU*, a federal, state or local enactment must satisfy constitutional standards, including protecting the due process, expressive and associational rights of teachers. *See generally Morrison*, 461 P.2d at 375; U.S. v. Nat'l Treasure Employees Union, 513 U.S. 454 (1995).

204. Shotwell likewise suggests that, as an alternative to the nexus standard and notoriety factor, compliance with or violation of positive law should be the standard for evaluating teacher fitness. Shotwell, *supra* note 19, at 73. Specifically, she states that "[c]riminal 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." *Id.* Professor DeMitchell disagrees, suggesting that Shotwell's proposed standard suffers from the same vagueness as the immorality standard and that only state dismissal laws, not negotiated contracts, can set the standard for teacher dismissal. DeMitchell, *supra* note 19, at 336–37. Shotwell is partially correct, but fails to recognize that the nexus standard must inform the analysis when teachers engage in unlawful off-duty conduct unrelated to students. *See* discussion *infra* notes 265–89 and 301–15 and accompanying texts. DeMitchell is correct in wanting to retain the nexus standard but, under this Article's proposed fitness framework, evidence concerning nexus and notoriety need not factor into the equation where the teacher's off-duty conduct is lawful and not involving students or is felonious conduct involving harm to students resulting in a conviction and the legislature has mandated permanent certificate denial or revocation. *See* discussion *supra* notes 174–206 and accompanying text and *infra* notes 334–36 and accompanying text. In addition, although DeMitchell is correct that most states establish standards for teacher dismissal via state law, which statutory law will control over collective bargaining provisions, *see, e.g.*, Anderson Fed'n of Teachers, Local 519 v. Alexander, 416 N.E.2d 1327, 1331–32 (Ind. App. 1981), several states have allowed school boards and local education associations to agree to provide teachers with greater rights concerning dismissal than the rights provided by state law. *See, e.g.*, Sch. Comm. of Needham v. Needham Educ. Ass'n, 500 N.E.2d 1320, 1324 (Mass. 1986) (arbitrator did not exceed his powers in applying broader teacher dismissal provision from collective bargaining agreement than dismissal provision set forth in state statutory law); Hunting v. Clark Cnty. Sch. Dist. No. 161, 931 P.2d 628, 632–34 (Idaho 1997) (reduction-in-force and notice of re-employment provisions in collective bargaining agreement giving teachers more rights than provided by state statutory law held enforceable).

would not be conclusive or irrebuttable.[205] Certain teacher off-duty conduct not involving students may be lawful, but may still constitute grounds for adverse employment or licensure action. In particular, off-duty conduct which is lawful, but which is or becomes related to the teacher's employment may fall within that narrow category of cases where the presumption of fitness might be rebutted. For example, a teacher may engage in an affair with a colleague or even a colleague's spouse. Although this conduct would not be unlawful (assuming laws prohibiting adultery have been repealed), it might lead to adverse employment consequences—typically a transfer with possible loss of pay or status in a large school district, but possibly dismissal in a small school district—if the affair causes disruption in the workplace.[206] The teacher would suffer adverse consequences, not because he or she had engaged in off-duty immoral conduct, but because the conduct was related to her employment and affected the school district's legitimate interests.

In sum, to refine and make more objective the nexus and fitness to teach standards, teachers who engage in lawful, off-duty behavior not involving students should be entitled to a strong presumption concerning their fitness to teach, which should be rebuttable only upon proof that the teacher's off-duty conduct disrupted the school district's legitimate interest in operating its schools.

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205. Black's defines "irrebuttable presumption" as "[a] presumption that cannot be overcome by any additional evidence or argument." BLACK'S LAW DICTIONARY 1305 (9th ed. 2009). According to the Supreme Court, a conclusive or irrebuttable presumption " . . . foreclose[s] the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate." Michael H. v. Gerald D., 491 U.S. 110, 120 (1989).

206. An employer, including a school board, who takes adverse employment action against an employee, including a teacher, under these circumstances would not be subject to liability even if it did not have an express anti-fraternization policy, i.e. a policy prohibiting off-duty intimate relations between co-workers or between an employee and the spouse of a co-worker. *See, e.g., generally* Triplett v. Belle of Orleans, LLC, Civ. A 98-2885, 2000 WL 2640002, at **1–5 (E.D. La. 2000) (employee's continuing affair with a subordinate employee and the lack of judgment it demonstrated, plus supervisor's dissatisfaction with employee's subsequent attitude and ability to work as part of the team constituted a legitimate nondiscriminatory reason for terminating employee); *see generally* Keppler v. Hinsdale Twp. High Sch., 715 F. Supp. 862 (N.D.Ill. 1989). The existence of an express anti-fraternization policy adopted by a school board would not only be enforceable, *see, e.g.,* Ellis v. United Parcel Serv., Inc., 523 F.3d 823, 828 (7th Cir. 2008) (finding and concluding that violation of employer's anti-fraternization policy was a legitimate, non-discriminatory reason for plaintiff's discharge); Barbee v. Household Automotive Finance Corp., 6 Cal. Rptr. 3d 406, 411-14 (Cal. Ct. App. 2003) (upholding employer anti-fraternization policy as against state constitutional privacy and statutory challenge); *see also* Montgomery v. Carr, 101 F.3d 1117, 1118 (6th Cir. 1996) (school board anti-nepotism policy upheld as against First Amendment challenge, but would cause re-categorization of the teacher's conduct from off-duty lawful conduct to off-duty conduct prohibited by positive law).

2. Off-Duty Lawful and Protected Speech

The Supreme Court's decisions in *NTEU* and *Roe* have been interpreted and applied by lower courts in the teacher and other public employee off-duty speech setting, with the analysis and results there similar to the judicial approach taken concerning off-duty teacher conduct in *Land* and under the lawful behavior aspect of the framework proposed in this Article.[207]

Thus, lower federal courts have correctly held—and at least one other scholar has cogently opined—that, where the content of a public employee's lawful off-duty speech, expressive conduct or associational activities does not concern his or her employment and is not directed to his or her co-workers or others with whom the employee works, no nexus will have been established and the speech should be presumed to be entitled to First Amendment protection.[208] As pointed out by one lower court, quoting the dissent in *NTEU*, "'the Government's interests are at their lowest ebb' where the content of employees' off-duty speech is not related to their professional duties."[209]

Those same courts and commentators have also held or opined that the presumption of First Amendment protection may be overcome by the public employer.[210] Thus, lower courts, relying on well-settled principles enunciated by the Supreme Court, have held that public employers may overcome proof that the public employee's expressive behavior is protected under the First Amendment by satisfying its burden under the second part of the *Pickering* balancing test, i.e., that "the speech could cause [injury] to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[211] In evaluating the government's proof, a

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207. Professor Papandrea has likewise recognized the symmetry between teacher off-duty speech and conduct cases, noting that "[a] nexus approach finds support in cases in which teachers have been punished for their off-duty conduct." Papandrea II, *supra* note 173 at 1638.

208. Locurto v. Guiliani, 447 F.3d 159, 175 (2d Cir. 2006) ("It is more sensible . . . to treat off-duty, non-work-related speech as presumptively entitled to First Amendment protection. . . . ."); Hall v. Gallo, No. 030476708, 2008 WL 2796950, at *6 (Conn. Super. Ct. 2008) (same); Jean-Gilles v. Cnty. of Rockland, 463 F. Supp. 2d 437, 450 (S.D.N.Y. 2006) (same); Papandrea I, *supra* note 148, at 2120 ("[O]ff-duty, non-work-related speech by government employees should be entitled to presumptive protection under the First Amendment."); Papandrea II, *supra* note 173, at 1630 ("[I]n cases involving non-work-related expression, courts should ... afford such speech presumptive constitutional protection. . . .").

209. Navab-Safavi v. Broad. Bd. of Governors, 650 F.Supp. 2d 40, 57 (D.D.C. 2009) (quoting *NTEU*, 513 U.S. at 494 (Rehnquist, C.J., dissenting)), *affirmed in* Navab-Safavi v. Glassman, 637 F.3d 211 (D.C. Cir. 2011).

210. *See Locurto*, 447 F.3d at 175–83; *Navab-Safavi*, 650 F. Supp.2d at 57–62; Papandrea II, *supra* note 173, at 1630.

211. *Locurto*, 447 F.3d at 172 (quoting Waters v. Churchill, 511 U.S. 661, 668 (1994)); *see also Pickering*, 391 U.S. at 570–73; *supra* notes 117–20 and accompanying text.

court may consider whether the statement: (1) "impairs discipline by superiors or harmony among co-workers," (2) "has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary," or (3) "impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[212] As further gloss on the above-listed factors, a court should also evaluate whether the public employee discredited his or her employer by making the statements in public, or the employee's expression demonstrated a character trait that made the public employee unfit to perform his or her work.[213] Or, as capsulized by one scholar in the public school teacher context, the "presumption [of First Amendment protection] can be overcome only if school officials can demonstrate a significant nexus between the speech and the teacher's fitness and ability to perform her educational duties."[214]

In one of only a handful of teacher cases applying *NTEU* and *Roe* to teacher off-duty speech, the district court for the Western District of Kentucky addressed the threshold issue of whether a teacher's expressive and associational activities were unrelated to work such that the (more) public employee-friendly *NTEU* standard, rather than the *Pickering-Connick* line of cases, applied.[215] There, the school district had reprimanded the teacher (Baar) for having violated a memorandum prohibiting him from communicating with another teacher (Payne) and attending meetings of the Louisville Area Chemistry Alliance (LACA).[216] The trial court granted summary judgment on the claim, finding and concluding that Baar's expressive and associational activities were related to his work and, therefore, did not "fall . . . within the *NTEU* protection for speech that occurs outside of work and is

212. *Navab-Safavi*, 650 F.Supp. 2d at 55 (quoting Rankin v. McPherson, 483 U.S. 378, 388 (1987)).

213. *Id.* at 59–60 (quoting *Rankin*, 483 U.S. at 389). Courts have identified one other government employer defense to an alleged First Amendment violation concerning the dismissal of an employee who has exercised his or her expressive or associational rights away from work. Specifically, as an exception to the general prohibition on taking adverse employment action against public employees for their expressive or associational behavior, "policymaking staffers may permissibly be fired by elected officials based on the staffers' political views and associations." Velez v. Levy, 401 F.3d 75, 95 (2d Cir. 2005) (citing Elrod v. Burns, 427 U.S. 347, 367 (1976); Branti v. Finkel, 445 U.S. 507, 518 (1980)). Teachers, however, are invariably not considered policymakers under the *Elrod/Branti* partisan policymaker exception. Ill. State Emp. Union, Council 34 v. Lewis, 473 F.2d 561, 574 (7th Cir. 1972); Smith v. Harris, 560 F. Supp. 677, 694 (D.R.I. 1983). As such, this defense will seldom, if ever, come in to play where a teacher challenges her dismissal for engaging in off-duty expressive or associational behavior.

214. Papandrea II, *supra* note 173, at 1642.

215. Baar v. Jefferson Cnty. Bd. of Educ., No. 3:06 CV-75-H, 2008 WL 360719 (W.D. Ky. 2008).

216. *Id.* at **2.

unrelated to the subject of public employment."[217] In so holding, the district court first articulated the NTEU standard, stating that "[t]he Supreme Court has already said that absent a reason 'far stronger than mere speculation,' where there is no relationship between the employees' speech and their effective performance of their public duties, public employers cannot regulate the speech that employees engage in outside of work."[218]

The district court went on to evaluate the threshold "unrelated to employment" issue, summarizing and assessing the evidence as follows:

> Here, Plaintiff's involvement in LACA has some superficial similarities to a non-work speech or association. The LACA meetings occur outside normal work hours, and are not an officially sanctioned school activity. The meetings are open to non-public school teachers. . . .
>
> However, Plaintiff's LACA participation is related to his work in many other obvious and material ways. The LACA discussions relate entirely or very closely to Plaintiff's work as a public school science teacher. Indeed, his work forms the entire rationale for his participation. Many of his public school colleagues, including Payne, are members, and at least some LACA meetings take place at public schools. Discussions among colleagues about their professional goals and development are distinguishable from statements made to public audiences. . . . This would be a different case, for instance, if Plaintiff were meeting with non-school employees to discuss matters unrelated to science education.[219]

The district court then concluded that:

> Plaintiff's LACA activities involve topics and associations closely related to Plaintiff's public employee duties. . . . The strong weight of the evidence is that the activities are not those "unrelated to their employment." Therefore, the speech is not protected under *NTEU* and the Court need not balance Plaintiff's interest against the employer's asserted interest in enacting the 2005 Reprimand.[220]

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217. *Id.* at *8-9.

218. *Id.* (quoting *NTEU,* 513 U.S. at 475).

219. *Id.* at *9.

220. *Id.* (citing *NTEU,* 513 U.S. at 475; *Roe,* 543 U.S. at 81). The district court went on to evaluate Baar's expressive and associational activities under the less exacting standard for assessing the permissibility of public employer regulation of speech related to employment. *See id.* at **9–11. The court concluded that Baar's activities were not protected under the First Amendment because they did not pertain to a matter of public concern under the first prong of the *Pickering* test. *Id.* The Sixth Circuit affirmed on that basis and did not reach the unrelated/related to employment issue. Baar v. Jefferson Cnty. Bd. of Educ., 311 Fed. Appx. 817, 821 (6th Cir. 2009).

More recently, the issue of *NTEU*'s applicability arose in *Craig v. Rich Township High School Dist. 227.*[221] In *Craig*, a public school guidance counselor wrote and published a book concerning adult relationship advice entitled "It's Her Fault," which explicitly discussed sexually-provocative themes.[222] After the school board learned of the book, the board terminated Craig's employment.[223] Craig then filed a Section 1983 action against the school board and several of its members.[224] The district court dismissed the action, finding and concluding that Craig's speech did not address a matter of public concern.[225]

The Seventh Circuit affirmed, albeit on alternative grounds.[226] Although the Court of Appeals disagreed with the district court concerning the public concern issues, the court determined that Craig's book was sufficiently related to his employment such that *NTEU* did not apply.[227] Specifically, the court stated as follows:

> *NTEU* is of no help to Craig because he took "deliberate steps to link" his book with his work as a guidance counselor at Rich Central. See *Roe,* 543 U.S. at 80–81, 125 S.Ct. 521 (holding that reliance on *NTEU* "was seriously misplaced" when plaintiff deliberately linked speech to public employment). Craig included a number of references to his job as a high school guidance counselor within the pages of his book. . . . Because of Craig's conscious choice to connect "It's Her Fault" to his counseling position at Rich Central, his speech relates to his employment and *NTEU* does not apply.[228]

Applying *Pickering*, the Court of Appeals concluded by determining that the school board's interest in taking adverse employment action against Craig outweighed his interest in exercising his First Amendment rights.[229]

The leading off-duty teacher speech case is *Melzer v. Board of Education of City of New York.*[230] There, Melzer, a Bronx high school science teacher, was a member of the North American Man/Boy Love

221. 736 F.3d 1110 (7th Cir. 2013).
222. *Id.* at 1113.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 1113–19
228. *Id.* at 1118.
229. *Id.* at 1118–21.
230. 336 F.3d 185 (2nd Cir. 2003).

Association (NAMBLA or Association).[231] NAMBLA is an advocacy organization, which has sought, among other things, changes in the public's attitude and in the laws concerning sexual activities between men and boys and, in particular, changes in the law concerning the age of consent and child pornography.[232] In addition, Melzer wrote several articles for the Association, offering advice to NAMBLA members on how to avoid detection by law enforcement of sexual activities with minors and how to lure susceptible children into sexual relations.[233] During an investigation by the New York City School District, Melzer's and other New York City teachers' membership in NAMBLA was publicized by a number of media outlets.[234] This publicity resulted in several heated meetings attended by parents and students. Many of the parents believed that Melzer should not be allowed to return to the school (he had been on sabbatical), threatening to remove their children from and/or stage a sit in at the school if he was allowed to do so.[235] Likewise, a majority of students at the meetings agreed with the parents about Melzer, although "a few students . . . expressed the view that a person not convicted of anything illegal should be allowed to practice his profession."[236]

The Board of Education eventually brought disciplinary proceedings against Melzer based on his NAMBLA activities and the resulting turmoil that it had caused in the school community.[237] After numerous hearings over a three-year period, a hearing officer recommended Melzer's termination.[238] The Board accepted the hearing officer's recommendation and dismissed him from employment.[239] Melzer then brought a civil rights action under 42 U.S.C. § 1983, alleging that the board's dismissal decision violated his rights to freedom of speech and association under the First Amendment.[240] The district court affirmed the Board's decision, finding that "Melzer was terminated solely because his employer reasonably believed that the public exposure of [Melzer's] associational activities . . . was likely to impair Melzer's effectiveness as a teacher and cause internal disruption if he were returned to the classroom"[241] and concluding that "[t]he threat of such

231. *Id.* at 188-89.
232. *Id.* at 189.
233. *Id.* at 190.
234. *Id.* at 190-91.
235. *Id.* at 191.
236. *Id.*
237. *Id.* at 191-92.
238. *Id.* at 192.
239. *Id.*
240. *Id.* (citing Melzer v. Bd. of Educ., 196 F. Supp. 2d 229 (E.D.N.Y. 2002)).
241. *Id.* (quoting *Melzer*, 196 F. Supp. 2d at 245).

disruption . . . weighed more heavily than Melzer's rights to speech and association."[242]

The Second Circuit Court of Appeals affirmed.[243] The Second Circuit first noted that, in order for speech and associational activities to be constitutionally protected, expressive behavior would typically have to satisfy the *Pickering* balancing test.[244] Paraphrasing *Pickering* and subsequent Supreme Court authority, the court reiterated that "[t]he *Pickering* test involves a two-step inquiry: first, a court must determine whether the speech which led to an employee's discipline relates to a matter of public concern; and, second, if so, the balance between free speech concerns is weighed against efficient public service to ascertain to which the scale tips."[245] The Second Circuit, paralleling the sentiment expressed by Justice O'Connor in her concurrence and dissent in *NTEU*,[246] next noted that Melzer's case differed from most public employee speech cases in that it did not "involv[e] speech directed at an employer, made at the place of employment or directly concerning the employer in some way."[247] Specifically, the court pointed out that "Melzer's termination stem[med] not from something done in the workplace, but from First Amendment activities occurring outside the workplace and largely unconnected to it."[248] The court also noted that Melzer's case, rather than solely involving speech, was a hybrid speech-association case.[249] Citing to *NTEU*, its own prior decisions and decisions from other circuits, the Second Circuit concluded that, notwithstanding the differences between Melzer's case and most of its prior public employee speech cases, the *Pickering* balancing test would apply.[250]

Applying the first step of the *Pickering* test and again citing to Justice O'Connor's concurrence and dissent in *NTEU*, the Second Circuit noted that "courts have questioned whether the public concern test is appropriate in cases like the present one," i. e., where off-duty speech "bear[s] no nexus to Government employment."[251] The court, however,

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242. *Id.* (citing *Melzer*, 196 F. Supp. 2d at 250–52).

243. *Id.* at 200.

244. *Id.* at 192.

245. *Id.* at 193 (citing Rankin v. McPherson, 483 U.S. 378, 384, 388 (1987)); *see also supra* note 119 and accompanying text.

246. *See supra* notes 130–34 and accompanying text.

247. *Melzer*, 336 F.3d at 193.

248. *Id.* at 194.

249. *Id.* at 194–95.

250. *Id.* at 194 and 195–96.

251. *Id.* at 196 (quoting *NTEU*, 513 U.S. at 480) (O'Connor, J., concurring in part and dissenting in part)). Lower courts have split on the issue, with the better reasoned decisions concluding that speech need not pertain to a matter of public concern under these circumstances. *See, e.g.*, Flanagan v. Munger, 890 F.2d 1557, 1565 (10th Cir. 1989) ("[W]e conclude that the public concern test does not apply when

did not resolve the issue concerning the public concern test's applicability.[252] Instead, it assumed that, because a substantial portion of Melzer and NAMBLA's speech involved advocating for change in the law and attitudes concerning the age of consent, no matter how distasteful to most, their speech involved matters of public concern.[253]

The Second Circuit went on to apply the second-step of *Pickering*, i.e., the balancing test.[254] The court first delineated the government's burden under the balancing test, stating that "the government has the burden to show that the employee's activity is disruptive to the internal operations of the governmental unit in question."[255] Specifically, as in *Navab-Safavi*, the court noted that "[t]he disruption must be significant enough so that it 'impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships . . . or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.'"[256] Regarding the public employee's side of the balancing test, the Second Circuit stated that the content of the employee's speech is important, noting that the more the expressive behavior pertained to matters of public concern the greater the burden on the public employer to prove disruption.[257] The Second Circuit further pointed out that the nature of the employee's responsibilities is also an important factor in the *Pickering* equation.[258]

Applying Pickering's second step, the Second Circuit assumed, notwithstanding that some of NAMBLA's publications urged illegality, that Melzer's expressive behavior was of the "highest value" and, therefore, that the School Board had a "heavy burden" to justify

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public employee nonverbal protected expression does not occur at work and is not about work."); *but cf.* Piscottano v. Murphy, No. 3:04CV682, 2005 WL 1424394, at *6 (D. Conn. 2005) ("Nothing in either *Roe* or *NTEU* suggests that the Supreme Court in those cases had decided to categorically exempt 'off-duty' public employee expression from the public concern requirement of *Connick/Pickering*."), *aff'd*, 511 F.3d 247 (2d Cir. 2007). Several scholars agree with the position taken by Justice O'Connor in NTEU and the Tenth Circuit in Flanagan. *See* Panpandrea I, *supra* note 148, at 2120 ("The Connick/Pickering framework should not apply in cases involving off-duty, non-work-related government-employee speech."); Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 143 n.140 (1996) (advocating for elimination of the public concern threshold generally and in off-duty speech and expressive conduct cases specifically, noting that a "'public concern' threshold, by precluding any balancing, gives officials in charge of the employer's affairs a free hand to take action, not to promote the employer interest in government performance, but to punish those not in their favor.").

252. *Melzer*, 336 F.2d at 196.

253. *Id.* at 196.

254. *Id.* at 197–199.

255. *Id.* at 197, citing *Connick*, 461 U.S. at 150.

256. *Id.* (quoting *Rankin*, 483 U.S. at 388); *see supra* note 120 and accompanying text.

257. *Id.*

258. *Id.*

Melzer's dismissal."[259] Before analyzing the Board's evidence of disruption, the court discussed the importance of Melzer's position as a teacher.[260] Focusing on the trust issue identified by nineteenth century courts and, in the contemporary context, by Professor DeMitchell in discussing teacher off-duty conduct,[261] the court announced its decision as follows:

> . . . [W]e conduct our evaluation of appellant's rights versus governmental interest bearing in mind his position as a teacher in a public school. This position by its very nature requires a degree of public trust not found in many other positions of public employment. Although we recognize the danger in allowing the government to take action against an employee for his off-duty affiliations, in the context of teaching schoolchildren Melzer's activities strike such a sensitive chord that, despite the protection afforded his activities, the disruption they cause is great enough to warrant the school's action against him.[262]

The Second Circuit also returned to the public trust issue in discussing the reported and predicted incidents of disruption, pointing out that

> . . . there is strong proof that Melzer's return to his teaching post would compromise the learning environment, particularly because of his effect on two critical constituencies—the students and the parents. An expert in psychology testifying for the Board stated that having a teacher with beliefs such as Melzer's would provoke anxiety and be a disruptive experience for the average student. He believed students would likely be unable to concentrate in plaintiff's class or be uncomfortable asking him for help after class or in any other one-on-one situation.
>
> Melzer . . . acts *in loco parentis* for a group of students that includes adolescent boys. . . . At the same time, he advocates changes in the law that would accommodate his professed desire to have sexual relationships with such children. We think it is perfectly reasonable to predict that parents will fear his influence and predilections. Parents so concerned may remove their children from the school, thereby interrupting the children's education, impairing the school's reputation, and impairing educationally desirable interdependency and cooperation among parents,

259. *Id.* at 198.

260. *Id.*

261. *See supra* notes 19–25 and accompanying text and note 160 and accompanying text.

262. *Melzer*, 336 F.3d at 198.

teachers, and administrators.[263]

Having analyzed the evidence against the *Pickering* standard, the Second Circuit concluded that, notwithstanding that Melzer's expressive activities enjoyed protection under the First Amendment, the school board had met its burden of showing disruption to its operation sufficient to justify Melzer's termination.[264]

Under the framework proposed in this Article, teacher off-duty expressive and associational behavior which is lawful, i.e., which enjoys First Amendment protection, should presumptively not support a claim that a teacher is unfit to teach. In other words, such behavior should presumptively not constitute grounds for adverse employment or licensure action against a teacher. This presumption should arise irrespective of whether the teacher's expressive or associational behavior involves matters of public concern. And, the presumption should only be rebutted in those limited circumstances where a school district or teacher licensing board carries its heavy burden of demonstrating a nexus between the teacher's behavior and his or her employment as an educator. Specifically, those circumstances will only occur where, based on fact rather than conjecture, the teacher's off-duty expressive or associational behavior relates to the teacher's employment such that it disrupts the educational process in a significant way under the criteria set forth in *NTEU* (particularly, Justice O'Connor's concurrence and dissent) and *Roe* and their progeny. By presumptively protecting teacher expressive and associational behavior under these circumstances, school officials and courts will properly tip the balance in favor of teachers who engage in lawful and protected expressive behavior which does not adversely affect legitimate school district interests.

263. *Id.* at 198–99. For more in-depth discussions of the public trust issue and the in loco parentis doctrine, see generally John E. Rumel, *Back to the Future: The In Loco Parentis Doctrine and its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 IND. L. REV. 711 (2013); Tyler Stoehr, Comment, *Letting the Legislature Decide: Why the Court's Use of In Loco Parentis Ought to be Praised Not Condemned*, 2011 BYU L. REV. 1695; Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused and in Need of Change*, 78 U. CIN. L. REV. 969, 970 (2010); 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; DeMitchell, *supra* note 160 and accompanying text.

264. *Melzer*, 336 F.3d at 199. Before reaching its conclusion, the Court of Appeals also rejected Melzer's arguments that his dismissal was caused by an impermissible "heckler's veto" and retaliation. *Id.*

B. Unlawful Off-Duty Conduct or Unprotected Speech

1. Off-Duty Misdemeanor Conduct & Misdemeanor Speech

a. Off-Duty Misdemeanor Conduct

A teacher who engages in off-duty misdemeanor conduct should only be subject to adverse employment or licensure action when a sufficient nexus to teacher unfitness has been demonstrated.

Courts have issued divergent opinions in cases involving off-duty teacher misdemeanor conduct. In *Rogliano v. Fayette County Board of Education*,[265] a teacher (Rogliano) was arrested and charged with misdemeanor possession of a small amount of marijuana following a police search of his home.[266] Based on the charges, the school board initially suspended Rogliano without pay.[267] After the charges had been dismissed due to a technical defect on the face of the search warrant, the superintendent recommended that the board reinstate Rogliano with back pay.[268] The school board, however, conducted a hearing concerning the teacher's possible dismissal, receiving unrebutted evidence that the search had revealed that Rogliano had, in fact, possessed marijuana.[269] After several additional proceedings, where the court found that the evidence conclusively demonstrated that the teacher had possessed and used marijuana, but the teacher denied that he had done so, the board dismissed the teacher and the district court affirmed.[270]

The West Virginia appellate court reversed.[271] Applying *Morrison*'s nexus test, the court found and concluded that, notwithstanding that Rogliano's case had generated some level of notoriety in the community, the lower court had erred in upholding Rogliano's dismissal on that grounds.[272] Specifically, the appellate court stated as follows:

> We believe . . . that when . . . [the notoriety] factor is considered along with the fact that the appellant was, by all accounts, an above average teacher who was well-liked by his students, that the

265. 347 S.E.2d 220 (W.V. 1986).

266. *Id.* at 221–22.

267. *Id.* at 222.

268. *Id.*

269. *Id.*

270. *Id.* at 222–24. Although the school board never expressly charged Rogliano with violating the West Virginia statute allowing for school boards to dismiss teachers for immorality, both the school board and Rogliano agreed that he was discharged for alleged immorality. *Id.* at 224.

271. *Id.* at 225.

272. *Id.* at 221, 224–25.

> misconduct occurred in private and did not directly involve any student or school personnel, and that he was charged only with a misdemeanor for possession of a small amount of marijuana, the evidence was insufficient to warrant the termination of his employment.[273]

In contrast, in *Pettit v. State Board of Education,*[274] an elementary school teacher (Pettit) and her husband were nabbed, along with approximately twenty other individuals, by an undercover law enforcement officer who had infiltrated a "swinger's club" designed to promote diverse sexual activities between consenting adults.[275] Pettit was arrested and charged with violating a California criminal statute prohibiting oral copulation, but eventually pled guilty to and was convicted of [outrageous?] public decency, a misdemeanor.[276] The State Board of Education then initiated proceedings to revoke Pettit's teaching credential "on the grounds (among others) that her conduct involved moral turpitude and demonstrated her unfitness to teach."[277] The State Board revoked Pettit's credential and the trial court refused to overturn the Board's decision.[278]

On appeal, the California Supreme Court affirmed.[279] The court distinguished its prior decision in *Morrison* on three grounds.[280] First, the Court noted that, unlike in *Morrison*, where the unspecified sexual conduct was not criminal in nature, Pettit's conduct involved criminal conduct for which Pettit was convicted of a misdemeanor.[281] Second, while Morrison's conduct occurred in private, Pettit's conduct, having involved a number of other participant-observers, was "semi-public."[282] Third, unlike in *Morrison*, where the Board of Education had not offered any evidence that Morrison was unfit to teach or would advocate improper conduct, the Board offered expert testimony that Pettit was unfit to teach in that she might inject her personal views about sexual mores into her conversations with students.[283] The Court found and concluded that, although Pettit presented evidence that her principal

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273. *Id.* at 225; *see also, e.g.,* Comings v. State Bd. of Educ., 100 Cal. Rptr. 73 (Cal. Ct. App. 1972) (proof that a teacher had been convicted of possession of marijuana was not evidence of his unfitness to teach and, thus, insufficient to sustain the revocation of his teaching credential).

274. 513 P.2d 889 (1973).

275. *Id.* at 889–90.

276. *Id.* at 890.

277. *Id.*

278. *Id.* at 891.

279. *Id.* at 894.

280. *Id.* at 893–94.

281. *Id.* at 893–94.

282. *Id.* at 893.

283. *Id.* at 893.

viewed Pettit as a satisfactory teacher and that Pettit's school district had offered to rehire her,[284] she could no longer serve as an exemplar to students and the public.[285] Thus, the Court concluded that "Pettit's illicit and indiscreet actions disclosed her unfitness to teach in public elementary schools."[286]

Under the framework proposed in this Article, the West Virginia high court's decision in *Rogliano* properly took into account and gave some weight to the teacher's misdemeanor conduct—possessing marijuana—in determining whether the teacher was unfit to teach. The court likewise properly discounted the significance of Rogliano's relatively low-level criminal behavior (and the low-level of notoriety it had generated) based on the fact that Rogliano's behavior had essentially no nexus to his job responsibilities pertaining to his interaction with students and other school personnel. Indeed, under the framework proposed here, if Rogliano's off-duty possession of marijuana had involved or occurred in the presence of students, the result would have been different.[287]

Conversely, the California Supreme Court improperly upheld the State Board of Education's revocation of Pettit's credential. As in *Rogliano*, the court properly took into account the teacher's misdemeanor conviction as a circumstance weighing in favor of determining her unfitness to teach. However, the court stretched in attempting to emphasize two counterbalancing factors. First, given that there was no evidence suggesting that Pettit would take a further step by injecting her personal beliefs about sexual mores into her communications with students, the court speculated when it relied on testimony from the State Board's witnesses that Pettit was unfit to teach

284. *Id.* at 891.

285. *Id.* at 894.

286. *Id.*; Pettit and her husband also appeared on local television wearing facial disguises and discussed their unconventional sexual activities. *Id.* at 890.

287. The West Virginia Supreme Court of Appeals addressed a case that pushed the edge of this envelope a number of years after *Rogliano*. In *Powell v. Paine*, 655 S.E.2d 204 (W.V. 2007), the West Virginia high court reversed the State Superintendent of School's order suspending the teaching license of a teacher and coach (Powell) after he plead guilty to misdemeanor charges of domestic battery for beating his son with a belt while disciplining the child. *Id.* at 206. Based on Powell's previous unblemished record, his compliance with his criminal sentence and successful completion of a family course, and the testimony of experts that he did not pose a risk of harm to students, the court found and concluded that the State Superintendent had not demonstrated by clear and convincing evidence that Powell was unfit to teach under the *Rogliano* (*Morrison*-derived) nexus standard. *Id.* at 207, 210–11. As such, the court ordered reinstatement of Powell's teaching certificate. *Id.* at 205; 211. *Powell* was a close case on the nexus issue. Certainly, as a general matter, it would not be unreasonable for a state licensing official or a court to conclude that a teacher who beat his own child in anger while disciplining him might engage in similar conduct with students at school; however, given the evidentiary record in Powell's case, the court properly concluded that Powell did not pose a risk of replicating his misconduct with his students at school.

because she might do so.[288] Second, in characterizing Pettit's behavior as "semi-public," the Court minimized and obscured the undisputed fact that the sexual conduct occurred in a private setting amongst consenting adults. In this sense, Pettit's conduct, although criminal and involving more participants and observers, was indistinguishable from the teacher's conduct in *Morrison*. Because the court overstated the nexus factors and improperly resorted to exemplar analysis, application of the framework and analysis proposed in this Article would have led to a different result in *Pettit*.

Thus, as properly illustrated by the court in *Rogliano* and improperly illustrated by the court in *Pettit*, a teacher who engages in off-duty misdemeanor conduct should only be subject to adverse employment or licensure action when a sufficient nexus to teacher unfitness has been demonstrated.[289]

b. Off-Duty Misdemeanor Speech

Similar to off-duty misdemeanor conduct, a teacher who engages in off-duty speech or expressive or associational behavior that is not protected by the First Amendment, but is subject to only misdemeanor criminal sanctions, should only be subject to adverse employment or licensure action when a sufficient nexus to teacher unfitness is demonstrated.

Through a series of decisions over the years, the Supreme Court has held that certain categories of speech or expressive behavior, because their "slight social value . . . is clearly outweighed by the social interest in order and morality,"[290] fall outside the protections of the First Amendment.[291] Although legislatures have been reluctant to criminalize

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288. Justice Tobriner, who wrote the California Supreme Court's majority opinion in *Morrison*, dissented in *Pettit* on the grounds that all three of the *Pettit* majority's grounds for distinguishing *Morrison* could not withstand analysis. *Pettit*, 513 P.2d at 895–99. As to two of those grounds, this Article's reasoning tracks Justice Tobriner's analysis.

289. Adverse employment action by school boards against teachers who have committed misdemeanor offenses has led to several employment discrimination cases under Title VII—with divergent results. *See* Daniels v. City of Alcoa, 732 F. Supp. 1467 (E.D. Tenn. 1989) (African-American high school band director established that racial discrimination had motivated school board's decision to terminate him from employment after arrest for misdemeanor possession of marijuana, when white teachers accused or convicted of misdemeanors had been given second chance); *but cf.* Riley v. Sch. Bd. Union Parish, 379 Fed. Appx. 335 (5th Cir. 2010) (African-American substitute teacher failed to show that school district's stated reason for terminating her from employment was a pretext for racial discrimination where teacher had argued that she had been terminated because of misdemeanor marijuana possession conviction and that termination was discriminatory because two similarly situated white teachers with criminal backgrounds were not terminated).

290. R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

291. *See* United States v. Stevens, 559 U.S. 460, 468 (2010) (listing categories); *R.A.V.*, 505 U.S.

speech and expressive behavior because courts have struck down such provisions as unconstitutional on free speech and liberty grounds under the First and Fourteenth Amendments,[292] legislatures and courts have carved out several types of speech or expressive behavior which may be subject to criminal proscriptions and are excluded from First Amendment protection. Certainly, some categories of unprotected speech and expression have been subject to felony sanctions.[293] However, several categories of unprotected speech are punished in a less severe fashion. Thus, certain categories are punished as either a felony or a misdemeanor, other categories are regulated under both the criminal law provisions and civil penalty provisions, and at least one category is typically no longer subject to criminal sanctions.

For example, fraudulent misrepresentation is not protected by the First Amendment[294] and has often been proscribed by both criminal statutes and civil penalty provisions.[295] Similarly, libel (a species of defamation)—another unprotected category of speech—is typically no longer subject to criminal sanctions.[296] And, incitement of unlawful action, i.e., speech which is "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" by an individual or a group, may be criminalized as a felony or misdemeanor without offending the First Amendment.[297]

Only a few reported off-duty (or, for that matter, on-duty) teacher speech cases fall into the constitutionally-unprotected categories. As to fraud or fraudulent misrepresentation by a teacher, the one reported case in this area involved a New Jersey court that upheld a school district's dismissal of a teacher from employment for conduct unbecoming a teacher after she defrauded and made false statements to a bank when

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at 382-83 (same); Bigelow v. Virginia, 421 U.S. 809, 819 (1975) (same).

292. *See generally* Cantwell v. State of Connecticut, 310 U.S. 296, 305 (1940); Thornhill v. State of Alabama, 310 U.S. 88, 97–98 (1940).

293. *See infra* notes 316–20 and accompanying text.

294. *See generally* Illinois ex rel. Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003).

295. *See generally* Mark Zingale, Note, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinary Prudent Person or Monumentally Credulous Gull*, 99 COLUM. L. REV. 795, 817–18 (1999).

296. *See generally* Beauharnis v. Illinois, 343 U.S. 250 (1952). For an article chronicling the decline of criminal libel laws, *see* Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289, 294–97 (2005).

297. Healy v. James, 408 U.S. 169, 188 (1972) (quoting Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (felonious incitement); Winters v. New York, 333 U.S. 507, 508, 514 (1948) (misdemeanor incitement)). However, mere membership in a group with unlawful aims may not be criminalized unless there is proof that the member specifically intended to accomplish the aims of the organization. Scales v. United States, 367 U.S. 203, 229 (1961) (quoting Noto v. United States, 367 U.S. 290 (1961)). That is why Melzer's membership in NAMBLA did not lose constitutional protection. *Melzer*, 336 F.3d at 198.

applying for a loan, but who was acquitted of criminal fraud charges concerning the same matter.[298] In addition, although teachers have had varying degrees of success when suing school districts and school officials for libel related to adverse employment actions,[299] the author was unable to locate any reported cases where teachers have been fired by school districts for making libelous statements—criminal or otherwise—against school officials or other individuals. And, concerning teachers inciting imminent unlawful action, the few cases discussing this issue have reached different conclusions concerning whether a teachers' organization calls for imposition of "sanctions" against its members if they do not refrain from working for or accepting employment at an objectionable school district constitutes protected speech or speech inciting an illegal strike falling outside of First Amendment protection.[300]

Under the standard proposed in this Article, the New Jersey court, by engaging in the moralistic thinking of the times, incorrectly upheld the school board's dismissal of a teacher who made fraudulent statements to a bank. Even if the teacher had been convicted of criminal charges (and she was not), the offense—having been made off-duty and directed toward a lending institution and not toward the school district—would have had an insufficient nexus to the teacher's employment to warrant her dismissal. Conversely, if the teacher had made fraudulent statements to the school district, a nexus would have been present and dismissal would have been appropriate. Likewise, in those few jurisdictions which still have criminal libel statutes, only off-duty libelous statements by teachers that relate to their employment—such as a defamatory statement about a school official, another teacher or even a student—would have a sufficient nexus to the teacher's employment to call for adverse employment or licensure action. Lastly, individual teachers who engage in off-duty incitement of unlawful strikes against a school district might be subject to dismissal due to the nexus between

298. Smith v. Carty, 199 A. 12, 16–17 (1938).

299. Disend v. Meadowbrook Sch., 604 N.E.2d 54 (Mass. Ct. App. 1992) (letter from school officials to parents referring to an "incident" and commenting that teacher "was inappropriate in the way she dealt with the children" potentially libelous); *but cf.* Ginwright v. Unified Sch. Dist., 756 F. Supp. 1458 (D. Kan. 1991) (negative evaluations or letters of recommendations concerning teacher will not give rise to claims for libel unless they were made with actual malice).

300. *See, e. g.*, Bd. of Educ. of Union Free Sch. Dist. No. 3 v. Nat'l Educ. Assoc., 287 N.E.2d 383 (N.Y. 1972), (reversing decision of Appellate Division enjoining imposition of sanctions based on opinion of dissenting judge in that case); *but cf. Id.* at 384 (Scileppi, Breitel and Jansen, JJ., dissenting) ("Advocacy directed to producing imminent illegal action, in this case an illegal strike, and likely to produce such action, does not enjoy constitutional protection."); Bd. of Educ., Borough of Union Beach v. New Jersey Educ. Assoc., 233 A.2d 84 (N.J. Super. Ct. 1967), *aff'd*, 247 A.2d 867, 874 (1968) ("It need hardly be said that freedom of speech does not include the right to use speech as an instrument to an unlawful end.").

their unprotected speech and their employment and certainly would be subject to adverse employment or licensure action if they incited students (off-duty or on) to engage in unlawful action; however, the above-discussed divergent decisions concerning imposition of sanctions on school districts involved decisions by teacher unions, not individual teachers. As such, the question of teacher off-duty unprotected speech was not at issue in those cases.

2. Off-Duty Felonious Conduct and Speech not Directed at Students

a. Off-Duty Felonious Conduct

A teacher who engages in off-duty felonious conduct will more likely be subject to adverse employment or licensure action since a sufficient nexus to teacher unfitness will more likely be shown.

Representative cases in this area come from Massachusetts. Thus, in *Dupree v. School Committee of Boston*,[301] a junior high school teacher (Dupree) brought an action challenging the School Committee's decision suspending him after he was indicted for felony possession with intent to distribute cocaine.[302] The trial court ruled in Dupree's favor, holding that the crime for which Dupree had been indicted and eventually convicted did not constitute misconduct "in office or employment" within the meaning of the Massachusetts statute under which Dupree had been suspended.[303]

On the School Committee's appeal, the Massachusetts appellate court reversed.[304] The appellate court, quoting the trial judge, first noted that "[t]here has never been an allegation, in the indictment or otherwise, that the plaintiff engaged in misconduct on school grounds, during work hours, or with school personnel or students."[305] The court next emphasized both the role model responsibilities of teachers and the statutory job responsibilities assigned to teachers by the Massachusetts legislature:

> Teachers . . . are in a position of special public trust. As role models for our children they have an "extensive and peculiar opportunity to impress [their] attitude and views" upon their pupils. . . . More particularly, they also have special obligations to

301. 446 N.E.2d 1099 (Mass. App. Ct. 1983).

302. *Id.* at 1099–1100.

303. *Id.* at 1100 & n.2.

304. *Id.* at 1100.

305. *Id.*

> their pupils as to drugs. This is so not only because of the "frightening increase of drug use among the students," . . . but because [state law] specifically requires that "instruction as to the effects of . . . narcotics on the human system . . . be given to all pupils in all schools under public control."
>
> In view of this statutory duty and the legitimate concern over the use of drugs by students, we think it within the discretion of the school committee to consider the indictment for possession of cocaine with intent to distribute to be an "indictment for misconduct . . . in office." The school committee could reasonably have decided that the plaintiff's alleged conduct with respect to drugs violated a "known and significant . . . duty inherent in the obligations of his office," . . . which severely impaired his value as a teacher and was in direct conflict "with the message his teaching should impart. . . . "[306]

The appellate court concluded by again emphasizing both the eighteenth and nineteenth century principles of morality still found in Massachusetts statutory law and again recognizing the statutory obligations of teachers, stating that:

> In addition to [state law], which provides for instruction as to drugs, we note that statutes from colonial days forward recognize the unique position of teachers as examples to our youth and charge them to "exert their best endeavors to impress on the minds of children and youth committed to their care and instruction" the values basic to our society. . . . See also [state law] . . . requiring school committees to have "full and satisfactory evidence of [teachers'] moral character . . . "
>
> This special role of teachers on impressionable and not fully tutored minds distinguishes them from other public officials and, we think, also informs the term "misconduct in office" as applied to teachers. For this reason, and because of the specific statutory duty of drug education imposed on schools in [state statutory law], we view an indictment of a teacher for a drug felony to be sufficiently different from the circumstances in [a police officer suspension case]. . . . [307]

Similarly, in *Perryman v. School Committee of Boston*,[308] the School Committee suspended two teachers after they had been indicted on

306. *Id.* at 1101.

307. *Id.*

308. 458 N.E.2d 748 (Mass. Ct. App. 1983).

welfare fraud charges.[309] The trial court reversed the School Committee's decision, but noted that the *Dupree* case was pending before the Massachusetts appellate court.[310]

On appeal, the appellate court reversed the trial court's decision in *Perryman*, relying on its recently-decided opinion in *Dupree*.[311] The court first noted that, in order to suspend a teacher for felonious conduct under Massachusetts law, "a direct relationship between the misconduct and the office must exist. . . ."[312] The court went on to indicate that "[t]eachers are not required to comport themselves in a manner approved by all segments of a community in order to meet the obligations of their office."[313] However, the appellate court, applying *Dupree* and reiterating its emphasis about teachers holding positions of special trust, upheld the school committee's suspension of the two teachers.[314] In so holding, the appellate court stated as follows:

> Although the allegations against the teachers—lying and stealing—do not conflict with an expression of duty such as that found impressive . . . in *Dupree,* they nonetheless conflict with the obligations imposed on teachers by [state statutory law] . . . which can be collectively described as requiring teachers to be of such "moral character" as to be able to instruct students on the basic values of our society.
>
> We are aware that these statutes may be too abstract for consideration in certain circumstances (especially those connected to the expression of thought) and that it sometimes may be difficult to draw the line between misconduct and misconduct in office. Such is not the case here.
>
> The teachers' alleged conduct directly contradicts the most fundamental values which all segments of our society expect teachers to inculcate in the children entrusted to them.
>
> As it relates to a teacher's position of special public trust, we do not view lying to and stealing from the public as so significantly different from possession of cocaine with intent to distribute as to allow us to reason that the former is simply misconduct whereas the latter is misconduct in office. Accordingly, we conclude that the indictments allege conduct so inimical to the obligations

309. *Id.* at 749.
310. *Id.*
311. *Id.* at 750–51.
312. *Id.* at 749.
313. *Id.* at 750.
314. *Id.* at 750–51.

imposed by reason of a teacher's position of special public trust that *Dupree* controls.[315]

The *Dupree* and *Perryman* courts reached decisions consistent with the framework proposed in this Article by requiring a nexus between the teachers' off-duty felonious conduct and their job responsibilities. Indeed, the courts' insistence that the teachers' conduct directly relate to their statutory duties constituted a laudable effort to further objectify the nexus standard. Likewise, the *Perryman* court's observation that teachers "are not required to comport themselves in a manner approved by all segments of a community" to satisfy their job responsibilities is consistent with this Article's attempt to make more objective the standard for evaluating teacher off-duty conduct. Yet, to truly comport with the proposed framework, the Massachusetts court should have emphasized the teachers' felony violations in both cases. By so doing, the courts would have focused on positive law enacted by the Massachusetts legislature, i.e., criminal law provisions which unequivocally reflected a readily-ascertainable baseline for the community standard for morality in that state. That focus, plus the courts' insistence on adherence to nexus analysis, would have tracked the standard for analyzing felonious conduct committed by teachers suggested by this Article. Instead, however, the courts fell back on traditional role model and morality standards which, in future cases, may invite decisionmakers to evaluate teacher off-duty conduct based on "the comporting in a manner with all segments of the community" thinking that the *Perryman* court had earlier decried.

b. Unlawful Felonious Speech not Directed at Students

Much like teacher felonious conduct, teacher felonious expressive or associational behavior will have a sufficient nexus to teacher fitness and will generally constitute a sufficient basis for adverse employment or licensure action.

As a general matter, legislatures have been reluctant to criminalize speech, expressive conduct, and associational behavior because courts have frequently struck down such provisions as unconstitutional on the grounds that they impermissibly limit the right to liberty under the First and Fourteenth Amendments.[316] These concerns notwithstanding, legislatures and courts have carved out several types of speech or expressive conduct which may be subject to felony criminal

315. *Id.* at 751.

316. *See* Cantwell v. State of Connecticut, 310 U.S. 296, 305 (1940); Thornhill v. State of Alabama, 310 U.S. 88, 97–98 (1940).

proscriptions and are excluded from First Amendment protection. For example, obscene speech receives no protection under the First Amendment.[317] Also, fighting words, i.e. face-to-face speech which is likely to provoke an immediate breach of peace by the recipient, are likewise not constitutionally protected.[318] Likewise, true threats fall outside the First Amendment.[319] Thus, "statements where the speaker means to communicate a serious expression of . . . intent to commit an act of unlawful violence to a particular individual or group of individuals" do not receive First Amendment protection.[320]

Only a few reported off-duty (or, for that matter, on-duty) teacher speech cases fall into the criminalized, constitutionally-unprotected categories. As to obscenity-caused dismissals, as discussed previously, the only case squarely discussing the matter—*Waters*—involved a non-teacher public employee who used non-erotic obscene language in griping at an off-duty setting about work in a private conversation.[321] The court there properly concluded that the speech was constitutionally protected.[322] As to fighting words and true threats, in *White v. South Park Independent School District*, the Fifth Circuit correctly upheld a school district's dismissal of a teacher and coach against a First Amendment challenge when it was undisputed that the educator had threatened to kill the school district's athletic director.[323] The Court of Appeals relied on Supreme Court authorities discussing both the

317. Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476, 485 (1957). Ironically, given earlier discussions in this Article concerning morality and local community standards and their role in evaluating teacher fitness, the Supreme Court has held that courts should determine whether speech is obscene by referencing "contemporary community standards." *Miller*, 413 U.S. at 24. In *Miller*, the Court rejected the use of a national standard to determine obscenity, *Id.* at 30, but did "not state what geographic standard a jury must apply. . . ." Scott A. Duval, *A Call for Obscenity Law Reform*, 1 WM. & MARY BILL RTS. J. 75, 79 (1992). In addition, the Supreme Court, distinguishing *Roth*, has made clear that non-erotic uses of otherwise obscene expression do not lose their First Amendment protection. Cohen v. California, 403 U.S. 15, 20 (1971). In a similar vein, lower courts have held that public employees have a right to use otherwise obscene language as part of their First Amendment "right to gripe" in private, off-duty conversations as long as such conversations do not adversely affect their relations in the workplace. *See, e.g.*, Waters v. Chaffin, 684 F.2d 833, 834, 837–40 (11th Cir. 1982).

318. Chaplinsky v. State of New Hampshire, 315 U.S. 568, 572-73 (1941).

319. Virginia v. Black, 538 U.S. 343, 359 (2003); Watt v. United States, 394 U.S. 705, 708 (1969).

320. *Black*, 538 U.S. at 359.

321. *See* Duval, *supra* note 317; *see also* Waters v. Chaffin, 684 F.2d 833, 834, 837-40 (11th Cir. 1982).

322. Duval, *supra* note 317. Also, although public employee expression that is sexually explicit, but not obscene and not involving children, falls within the ambit of the First Amendment, *Roe v. City of San Diego*, 356 F.3d 1108, 1114 (9th Cir. 2004), *rev'd on other grounds*, *City of San Diego v. Roe*, 543 U.S. 77 (2004); *Flanagan v. Munger*, 890 F.2d 157, 1560, 1560 n.2, 1565 (1989); *Waters*, 684 F.2d at 838 n.11, obscene speech of public employees does not. Am. Postal Workers Union v. U. S. Postal Serv., 595 F. Supp. 403, 406 n. 2 (D. Conn. 1984) (citing *Connick*, 461 U.S. at 147).

323. 693 F.2d 1163 (5th Cir. 1982).

fighting words doctrine and the true threat doctrine;[324] however, the district court's findings in the case, supported by the evidence, that the teacher had repeatedly threatened to kill the athletic director and was serious about carrying the threats out, but that the threats were never made personally to the athletic director, suggest that the case should have been disposed of solely as a true threat case.[325] Also, in *Smith v. New York City Department of Education*,[326] a teacher made true threats to kill the arbitrator presiding over the teacher's initial termination proceeding.[327] After the first arbitrator recused himself, the second arbitrator recommended that the Department of Education terminate the teacher based on his threats.[328] The Department adopted the recommendation and terminated the teacher.[329] When the teacher filed an action to set aside the arbitration award, the trial court granted the Department's motion to dismiss the action and the appellate court affirmed.[330]

In sum, the few courts addressing teacher termination matters in the off-duty felonious expressive behavior context have correctly upheld the teachers' dismissals where there was a nexus between the teachers' speech and their employment relations.

3. Off-Duty Conduct and Speech Exploitive of Students

a. Off-Duty Conduct Exploitative of Students

Just as a teacher should enjoy a strong presumption of fitness when he or she engages in lawful off-duty conduct unrelated to students, a teacher should face a strong presumption of unfitness when he or she engages in off-duty conduct which sexually exploits children.

The Colorado Supreme Court has said it best—albeit in gender-specific language. Thus, in cases where male teachers engaged in sexual provocative or romantic conduct such as kissing or touching female students either while off-duty or while supervising students on a field trip, the Colorado high court stated that "whenever a male teacher engages in sexually provocative or exploitative conduct with his minor

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324. *Id.* at 1168 n.8 (citing *Chaplinsky*, 315 U.S. 568; *Watts*, 394 U.S. at 705).

325. *Id.* at 1165, 1169.

326. 109 A.D. 3d 701, 701–03 (S. Ct. App. Div. 2013).

327. *Id.* at 701–02.

328. *Id.*

329. *Id.*

330. *Id.*; *see also* State v. Chung, 862 P.2d 1063, 1073 (Haw. S. Ct. 1993) (where teacher made true threats against a building principal, court in criminal proceeding held that teacher's threatening statements were not protected under the First Amendment).

female students, a strong presumption of unfitness arises against the teacher."[331] Of course, this strong presumption of unfitness should arise when such conduct occurs between female teachers and male students and, indeed, between any teacher and any student irrespective of their gender.[332]

In sum, under the framework proposed in this Article, a strong presumption of unfitness should arise when a teacher engages in sexually exploitive conduct directed at students. That presumption should only be rebutted in extremely limited instances. Those instances should arise, if at all, only where the teacher is able to demonstrate that his or her conduct occurred under circumstances which give rise to a legal excuse, such as coercion, duress, mental incapacity, involuntary intoxication or the like.

b. Off-Duty Speech Exploitive of Students

The same strong presumption of unfitness concerning off-duty teacher speech exploitive of students should attach when a teacher engages in expressive behavior exploitive of students.

In the above-discussed Colorado Supreme Court decisions, the teachers' behavior involved, among other things, vulgar and suggestive speech (both off-campus and on) laden with sexual innuendo.[333] Beyond those cases, the author was unable to locate any additional reported decisions discussing adverse employment or licensure consequences concerning off-duty teacher speech directed at or exploitive of students.

However, under the framework proposed in this Article, teacher off-duty speech directed at or exploitative of children—including, especially, unprotected or marginally protected speech such as obscenity, pornography, fighting words, true threats, or incitement—should be presumptively grounds for adverse employment or licensure action against teachers. Again, as with exploitive conduct, the presumption should only be rebuttable in extremely limited circumstances.

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331. Ricci v. Davis, 627 P.2d 1111, 1120 (Colo. 1981) (en banc) (quoting Weissman v. Bd. of Educ., 547 P.2d 1267, 1273 (Colo. 1976)); *see also supra* note 174.

332. *See* Stephanie S. Reed, Note and Comment, *Bad Bad Teacher!: How Judicial Lenience, Cultural Ignorance, and Media Hype Have Inevitably Lead to Lighter Sentences, Underreporting and Glamorization of Female Sex Offender*, 11 WHITTIER J. CHILD & FAM. ADVOC. 353 (2012).

333. *Weissman*, 547 P.2d at 1270; *Ricci*, 627 P.2d at 1120 n.8.

4. Off-Duty Felonious Conduct and Speech Causing Serious Harm to Students

a. Off-Duty Conduct Causing Serious Injury to Students

When a teacher engages in felonious off-duty conduct exploiting children that results in a criminal conviction, that conduct should render a teacher per se unfit to teach and should constitute sufficient grounds for permanent adverse employment and licensure action against him or her where the legislature has so indicated.

A number of state legislatures have followed this approach, enacting statutes requiring the automatic or permanent revocation of a teaching license or certificate when a teacher has been convicted of or pleads no lo contendre to a felony offense involving serious injury, often of a sexual nature, to a child.[334] Interpreting California's statutory provisions concerning teacher credential revocation, a California appellate court has stated that "a teacher whose credential is being investigated for possible adverse action is per se unfit to teach only when the teacher has been convicted of a crime which the Legislature has declared requires the imposition of automatic sanctions on that teacher's credentials."[335]

By codifying a permanent revocation sanction for teacher off-duty conduct where the teacher has been convicted of a serious felony against a child, a state legislature will have set the community standard for morality. Under these circumstances, a nexus between the conduct and teacher unfitness will have been established per se, or stated another way, irrebuttably presumed. As such, no further showing beyond the fact of the conviction would be required. Thus, unlike in *Morrison*, and unlike other criminal convictions involving off-duty contact, a teacher's conviction for a serious felony causing injury to a child, where the legislature has mandated permanent revocation of the teacher's teaching certificate, will have "talismanic significance."[336]

b. Off-Duty Speech Causing Serious Injury to Children

Felonious off-duty teacher speech or expressive sexual behavior

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334. See, *e.g.*, California Education Code Sections 44420 and 44424, discussed in Rebecca Rabovsky, *Chapter 578: Reducing the Discretion of the California Commission on Teacher Credentialing*, MCGEORGE L. REV. 344, 346 (2009). *See also* IDAHO CODE § 33-1208(2)(a-n) (2014) (listing serious felony offenses against children, conviction of which requires permanent denial or revocation of a teaching certificate); Ind. Code § 20-28-5-8 (c)(1-31) (2014) (same); ARIZ. REVL STAT. § 15-550(B) (2014) (same).

335. Broney v. Cal. Comm'n on Teacher Credentialing, 108 Cal. Rptr. 3d 832, 834 (Cal. Ct. App. 2010); *see also* Bd. of Educ. v. Jack M., 139 Cal. Rptr. 700, 701 (Cal. 1977).

336. Morrison v. State Bd. of Educ., 461 P.2d 375, 377 n.4 (1969).

exploiting or causing serious injury to children should likewise render a teacher both per se and permanently unfit to teach.

In this regard, possession or distribution of child pornography is criminalized in essentially every jurisdiction and is not protected under the First Amendment.[337] Not surprisingly, the few cases involving teachers possessing or distributing child pornography have resulted in the teacher resigning from employment prior to completion of felony criminal proceedings.[338]

Thus, like felonious off-duty teacher sexual conduct involving exploitation of or serious injury to children, felonious off-duty teacher speech or expressive behavior leading to the same exploitation or injury should result in the same per se and permanent exclusion from the teaching profession.

V. CONCLUSION

The nexus standard adopted by contemporary courts in evaluating off-duty teacher conduct and speech in the employment and licensure context has constituted an appropriate development in the evolution of K-12 education law. Yet, as discussed in this Article, the nexus standard, although helpful to the proper resolution of a range of off-duty teacher conduct and speech cases, still suffers from deficiencies related to the subjectivity inherent in the community standard, morality, notoriety, and role model/exemplar principles that the nexus standard was designed to address. For these reasons, this Article has proposed a framework for analyzing off-duty teacher conduct—a framework which categorizes the nature of teacher off-duty conduct and expressive behavior through the prism of the positive law—that will bring more objectiveness to the analysis of those cases in the employment and licensure settings. Recognizing that certain cases will remain hard cases under any standard, judicial adoption of the proposed framework would augment the nexus standard and properly protect teachers' off-duty conduct and associational and speech rights, while still providing school boards and teacher licensing boards sufficient authority to take adverse action against teachers where their off-duty behavior makes them unfit to teach.

337. New York v. Ferber, 458 U.S. 747, 763–64 (1982).

338. *See, e.g.*, Garney v. Mass. Teachers' Retirement Sys., 14 N.E.3d 922, 925 (Mass. 2014).