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Civil Rights—Homosexual Teacher Dismissal: A Deviant Decision—Gaylord v. Tacoma School District No. 10, 88 Wn. 2d 286, 559 P.2d 1340, cert. denied, 98 S. Ct. 234 (1977)

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RECENT DEVELOPMENTS

CIVIL RIGHTS—HOMOSEXUAL TEACHER DISMISSAL: A DEVIANT DECISION—*Gaylord v. Tacoma School District No. 10*, 88 Wn. 2d 286, 559 P.2d 1340, *cert. denied*, 98 S. Ct. 234 (1977).

The facts culminating in James Gaylord's dismissal were undisputed. Gaylord had been a highly regarded public high school teacher for nearly twelve years when a student sought his counsel on several topics, including homosexuality. During their conversation the student formed the belief, not predicated upon any admission by Gaylord, that the teacher was homosexual. A year later he reported this belief to the vice-principal, who elicited Gaylord's confirmation of its accuracy. The school board promptly dismissed Gaylord on the ground of "immorality,"[1] because he had become a publicly known homosexual. There was no criticism of Gaylord's conduct toward any student or of his academic proficiency. No specific sexual conduct was alleged, nor had students, colleagues, or administrators been aware of his sexual orientation prior to his dismissal. Nevertheless, in *Gaylord v. Tacoma School District No. 10*,[2] a divided Washington Supreme Court held that public knowledge of his homosexuality impaired his academic efficiency and thus constituted sufficient cause for discharge under state law.[3]

I. DISMISSAL OF TEACHERS FOR SEXUAL CONDUCT

In the decade since the United States Supreme Court last delivered an opinion on homosexuals' rights,[4] lower court litigation involving teacher dismissal or credential revocation on sexual grounds has pro-

1. *See* Brief of Appellant at 3, Gaylord v. Tacoma School District No. 10, 88 Wn. 2d 286, 559 P.2d 1340, *cert. denied*, 98 S. Ct. 234 (1977) (quoting Tacoma School District No. 10, Policy No. 4119, which states that "immorality" is one of seven enumerated "justifiable causes for release or dismissal of school employees"). *See also* WASH. REV. CODE § 28A.70.160 (1976) (specifying grounds for the revocation of a teaching certificate).

2. 88 Wn. 2d 286, 559 P.2d 1340, *cert. denied*, 98 S. Ct. 234 (1977).

3. *Id.* at 298–99, 559 P.2d at 1346–47.

4. Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118 (1967) (homosexual alien excludable from United States as "psychopathic personality"). The recent judgment of the Court upholding the application of a Virginia sodomy statute against a homosexual appellant was unaccompanied by an opinion. Doe v. Commonwealth's Attorney, 425 U.S. 901, *rehearing denied*, 425 U.S. 985 (1976) (per curiam), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).

liferated.[5] The alleged offenses range from mere status,[6] through "orthodox" behavior in a proscribed setting,[7] to unique sexual practices.[8] The grounds for teacher dismissal comprise a lexicon of sexuality: masturbation,[9] solicitation,[10] various forms of sodomy,[11] adultery,[12] transsexualism,[13] mate-swapping,[14] prostitution,[15] and unwed motherhood.[16]

When there has been no allegation of sexual misconduct directly involving students, the perceived harm to the educational community results from the unique trust reposed in teachers, upon whom an elevated standard of behavior is imposed.[17] Thus, teachers' nonconforming[18] sexual practices may compromise their role as moral exemplars to their pupils[19] or undermine their statutory duty to teach moral

5. *See* cases cited at notes 7–17 *infra;* Annot., 78 A.L.R.3d 19 (1977); F. DELON, SUBSTANTIVE LEGAL ASPECTS OF TEACHER DISCIPLINE 20–23, 37–40 (Nolpe Monograph No. 2, 1972).

6. Burton v. Cascade School Dist. No. 5, 353 F. Supp. 254 (D. Ore. 1973), *aff'd,* 512 F.2d 850 (9th Cir.), *cert. denied,* 423 U.S. 839 (1975) (lesbianism).

7. Jerry v. Board of Educ., 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440 (1974) (heterosexual intercourse with student).

8. Wishart v. McDonald, 500 F.2d 1110 (1st Cir. 1974) (public sex acts performed upon a mannequin).

9. Moser v. State Bd. of Educ., 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972).

10. Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977).

11. *E.g.,* Board of Educ. v. Calderon, 35 Cal. App. 3d 490, 110 Cal. Rptr. 916, *cert. denied,* 419 U.S. 807 (1974).

12. Erb v. Iowa State Bd. of Pub. Instruction, 216 N.W.2d 339 (Iowa 1974) (teacher's dismissal reversed on appeal).

13. *In re* Grossman, 127 N.J. Super. 13, 316 A.2d 39 (1974).

14. Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973).

15. Governing Bd. v. Metcalf, 36 Cal. App. 3d 546, 111 Cal. Rptr. 724 (1974).

16. Andrews v. Drew Mun. Separate School Dist., 371 F. Supp. 611 (N.D. Miss. 1973, *aff'd,* 507 F.2d 611 (5th Cir. 1975).

17. *E.g.,* Moser v. State Bd. of Educ., 22 Cal. App. 3d 988, 991, 101 Cal. Rptr. 86, 88 (1972) (teaching distinguished from other professions in formulating standards for judging propriety of personal conduct).

18. Nonconformity may be more myth than reality. Kinsey *et al.* concluded that 37% of American males have at least one homosexual experience during their lifetimes; 25% have continued homosexual experiences over at least a three-year period. A. KINSEY, W. POMEROY, & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 650–51 (1948). A more recent study found that oral copulation, another basis for dismissal, occupies approximately 60% of heterosexual married adults with some regularity. M. HUNT, SEXUAL BEHAVIOR IN THE 1970S at 198 (1974). Behavioral research has indicated that "95% of adult American men and a large percentage of American women have experienced orgasm in an illegal manner." J. MCCARY, HUMAN SEXUALITY 460 (2d ed. 1973). *See generally* Willemsen, *Sex and the School Teacher,* 14 SANTA CLARA LAW. 839, 844–46 (1974).

19. Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 36, 513 P.2d 889, 894, 109 Cal. Rptr. 665, 670 (1973).

principles.[20] The fear has been expressed that retention of such teachers might be construed as adult approval of the offending behavior,[21] might provide the opportunity for a recurrence actually involving a student,[22] or might impair relationships with parents, fellow teachers, and administrators.[23]

Countervailing considerations include the individual teacher's constitutional rights and the punitive effect of dismissal or decertification.[24] Depending upon the particular fact pattern, the relevant constitutional interests may include the rights to practice one's profession,[25] to associate freely,[26] to express views publicly,[27] or to live in privacy.[28] Due process limits on arbitrary and capricious dis-

20. *Gaylord,* 88 Wn. 2d at 298–99, 559 P.2d at 1347 (citing WASH. REV. CODE § 28A.67.110 (1976)). The statute provides:

> It shall be the duty of all teachers to endeavor to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity and patriotism; to teach them to avoid idleness, profanity and falsehood; to instruct them in the principles of free government, and to train them up [*sic*] to the true comprehension of the rights, duty and dignity of American citizenship.

In California, litigants have questioned whether such a mandate encompasses principles of sexual morality. Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 42 n.6, 513 P.2d 889, 898 n.6, 109 Cal. Rptr. 665, 674 n.6 (1973) (Tobriner, J., dissenting).

21. *Gaylord,* 88 Wn. 2d at 298, 559 P.2d at 1347. *But cf.* Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969) ("the Civil Service Commission has neither the expertise nor the requisite anointment to make or enforce absolute moral judgments").

22. Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 826, 94 Cal. Rptr. 318, 322 (1971) (teacher may be discharged if "conduct indicates a potential for misconduct with a student"). However, the assumption that homosexual teachers are less able to control their "pedophilic tendencies" than heterosexual ones appears to be unfounded. Pomeroy, *Homosexuality,* in THE SAME SEX 3, 11 (R. Weltge ed. 1969); *see* G. WEINBERG, SOCIETY AND THE HEALTHY HOMOSEXUAL 5 (1972); note 43 *infra.*

23. *Gaylord,* 88 Wn. 2d at 297, 559 P.2d at 1346–47.

24. In *Gaylord,* the majority focused only on the perceived harm to the educational community, ignoring arguments based upon Gaylord's rights and the punitive effects of dismissal. *See* notes 62–65 and accompanying text *infra.* Gaylord's arguments are set forth at note 49 *infra.*

25. Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 239, 461 P.2d 375, 394, 82 Cal. Rptr. 175, 194 (1969) (" '[t]he right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection' ") (quoting Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 75, 435 P.2d 553, 559, 64 Cal. Rptr. 785, 791 (1968)).

26. Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974).

27. Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974).

28. Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 233–34, 461 P.2d 375, 390, 82 Cal. Rptr. 175, 190 (1969). For an assessment of the impact on homosexual privacy rights of the United States Supreme Court's summary affirmance, upholding a Virginia statute prohibiting "crimes against nature," in Doe v. Commonwealth's Attorney, 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd mem.,* 425 U.S. 901 (1976), see 65 KY. L.J. 748 (1977).

missals are tightened when the dismissal imposes upon the employee "a 'badge of infamy,' . . . fixing upon him the stigma of an official defamation of character."[29] Because dismissal for sexual conduct is likely to eclipse the teacher's career[30] it may impose a draconian penalty in terms of lost future earnings[31] and psychological damage.[32] This is particularly true when the offending conduct is commonplace in the community.[33]

In this emotionally charged area of the law, courts have been criticized for their reluctance to confront and resolve the legal issues.[34] Reported decisions seem to reflect "folk wisdom steeped in antiquity"[35] rather than empirical data substantiating a detrimental effect on public education.[36] Nevertheless, when the facts of these cases are compared, discernible contours of a ratio decidendi emerge.

The view that homosexual conduct per se evidences unfitness for employment[37] has been generally repudiated.[38] The prevailing doctri-

29. Norton v. Macy, 417 F.2d 1161, 1164 (D.C. Cir. 1969) (footnotes omitted) (alleged homosexual advance by civil service employee insufficient to justify dismissal). *Accord,* Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 239, 461 P.2d 375, 394, 82 Cal. Rptr. 175, 194 (1969) (dismissal for homosexual relationship might impair teacher's chances of securing other employment).

30. *See* Comment, *Remedial Balancing Decisions and the Rights of Homosexual Teachers: A Pyrrhic Victory,* 61 IOWA L. REV. 1080, 1082 n.23 (1976).

31. Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 37, 513 P.2d 889, 894, 109 Cal. Rptr. 665, 670 (1973) (Tobriner, J., dissenting) (loss of future earnings exceeding $100,000). Four years after dismissal, Gaylord was earning one-third his former salary. Civil Liberties, November 1977, at 7, col. 4.

32. One court commented:

> It is no less true now than when written in 1859 that although society no longer puts heretics and sinners to death, nor does it act so vigorously as to stamp them out, it cannot flatter itself as free from the stain of legal persecution. The *chief* harm in these laws [prohibiting private, consensual homosexual behavior] is the perpetuation of social stigma, cramping mental development, cowing reason, and repressing human expression for fear of social disfavor.

Acanfora v. Board of Educ., 359 F. Supp. 843, 852 (D. Md. 1973), *aff'd on other grounds,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974) (citing J.S. MILL, *On Liberty,* in THE SIX GREAT HUMANISTIC ESSAYS OF JOHN STUART MILL 154–58 (1963)).

33. "[A] policy of excluding all persons who have engaged in homosexual conduct from government employ would disqualify for public service over one-third of the male population. This result would be both inherently absurd and devastating to the public service." Norton v. Macy, 417 F.2d 1161, 1167 n.28 (D.C. Cir. 1969). *See* note 18 *supra.*

34. La Morte, *Legal Rights and Responsibilities of Homosexuals in Public Education,* 4 J.L. & EDUC. 449, 450–51 (1975); Comment, *supra* note 30, at 1080; 65 KY. L.J. 748, 761 (1977).

35. La Morte, *supra* note 34, at 462.

36. *Id.* at 460.

37. One court stated:

> Any schoolboy knows that a homosexual act is immoral, indecent, lewd, and obscene. Adult persons are even more conscious that this is true. If activities of this

nal framework requires a nexus between the allegedly immoral behavior and unfitness for continued employment,[39] a premise acknowledged in *Gaylord*.[40] When the offending conduct involves students directly, through either a physical relationship[41] or sexual proselytism,[42] the nexus requirement is deemed satisfied by the abuse of professional responsibility, and the decided cases uniformly uphold dismissal.[43] Far more common, however, are those cases, including *Gaylord,* in which the questionable conduct does not occur within the academic environment.[44] The pattern of the decisions indicates that the nexus between sexual conduct and unfitness to teach may be inferred when at least one of three possible aggravating circumstances is identifiable in the fact pattern:

1) the sexual conduct occurred in public;[45]

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kind are allowed to be practiced in a government department, it is inevitable that the efficiency of the service will in time be adversely affected.

Schlegel v. United States, 416 F.2d 1372, 1378 (Ct. Cl. 1969). *Accord,* Sarac v. State Bd. of Educ., 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (1967), *overruled by* Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 238, 461 P.2d 375, 393, 82 Cal. Rptr. 175, 193 (1969).

38. Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969); Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974); Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977).

39. Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977) (arrest for homosexual solicitation does not demonstrate unfitness to teach per se); Weissman v. Board of Educ., 547 P.2d 1267 (Colo. 1976) (nexus requirement inferred from language of teacher dismissal statute). *Cf.* Beebee v. Haslett Pub. Schools, 66 Mich. App. 718, 239 N.W.2d 724 (1976) (conduct must bear directly on fitness to teach and must cause a clearly discernible detriment to school and students). These courts postulate the nexus requirement without undertaking an analysis of its possible constitutional underpinnings.

40. 88 Wn. 2d at 290, 559 P.2d at 1342.

41. Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318 (1971); Denton v. South Kitsap School Dist. No. 402, 10 Wn. App. 69, 516 P.2d 1080 (1973).

42. *E.g.,* Safransky v. State Personnel Bd., 62 Wis. 2d 464, 215 N.W.2d 379 (1974) (houseparent at state institution for retarded teenage boys).

43. *See* Annot. 78 A.L.R.3d 19, 35–39 (1977). Despite fears of homosexual child molestation, most cases of teachers dismissed for child molestation involve heterosexuals. *See* note 22 *supra.* Child molestation, however, is not an exclusively heterosexual activity. *See, e.g.,* Hankla v. Governing Bd., 46 Cal. App. 3d 644, 120 Cal. Rptr. 827 (1975) (elementary school principal dismissed for homosexual acts with student).

44. The relevance of such extracurricular conduct has been debated. *Compare* Erb v. Iowa State Bd. of Pub. Instruction, 216 N.W.2d 339, 343 (Iowa 1974) (where professional achievement is unaffected by private conduct, such conduct may not be the basis for discipline), *with* Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 824–25, 94 Cal. Rptr. 318, 321 (1971) (determinants of teacher selection and retention include wisdom and propriety of unofficial conduct and associations).

45. Wishart v. McDonald, 500 F.2d 1110 (1st Cir. 1974); *In re* Labady, 326 F. Supp. 924 (S.D.N.Y. 1971) (most important factor is whether challenged conduct is public or private); Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal.

2) the behavior is criminal and has been judicially recorded in a proceeding separate from the dismissal action, although conviction is not required;[46] or

3) the teacher has otherwise invited notoriety beyond the publicity which would reasonably attend such a dismissal.[47]

These situations have in common the fact that the activity has been flaunted sufficiently flagrantly to pierce the veil of privacy, exposing the deportment to the school board's rigid scrutiny. Conversely, when these aggravating circumstances have been absent, dismissals have been reversed.[48]

Rptr. 665 (1973) (distinguished from cases granting reinstatement by the public nature of the conduct). *Cf.* Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977) (offense occurred in public restroom, but in sole presence of arresting officer; teacher reinstated).

Because a public offense is a prerequisite for criminality under some state statutes, these two factors often appear in tandem. *See* 70 YALE L.J. 623, 625 (1961).

46. In thirty-four states, private homosexual behavior between consenting adults carries criminal sanctions. *See* 65 KY. L.J. 748, 750 n.10 (1977). This statutory pattern persists despite the proposal by the American Law Institute to decriminalize private sexual conduct between consenting adults. MODEL PENAL CODE § 213.

Although there is dictum to the contrary, Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 219 n.4, 461 P.2d 375, 378 n.4, 82 Cal. Rptr. 175, 178 n.4 (1969) ("a criminal conviction has no talismanic significance"), criminal conviction for sexual conduct invariably constitutes an ipso facto basis for dismissal. *E.g.*, Moser v. State Bd. of Educ., 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972). Lack of a criminal conviction, on the other hand, bears no talismanic significance, as it has been repeatedly demonstrated that something less than a conviction may be sufficiently aggravating to support termination. Jenkyns v. Board of Educ., 294 F.2d 260 (D.C. Cir. 1961) (directed verdict of not guilty); Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973) (criminal charges dismissed); Board of Educ. v. Calderon, 35 Cal. App. 490, 110 Cal. Rptr. 916 (1974) (after acquittal, civil proceeding found that teacher had engaged in oral copulation). *Cf.* Baker v. School Dist., 371 A.2d 1028 (Pa. Commw. Ct. 1977) (plea of nolo contendere to federal gambling charge admissible as admission of guilt in dismissal proceeding and supported finding that actions were immoral and warranted dismissal).

Because criminality usually appears in conjunction with another aggravating factor, its weight is conjectural. *See* text accompanying notes 71 & 72 *infra*.

47. *See* McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied*, 405 U.S. 1046 (1972), *rev'g* 316 F. Supp. 809 (D. Minn. 1970) (self-proclaimed gay activist gained notoriety by applying for license to marry another male); Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) (teacher publicized his homosexuality via radio, television, and press interviews); Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973) (teacher and spouse discussed their mate-swapping activities on television interview program).

48. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (noncriminal homosexual activity would not support disciplinary action); Erb v. Iowa State Bd. of Pub. Instruction, 216 N.W.2d 339 (Iowa 1974) (admitted adultery insufficient basis for revocation of teaching certificate). *Cf.* Burton v. Cascade School Dist. No. 5, 353 F. Supp. 254 (D. Ore. 1973), *aff'd*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975) (admittedly lesbian teacher improperly dismissed because statute authorizing dismissal for immorality was unconstitutionally vague; court ordered damages but not reinstatement).

II. THE *GAYLORD* COURT'S REASONING

The dismissal of a teacher for sexual status or conduct not directly involving a student presented a case of first impression to the Washington Supreme Court.[49] The court first resolved that "immorality" under the school board policy[50] satisfied the statutory requirement of "sufficient cause"[51] for discharge if "coupled with resulting actual or prospective adverse performance as a teacher."[52] In the absence of statutory definition, "immorality" would be defined by common usage.[53]

Although Gaylord had acknowledged his status as a homosexual, the trial record contained no allegation of specific conduct.[54] To this admitted status, in conjunction with evidence that Gaylord had associated with other homosexuals, the court applied a rule of construc-

49. Gaylord's arguments on appeal were (1) that discharge for immorality without evidence of improper conduct or impaired teaching failed to satisfy the statutory requirement of sufficient cause; (2) that immorality as a ground for dismissal was void for vagueness; and (3) that discharge on the basis of sexual status, or public knowledge of that status, violated constitutional rights of substantive due process, equal protection, and privacy. Brief of Appellant at 11–22, Gaylord v. Tacoma School Dist. No. 10, 88 Wn. 2d 286, 559 P.2d 1340, *cert. denied,* 98 S. Ct. 234 (1977). The court emphasized the evidentiary problems of the first argument, *see* notes 54–65 and accompanying text *infra,* and summarily addressed the vagueness question, *see* note 53 *infra.* The majority otherwise avoided the constitutional issues by inferring sexual conduct, rather than mere status, as the basis for dismissal. *See* notes 54–60 and accompanying text *infra.*

50. 88 Wn. 2d at 289, 559 P.2d at 1342; *see* note 1 *supra.*

51. WASH. REV. CODE § 28A.58.100(1) (1976).

52. 88 Wn. 2d at 290, 559 P.2d at 1342.

53. The Oregon federal district court, reviewing a lesbian teacher's dismissal for immorality, held the statute authorizing dismissal unconstitutionally vague because it failed to define immorality.

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

Burton v. Cascade School Dist. No. 5, 353 F. Supp. 254, 255 (D. Ore. 1973), *aff'd,* 512 F.2d 850 (9th Cir.), *cert. denied,* 423 U.S. 839 (1975) (citing Connally v. General Constr. Co., 269 U.S. 385 (1926)). The *Gaylord* court sought to avoid unconstitutional vagueness by asserting that immorality must be "coupled with resulting actual or prospective adverse performance as a teacher." 88 Wn. 2d at 290, 559 P.2d at 1342. Although this qualification recognizes the nexus generally required for dismissal, *see* text accompanying notes 37–48 *supra,* it fails to give content to the term "immorality," or to provide the notice constitutionally mandated by *Connally*: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." 269 U.S. at 391.

54. "'[F]rom appellant's own testimony it is unquestioned that homosexual acts were participated in by him, although there was no evidence of any overt act having been committed.'" 88 Wn. 2d at 293, 559 P.2d at 1344 (quoting trial court Finding of Fact No. 3).

tion[55] supporting the adverse inference that his homosexuality was overt, *i.e.*, that he had engaged in homosexual conduct.[56] The court also inferred that Gaylord's conduct involved sodomy[57] and lewdness,[58] which were crimes at the time of his dismissal,[59] although statutes making such conduct criminal were repealed while the case was pending.[60] The majority reasoned that, because condemnation of homosexuality as immoral was well documented in sociological and religious treatises, repeal of the sodomy statute did not relieve the conduct of its immoral character; and because Gaylord had not sought psychiatric help to change his orientation, he had made a "volitional choice" for which he must be held morally responsible.[61]

The final inquiry concerned whether Gaylord's now publicly known immoral conduct sufficiently impaired his performance as a teacher to warrant discharge. Three fellow teachers testified at trial that his retention would be objectionable to them, and several admin-

55. "If the meaning of a party's written statement is in doubt, that construction must be adopted which is least favorable to him; 'he selected its language.' " 88 Wn. 2d at 293–94, 559 P.2d at 1344 (quoting 2 C. MOORE, A TREATISE ON FACTS OR THE WEIGHT AND VALUE OF EVIDENCE § 1178, at 1322 (1908)) (footnote omitted).

56. In his dissenting opinion, Justice Dolliver protested that this inference placed upon Gaylord the burden of proving that he had not committed acts of which he had never been accused, adding: "Presumably under this reasoning, an unmarried male who declares himself to be heterosexual will be held to have engaged in 'illegal or immoral acts.' The opportunities for industrious school districts seem unlimited." 88 Wn. 2d at 302–03, 559 P.2d at 1349 (Dolliver, J., dissenting). In a separate dissent, Justice Utter also took exception to shifting the burden of proof from the school district to Gaylord and to basing his dismissal by the school district upon "this slimmest of inferences." 88 Wn. 2d at 307, 559 P.2d at 1351 (Utter, J., dissenting).

57. The statute provided:

> Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punished . . . .

Criminal Code, ch. 249, § 204, 1909 Wash. Laws 890 (repealed 1975).

58. The statute provided:

> Every person who shall lewdly and viciously cohabit with another not the husband or wife of such person, and every person who shall be guilty of open or gross lewdness, or make any open and indecent or obscene exposure of his person, or of the person of another, shall be guilty of a gross misdemeanor.

Criminal Code, ch. 249, § 206, 1909 Wash. Laws 890 (repealed 1975).

59. The majority's assumption that all conceivable homosexual acts were illegal under either the sodomy or the lewdness statutes was challenged by Justice Dolliver. 88 Wn. 2d at 301, 559 P.2d at 1348 (Dolliver, J., dissenting). The California Supreme Court deemed mutual masturbation beyond the scope of similar statutes and therefore noncriminal. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 218 n.4, 461 P.2d 375, 377 n.4, 82 Cal. Rptr. 175, 177 n.4 (1969).

60. Washington Criminal Code, ch. 260, § 9A.92.010(209), (211), 1975 Wash. Laws 1st Ex. Sess. 817.

61. 88 Wn. 2d at 296, 559 P.2d at 1345–46.

istrators speculated that his presence "would create problems."[62] On the other hand, parent, teacher, and student testimony in Gaylord's behalf was buttressed by that of two psychiatrists and an educational psychologist to the effect that his continued teaching would pose no risk of harm to the students.[63] The court held that, despite the conflicting evidence, the trial court's finding of fact[64] was supported by substantial evidence and should therefore be upheld.[65]

III. ANALYSIS OF THE OPINION

The proposition tacitly adopted in *Gaylord,* that in determining the propriety of dismissal on sexual grounds the decided cases draw a meaningful distinction between status and conduct,[66] must be deemed a fiction. Although the mode of conveyance from status to conduct in *Gaylord* is inventive,[67] conduct may not, in fact, be a prerequisite for dismissal. In decisions in which aggravating circumstances are present, status has supported dismissal,[68] while in others, specific conduct has not.[69] Had the *Gaylord* court not inferred conduct, the dis-

62. *Id.* at 298, 559 P.2d at 1346–47. *See* note 84 *infra.*

63. Petition for a Writ of Certiorari at 8–9, Gaylord v. Tacoma School Dist. No. 10, *cert. denied,* 98 S. Ct. 234 (1977).

64. The trial court found:

> A teacher's efficiency is determined by his relationship with students, their parents, fellow teachers and school administrators. In all of these areas the continued employment of appellant after he became known as a homosexual would result, had he not been discharged, in confusion, suspicion, fear, expressed parental concern and pressure upon the administration from students, parents and fellow teachers, all of which would impair appellant's efficiency as a teacher and injure the school.

88 Wn. 2d at 297, 559 P.2d at 1346 (quoting Finding of Fact No. 10).

65. *But see id.* at 306, 559 P.2d at 1351 (Utter, J., dissenting) (finding not supported by substantial evidence). Justice Dolliver's dissent concluded: "To base a dismissal on the proof of a status with no showing of conduct and no showing of an actual detrimental effect on teaching efficiency violates the constitutional due process rights to which Mr. Gaylord is entitled." *Id.* (Dolliver, J., dissenting).

66. McConnell v. Anderson, 316 F. Supp. 809, 814 (D. Minn. 1970), *rev'd on other grounds,* 451 F.2d 193 (8th Cir. 1971), *cert. denied,* 405 U.S. 1046 (1972). *See* Annot., 78 A.L.R.3d 19, 26, 47–53 (1977).

67. *See* text accompanying notes 54–61 *supra.*

68. McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied,* 405 U.S. 1046 (1972), *rev'g* 316 F. Supp. 809 (D. Minn. 1970) (homosexuality); Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974) (homosexuality); Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973) (lesbianism). In each case, the dismissed employee provoked substantial notoriety.

69. Board of Educ. v. Jack M., 19 Cal. 3d 691, 566 P.2d 602, 139 Cal. Rptr. 700 (1977) (homosexual solicitation); Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969) (mutual masturbation); Erb v. Iowa State Bd. of Pub. Instruction, 216 N.W.2d 339 (Iowa 1974) (adultery).

missal might nevertheless have been upheld in harmony with the decided cases, *provided that* one of the three previously enumerated aggravating circumstances had been present.[70]

Because there was no finding in *Gaylord* that the inferred conduct was deemed to have transpired publicly, the first factor in the proposed synthesis—that the sexual activity have occurred publicly—may not be relied upon to support dismissal. The second factor which has appeared in cases upholding dismissal is the existence of a separate judicial record of criminal sexual behavior. Not only is such a public record absent here, but the trial record contains a finding of fact that Gaylord was never accused of any criminal act.[71] On the issue of criminality, the court's observation that the inferred acts of sodomy and lewdness were criminal at the time of Gaylord's employment and discharge is rendered dictum by the subsequent declaration that repeal of the sodomy statute was irrelevant to the determination of morality.[72] The court's discussion of this issue is clearly a makeweight and therefore not dispositive under the proposed analysis.

The third factor supporting dismissal under the decided cases, notoriety precipitated by the teacher, emerges as the crucial question in *Gaylord* because the court found that *public knowledge* of homosexuality impaired academic performance. But the facts of *Gaylord* do not satisfy case law standards for the quantum, origin, or effect of notoriety required as ipso facto evidence of unfitness to teach.

First, mere public knowledge, without activism or sensationalism,[73] has been held insufficient to provide the nexus: "[M]ere knowledge that a teacher is homosexual is not sufficient to justify transfer or dismissal. In addition, the homosexual teacher need not become a recluse, nor need he lie about himself. Like any other teacher, he may attend public gatherings and associate with whomever he chooses."[74]

70. *See* text accompanying notes 45–47 *supra*.
71. *See* note 54 *supra*.
72. "Generally the fact that sodomy is not a crime no more relieves the conduct of its immoral status than would consent to the crime of incest." 88 Wn. 2d at 297, 559 P.2d at 1346.
73. *See* cases cited at note 47 *supra*.
74. Acanfora v. Board of Educ., 359 F. Supp. 843, 856 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974). *Cf.* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) (civil service employee); Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Cal. 1973) (civil service employee).

Gaylord made no television appearances,[75] no marriage license application;[76] on the contrary, his sexual preference was unknown to his colleagues, to his best friends, even to his parents until after his dismissal.[77] The most diligent probing of the *Gaylord* record fails to disclose the quantum of notoriety which relevant decisions have required as a decisive aggravating factor.

Second, that the teacher not be burdened with notoriety generated by school officials is a judicially accepted argument[78] calculated to prevent school boards from fomenting such notoriety deliberately to justify a dismissal. The court rejected Gaylord's contention that school administrators were responsible for public knowledge of his homosexuality with the abstruse reasoning that the school board could not be charged with making Gaylord's orientation known because the vice-principal who interrogated him had a duty to report the information to his superiors.[79] Nevertheless, the academic community's knowledge of Gaylord's orientation did result directly from administrative action and the school board should have been estopped from asserting it as the basis for dismissal.[80]

Finally, "undifferentiated fear or apprehension,"[81] "institutional discomfiture,"[82] and "hypothetical embarrassment and public contempt"[83] have been routinely disparaged as lacking the concreteness and specificity required to demonstrate unfitness for employment. The harm anticipated from public knowledge of Gaylord's homosexuality consisted of no more than " 'confusion, suspicion, fear, expressed parental concern and pressure upon the administration from

75. *See* Acanfora v. Board of Educ., 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds,* 491 F.2d 498 (4th Cir.), *cert. denied,* 419 U.S. 836 (1974); Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973).

76. *See* McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971), *cert. denied,* 405 U.S. 1046 (1972), *rev'g* 316 F. Supp. 809 (D. Minn. 1970).

77. Brief of Appellant at 5, Gaylord v. Tacoma School Dist. No. 10, 88 Wn. 2d 286, 559 P.2d 1340, *cert. denied,* 98 S. Ct. 234 (1977).

78. *E.g.,* Jerry v. Board of Educ., 35 N.Y.2d 534, 324 N.E.2d 106, 364 N.Y.S.2d 440 (1974) (teacher's alleged intercourse with former student held beyond scope of school officials' concern unless it had become the subject of public notoriety without contribution on the part of school officials). *See also* cases cited at note 47 *supra.*

79. 88 Wn. 2d at 298, 559 P.2d at 1346.

80. The trial court found that public knowledge of Gaylord's homosexuality occurred at the time of dismissal. 88 Wn. 2d at 303–04, 559 P.2d at 1349 (Dolliver, J., dissenting). *See* text accompanying note 77 *supra.*

81. Fisher v. Snyder, 346 F. Supp. 396, 401 (D. Neb. 1972).

82. Norton v. Macy, 417 F.2d 1161, 1167 (D.C. Cir. 1969).

83. Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399, 401 (N.D. Cal. 1973).

students, parents and fellow teachers,' "[84] all of which the court concluded would impair appellant's efficiency as a teacher and injure the school. Amorphous, speculative fear that some might be offended by the sexual preference of a teacher who sought neither to publicize it nor to impose it upon others hardly justifies purging him from the educational system. Such a triumph of majoritarianism over pluralism is an oppressive development for both personal liberty and public education.[85]

IV. CONCLUSION

Because Gaylord's homosexuality was uncomplicated by the aggravating circumstances which other courts require for termination of employment, the *Gaylord* decision is an anomaly within the case law synthesis. That the Washington Supreme Court may depart from the rationale adopted by other jurisdictions, however tortured its analysis, is its prerogative in the absence of mandatory precedents.[86] Nevertheless, the policy implications[87] of institutionalizing homophobia in the public school system, at the expense of dedicated teaching,[88] are tragically retrogressive. The children are the losers.

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84. 88 Wn. 2d at 297, 559 P.2d at 1346 (quoting trial court Finding of Fact No. 10). On cross-examination, both the principal and the vice-principal conceded that their testimony regarding the effects of Gaylord's continued employment was speculation. Petition for a Writ of Certiorari at 8, Gaylord v. Tacoma School Dist. No. 10, *cert. denied*, 98 S. Ct. 234 (1977). For a specific example of a nonspeculative deleterious effect on performance, see Norton v. Macy, 417 F.2d 1161, 1168 (D.C. Cir. 1969).

85. *See* Comment, *Unfitness To Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 CALIF. L. REV. 1442, 1460–61 (1973). *See also* note 32 *supra*.

86. *See* note 4 and accompanying text *supra*.

87. Judge Tobriner of the California Supreme Court commented: "In conclusion, I submit that the majority opinion is blind to the reality of sexual behavior. Its view that teachers in their private lives should exemplify Victorian principles of sexual morality, and in the classroom should subliminally indoctrinate the pupils in such principles, is hopelessly unrealistic and atavistic." Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 44, 513 P.2d 889, 899, 109 Cal. Rptr. 665, 675 (1973) (Tobriner, J., dissenting). *See also* note 32 *supra*.

88. The last evaluation of Gaylord's teaching prior to dismissal stated: " 'Mr. Gaylord continues his high standards and thorough teaching performance. He is both a teacher and student in his field.' " 88 Wn. 2d at 300, 559 P.2d at 1347 (Dolliver, J., dissenting).