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## Expectations of the Exemplar: An Exploration of the Burdens on Public School Teachers in the Absence of Tenure

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# EXPECTATIONS OF THE EXEMPLAR: AN EXPLORATION OF THE BURDENS ON PUBLIC SCHOOL TEACHERS IN THE ABSENCE OF TENURE

*Jacqueline A. Meese*†

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### I. INTRODUCTION

Consider this hypothetical: You have an accountant who has prepared your taxes for the past three years, and you meet with this accountant several times leading up to April 15. Over the course of this professional relationship, you have determined that this accountant is proficient—the accountant finds you a refund when possible and makes sense of your year’s worth of receipts. Perhaps there are better accountants in the larger profession, but this one creates no cause for complaint.

Then, one day, you discover that your accountant routinely posts ads on Craigslist seeking casual sex. These ads are not meretricious, but they do include explicit language describing the desired sex and nude photos of the accountant. The ads neither mention the accountant’s profession nor the accounting firm for which he works.

Would this revelation cause you to fire your accountant? This behavior appears to have no impact on the accountant’s professional performance, and the ads appear to be solely confined to the accountant’s private life.

Now consider a second hypothetical: You have a daughter in eighth grade. She has little interaction with her school’s dean of students but, as far as you know, the dean is proficient—the students are generally well behaved and other parents seem to like him. Perhaps there are better disciplinarians in the school district, but this one performs well enough.

Then, one day, another parent forwards you an ad from Craigslist, in which the dean is soliciting casual sex. These ads are not meretricious, but they do include explicit language describing the sex and nude photos of the dean. They include no information about his position or the school, and the ads in no way mention children.

Would this revelation cause you to ask for the dean’s termination?<sup>1</sup> This behavior appears to have no impact on his performance as the dean, the students are unaware of the ads, and the ads appear to be solely confined to the dean’s private life.

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<sup>1</sup> This hypothetical was adapted from Frank Lampedusa’s court case, in which he was fired for this exact behavior. *See* San Diego Unified Sch. Dist. v. Comm’n on Prof’l Competence, 194 Cal. App. 4th 1454, 1458 (Cal. App. Ct. 4th Dist. 2011).

If your answer was different for the dean than it was for the accountant, you're likely not alone. Even though both accountants and teachers are professions licensed by the state, these professions clearly carry different expectations. Teachers are often set apart from other occupations because teachers are required to be exemplars<sup>2</sup> for good and moral conduct. "With great sincerity, parents and the community believe[ ] a teacher should serve the community through an upright exemplary life and whose influence will give their children the characters they themselves aspired to and failed to attain."<sup>3</sup> To put it simply, teachers are expected to act differently than other people.

Thus, teaching is a curious profession. Communities feel very comfortable with telling teachers how to do their jobs and live their lives, and likely no other job occupies the minds of the American public as does teaching. For instance, in April 2015, eleven teachers were convicted on racketeering charges for their involvement in changing students' answers on standardized tests so as to increase their scores.<sup>4</sup> When the teachers attempted to appeal the sentence, the judge responded, "They have made their bed and they're going to have to lie in it, and it starts today."<sup>5</sup> The need to discipline the cheating teachers is likely undisputed—even within the most stringent tenure system, this misconduct is grounds for dismissal and revocation of their teaching licenses. Yet, the fact that this misconduct made its way into a criminal court is simultaneously exceedingly troublesome and unsurprising. By imposing an eleven-year sentence, the presiding judge determined that cheating on an exam was quantifiably worse than involuntary manslaughter, which carries a maximum ten-year prison sentence in Georgia.<sup>6</sup> Such a sentence appears to be rooted in both the heightened expectations of teachers and the comfort with which the community exercises control over teachers.

As extreme as the Atlanta teachers' sentences may be, this exercise of control is not novel. Perhaps nothing crystallizes this point more than the manner in which the American public is fascinated

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<sup>2</sup> Black's Law Dictionary secondarily defines exemplar as "[a]n ideal example; the epitome of some characteristic." *Exemplar*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>3</sup> Todd A. DeMitchell, *Sexual Orientation and the Public School Teacher*, 19 B.U. PUB. INT. L.J. 65, 69 (2009) (internal quotation marks omitted).

<sup>4</sup> See Alia Wong & Terrance F. Ross, *When Teachers Cheat*, THE ATLANTIC (Apr. 2, 2015), <http://www.theatlantic.com/education/archive/2015/04/when-teachers-cheat/389384/> [<http://perma.cc/J324-GBAL>].

<sup>5</sup> *Id.*

<sup>6</sup> GA. CODE ANN. § 16-5-3 (2015).

with the sex lives of teachers. From kindergarten teachers through college professors, stories about teachers' sexual relationships, sexual choices, and gender identity regularly populate the news cycle.<sup>7</sup> The rise of social media has made it immensely easier to peer into teachers' private lives, and communities are quick to pass judgment on teachers' sexual "misconduct." Overall, teachers' privacy is minimized in a way that others do not experience.

Simultaneously, however, there is a movement that is aimed at treating teachers the same as other professionals. The Educational Policy Reform movement<sup>8</sup> has lofty and admirable goals, which are targeted at overhauling our entire "failing" education system. For Ed Reformers, our country's educational ills will be cured by removing "ineffective" teachers from classrooms, but there is a complication: "ineffective" teachers are protected by teacher tenure and cannot be easily removed.<sup>9</sup> As such, this movement has long been focused on dismantling teacher tenure for elementary and secondary public school teachers<sup>10</sup> to fix our education system.<sup>11</sup> The ultimate goal is to make teachers at-will employees,<sup>12</sup> just like other professions.<sup>13</sup>

Yet, teachers' limited privacy rights and heightened expectations make the newest Ed Reform strategy worrisome. Although there are admitted problems with the current teacher tenure system in many states, this paper will argue that eliminating or rolling back teacher tenure is an inappropriate mechanism for solving the country's educational difficulties because of the public's attempt to control the lives of teachers. Throughout, this paper will use teachers' sex lives as the lens by which to understand the implications of eliminating tenure. Section II will examine the current teacher tenure cases in New York and California and explore the legal arguments posited by the parties. Next, Section III will conduct a

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<sup>7</sup> *Why are Our Teachers Obsessed with Sex?*, CBS TAMPA BAY, Feb. 7, 2012, <http://tampa.cbslocal.com/2012/02/07/why-are-our-teachers-obsessed-with-sex-debra-la-fave/> [<http://perma.cc/E8VF-GDV7>].

<sup>8</sup> Henceforth, referred to as "Ed Reform."

<sup>9</sup> Rebecca Klein, *This Is What It Takes To Get A Teacher Fired Around The Country*, HUFFINGTON POST (Sept. 8, 2015), [http://www.huffingtonpost.com/2015/06/03/teacher-tenure-map\\_n\\_7502770.html](http://www.huffingtonpost.com/2015/06/03/teacher-tenure-map_n_7502770.html) [<http://perma.cc/TXB3-4S4P>].

<sup>10</sup> Henceforth, referred to as "K-12 teachers" or "teachers."

<sup>11</sup> Jennifer Medina, *Fight Over Effective Teachers Shifts to Courtroom*, N.Y. TIMES (Jan. 31, 2014), [http://www.nytimes.com/2014/02/01/education/fight-over-effective-teachers-shifts-to-courtroom.html?\\_r=0](http://www.nytimes.com/2014/02/01/education/fight-over-effective-teachers-shifts-to-courtroom.html?_r=0).

<sup>12</sup> "At-will employees" are those who can be terminated at any time without cause. *Employment At Will*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>13</sup> E.g., *Can You Be Fired?*, N.Y. STATE OFFICE OF THE ATT'Y GEN., <http://www.ag.ny.gov/labor/can-you-be-fired> [<http://perma.cc/Z57K-U3WC>].

comprehensive discussion of tenure. The section will start by explaining what teacher tenure actually is today, before moving into the history of teacher tenure. This section will also explore the weakness in the tenure system. Section IV will turn to how the American public treats teacher sex and how this impacts the limited constitutional protections given to teachers. Section V will inventory the ways in which this preoccupation has influenced termination decisions at non-unionized schools and will discuss how employment law treats teachers in the absence of tenure. Section VI will discuss the critiques of teacher tenure and respond to those critiques. Section VII will conclude by making recommendations for how to improve education without compromising the protections given by the tenure system.

## II. CURRENT CASES

Attempts to eliminate teacher tenure have historically been focused on policy changes and statutory revisions, but such efforts have been largely unsuccessful in most states.<sup>14</sup> Thus, the Ed Reform movement has recently shifted its strategy and is seeking judicial intervention.

As of August 2015, two consolidated teacher tenure cases are pending in New York state. The first is *Dauids v. State*, in which the plaintiffs allege that New York's teacher tenure statute prevents school administrators from firing ineffective teachers in violation of students' right to a sound basic education under the New York State Constitution.<sup>15</sup> According to the complaint, K-12 teachers are afforded job protection beyond what other public employees are given, and this "super due process" stops school administrators from terminating ineffective teachers.<sup>16</sup>

The second and more widely known case is *Wright v. New York*, which also alleges the New York education law granting tenure to public school teachers violates students' right to a sound basic education under the New York Constitution.<sup>17</sup> The complaint goes on

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<sup>14</sup> See, e.g., Tom Moroney & Jeffrey Young, *Michelle Rhee Resigns as D.C. Schools Chancellor*, BLOOMBERG NEWS (Oct. 13, 2010), <http://www.bloomberg.com/news/2010-10-13/michelle-rhee-is-said-to-step-down-as-washington-d-c-schools-chancellor.html> [<http://perma.cc/28J4-6BCA>].

<sup>15</sup> Verified Amended Complaint ¶ 3, *Dauids v. State*, No. 101105/14 (N.Y. Sup. Ct. Richmond Cty. 2014), <http://www.nycparentsunion.org/archives/1383> [<http://perma.cc/AW6E-VYS9>].

<sup>16</sup> *Id.* ¶ 37.

<sup>17</sup> Complaint for Declaratory and Injunctive Relief ¶ 4, *Wright v. New York*, A00641/2014 (N.Y. Sup. Ct. Albany Cty. 2014), <http://nylawyer.nylj.com/adgifs/decisions14/072914summons.pdf> [<http://perma.cc/FZ4T-QNZC>].

to describe how “effective teachers” are a key part of a sound basic education by citing a host of social science studies.<sup>18</sup>

New York Attorney General Eric Schneiderman moved to consolidate the two cases, and Judge Minardo of the Richmond County Supreme Court ruled in favor of the motion on September 11, 2014.<sup>19</sup> Both the United Federation of Teachers (“UFT”) and the New York State United Teachers (“NYSUT”) have intervened in the suit,<sup>20</sup> claiming that they have an interest in the outcome of the suit since they represent hundreds of thousands of teachers in New York State. NYSUT has moved to dismiss the case, claiming that the plaintiffs failed to state a claim, lacked standing, and presented a non-justiciable claim.<sup>21</sup>

On March 12, 2015, Judge Minardo denied the defendants’ motion to dismiss.<sup>22</sup> On the failure to state a claim grounds, the judge explained that, accepting all of the alleged facts as true, the plaintiffs have asserted a cause of action by alleging that the dismissal policy caused the injury.<sup>23</sup> The statistical evidence presented by the plaintiffs also supported this point.<sup>24</sup>

The judge went on to refuse the motion to dismiss for non-justiciability and standing.<sup>25</sup> The judge determined that the issue is justiciable because the court’s appropriate role is to “interpret and safeguard” the students’ constitutional rights.<sup>26</sup> The court rejected the claim that the outcome in this case would amount to judicial policy-making.<sup>27</sup> Additionally, the judge acknowledged that the plaintiffs have standing because they have suffered an injury—the deprivation of a sound basic education.<sup>28</sup> Thus, the court concluded that they are within the “zone of protected interests” cre-

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<sup>18</sup> *Id.* ¶¶ 27-33.

<sup>19</sup> Diane C. Lore, *Now it’s ‘Davids v. Goliath’ in New York teacher tenure lawsuit*, S.I. LIVE (Sept. 11, 2014), [http://www.silive.com/news/index.ssf/2014/09/now\\_its\\_davids\\_v\\_goliath\\_in\\_ne.html](http://www.silive.com/news/index.ssf/2014/09/now_its_davids_v_goliath_in_ne.html) [<http://perma.cc/TFS6-4K8P>].

<sup>20</sup> Linda Ocasio, *UFT becomes defendant in tenure lawsuit*, UNITED FED’N OF TEACHERS (Oct. 2, 2014), <http://www.uft.org/news-stories/uft-becomes-defendant-tenure-law-suit> [<http://perma.cc/MW57-TF8Z>].

<sup>21</sup> *NYSUT files motion to dismiss lawsuit challenging tenure law*, NYUST (Oct. 29, 2014), <http://www.nysut.org/news/2014/october/nysut-files-motion-to-dismiss-lawsuit-challenging-tenure-law>.

<sup>22</sup> *See Davids v. New York*, Index No. 10115/14, at 13 (N.Y. Sup. Ct. Richmond Cty. Mar. 12, 2015), <http://www.scribd.com/doc/258542104/Judge-Minardo-Decision-on-Denied-Motions-to-Dismiss> [<http://perma.cc/UZ5V-XRLX>].

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 13-15.

<sup>25</sup> *Id.* at 15.

<sup>26</sup> *Id.* at 15-16.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

ated by the statute.<sup>29</sup>

Moving into discovery, the defendants have good reason to be worried. These cases were filed on the heels of the decision in *Vergara v. California*, a California case that made national headlines when the judge ruled in favor of the plaintiffs who posited that teacher tenure violated students' equal protection rights under the California State Constitution.<sup>30</sup> The judge relied heavily on *Brown v. Board of Education* and other California cases to reach his decision, criticizing the "uber due process" guaranteed to K-12 teachers by statute.<sup>31</sup> An important difference between the California and New York cases is that *Vergara* focused on the impact on low-income and minority students,<sup>32</sup> whereas the *Wright* and *Davids* complaints focus on all students, regardless of household income or wealth. Perhaps this is due in part to the landmark New York case that guaranteed sound basic education to all children,<sup>33</sup> despite the unfavorable federal law determination that education is not a fundamental right.<sup>34</sup>

All three cases were filed by Ed Reform activist groups<sup>35</sup>—Students Matter in *Vergara*, New York City Parents Union in *Davids*, and Partnership for Educational Justice in *Wright*. Though these cases are touted as parental activism in the Ed Reform world,<sup>36</sup> there are others,<sup>37</sup> such as the United Federation of Teachers, who consider these cases to be anti-teacher. Their response to the litigation is that vilifying teachers for the problems with the education system is unfair, as well as purely political. "This action is not brought by aggrieved Plaintiffs who have been denied a 'sound basic education;' it is brought by political advocacy groups attempting to drive policy that is in closer alignment with their own political

<sup>29</sup> *Id.*

<sup>30</sup> *Vergara v. California*, No. BC484642, slip op. at 2 (Sup. Ct. Cal. L.A. Cty. Aug. 27, 2014).

<sup>31</sup> *Id.* at 6.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> See generally Campaign for Fiscal Equity v. New York, 100 N.Y.2d 893 (2003).

<sup>34</sup> See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>35</sup> Generally, the Ed Reform world is multi-tiered, with many activist groups both working together and against each other. See generally Billy Easton, *Changing Course on School Reform: Strategic Organizing around the New York City Mayoral Election*, 39 VOICES IN URBAN EDUC., 2014, at 6, <http://vue.annenberginstitute.org/sites/default/files/issues/VUE39.pdf> [<http://perma.cc/HSU8-5TH2>].

<sup>36</sup> See Angela Dickens, *Vergara's Effects Ripple Out to New York State*, STUDENTS FIRST (July 31, 2014), <https://www.studentsfirst.org/blogs/entry/vergaras-effects-ripple-out-to-new-york-state> [<https://perma.cc/92D9-B3AZ>].

<sup>37</sup> *UFT urges dismissal of anti-tenure lawsuits*, UNITED FED'N OF TEACHERS (Oct. 28, 2014), <http://www.uft.org/press-releases/uft-urges-dismissal-anti-tenure-lawsuits> [<http://perma.cc/BLU3-NKP4>].

preferences for the way they believe New York State School Districts ought to be run.”<sup>38</sup>

Overall, these cases are troublesome for the teaching workforce. Of course, predicting a future consequence of a case that has yet to be decided is far from foolproof. Still, the historical and contemporaneous treatment of teachers provides an instructional basis for forecasting the ways in which the “exemplar” label can be an impossible burden to carry, even with tenure.

### III. UNTANGLING TENURE – SAFEGUARDS & SHORTFALLS

Against this political and legal backdrop, a general discussion about teacher tenure becomes crucial to understanding the risks posed by *Vergara*, *Dauids*, and *Wright*. Teachers are already provided with limited legal protection, and an outcome like that in *Vergara* will chip away the little protection that is provided. As such, this section reviews the purpose and history of tenure, the history of the exemplar label, and the gaps left by the exemplar label that tenure is intended to fill.

#### A. *What is Teacher Tenure?*

Teacher tenure is an often-misunderstood term, as it is often thought to confer permanent employment<sup>39</sup> on public school-teachers.<sup>40</sup> However, tenure is a statutorily-created interest in a teacher’s employment that guarantees certain due process rights before termination.<sup>41</sup> This guarantee of employment is one of the benefits for almost all government jobs, and the general protection of public service positions was created in part to stimulate productivity by insulating the employees from political changes.<sup>42</sup> Thus, permanent employment was implemented to stop newly-elected

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<sup>38</sup> *Id.*

<sup>39</sup> This confusion likely stems from the term “permanent employee” being used interchangeably with “tenured employee.” However, this is a misnomer as the employment is not permanent, but is rather a statutory benefit.

<sup>40</sup> M.J. Stephey, *A Brief History of Tenure*, TIME (Nov. 17, 2008), <http://www.time.com/time/nation/article/0,8599,1859505,00.html>.

<sup>41</sup> See *Goldberg v. Kelly*, 397 U.S. 254 (1970); see also *Civil Serv. Emps. Ass’n Inc. v. Venugopalan*, 228 A.D. 767 (3d Dep’t 1996).

<sup>42</sup> Jonathan Fineman, *Cronyism, Corruption, and Political Intrigue: A New Approach for Old Problems in Public Sector Employment Law*, 8 CHARLESTON L. REV. 51, 61 (2013) (“The belief was that employees who had some job stability and who did not have to worry about retribution could focus on performing their jobs to the best of their ability. The public would be better served if employees were rewarded based on their competence and expertise rather than their adherence to the dictates of a particular political party or as a reward for political favors.”).

politicians from firing existing public employees and hiring friends into the open positions, as was the practice under the “spoils system.”<sup>43</sup> This anti-corruption, anti-cronyism policy is still in effect today,<sup>44</sup> and this is partially why teachers have tenure.

Consequently, in New York, most non-political civil servant jobs are given permanent employee status, including public school teachers.<sup>45</sup> The statute granting teacher tenure requires an eligible teacher to go through a three-year probationary period and obtain a recommendation from the superintendent of schools before getting tenure.<sup>46</sup>

Yet, even after obtaining tenure, a New York teacher can be dismissed for: (a) insubordination, immoral character, or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty; or (c) failure to maintain certification as required by this chapter<sup>47</sup> and by the regulations of the commissioner.<sup>48</sup> However, under the federal Due Process Clause, a state-created statutory-interest in employment can only be revoked after the employee has been given notice and some opportunity to be heard.<sup>49</sup> For New York teachers, the process due to the teachers amounts to a notice of the termination charges, a hearing before an impartial hearing officer at which the teacher may mount a defense, a record of the hearing, and the right to appeal the decision.<sup>50</sup>

These are the statutes the plaintiffs in *Wright* and *Dauids* seek to challenge.<sup>51</sup> Specifically, the *Dauids* complaint regards this as “super due process,”<sup>52</sup> a term which is likely referring to the portion of the *Vergara* opinion in which the judge referred to Califor-

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<sup>43</sup> *Id.* at 59, 61.

<sup>44</sup> *Id.* at 91.

<sup>45</sup> *See, e.g.*, N.Y. CIV. SERV. LAW § 63(1) (McKinney 2015).

<sup>46</sup> N.Y. EDUC. LAW § 3012(1) (McKinney 2015).

<sup>47</sup> EDUC. Art. 61 (McKinney 2015).

<sup>48</sup> EDUC. § 3012(2).

<sup>49</sup> *See generally* Mathews v. Eldridge, 424 U.S. 319 (1976).

<sup>50</sup> EDUC. § 3020-a.

<sup>51</sup> Complaint for Declaratory and Injunctive Relief ¶ 6, *Wright v. New York*, A00641/2014 (N.Y. Sup. Ct. Richmond Cty. 2014), <http://nylawyer.nylj.com/adgifs/decisions14/072914summons.pdf> [<http://perma.cc/F67W-MVNY>]; Verified Amended Complaint ¶ 37, *Dauids v. State*, No. 101105/14 (N.Y. Sup. Ct. Richmond Cty. 2014), <http://www.nycparentsunion.org/archives/1383> [<http://perma.cc/AW6E-VYS9>]. These plaintiffs are also challenging New York’s seniority system (“Last In, First Out” or “LIFO”), but these statutes are outside the scope of this paper.

<sup>52</sup> Verified Amended Complaint ¶ 37, *Dauids*, No. 101105/14.

nia's statutory steps as "uber due process."<sup>53</sup> Yet, the process due in both states is the same as it is for other public employees.

While permanent employment laws have critics no matter the position,<sup>54</sup> the current plaintiffs are specifically only targeting teacher tenure. This distinction is interesting since the road to permanent employment for teachers was unique.

### B. *History of Teacher Tenure*

The existence of teacher tenure can only be properly understood within the context of the history of the teaching profession itself. Public schools were built on the backs of a female workforce—taxpayers in the mid-1800's were initially reluctant to finance a public school system, and the system only survived because the governments could pay female teachers little to no money.<sup>55</sup> Still, because of cultural attitudes of the time, many were wary of allowing women into the workforce and permitting them to have public lives at all.<sup>56</sup> Thus, the discussion of the public school system often framed education as a "private" space, akin to the home.<sup>57</sup>

By positioning the school as a private space, the greater public could exercise control over the lives of the female teachers, since they were acting *in loco parentis*. Professor Kristin Shotwell posits this is where the obsession with teachers' sex lives was born.<sup>58</sup> Not only were female teachers generally required to be unmarried due to coverture laws, but these teachers were also expected to be chaste so as to set a moral example for their students.<sup>59</sup> Because teachers were operating in a "private" sphere that was an extension of the home, parents and the community felt comfortable intruding into teachers' lives and requiring them to live up to a higher standard of moral conduct than the parents themselves abided by.<sup>60</sup> This hybridization of the teachers' public/private life to exercise control illustrates the feminist legal critique of privacy as a legal structure used to advance progressive objectives in lieu of

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<sup>53</sup> *Vergara v. California*, No. BC484642, slip op. at 10 (Sup. Ct. Cal. L.A. Cty. Aug. 27, 2014).

<sup>54</sup> See, e.g., Johan P. Olsen, *Citizens, Public Administration and the Search for Theoretical Foundations*, 37 POL. SCI. & POL. 69, 70-71 (2004).

<sup>55</sup> Kristin D. Shotwell, *Secretly Falling in Love: America's Love Affair with Controlling the Hearts and Minds of Public School Teachers*, 39 J.L. & EDUC. 37, 44 (2010).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 47-48.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

equality, which minimizes women as belonging to a primarily private sphere.<sup>61</sup>

Ultimately, the current teacher tenure system emerged early in the twentieth century, at a time when this mostly-female work force was both obtaining the right to vote and seeking the similar workplace protections as male manufacturing workers.<sup>62</sup> Tenure was initially offered at colleges and universities to protect professors' academic integrity and freedom of speech; the system was eventually extended to K-12 teachers as well.<sup>63</sup>

The K-12 teacher tenure system had unique aims, since this teaching corps was mostly female and the school administrators tended to be mostly white males.<sup>64</sup> Even well into the mid-twentieth century, public school teachers were subjected to unusually strict employment rules—such as those forbidding them from dating or wearing pants—and were dismissed for peculiarly frivolous reasons—such as getting married, becoming pregnant, or wearing pants—that the male workforce did not have to endure.<sup>65</sup>

Through organized labor efforts, female teachers were able to secure employment protection that otherwise eluded them simply because they were female.<sup>66</sup> The development of this system was intended to be a guarantee of due process for teachers before they could be removed from their jobs and was not intended to guarantee “permanent employment.”<sup>67</sup>

### C. *Teacher as Exemplar*

Despite moving away from considering schools to be an exten-

<sup>61</sup> Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 43 (1992) (“Women feel that too long we have been ignored, because we have been seen as private and unimportant. Furthermore, we feel that for too long our lives and our complaints have been ignored because they lacked visibility.”).

<sup>62</sup> Stephey, *supra* note 40.

<sup>63</sup> Laura McNeal, *Total Recall: The Rise and Fall of Teacher Tenure*, 30 HOFSTRA LAB. & EMPL. L.J. 489, 492 (2013).

<sup>64</sup> Sigrid Bathen, *Tracing the Roots of Teacher Tenure*, CAL. J., May 1999, at 11, <http://www.cde.ca.gov/nr/re/hd/documents/yr1999hd05.pdf> [<http://perma.cc/ZLL7-U9DM>].

<sup>65</sup> Stephey, *supra* note 40.

<sup>66</sup> Teacher tenure also protected all teachers' abilities to engage in free speech and political discourse, as well as provided protection for the teaching of radical or progressive ideas. See Ralph E. Shaffer, Opinion, *History shows why teachers need tenure*, L.A. DAILY NEWS (June 11, 2014), <http://www.dailynews.com/opinion/20140611/history-shows-why-teachers-need-tenure-ralph-shaffer> [<http://perma.cc/DK4J-KVSU>]. However, this article focuses primarily on using teachers' positions as public servants as a method to punish their sexual choices by revoking their employment.

<sup>67</sup> McNeal, *supra* note 63, at 492.

sion of the private home in the twentieth century, teachers are still required to be “exemplars” for their students. Thus, teachers must model perfect behavior since students are expected to follow all instructions and guidance provided by their teachers.<sup>68</sup> Parents, administrators, and politicians require more prudent and moral behavior from teachers because, “[e]xcept for sex, education is the most intimate of human contacts. Other than marriage, it is the most loving and momentous of personal relations.”<sup>69</sup>

Because public schools have their roots in a puritanical conception of Christianity,<sup>70</sup> schools are intended to “inculcate[e] fundamental values necessary to the maintenance of the democratic political system” and “a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values,”<sup>71</sup> which increases the importance of the role model function of teaching. “Parents who smoked, drank, gambled, lied, and committed adultery demanded that a teacher’s conduct be above their own.”<sup>72</sup>

Thus, teachers’ personal lives are frequently inspected by the greater public, which results in teachers regularly being denied the protections that are given to other citizens.<sup>73</sup> More often than not, this entails scrutiny of the teacher’s sexual life. For the greater public, sexual activity is a constitutionally protected aspect of privacy.<sup>74</sup> Although sex is usually considered a means to some end under the law (such as intimacy or procreation), the privacy of the act and communication about it are still typically protected.<sup>75</sup> This is less true for teachers because, for them, “[i]f suspicion of vice or immorality be once entertained against a teacher, his[/her] influence for good is gone. The parents become distrustful, the pupils contemptuous and the school discipline essential to success is at an end.”<sup>76</sup>

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<sup>68</sup> 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, 276 (2002).

<sup>69</sup> Lauren E. Fisher, *A Miscarriage of Justice: Pregnancy Discrimination in Sectarian Schools*, 16 WASH. & LEE J. C.R. & SOC. JUST. 529, 557 n.171 (2010).

<sup>70</sup> Shotwell, *supra* note 55, at 48.

<sup>71</sup> *Ambach v. Norwick*, 441 U.S. 68, 77-78 (1979).

<sup>72</sup> DeMitchell, *supra* note 3, at 69 (internal quotation marks omitted).

<sup>73</sup> *Id.* at 72-74.

<sup>74</sup> See Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 141-42 (2014) (citing *Lawrence v. Texas*, 539 U.S. 558 (2003); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

<sup>75</sup> *Id.* at 141.

<sup>76</sup> *Tingley v. Vaughn*, 17 Ill. App. 347, 351 (Ill. App. Ct. 1885).

*D. Shortcomings of Teacher Tenure*

Because of the heightened expectations for teachers' private behavior, teacher tenure has not been a panacea for all employment discrimination.<sup>77</sup> Under most tenure statutes, teachers can still be fired on the following grounds: incompetence, inadequate performance, immoral conduct, insubordination, willful neglect of duties, unfitness, or any other sufficient cause.<sup>78</sup>

Perhaps unsurprisingly, "immoral conduct" and "unfitness" became the loopholes for continuing sex discrimination under the tenure system. Until the mid-1980s, a female teacher who became pregnant out of wedlock could be considered to have engaged in "immoral conduct" and could still be fired for her "indiscretion."<sup>79</sup> For instance, in 1976, a federal district court in Nebraska held that a teacher who became pregnant out of wedlock could be terminated for being "unfit" since her continued employment could condone out-of-wedlock pregnancies.<sup>80</sup>

Furthermore, teachers' choices about their romantic lives have also come under scrutiny as "immoral." For example, in 1975, a female teacher who lived with her boyfriend in a trailer park was determined to have engaged in "immoral conduct."<sup>81</sup> Because her supervisor warned her that this living arrangement was "grossly immoral" under her contract, the court upheld the teacher's dismissal on the grounds that her behavior was both immoral and insubordinate.<sup>82</sup>

Thus, the protection afforded by teacher tenure is only as strong as the community standards in which the tenure system exists. Though these examples come from a generation ago, this history illuminates how external standards of morality influenced teachers' employment. The next section will examine the shortcomings of other protections given to the rest of the citizenry.

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<sup>77</sup> For a robust discussion of why teacher tenure is necessary to protect against age discrimination and to prevent firing teachers who are paid more, see Mark A. Paige & Perry Zirkel, *Teacher Termination Based on Performance Evaluations: Age and Disability Discrimination?*, 300 EDUC. L. REP. 1 (2014).

<sup>78</sup> McNeal, *supra* note 63, at 491.

<sup>79</sup> Floyd G. Delon, *Is a Teacher's Pregnancy Out of Wedlock Constitutionally Protected Conduct?*, 7 EDUC. L. REP. 9, 11 (1987).

<sup>80</sup> *Brown v. Bathke*, 416 F. Supp. 1194, 1198 (D. Neb. 1976).

<sup>81</sup> *Sullivan v. Meade Cty. Indep. Sch. Dist. No. 101*, 387 F. Supp. 1237, 1247 (D.S.D. 1975).

<sup>82</sup> *Id.* at 1248.

## IV. TEACHING WITH TENURE: LIMITATIONS ON LIBERTIES

Even with tenure, teachers and other public employees have limitations on their civil liberties as a result of their employment. Understanding the ways in which cultural attitudes about sex intersect with our vision of the teaching profession is a useful lens for understanding how these limitations impact teachers' private lives.

Despite developing more permissive attitudes towards sex in recent years, our society is still remarkably preoccupied with the sex lives of teachers, arguably more so than any other profession. When conducting a general internet search with the keywords "teacher sex," an uncountable number of news articles surface.<sup>83</sup> In fact, an entire section of the *Huffington Post* is dedicated to describing "Teacher Sex Scandals," which has four pages worth of teacher sex stories.<sup>84</sup> A Wikipedia page called "Sexual harassment in education in the United States" provides a comprehensive overview of sexual relationships between teachers and students.<sup>85</sup>

The rise of social media has fueled this obsession with teacher sex. Some school districts encourage parents to google their children's teachers and see what they can discover about the teachers' private conduct.<sup>86</sup> Stories about teachers' racy photos on social media have also become popular for online news readership.<sup>87</sup>

Furthermore, this phenomenon is not limited to the twenty-four hour news cycle and sensational journalism techniques. There is robust legal scholarship about the grounds on which a tenured teacher can be fired, and the first and most extensive category of "misconduct" is almost always about sex.<sup>88</sup>

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<sup>83</sup> In a review of 50 news articles about teacher sex conducted by the author, roughly 60% of the articles were about teachers having sex with students and about 20% were about teachers posting some sort of sexual material on social media.

<sup>84</sup> *Teacher Sex Scandals*, HUFFINGTON POST, <http://www.huffingtonpost.com/news/teacher-sex/> [http://perma.cc/8QUS-G2QQ].

<sup>85</sup> *Sexual Harassment in Education in the United States*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Sexual\\_harassment\\_in\\_education\\_in\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Sexual_harassment_in_education_in_the_United_States) [http://perma.cc/F5PL-8VBD].

<sup>86</sup> Shotwell, *supra* note 55, at 38.

<sup>87</sup> See, e.g., *Tiffani Webb, New York High School Counselor, Fired For Modeling Past, Racy Photos Taken 17 Years Ago*, HUFFINGTON POST (Oct. 8, 2012, 2:54 AM), [http://www.huffingtonpost.com/2012/10/08/tiffani-webb-new-york-hig\\_n\\_1947277.html](http://www.huffingtonpost.com/2012/10/08/tiffani-webb-new-york-hig_n_1947277.html) [http://perma.cc/U3NB-AHUT].

<sup>88</sup> See generally John Trebilcock, *Off Campus: School Board Control Over Teacher Misconduct*, 35 TULSA L.J. 445, 455-57 (2000) (discussing first the sexual activity cases that led to teacher dismissals before noting that sexual activity is "not the only area" for which teachers are dismissed); see also Clifford P. Hooker, *Terminating Teachers and Revoking Their Licensure for Conduct Beyond the Schoolhouse Gate*, 96 EDUC. L. REP. 1, 5-9 (1995) (dedicating all of Section III of the article to sexual misconduct before moving on to other grounds of dismissal); Ruth L. Davison, *The Personal Lives and Professional Respon-*

Consequently, this section will discuss how simply being a teacher can lead to intrusions into one's sexual choices because the teacher is an exemplar. This is further complicated by the limitations placed on teachers' right to privacy and freedom of speech.

#### A. *Privacy*

Aside from the lives of teachers, privacy generally occupies a peculiar space in American jurisprudence. Although not written into the Constitution, the right to privacy has been elevated to constitutional status as part of substantive due process doctrine.<sup>89</sup>

Because teachers are expected to be exemplars, they are afforded markedly less privacy than the general public.<sup>90</sup> Courts have recognized that unlimited intrusion into a teacher's personal life would raise constitutional concerns because of the fundamental right to privacy.<sup>91</sup> However, these same courts recognize that a teacher's right to privacy is limited by the possibility of a public injury.<sup>92</sup> The scope of "public injury" has been broadened by the internet. Teachers who post material intended for a limited audience may find themselves facing allegations of public injury.

For example, Frank Lampedusa was fired after he posted an ad on Craigslist soliciting casual sex.<sup>93</sup> He had been a middle school teacher and dean of students for nine years when he was

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*sibilities of P-12 Educators: Off Duty Conduct as Grounds for Adverse Employment Actions*, 171 EDUC. L. REP. 691, 698-706 (2003) (first discussing "sexual misconduct," "pregnancy out of wedlock," and "sexual orientation" before discussing "drug use," "alcohol abuse," or "criminal misconduct.").

<sup>89</sup> See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.").

<sup>90</sup> Shotwell, *supra* note 55, at 68-70.

<sup>91</sup> See, e.g., *Morrison v. St. Bd. of Educ.*, 461 P.2d 375, 392 (Cal. 1969) ("Conscientious school officials concerned with enforcing such a broad provision might be inclined to probe into the private life of each and every teacher, no matter how exemplary his classroom conduct. Such prying might all too readily lead school officials to search for 'telltale signs' of immorality in violation of the teacher's constitutional rights.").

<sup>92</sup> See *id.* at 391.

<sup>93</sup> *San Diego Unified Sch. Dist. v. Comm'n on Prof. Competence*, 194 Cal. App. 4th 1454, 1458 (Cal. App. Ct. 4th Dist. 2011). The court decision included the whole text of the Craigslist ad, which read:

In shape guy, mac, attractive, 32 waist, swimmer's build, horny as fuck. Looking to suck and swallow masc guys, also looking to get fucked. Uncut and huge shooters jump to head of line. Give my [sic] your loads so I can shoot mine. White, black, Hispanic, European, all good. No fats, fems, queens, Asians. NO BELLIES. Have pics when you email.

*Id.* at 1498.

fired from his position because the posting included graphic photos of Lampedusa's body, including his genitalia and his anus.<sup>94</sup> Though the Commission on Professional Competence<sup>95</sup> found Lampedusa to be a qualified teacher, a California appellate court reversed the decision and upheld his dismissal because of his "moral indifference" and the "unique position of public school teachers."<sup>96</sup>

Lampedusa's case demonstrates the fine line between private electronic conduct, intended for a limited audience, and the public nature of the internet. Despite making a public listing, Lampedusa claimed he did not think anyone from the school or his students would see the ad because it was on the adults-only section of Craigslist, and because he did not list his name or his place of employment; the ad was intended to help him meet someone in his personal life for a sexual relationship.<sup>97</sup> The Commission accepted Lampedusa's version of the story, noting that the ad was "neither praiseworthy nor blameworthy, although [Lampedusa] is now more mindful of how his actions in his private life can inadvertently affect his public life as a teacher."<sup>98</sup>

The California appellate court was not persuaded and upheld his initial termination because of his "unfitness to serve" and his "moral conduct."<sup>99</sup> The court relied heavily on the idea that a teacher should be an exemplar. According to the court, "there are certain professions which impose upon persons attracted to them, responsibilities and limitations on freedom of action which do not exist in regard to other callings. Public officials such as judges, policemen and schoolteachers fall into such a category."<sup>100</sup> The court noted that a parent in the community did actually see the ad, and its pornographic nature "interfered with his ability to serve as role model at the school."<sup>101</sup>

Although Lampedusa believed that he was making private sexual decisions using a public forum, the Court ultimately found that

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<sup>94</sup> *Id.*

<sup>95</sup> In California, a terminated teacher may request review of his termination before the impartial Commission on Professional Competence. The Commission's decision can be appealed to state court for arbitrary and capricious review. *See* CAL. CODE OF CIV. PROC. ANN. § 1094.5 (1945).

<sup>96</sup> *San Diego Unified Sch. Dist.*, 194 Cal. App. 4th at 1466 (internal quotation omitted).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1466-67.

<sup>100</sup> *Id.* at 1463.

<sup>101</sup> *Id.*

his position as a schoolteacher stripped him of the privacy rights that would be afforded to a person in a different position.<sup>102</sup>

### B. Freedom of Speech

The Supreme Court has held that the First Amendment protects teachers' private speech, but that the protection is limited by the state's interest in advancing employment goals.<sup>103</sup> Such an inquiry into whether a teacher's private speech is protected ultimately results in "balanc[ing] 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."<sup>104</sup> Accordingly, the Court developed a two-step analysis for conducting this balancing test:

First, does the speech in question touch on a legitimate matter of public concern? If the teacher is speaking on a matter of public concern, then the second question is whether the state's interest in its educational goals or maintaining order and discipline in the schools outweighs the teacher's interest in free expression.<sup>105</sup>

The Court went on to define "public concern" as speech "relating to any matter of political, social, or other concern to the community."<sup>106</sup>

Thus, teachers are given limited protection on speech concerning their sexual expression, since it may not be determined to be a matter of "public concern." Law Professor Eva DuBuisson has written at length about teacher's "out-speech" and how schools have attempted to censor such speech or fire teachers for engaging

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<sup>102</sup> *Id.* at 1466 ("Moreover, the definition of immoral or unprofessional conduct must be considered in conjunction with the unique position of public school teachers, upon whom are imposed responsibilities and limitations of freedom of action which do not exist in regard to other callings.") (internal quotations omitted).

<sup>103</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("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."). Since the *Pickering* decision, the Court has further rolled back speech protections for public employees by requiring that the speech be made by a citizen in order to be protected, in addition to touching on matter of public concern. See *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006). However, the ramifications of this decision are outside the scope of this paper.

<sup>104</sup> *Pickering*, 391 U.S. at 568.

<sup>105</sup> Eva DuBuisson, *Teaching from the Closet: Freedom of Expression and Out-Speech by Public School Teachers*, 85 N.C. L. REV. 301, 313 (2006) (citing *Cox v. Dardanelle Pub. Sch. Dist.*, 790 F.2d 668, 672 (8th Cir. 1986)).

<sup>106</sup> *Connick v. Myers*, 461 U.S. 138, 144-46 (1983).

in such speech.<sup>107</sup> Yet, the greater American community has grown more accepting of the LGBTQ community in the new millennium and teachers are less likely to be fired for engaging in such private “out-speech.”<sup>108</sup>

However, teachers are still not immune from being fired for their sexual speech. Although the *Pickering/Connick* analysis is used for teachers’ private speech, teachers’ speech inside the school—whether in the classroom or in an extracurricular setting—is treated differently. The Supreme Court has held that schools are permitted to regulate the content of any speech, so long as the regulation serves a legitimate pedagogical interest.<sup>109</sup> These legitimate pedagogical interests can include “assur[ing] that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”<sup>110</sup> Although *Hazelwood* was decided on a student speech issue, courts have subsequently applied this analysis to teachers as well.<sup>111</sup>

For example, Julia Frost was a veteran English teacher when she took a position at Sultana High School in California.<sup>112</sup> Once hired at the new school, Frost informed her colleagues that she is a lesbian, and her co-workers invited her to be a faculty advisor for the school’s Gay/Straight Alliance, which is a student-run organization that aims to end anti-gay sentiment.<sup>113</sup> Some months later during the same school year, the Vice Principal of Discipline informed Frost that she was being investigated for “teaching homosexuality” and determined that she was “teaching gay things.”<sup>114</sup> Despite this investigation, Frost received an exemplary review at the end of the

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<sup>107</sup> DuBuisson, *supra* note 105, at 304 (“[S]chool administrators in some communities still face strong incentives to keep gay teachers in the closet for fear of community reaction.”).

<sup>108</sup> Davison, *supra* note 88, at 703.

<sup>109</sup> See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (“A school need not tolerate student speech that is inconsistent with its “basic educational mission . . . even though the government could not censor similar speech outside the school.”) (internal quotation marks omitted).

<sup>110</sup> *Id.* at 271.

<sup>111</sup> DuBuisson, *supra* note 105, at 336 (citing *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 2005)).

<sup>112</sup> Complaint for Damages, Injunctive and Declaratory Relief ¶ 1, *Frost v. Hesperia Unified Sch. Dist.*, No. CIVDS 1313980 (Super. Ct. Cal. Cty. of San Bernadino Nov. 19, 2013), [http://www.lambdalegal.org/in-court/legal-docs/frost\\_ca\\_20131119\\_complaint](http://www.lambdalegal.org/in-court/legal-docs/frost_ca_20131119_complaint) [<http://perma.cc/D3D3-22CF>].

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* ¶ 4.

school year.<sup>115</sup>

Ultimately, Frost was terminated at the end of her probationary period and was not granted tenure.<sup>116</sup> She claims that she was dismissed because of her sexual orientation.<sup>117</sup> However, the school contends that she was just “not a good fit” with the school and that is why her contract was not “reelected.”<sup>118</sup>

Thus, the school district could terminate a teacher for classroom speech related to being a lesbian. Because schools are permitted to advance the pedagogical interest in not exposing students to “material that may be inappropriate for their level of maturity,”<sup>119</sup> these schools can stop teachers from having conversations with students about sexual orientation because the topic is “too mature.” Claiming that discussing sexual orientation is too mature for children under the age of eighteen is clearly reflective of the attitude that homosexuality is “outside the norm,” “taboo,” or “wrong.” Thus, the current law permits schools to advance their own moral attitudes towards homosexuality.

### C. *Freedom of Association*

Additionally, the freedom of association is an ancillary right to the freedom of speech.<sup>120</sup> Essentially, a portion of this right allows association for the exercise of free speech as a group, when the First Amendment protects the underlying speech.<sup>121</sup> This gets murky because the First Amendment does not protect all speech, and gets even murkier when the speaker is a teacher.

For example, Peter Melzer was fired from his teaching position at Bronx High School of Science in 2000 for being a member of the North American Man/Boy Love Association (“NAMBLA”) after over thirty years of employment with the school.<sup>122</sup> NAMBLA’s mission is to change sexual attitudes towards sexual activity between men and boys, and Melzer had been a member of the organization since 1979.<sup>123</sup> Parents found out about Melzer’s mem-

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<sup>115</sup> *Id.* ¶ 5.

<sup>116</sup> *Id.* ¶ 1.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* ¶ 11.

<sup>119</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

<sup>120</sup> *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-23 (1984) (describing the right to intimate association and the right to expressive association).

<sup>121</sup> Mark Strauss, *Public Employees’ Freedom of Association: Should Connick v. Myers Speech-Based Public-Concern Rule Apply?*, 61 *FORDHAM L. REV.* 473, 478 (1992) (citing *N.Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 13 (1988)).

<sup>122</sup> *Melzer v. Bd. of Educ.*, 336 F.3d 185, 188-89 (2d Cir. 2003).

<sup>123</sup> *Id.* at 189.

bership in the group, and parents and students alike called for his termination.<sup>124</sup> As his defense, Melzer argued that his termination violated his freedom of speech and freedom of association rights.<sup>125</sup>

The case went up to the Second Circuit and the court applied the *Pickering* test.<sup>126</sup> Although the court determined that Melzer's speech was a matter of public concern, the court ultimately determined that the school board met its burden by showing that the disruption caused by the speech outweighed Melzer's speech and association rights.<sup>127</sup> Melzer's position as a teacher was central to the outcome, and the court stated:

Melzer's position as a school teacher is central to our review. He 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, teachers, and administrators.<sup>128</sup>

Despite poetically quoting Alexis de Tocqueville at the outset of the opinion,<sup>129</sup> the court ultimately determined that the parents' outrage could override Melzer's constitutional rights. This illustrates both how Melzer failed to be an exemplar and how his sexual identity ultimately led to his termination.

Considered together, teachers' limited privacy and speech rights expose how demanding the role of exemplar actually is. The law specifically separates out teachers and treats them differently than the rest of the public. Even compared to other public employees, the burden of being an exemplar influences how teachers' privacy and speech are analyzed by the courts. For this reason, tenure becomes exceedingly important and explains why teachers are given heightened job security.

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<sup>124</sup> *Id.* at 191.

<sup>125</sup> *Id.* at 189.

<sup>126</sup> *Id.* at 192-95.

<sup>127</sup> *Id.* at 198.

<sup>128</sup> *Id.* at 199 (internal citations omitted).

<sup>129</sup> *Id.* at 188 ("Among the liberties an American citizen enjoys is the right to associate with whomever he or she chooses for whatever purpose. That right, Alexis de Tocqueville observed in discussing it 168 years ago in his classic book is 'almost as inalienable in its nature as [the right of] individual freedom.'").

## V. TEACHING WITHOUT TENURE: INVENTORY OF INTRUSIONS

Importantly, not all teachers are protected by tenure. Though these teachers are still required to be exemplars, their only legal protections come from federal and state employment statutes. Those who advocate for ending K-12 tenure claim that tenure's protections are now provided by federal civil rights legislation. Specifically, if schools move to an "at-will" system<sup>130</sup> of employment, Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act, or the Family Medical Leave Act are supposed to protect teachers from unwarranted intrusions into their personal lives which form the basis for termination.

As such, this section will provide an inventory of examples in which teachers were fired for their sexual conduct. Schools that operate without teacher tenure or teacher unions—namely private schools, parochial schools, and charter schools—illustrate the ways in which teachers' sex lives are implicated in termination decisions.<sup>131</sup> The section will then address the legality of these termination decisions under federal employment statutes.

### A. *Sexual Orientation*

As described below, teachers can be terminated for their sexual identity, rather than any specific sexual act. However, sometimes behavior can bleed into the notion of identity. For each example below, however, the teacher's private sexual orientation became public grounds for termination.

#### 1. Sexual Identity

Nichole Williams claims she was fired from Life School Waxahachie, a charter high school in Texas where she was a varsity basketball coach and ninth-grade geography teacher, for being a lesbian.<sup>132</sup> The school, however, denies that she was fired because of her sexual orientation, and instead claims that the termination decision was made after an incident that occurred on October 13,

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<sup>130</sup> At-will employment is practiced by most employers and allows either the employer or employee to terminate the employment relationship at any time. See Fineman, *supra* note 42, at 57-58.

<sup>131</sup> Although some of the examples come from Catholic schools that have particular exemptions because of the religious affiliation, the sexual undercurrent of the termination decision still illustrates the problem of being obsessed with teacher sex.

<sup>132</sup> John Wright, *Charter school won't reconsider coach's firing*, DALLAS VOICE (Nov. 11, 2011), <http://www.dallasvoice.com/charter-school-won%E2%80%99t-reconsider-coach%E2%80%99s-firing-1094828.html> [<http://perma.cc/9KYH-7LVT>].

2011.<sup>133</sup>

The “incident” occurred when Williams let some of her students stay in her office during a conference period.<sup>134</sup> Because these students were supposed to be in a scheduled class at that time, Williams expected to get into trouble for the minor incident but did not expect to be fired because of it. Thus, she believes that her termination for that incident was a pretext for sexual orientation discrimination.<sup>135</sup>

As often occurs in employment discrimination cases,<sup>136</sup> Williams and Life School Waxahachie settled before the case went to trial.<sup>137</sup> Still, this case illustrates both how intolerance for a teacher’s sexual orientation can cast a shadow over a termination decision and how a possible pretext for that discrimination can be formed.

## 2. Same-Sex Marriage

Michael Griffin was fired from Holy Ghost Preparatory School in Philadelphia, Pennsylvania, when he and his male partner decided to get married.<sup>138</sup> Griffin taught at the school for twelve years, and the school community was aware that he identified as a gay man for the entirety of his employment.<sup>139</sup> He frequently attended school events with his partner and did not attempt to hide his sexuality, despite being employed at a Catholic school.<sup>140</sup>

On December 6, 2013, the school principal terminated Griffin’s contract and explicitly stated that Griffin and his partner’s marriage license application was the grounds for the termination.<sup>141</sup> The Archdiocese issued a public statement that the school

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Christine Caulfield, *To Settle Or Not To Settle: Lawyer’s Share Their Tips*, LAW 360 (July 10, 2009), [https://www.hunton.com/files/News/236c18dd-fcb6-4486-a348-e96597a7062a/Presentation/NewsAttachment/4ef14289-8ad8-4aa1-b2e6-9af18a76a3a8/To\\_Settle\\_Or\\_Not\\_To\\_Settle\\_Law360.pdf](https://www.hunton.com/files/News/236c18dd-fcb6-4486-a348-e96597a7062a/Presentation/NewsAttachment/4ef14289-8ad8-4aa1-b2e6-9af18a76a3a8/To_Settle_Or_Not_To_Settle_Law360.pdf) [<https://perma.cc/U2LW-ABD8>].

<sup>137</sup> John Wright, *Coach settles with Waxahachie school that allegedly fired her for being gay*, DALLAS VOICE (Jan. 12, 2012), <http://www.dallasvoice.com/breaking-coach-settles-waxahachie-charter-school-allegedly-fired-gay-1098798.html> [<http://perma.cc/G6JY-LTHV>].

<sup>138</sup> David Gibson, *Students, alumni rally around fired gay teacher at Catholic school*, WASH. POST (Dec. 13, 2013), [http://www.washingtonpost.com/national/religion/students-alumni-rally-around-fired-gay-teacher-at-catholic-school/2013/12/13/69f31258-643f-11e3-af0d-4bb80d704888\\_story.html](http://www.washingtonpost.com/national/religion/students-alumni-rally-around-fired-gay-teacher-at-catholic-school/2013/12/13/69f31258-643f-11e3-af0d-4bb80d704888_story.html) [<http://perma.cc/95QK-9R49>].

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

had “no choice” but to terminate Griffin because the school’s teaching contract “requires all faculty and staff to follow the teachings of the Church as a condition of their employment . . . .”<sup>142</sup> The Archdiocese did not explain why the license to engage in a same-sex marriage was the tipping point for terminating Griffin’s contract, rather than Griffin’s identity as gay man, which also goes against the church’s teachings.

The community response to Griffin’s termination amounted to outrage.<sup>143</sup> Students, alumni, and allies started a change.org petition, which gathered more than 4,000 signatures in one week.<sup>144</sup> However, despite the public outcry, the school refused to reinstate Griffin.<sup>145</sup> Hence, this case demonstrates the ways in which the exercise of a fundamental right<sup>146</sup> can undercut otherwise secure employment because a marriage will publicly broadcast a teacher’s sexual identity.

### 3. Imputed Sexual Identity

Tim Torkildson was an education blogger when he was fired from his position as a teacher at Nomen Global Language Center in Provo, Utah, in July 2014 for a personal blog post that he wrote.<sup>147</sup> In this blog, Torkildson correctly defined “homophone” as “two words that sound alike but are spelled differently.”<sup>148</sup> The owner of the Nomen school subsequently fired Torkildson because he believed readers would associate the word “homophone” with “homosexuality,” and feared that the readers would associate the school with a “gay agenda.”<sup>149</sup>

Thus, Torkildson need not even identify as gay or engage in any sexual conduct to be terminated on the basis of sexual orientation. The Nomen school’s intolerance for homosexuality was sufficient reason for the school to fire Torkildson.

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Reinstatement Michael Griffin, CHANGE.ORG, <https://www.change.org/p/jeffery-danilak-reinstate-michael-griffin> [<https://perma.cc/LG4J-ZVY8>].

<sup>145</sup> *Id.*

<sup>146</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (“The Court, in this decision, holds same-sex couples may exercise the fundamental right to marry in all States.”).

<sup>147</sup> Zach Schonfeld, *Education Blogger Fired for Writing About Homophones and Confusing Homophobes*, NEWSWEEK (Jul. 31, 2014), <http://www.newsweek.com/education-blogger-fired-writing-about-homophones-and-confusing-homophobes-262404>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

#### 4. Title VII & Sexual Orientation

Title VII of the Civil Rights Act of 1964 makes it illegal for an employer to discriminate against employees based on their sex in hiring, promotion, or termination decisions.<sup>150</sup> Sexual orientation is not its own protected class, although it may be covered by the term “sex” in the statute in certain instances.<sup>151</sup> The Court has recognized that an employer may not discriminate against employees based on “‘stereotyped’ impressions about the characteristics of males or females.”<sup>152</sup> Yet, within the concept, legal scholars are divided over how to advance an equality agenda. Some advocate for a similarity approach, in which men and women must be treated equally only with respect to the areas where the sexes are similar.<sup>153</sup> Others argue that sex-based discrimination exists not only when the sexes are equal but treated differently, but rather any time that a rule or practice “disproportionately burdens one sex because of sex.”<sup>154</sup>

However, to make a claim for disparate treatment under Title VII for sexual orientation, the claim must be shown to be about “sex stereotypes” about how a “real” man or woman would behave.<sup>155</sup> Thus, a person who is experiencing discrimination based on sexual orientation must first determine what the cultural sex stereotype is and the ways in which his or her behavior is at odds with the stereotype.

To make out a claim of disparate treatment<sup>156</sup> for any type of sex-based discrimination, the initial burden rests on the plaintiff to show that there was intentional discrimination based on sex under the *McDonnell Douglas* burden-shifting framework.<sup>157</sup> From there, the burden shifts to the defendant-employer to show that there was a legitimate, non-discriminatory purpose for the plaintiff being treated differently.<sup>158</sup> If successful, the burden shifts back to the

<sup>150</sup> 42 U.S.C. § 2000e-2 (2015).

<sup>151</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Cf. *Baldwin v. Dep’t of Transportation*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015).

<sup>152</sup> *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978).

<sup>153</sup> See, e.g., Deborah M. Weiss, *All Work Cultures Discriminate*, 24 HASTINGS WOMEN’S L.J. 247, 248 (2013) (citing Carol Gilligan, *Getting Civilized*, 63 FORDHAM L. REV. 17, 20-21 (1994)).

<sup>154</sup> CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 225 (1979).

<sup>155</sup> *Id.* at 251.

<sup>156</sup> Sex-discrimination cases can also be brought under a “disparate impact” theory but such suits are outside the scope of this paper.

<sup>157</sup> See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>158</sup> *Id.*

plaintiff to show that the employer's stated reasons were pretext for the discrimination.<sup>159</sup>

Thus, without tenure protection, a school may fire an at-will teacher for a discriminatory purpose and claim that the non-discriminatory purpose was the teacher's ineffectiveness. Then, the burden will be on the employee to show that the "ineffective" label was pretext for some other form of discrimination. For instance, Nichole Williams believed the charter school's reason for her termination was pretext for sex-discrimination based on sexual orientation, meaning Williams would have to present evidence of the intentional discrimination to win her case. Finding such evidence is typically very difficult, and public school teachers would be exposed to these difficulties without due process and with limited privacy and free speech protections.

Similarly, even if the teacher-plaintiff can assert direct evidence of discrimination, the failure of federal courts to recognize sexual orientation discrimination as protected under Title VII means that the teacher will need to tie the discrimination to the statutorily-protected class of sex on a gender stereotype theory. Title VII protections are limited by the gender-stereotyping theory for sexual orientation.<sup>160</sup> As such, Michael Griffith and Tim Torkildson would likely be unable to invoke Title VII protections for their terminations because they might not be able to show how their terminations were caused by their failure to conform to gender stereotypes. Perhaps Griffith could argue that marrying a man is a failure to comply with the gender-stereotype of a different-sex marriage, but courts have been reluctant to find such a cause of action for fear of opening up the flood gates to sexual orientation as a protected class in and of itself.<sup>161</sup>

### B. *Gender Identity*

As attitudes about sex have become more relaxed, cultural understanding of gender identity has increased. However, transgender teachers still face difficulties because of the worries about how students will respond to a teacher's gender expression.

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<sup>159</sup> *Id.*

<sup>160</sup> Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals under Title VII*, 2004 U. ILL. L. REV. 465 (2004).

<sup>161</sup> See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 219 (2d Cir. 2005).

## 1. Gender Identity Termination

Mark Krolikowski taught at St. Francis Preparatory School in Queens, New York for over thirty-two years before he was fired for his<sup>162</sup> gender identity.<sup>163</sup> Some years before his termination in January 2013, Krolikowski began to grow his hair out, wear nail polish, and dress in more feminine clothing.<sup>164</sup> Although the students noticed Krolikowski's change in appearance, they claimed to not feel affected by it.<sup>165</sup>

The school, however, did not react positively. During the 2011-2012 school year evaluations, Krolikowski was instructed to "tone down his appearance."<sup>166</sup> Bishop Leonard Conway told Krolikowski that he would not be able to attend school functions if he dressed in women's clothing.<sup>167</sup> Bishop Conway went on to say that Krolikowski's gender identity was "worse than [being] gay."<sup>168</sup>

Krolikowski was ultimately terminated for insubordination for failing to dress appropriately.<sup>169</sup> Much like Michael Griffin's termination for entering into a same-sex marriage, Krolikowski's students, alumni, and allies were outraged by his termination and started a change.org petition.<sup>170</sup> However, the school refused to re-hire Krolikowski, and he took the case to court.<sup>171</sup>

Krolikowski's case demonstrates how teachers who are gender non-conforming can be subject to discriminatory employment

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<sup>162</sup> Krolikowski has confirmed in media stories that he prefers the continued use of male pronouns, and asks that his students call him "Mr. K." Michelle Garcia, *Transgender Teacher Fired From Catholic School*, ADVOCATE (Jan. 8, 2013, 7:19 PM), <http://www.advocate.com/politics/religion/2013/01/08/transgender-teacher-fired-catholic-school> [<http://perma.cc/6ELD-R49C>].

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Miriam Lazewatsky, *Queens Teacher Fired for Being Transgender*, GLAAD.ORG BLOG (Jan. 31, 2013), <http://www.glaad.org/blog/queens-teacher-fired-being-transgender> [<http://perma.cc/D7AX-74PQ>].

<sup>167</sup> *Id.*

<sup>168</sup> Russell Goldman, *Transgender Teacher Sues Catholic School Over Firing*, ABC NEWS (Jan. 7, 2013), <http://abcnews.go.com/US/transgender-teacher-sues-catholic-school-firing/story?id=18153937>.

<sup>169</sup> *Id.*

<sup>170</sup> *St. Francis Preparatory High School: Formally Apologize to Mark (Marla) Krolikowski for Sexual Discrimination*, CHANGE.ORG, <https://www.change.org/p/st-francis-preparatory-high-school-formally-apologize-to-mark-marla-krolikowski-for-sexual-discrimination> [<https://perma.cc/FWJ4-ZLBB>].

<sup>171</sup> Sarah Wallace, *Victory for Transgender Former Teacher*, EYEWITNESS NEWS (Sep. 9, 2013, 6:18 PM), <http://abc7ny.com/archive/9241977/> [<http://perma.cc/49ZW-KTQR>].

practices because of the sometimes-public nature of their gender expression.

## 2. Gender Identity & Title VII

Like sexual orientation, Title VII does not address gender identity as its own protected class, but it, too, is covered by the term “sex” in the statute.<sup>172</sup> “Title VII’s prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex,” such that “[w]hen an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment ‘related to the sex of the victim’ in violation of Title VII.”<sup>173</sup> Attorney General Eric Holder announced on December 18, 2014 that the Department of Justice will officially extend Title VII protection to those discriminated against because of their gender identity.<sup>174</sup>

Still, Mark Krolkowski would likely not be successful in bringing his suit to the Equal Employment Opportunity Commission (“EEOC”) because of the ministerial exception to Title VII. The Supreme Court has recognized a ministerial exception to Title VII that allows religious institutions to discriminate against ministerial employees who do not follow the institution’s religious requirements, as a means to protect the institution’s First Amendment freedoms.<sup>175</sup> For example, while a religious school is not permitted to fire a teacher for being pregnant, that school is permitted to fire a teacher for having a child out of wedlock or for using assistive reproductive technologies when that teacher is a ministerial employee.<sup>176</sup>

[C]ourts have made clear that if the school’s purported ‘discrimination’ is based on a policy of preventing non-marital sexual activity which emanates from the religious and moral precepts of the school, and if that policy is applied equally to its male and female employees, then the school has not discrimi-

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<sup>172</sup> See, e.g., *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

<sup>173</sup> *Macy v. Holder*, EEOC Appeal No. 0120120821 (Apr. 20, 2012), <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/Macy%20v.%20Holder.pdf> [<http://perma.cc/P93K-J289>].

<sup>174</sup> *Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims*, DEP’T OF JUSTICE (Dec. 18, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination> [<http://perma.cc/93WH-Y37H>].

<sup>175</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 709 (2012) (“The exception instead ensures that the authority to select and control who will minister to the faithful—a matter ‘strictly ecclesiastical’—is the church’s alone.”) (quoting *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952)).

<sup>176</sup> *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000).

nated based on pregnancy in violation of Title VII.<sup>177</sup>

Although this exception would not apply to public schools, the ministerial exception does demonstrate that Title VII is not impermeable when another legal right is at stake. Thus, it seems possible that a similar exception could be carved out for teachers. Since teachers are expected to adhere to a morally irreprehensible level of conduct as exemplars, they could also have their permissible sexual conduct further limited for the sake of the school's pedagogical interests.

### C. *Pregnancy*

Pregnancy and teaching have a long and complicated history. Pregnancy by its very nature is not private, even if a pregnant woman has every intention to keep her sex life private.<sup>178</sup> Although pregnancy-related rules often purport to be gender-neutral, the underlying nature of pregnancy typically means only women's bodies will betray their privacy.<sup>179</sup> Female teachers will ultimately bear the brunt of any policies against premarital sex, and these cases demonstrate how pregnancy can be treated today.

#### 1. General Attitudes Towards Pregnancy

Loyda Suero and Leslie Cruz claimed that they were fired from South Bronx Charter School for International Cultures in July 2012 because they were pregnant.<sup>180</sup> Though they never filed a lawsuit, the two teachers told the media that their principal stated that they must either plan to get pregnant in the summer or take a month of maternity leave.<sup>181</sup> Richard Riley, a United Federation of Teachers representative, stated that because the teachers worked at a charter school without a union or tenure, Suero and Cruz could be terminated without cause.<sup>182</sup>

This case illustrates the broader attitude towards pregnancy at schools. Teachers are often told to time their pregnancies so that

<sup>177</sup> *Id.*

<sup>178</sup> Fisher, *supra* note 69, at 557 n.173.

<sup>179</sup> *Id.*

<sup>180</sup> Candida Portuguese, *Maestras Alegan Que Fueron Despedidas por Embarazo*, EL DIARIO (July 5, 2012), <http://www.eldiariiony.com/2012/07/05/maestras-alegan-que-fueron-despedidas-por-embarazo/> [http://perma.cc/WDW9-Z2C5], translated in *Charter School Teachers Say They Were Fired for Getting Pregnant*, VOICES OF NY (July 9, 2012), <http://www.voicesofny.org/2012/07/charter-school-teachers-say-they-were-fired-for-getting-pregnant/> [http://perma.cc/RV93-CQ77].

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* However, given the UFT's relationship with charter schools, this statement may be biased.

they will give birth over the summer.<sup>183</sup> Schools are typically reluctant to get long-term substitute teachers and will push their teachers to plan their sexual lives around the school calendar.

## 2. Out-of-Wedlock Pregnancy & Assistive Reproductive Technology

In January 2014, Shaela Evenson was fired from her position as a middle school teacher at a Catholic school in Montana for becoming pregnant out of wedlock.<sup>184</sup> Despite not being Catholic herself, the school terminated her because her pregnancy by artificial insemination went against “the moral and religious teachings of the Roman Catholic Church” and violated her employment contract.<sup>185</sup> Although Evenson’s principal initially expressed happiness for Evenson’s pregnancy, the Diocese stepped in to fire Evenson after receiving an anonymous letter about her out-of-wedlock pregnancy.<sup>186</sup> The EEOC issued Evenson a right to sue letter in July 2014, and she has since filed a lawsuit in federal court.<sup>187</sup> However, Evenson’s lawsuit is currently on hold, as the Diocese is now in bankruptcy proceedings.<sup>188</sup>

Thus, this case reflects how pregnancy can betray a woman’s desire to keep her sexual life private. Although the school may not have intended to intrude into her sexual life, the school was still able to form a judgment about Evenson’s life because of the public nature of pregnancy.

## 3. Pregnancy Discrimination Act & Family Medical Leave Act

Pregnancy discrimination is illegal under Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act.<sup>189</sup> Additionally, the Family Medical Leave Act guarantees em-

<sup>183</sup> June Kronholz, *No Substitute for a Teacher*, 13 EDUC. NEXT 2, 17 (2013), [http://educationnext.org/files/ednext\\_XIII\\_2\\_kronholz.pdf](http://educationnext.org/files/ednext_XIII_2_kronholz.pdf) [<http://perma.cc/VY7R-WPQE>].

<sup>184</sup> Complaint and Demand for Jury Trial ¶ 22, *Evenson v. Butte Central Catholic Schs.*, No.14-cv-00055-DWM-JCL (D. Mont. Aug. 21, 2014).

<sup>185</sup> *Id.* ¶ 22.

<sup>186</sup> *Id.* ¶¶ 17, 19.

<sup>187</sup> *Id.* ¶ 6.

<sup>188</sup> Angela Brandt, *Former Butte Central teacher’s lawsuit on hold pending diocese bankruptcy hearings*, MONT. STANDARD (Nov. 8, 2014, 3:30 AM), [http://mtstandard.com/news/local/former-butte-central-teacher-s-lsuit-on-hold-pending-diocese/article\\_898c03c1-62d0-50f8-9dbc-304f15cf9c3b.html](http://mtstandard.com/news/local/former-butte-central-teacher-s-lsuit-on-hold-pending-diocese/article_898c03c1-62d0-50f8-9dbc-304f15cf9c3b.html) [<http://perma.cc/C8T5-8A5L>].

<sup>189</sup> 42 U.S.C. § 2000e(k) (2015) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related

ployees “a total of 12 workweeks of leave during any 12-month period for one or more of the following: (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.”<sup>190</sup>

Importantly, though, even if an employer may not be permitted to terminate an employee on the basis of pregnancy, this does not mean that the employers won’t still attempt to do so, as was the case for Loyda Suero and Leslie Cruz. Pregnancy discrimination suits have nearly doubled from 1997 through 2011.<sup>191</sup>

Given that there are approximately 3.3 million public school teachers in the United States and roughly 1 million of those teachers are women of childbearing age,<sup>192</sup> eliminating teacher tenure altogether could expose nearly .3% of the American population<sup>193</sup> to erroneous termination claims from which they would otherwise be protected.

Furthermore, the relationship between assistive reproductive technology (“ART”) and pregnancy discrimination is still tenuous. The Pregnancy Discrimination Act does not explicitly prevent employers from discriminating against an employee for using ARTs because the Act was intended to protect the status of being pregnant.<sup>194</sup> Thus, Shelia Evenson will likely have to argue that her termination was gender discrimination, rather than pregnancy discrimination, because the termination was not about the status of being pregnant. Courts may not be persuaded by such an argument since people in both different- and same-sex couples rely on ARTs to create families.

Title VII, the Pregnancy Discrimination Act, and the Family Medical Leave Act protect the general public from a large swath of discriminatory conduct. However, given teachers’ limited constitu-

medical conditions shall be treated the same for all employment-related purposes . . . .”).

<sup>190</sup> 29 U.S.C. § 2612 (2015).

<sup>191</sup> *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997 - FY 2011*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> [<http://perma.cc/YLR4-E7UF>].

<sup>192</sup> *Fast Facts: Teacher Trends*, NAT’L CTR. FOR EDUC. STATS., U.S. DEP’T OF EDUC., <http://nces.ed.gov/fastfacts/display.asp?id=28> [<http://perma.cc/CN9S-3BK9>].

<sup>193</sup> *Annual Estimates of the Resident Population by Single Year of Age and Sex for the United States: April 1, 2010 to July 1, 2014*, U.S. CENSUS BUREAU (June 2015), <http://factfinder.census.gov/bkmk/table/1.0/en/PEP/2014/PEPSYASEX> [<http://perma.cc/62GR-2FLK>].

<sup>194</sup> JESSICA ARONS & ELIZABETH CHEN, CTR. FOR AM. PROGRESS, *FUTURE CHOICES II: AN UPDATE ON THE LEGAL, STATUTORY, AND POLICY LANDSCAPE OF ASSISTED REPRODUCTIVE TECHNOLOGIES* (Mar. 2013), <https://www.americanprogress.org/wp-content/uploads/2013/03/ChenAssistedReproduction.pdf> [<https://perma.cc/M4XS-KRX9>].

tional protections, this federal civil rights legislation will likely be insufficient to cover the gaps in privacy and speech rights. Taken together, these examples of firing teachers for their sexual orientation, their pregnancy status, or their gender identity provide an important context for understanding teacher tenure. While all of the American workforce can be subjected to such discriminatory terminations, teachers are precariously more vulnerable to such systemic failings because of the bizarre nature of their position in society. Thus, the next section will describe the current battle against tenure.

## VI. RESPONSE TO THE FIGHT AGAINST INEFFECTIVE TEACHERS & TENURE

Undoubtedly, teacher tenure is not without problems, and this paper recognizes that any potential resolution will require balancing two social justice goals—improving educational access and protecting teachers. On the one hand, the  *Davids*  and  *Wright*  complaints correctly assert that there are students who are assigned to ineffective teachers. Specifically, the  *Wright*  plaintiffs are Kaylah and Kyler Wright. They are twin sisters, both of whom entered kindergarten at a Brooklyn public school in the fall of 2013.<sup>195</sup> According to the complaint, Kyler was assigned to an “ineffective” kindergarten teacher, which has resulted in her falling several reading levels behind her sister.<sup>196</sup> Kyler’s story is upsetting, as every child should be provided meaningful opportunities to reach their full potential.

Critics of teacher tenure are quick to point out stories like Kyler’s as a means to prove that tenure should be abolished. They claim that, under the tenure system, removal proceedings are so costly and so often unsuccessful, that schools rarely pursue them to remove ineffective teachers.<sup>197</sup> Thus, school administrators instead transfer ineffective teachers to different districts or accept that the ineffective teachers will remain on the payroll.<sup>198</sup>

However, stories like Kyler’s raise more question than can be resolved with the patent “end teacher tenure” response. Such an answer fails to account for how difficult it is to determine which teachers are “ineffective.” Currently, no objective system exists for

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<sup>195</sup> *Wright* complaint, *supra* note 17, ¶ 4.

<sup>196</sup> *Id.* ¶ 3.

<sup>197</sup> Nicholas Dagostino, *Giving the School Bully a Timeout: Protecting Urban Schools Students from Teacher Unions*, 63 ALA. L. REV. 177, 194-95 (2011).

<sup>198</sup> *Id.*

determining which teachers are “ineffective”—evaluative systems typically involve measuring student outcomes and some type of observation by an administrator.<sup>199</sup> However, the manner in which student outcomes should be measured is a highly contested topic,<sup>200</sup> and the observational model allows for school administrators to use subjective beliefs when evaluating teachers.

Typically, Ed Reform proponents claim that student test scores should be the primary determinant in whether a teacher receives tenure, thus increasing the evaluation’s objectivity.<sup>201</sup> However, educational testing experts consistently agree that testing is an unreliable tool for predicting teacher effectiveness.<sup>202</sup> “[Testing results] will not simply reward or penalize teachers according to how well or how poorly they teach. They will also reward or penalize teachers according to which students they teach and which schools they teach in.”<sup>203</sup> For instance, a story like Kyler’s is upsetting, but it indicates nothing about the outcomes of the other students in the classroom. By using one student’s reading level to determine that a teacher is “ineffective,” the complaint provides only limited insight into what type of teacher she had. As such, even the complaint is unable to objectively set forth a way to determine that a teacher is “ineffective.”

Such a discussion raises the causation and redressability issues presented by *Dauids*, *Wright*, and *Vergara*. While the plaintiffs pleaded statistical evidence that a student’s teacher has the most impact on that student’s educational outcomes, the complaint only described “ineffective” teachers in a broad sense.<sup>204</sup> There were no facts pleaded that the plaintiffs’ actual teachers were “ineffective.” The complaints themselves were focused on the broad problems with education,<sup>205</sup> rather than the harm caused to the actual litigants. Furthermore, the complaint did not address how eliminating teacher tenure would redress these students’ problems—even if “ineffective” teachers can be terminated more easily, they will not necessarily be replaced by “effective” teachers.

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<sup>199</sup> Jim Hull, *Trends in Teacher Evaluation: At a Glance*, CTR. FOR PUB. EDUC. (Oct. 2013), <http://www.centerforpubliceducation.org/teacherevalreview> [http://perma.cc/GSX2-7TWA].

<sup>200</sup> *Id.*

<sup>201</sup> Dagoistino, *supra* note 197, at 194.

<sup>202</sup> See EDWARD H. HAERTEL, RELIABILITY AND VALIDITY OF INFERENCES ABOUT TEACHERS BASED ON STUDENT TEST SCORES (Sept. 2013), [http://www.ets.org/s/pdf/23497\\_Angoff%20Report-web.pdf](http://www.ets.org/s/pdf/23497_Angoff%20Report-web.pdf) [http://perma.cc/Z43U-JCHZ].

<sup>203</sup> *Id.* at 13.

<sup>204</sup> *Wright* complaint, *supra* note 17, ¶ 4.

<sup>205</sup> *Id.*

Furthermore, blaming the teacher for being “ineffective” is only part of the problem. The majority of public schools fail to provide their teachers with any meaningful professional development.<sup>206</sup> Most teachers receive infrequent professional development training, and the trainings that are provided are generally presented in an ineffective workshop style.<sup>207</sup> Thus, teachers are blamed for being ineffective, but their schools are failing to support them.

Thus, on the other side of the social justice agenda, teachers also need protection. Of course, attracting and maintaining highly effective teachers is an important goal. Yet, unilaterally eliminating or scaling back teacher tenure is not guaranteed to advance this goal. Much more robust evaluative systems and teacher support programs need to be developed before eliminating teacher tenure will actually result in “ineffective” teachers being dismissed.

In the absence of such systems, teachers may be labeled as “ineffective” when an administrator, parent, or community member is unhappy with the teacher’s private sexual choices, the same way teachers were labeled as “unfit” just a generation ago.<sup>208</sup> Because of the American public’s obsession with teachers’ sex lives, judicially reforming teacher tenure could flood the legal system with employment discrimination cases that otherwise could have been prevented by the tenure system. As described throughout, teachers occupy a peculiar legal space. In the absence of tenure, teachers will continue to be exemplars but will be afforded limited privacy, freedom of association, and freedom of speech rights. Removing teacher tenure may expose teachers to additional discrimination that the rest of the public does not experience.

## VII. CONCLUSION & RECOMMENDATIONS

Eliminating tenure may expose our teachers to the whims and morals of the loudest opponents. Instead of weeding out truly ineffective teachers, ending tenure may allow employing school districts to use the “ineffective” label as a pretext for terminating teachers whose sexual choices are questioned by their administration.

Ensuring that the nation’s public school teachers are effective

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<sup>206</sup> Allison Gulamhussein, *Teaching the Teachers: At a Glance*, CTR. FOR PUB. EDUC. (Sept. 2013), <http://www.centerforpubliceducation.org/teachingtheteachers> [<http://perma.cc/G4QF-TSRJ>].

<sup>207</sup> *Id.*

<sup>208</sup> *See supra* Part III, Section D.

is an important goal. However, true effectiveness will not be achieved through ending tenure and wrapping the education reform efforts around an abundance of anti-teacher rhetoric. Instead, supporting and developing our teaching workforce must be the means to achieve true reform. As such, here are this paper's recommendations for reform:

**1) Recognize Teacher Tenure as a Political Question.** Given the many competing policy goals of education reform and teacher tenure, this issue is better left addressed by the political process. Tenure needs to be refined by the public at large, not obliterated by a judge.

**2) Keep Tenure in Place Until "Ineffectiveness" Can Be Objectively Observed.** The cases outlined above illustrate how reactions to teachers' private sexual lives overestimate whether the teachers are actually unfit to teach. Similarly, "ineffective" ratings can be swayed or influenced by teachers' private sexual conduct. Thus, until a purely objective rating system exists, teachers should continue to have tenure protections.

**3) Invest in Professional Development.** Every school district has money earmarked for professional development programs, but, in many school districts, this money is never spent and is recycled back into the district at the end of the school year. School districts need to commit to spending this money and offering robust training programs to their teachers. Not only is it inefficient to not offer such programs, it is also unfair to label teachers as ineffective when the school districts fail to offer them support.

**4) Create a Culture for Professional Development.** Spending money on professional development is only part of the problem. Schoolteachers are faced with demanding schedules, but are often told their jobs are easy or minimally challenging. Thus, changing the effectiveness of teachers is not about firing practices, but rather creating school cultures in which teachers are expected to grow professionally and given the support they need to become excellent educators. This is easier said than done, but there are many bright spot schools throughout the nation that are doing just this.