

CHAPTER 8

STANDARDS OF BEHAVIOR FOR TENURED
TEACHERS: THE NEW YORK STATE EXPERIENCE

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Section 3012 of the New York State Education Law¹ sets forth the general categories of offenses for which tenured teachers may be disciplined—conduct unbecoming a teacher, insubordination, immoral character, inefficiency, incompetency, physical or mental disability, and neglect of duty. Section 3020-A establishes procedures for the implementation, challenge, review, and final determination of such discipline.²

The subject of this paper, conduct unbecoming a teacher, is part of a larger study of nine years' experience with these statutory provisions. The conduct-unbecoming-a-teacher cases raise interesting and important questions about the nature of teaching, the conception of teachers as role models, the standard of conduct to which teachers are to be held, and the objectives or purposes of education. Although the cases discussed occurred mainly in the jurisdiction of the New York State Education Law, the issues raised have nationwide applicability since most states have statutes permitting school boards to dismiss teachers for "immorality" and other misconduct.³

There is, however, one unique and particularly important aspect of the New York State scheme. Arbitrators chosen from a list supplied by the American Arbitration Association act as

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¹McKinney's Consolidated Laws of New York annotated. Chapter 16, Education Law, §3012.

²*Id.*, §3020A.

³Punger, *Unwed Mothers As Teachers*, 14 *School L. Bull.* 3 (1983); Melnick and Twyman, *Teacher As Exemplar: Freedom in Private Life*, 59 *The Clearing House* 301 (1986).

third-party chairpersons of three person panels that have decision-making and penalty authority. These arbitrator-chairpersons are chosen either by the two school board and teacher appointed panelists or by the Commissioner of Education when the panelists are deadlocked. The New York State Court of Appeals upheld the constitutionality of this arrangement, stating:

We perceive no constitutional bar to the legislative designation of the association as a nominating body, who can reasonably be expected to present to the commissioner, on an objective and non-partisan basis, the names of individuals exceptionally qualified by prior service in the field of adversarial hearings for service as chairman of a hearing panel under section 3020-a.⁴

The end result is the phenomenon of labor arbitrators interpreting and applying a statute on a case-by-case basis and, in the process, inevitably making law by giving specific meaning to the general categories of disciplinary offenses listed in the statute.⁵ School boards and teachers have the right to appeal panel decisions to either the Commissioner of Education or the courts.

The Meaning of Conduct Unbecoming a Teacher

In 1974, a United States district court rejected a teacher's contention that the language of Section 3012, setting forth the causes of teacher discipline, was "both unconstitutionally vague and overboard in that it fails to set forth guidelines for its application."⁶ The court sidestepped the main thrust of this constitutional challenge by simply asserting without substantiation that the alleged excessive corporal punishment, if proven, fell "squarely within the hard core of conduct the statute was designed to proscribe." The court admitted "uncertainty," however, about "the outer limits of the statutory language."⁷

One year earlier, a district court found an Oregon statute permitting the discharge of teachers for "immorality" unconstitutionally vague because "Immorality means different things

⁴*Board of Educ. of Belmont Central School Dist. v. Gootnick*, 49 N.Y.2d 683, 689, 427 N.Y.S.2d 777, 779-80 (1980).

⁵Those who argued against this arrangement cited the long delays in getting AAA arbitrators to schedule hearings and the nonattorney status of many AAA arbitrators as increasing the likelihood of errors on questions of law. Blumner, 3020-A Analysis 6, (1982) (unpublished senior thesis on file with the author).

⁶*Kinsella v. Board of Educ. of Central School Dist. No. 7 of Towns of Amherst and Tonawanda*, 378 F. Supp. 54, 57 (1974).

⁷*Id.* at 57.

to different people and its definition depends on the idiosyncracies of the individual school board members. . . . The potential for arbitrary and discriminatory enforcement is inherent in such a statute."⁸

The phrase "conduct unbecoming a teacher" does not define itself. Certain types of alleged misconduct can be classified in the category of "conduct unbecoming." There were, for example, 185 panel decisions from 1977 to 1986 that, in the main, involved alleged misconduct, as shown in Table 1. The total number of conduct unbecoming a teacher cases decided pursuant to Section 3020-A is as great as the total of cases involving all other disciplinary reasons combined (see Table 2).⁹ This does

**Table 1. Cases Alleging Teacher Misconduct,
State of New York, 1977-1986.**

<i>Types of Alleged Misconduct</i>	<i>Cases Involved</i>	
	<i>Number</i>	<i>Percent</i>
1. Physical abuse of students	54	29
2. Sexual activities	35	19
3. Dishonesty	30	16
4. Abusive classroom comments and related actions	17	9
5. Disrespectful relations with the administration	17	9
6. Criminal convictions for off-duty conduct	13	7
7. Fighting with other teachers	6	3
8. Bizarre behavior	5	3
9. Other miscellaneous behavior ^a	6	3
Total cases	185	100 ^b

Notes: ^aBehavior such as causing upset in a community.

^bTotal percentage does not add up to 100 because of rounding.

Source: Files of New York State Education Department.

⁸*Burton v. Cascade School Dist. Union High School No. 5*, 353 F. Supp. 254, 255 (1973); *aff'd.*, 512 F.2d 850 (9th Cir. 1975), *cert. denied*, 423 U.S. 839 (1975).

⁹The total number of cases in Tables 1 and 2 was compiled by a search of the files at the State Education Department offices. The State Education Department does not keep statistics on types of cases; therefore the categories were established by the author.

Table 2. Cases Decided Under Section 3020-A, New York State Education Law, 1977-1986.

<i>Types of Cases</i>	<i>Number</i>	<i>Percent</i>
1. Conduct unbecoming a teacher ..	185	50
2. Insubordination	55	15
3. Neglect of duty	55	15
4. Incompetency and inefficiency ...	73	20
Total cases	368	100

Source: Files of New York State Education Department (author's categorization).

not account for coerced resignations, financial settlements, or "buyouts" without formal dismissal.¹⁰

But classifications of conduct are not standards of conduct, and any person subject to disciplinary penalties for misconduct has a right to know the standards by which conduct will be judged. Some of the actions engaged in by teachers in these cases certainly would by their nature be wrongful and punishable—whether committed by teachers or anyone else: sexual abuse of a student,¹¹ unrestrained and unwarranted physical attacks on another person,¹² or, as in one case, murder, mutilation, and cannibalism.¹³

Other types of conduct would be wrong not because they were inherently evil, but because some authority in society or at a workplace has prohibited such conduct. Since this sort of conduct is not inherently evil, elemental fairness and procedural due process require that those subject to these prohibitions be given fair warning of the conduct prohibited and be provided a standard against which conduct can be uniformly judged by panels, commissioners of education, court justices, and administrative agencies.¹⁴ No precise and useful standard of conduct has been developed for teachers or for various bodies that pass judgment on their conduct.

¹⁰Thurston, *Tenured Teacher Dismissal in Illinois, 1975-1979*, 69 Ill. Bar J. 422, 423-24; Melnick and Twyman, *supra* note 3, at 304.

¹¹*Community School Dist. No. 18 v. Richard Errera*, N.Y. St. Ed. Dept., File No. 1316 (1984).

¹²*Community School Bd No. 5 v. W. Rogers Gist*, N.Y. St. Ed. Dept. (1980).

¹³*Poughkeepsie City School Dist. v. Albert Fentress*, N.Y. St. Ed. Dept., File No. 762 (1981).

¹⁴*Morrison v. State Bd of Educ.*, 461 P.2d 375, 387 (1969); 1 Cal.3d 214; 82 Cal. Rptr. 175.

There was only one case where a panel addressed this issue directly. In dismissing charges that a teacher had conducted herself in a manner unbecoming a teacher by “wearing improper clothing, talking about her personal life, laughing hysterically, staring, and slamming doors,” the panel pointed out that “nowhere in the record was any evidence adduced as to what said conduct ought to be.”¹⁵

The Harmful Consequences of Vague Standards

Some of the vaguest standards have been applied in the delicate and complicated area of alleged sexual misbehavior. Panels have found teachers guilty, for example, because they did not conduct themselves “in a manner which would uphold the dignity” of the position of teacher and conform “to a generally accepted level of proper behavior” for teachers,¹⁶ or they failed “to conform to that strict level of propriety required of teachers in the New York City system,”¹⁷ or they did not fulfill their obligation “not only to avoid impropriety but with equal vigor, to avoid the appearances of impropriety.”¹⁸

In other sexual misconduct cases, vagueness is compounded by the application, not of an absolute standard of conduct applicable to all teachers, but by what I call a subjective-relative standard whereby the appropriateness of a teacher’s conduct depends on how that conduct is perceived by students and/or the “community.”

One panel made the appropriateness of a teacher’s conduct dependent on the perceptions of students and made the teacher responsible for knowing when some unmarked boundary line had been passed: “While the Panel acknowledges that each teacher has an individual style, a teacher is also responsible for knowing when he or she has crossed the line between productive encouragement and acts that can be misconstrued as sexual advances by girls and boys who are becoming aware of their own sexuality.”¹⁹

¹⁵*Beacon City School Dist. v. Louisa Jackson*, N.Y. St. Ed. Dept. 3 (1982).

¹⁶*In the Matter of Frank Tucci*, N.Y. St. Ed. Dept., 1 (1978).

¹⁷*Board of Educ. of the City of New York v. Joseph Pargament*, N.Y. St. Ed. Dept., 21 (1983).

¹⁸*Whitehall Central School Dist. v. Robert Mowatt*, N.Y. St. Ed. Dept., 8 (1984).

¹⁹*Community School Dist. No. 18 v. Mark Katz*, N.Y. St. Ed. Dept., 13 (1980).

Those panels that focus on how touching could be perceived or misperceived, however, are endorsing, in effect, a hands-off, keep-your-distance teaching style without any consideration of the effect of that style on children and their education. It certainly is Orwellian and contrary to traditional notions of excellent teaching for a panel to tell a teacher that, because of "the imagination and fantasy of the teenagers at the school," the teacher would best avoid danger "by non-involvement with students."²⁰ Even in a case where a teacher was "guilty of nothing more than giving a lonely, troubled child a measure of the love and affection she craved," a panel warned that "Teachers must not 'touch the merchandise'."²¹

The use of vague and "subjective-relative" standards, therefore, may have seriously unjust and harmful consequences. As one panel pointed out, Section 3020-A is a statutory proceeding in which constitutional standards apply and "standards of proper conduct must be substantially clear for constitutionally valid discipline to be imposed."²² Even absent statutory and constitutional requirements, a decider's personal views and the perceptions of students and "community" cannot be appropriate standards for determining proper teacher behavior or for judgments directly affecting teachers' careers.

The use of personal views and the perceptions of others as "standards" is unfair because it denies a teacher any useful guide to acceptable conduct before acting, deprives an accused teacher of any reasonable opportunity for self-defense—how can one defend against the personal views of judges and the perceptions of accusers?—and, contrary to the traditional principle of innocent until proven guilty, resolves doubts about guilt against the accused. The potential career-ending consequences of misinterpretations and misunderstandings, potential or real, have inhibited teachers from freely expressing affection for children, thereby diminishing both teaching and learning.

The Role Model Standard

There is another imprecise but even more powerful presumption about teacher conduct that influences the outcome of the whole range of unbecoming-conduct cases. It is that teachers

²⁰*Iroquois Central School Dist. v. Robert Miller*, N.Y. St. Ed. Dept., 16 (1978).

²¹*East Meadow Union Free School Dist. v. George Bredehorn*, N.Y. St. Ed. Dept., 22–23 (1979).

²²*Williamson Central School Dist. v. Ronald Morris*, N.Y. St. Ed. Dept., File No. 1559, 26–27, 34 (1985).

must be held to a higher standard of personal behavior than persons engaged in most other pursuits. Justifications for imposing this higher standard of conduct range from general references to "the trust reposed in the teacher by society,"²³ to assertions that teachers serve in loco parentis,²⁴ to conceptions of teachers as role models.²⁵ One panel put it succinctly in a series of assertions:

A person who accepts a teaching position willingly places himself and his conduct in the arena of public attention. What may be acceptable in other walks of life, takes on an entirely different aspect when engaged in by a teacher. A teacher accepts a special place within the community. A teacher's influence and effect on students extends beyond the classroom and the school. A teacher stands in loco parentis. A teacher is a role model for students to emulate. A teacher is a purveyor of community values. A teacher is responsible for the well being of all students. A teacher is all of these things, and more.²⁶

No evidence to support the role-model theory can be found in the Commissioner of Education's decisions, since he refers merely to "the widely recognized role of a teacher as a highly influential example to his or her students."²⁷ The Commissioner relies on the U.S. Supreme Court's often quoted assertion in *Ambach v. Norwick*²⁸ about teachers as role models:

No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.²⁹

²³*Pine Plains Central School Dist. v. Bernard Weaver*, N.Y. St. Ed. Dept., File No. 1531, 15 (1985); *In the Matter of Robert Stein*, N.Y. St. Ed. Dept., 5 (1977); see also, *Board of Educ. of the City School Dist. of New York*, 24 Ed. Dept. Rep. 163, 168 (1984).

²⁴"In legal contemplation, Respondent, a school teacher, stands in loco parentis and, in the eyes of the community, is expected to be an exemplar of good morals and behavior to the school children in her charge." *Community School Dist. No. 2 v. Bonnie Lane*, N.Y. St. Ed. Dept., 8 (1978); *Canandaigua Central School Dist. v. Weldon Canough*, N.Y. St. Ed. Dept., 6-7 (1980); *Connetquot Central School Dist. v. Russell Schmidt*, N.Y. St. Ed. Dept., 60 (1984).

²⁵*Pine Plains Central School Dist.*, supra note 23, at 14.

²⁶*Community School Bd. Dist. No. 25 v. Ronald Drew*, N.Y. St. Ed. Dept., 9-10 (1980).

²⁷*Board of Educ. of the City School Dist. of New York*, 20 Ed. Dept. Rep. 455, 456 (1981).

²⁸441 U.S. 68, 78-79 (1978).

²⁹*Id.*

What is not so often quoted is the Court's footnote to its role-model assertion in *Ambach*³⁰ revealing that the assertion rests, not on the objective findings of scholars, but on subjective sources of much potential mischief—the common sense and personal experiences of the deciding justices.

The process that psychologists call modeling certainly exists. All of us in some way or another “are dependent on one another for what we are, what we know, and what we prize,” and values, attitudes, and even personality traits are influenced by contacts with others.³¹

The problem with using role modeling as a basis for determining the nature of conduct unbecoming a teacher and assessing appropriate penalties, however, is that no one knows exactly how models are selected, particularly outside a child's home.³² Parents are the first and most important models of behavior: “Their influence endures and is frequently ineradicable.”³³ When adolescent values differ from those of teachers, the teachers are likely to be rejected as role models. It may be that institutional demands force teachers, as employees, to model behaviors they do not truly endorse, thereby undermining their credibility with students who perceive this, and creating a situation counterproductive to learning and role modeling.³⁴

A teacher cannot help but exercise power in influencing students to participate in the learning process. Teachers exercise the power in different ways and for different reasons. Generalizations about teachers as role models presume a certain “Mr. Chips” teaching style, personality, and environment for teaching that do not apply to all or even most teachers and teaching situations. Different teaching styles, personalities, and situations can weaken or strengthen the possibility that a student might choose a teacher as a role model.

³⁰“Although the findings of scholars who have written on the subject are not conclusive, they generally reinforce the common-sense judgment and the experience of most of us, that a teacher exerts considerable influence over the development of fundamental social attitudes in students, including those attitudes which in the broadest sense of the term may be viewed as political.”

³¹Cohen, *Models Inside and Outside the Classroom: A Force for Desirable Learning*, 51 *Contemporary Educ.*, at 186 (1980).

³²*Id.*

³³*Id.*

³⁴Green, *Rural High School Students' Perceptions of the Basic Values and Educational Philosophies of Significant Secondary School Role Models*, 57 *Pers. & Guidance J.* 392, 396–97.

Some teachers function on the basis of a power to punish—to inflict “fear, embarrassment and humiliation, boredom, pain, and physical discomfort” on their students.³⁵ Other teachers rely on their position in the accepted hierarchy of power to influence student behavior, just as parents and employers do. Students who submit to this type of authority show respect for the teacher’s position, not necessarily for the teacher as a person. Some teachers rely on special knowledge or expertise, which is a more personal power, although it also capitalizes on position in the hierarchy.

Certain teachers, however, do exercise personal power because of “a student’s identification with the teacher” and the student’s desire to be like the teacher. The person, not necessarily the position, is respected, and students “actually look for opportunities to be of service to persons whom they respect.” (Many teachers believe that a person either is born with this power or does not have it.)³⁶ This is the situation likely to result in role modeling.

The role-model notion, however, lacks sufficient empirical content to be the basis for determining and punishing conduct unbecoming a teacher. No matter how elaborate the procedural safeguards built into a statutory or contractual disciplinary system, they are illusory if the substantive standards against which teacher conduct is measured are subjective. It is unjust to prevent teachers from practicing their chosen professions or to deny them the right to live their personal lives free of employer interference merely on some deciding body’s recitation of the immorality of certain actions or invocation of an unsubstantiated role-model theory.³⁷

The Nexus Requirement

Although subjective moral values can never be eliminated from the determination of conduct unbecoming a teacher, their negative influence can be substantially reduced by requiring

³⁵Tauber, French & Raven’s Power Bases: An Appropriate Focus for Educational Researchers and Practitioners, paper presented at the Education Research Association Craft Knowledge Seminar, 2 (April 12, 1985).

³⁶*Id.* at 4, 7.

³⁷Scholz, *Comment: Out of the Closet, Out of a Job: Due Process in Teacher Disqualification*, 6 *Hastings Constitutional Law Quarterly* 663, 688, 712 (1979); Willett, *Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 *California Law Review* 1442, 1460.

school districts to demonstrate an objective evidentiary nexus—instead of a speculative subjective nexus—between teachers' alleged misconduct and their job performance.

The failure to require a nexus between conduct and teaching performance was a major reason why the Oregon state statute, empowering school boards to dismiss teachers for immorality without defining immorality, was found unconstitutionally vague.³⁸ In that case a school board had dismissed a self-acknowledged “practicing homosexual” female teacher without even an allegation that she was derelict in her teaching duties or that she had made any homosexual advances toward any student. The court said:

A statute so broad makes those charged with its enforcement the arbiters of morality for the entire community. In doing so, it subjects the livelihood of every teacher in the state to the irrationality of such judgments. The statute is vague because it fails to give fair warning of what conduct is prohibited and because it permits erratic and prejudiced exercises of authority.³⁹

In *Morrison v. State Board of Education*,⁴⁰ a case involving two teachers who engaged in a “physical relationship of a homosexual nature,” the California Supreme Court also found the phrases “immoral conduct,” “unprofessional conduct,” and “moral turpitude” in that state’s Education Code “too sweeping to be meaningful” and ruled that this language could be constitutionally applied only if limited to conduct shown to affect a teacher’s job performance.⁴¹

The *Morrison* court set forth several factors relevant to the determination of a teacher’s fitness or unfitness to teach:

[The] likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.⁴²

³⁸*Supra*, note 8.

³⁹*Id.* at 255.

⁴⁰*Supra*, note 14.

⁴¹*Id.* at 379–387.

⁴²*Id.* at 386.

This job-relatedness test should replace the role-model notion in both on-the-job and off-duty conduct cases. As a generalization, when teacher misconduct is directed at students, it is most directly job-related and most likely to result in disqualification.

Teachers who use their power to exploit young people under their control give evidence of unfitness to teach. Such evidence is also inherent in the physical abuse of students. In most of these cases, these teachers are not acting in self-defense, or under extreme provocation, or to quell classroom disturbances that may require physical contact with students. As one panel put it, they create "an environment of fear and intimidation hostile to the very foundation of the educational process."⁴³

The job-relatedness of other types of on-duty teacher conduct, however, is not nearly so direct or obvious. A number of dishonesty cases, for example, involve teacher falsification of reasons for their absenteeism.⁴⁴ Any discipline for such conduct should be based on the act of falsification, not on the role-model theory.

The role-model approach, in the words of the *Morrison* court, does not "provide a standard or guide against which conduct can be uniformly judged by courts or administrative agencies"⁴⁵ (or 3020-A panels), nor does it give fair warning to teachers of prohibited conduct and its consequences. It biases the outcome of these cases by focusing on the obligations of teachers, not on their rights.

There is no doubt that teachers as public employees and citizens have constitutional rights and that constitutional standards apply in the implementation of statutory disciplinary proceedings.⁴⁶ These rights are not absolute, but public employers, including school districts, cannot abridge or deny them without demonstrating that their exercise caused serious disruption to the operations of the district or the educational process.

Even when serious misconduct occurs on the job, there is no necessary connection between that misconduct and classroom performance. A panel, for example, found a teacher guilty of inflicting serious injury on another teacher "in a brutal and

⁴³*Community School Dist. No. 16 v. Benjamin Greene*, N.Y. St. Ed. Dept., File No. 1524, 38 (1985).

⁴⁴Of a total 30 dishonesty cases examined, 10 involved charges of falsifying reasons for absence from work or requests for leaves of absence.

⁴⁵*Supra* note 14, at 387.

⁴⁶*Supra* note 22, at 26-27.

unwarranted manner” during a fist-fight in the pool area of the school. The panel fined the teacher for his misconduct but did not suspend him because there was “no need to keep the [teacher] from the classroom.”⁴⁷

Role Model and Nexus: Off-Duty Conduct

The role-model concept is also used as a basis for restricting teacher conduct that would otherwise be beyond the legitimate concern of a school district employer—such as conduct occurring off duty and off school premises.⁴⁸ The New York State Court of Appeals has ruled in *Goldin v. Board of Education*, that private conduct can become the lawful concern of school officials only if the alleged conduct is explicitly linked to the performance of a teacher’s job responsibilities, that is, “if the conduct directly affects the performance of the professional responsibilities of the teacher or if, without contribution on the part of school officials, the conduct has become the subject of such public notoriety as significantly and reasonably to impair the capability of the particular teacher to discharge the responsibilities of his position.”⁴⁹

Several years after *Goldin* was decided, a school board brought conduct-unbecoming charges against a teacher, Berardino DeSantis, who had pleaded guilty to criminal charges of conspiring with others to defraud the government by paying \$1000 to a public official to influence approval of a loan application.⁵⁰ The teacher received a suspended sentence of one year in jail, two years’ probation, and a \$3000 fine. After a disciplinary hearing, the panel dismissed the charges, but the Commissioner of Education reinstated them, relying on beliefs about teacher role models set forth by justices of the U.S. Supreme Court in *Ambach v. Norwick*—beliefs based only on their own personal experiences and their own common sense.⁵¹

⁴⁷*Supra* note 12, at 6.

⁴⁸Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. Penn. L. Rev. 1293, n.36 at 1305 (1976).

⁴⁹35 N.Y.2d 534 at 543–44, 364 N.Y.S.2d 440 at 446 (1974).

⁵⁰*Board of Educ. of the City of New York v. Berardino DeSantis*, N.Y. St. Ed. Dept. (1980).

⁵¹*Supra* note 28, at 456. For comments concerning *Ambach*, see text at notes 28, 29.

One panel dismissed conduct-unbecoming charges against a teacher convicted of negligent homicide for operating an automobile under the influence of alcohol, but on appeal the Commissioner again overruled the panel:

I find that it was error for the panel to infer [the teacher's] fitness from the fact that the board of education permitted him to continue teaching after his arrest. This circumstance might support an inference that [the teacher] retained his classroom skills, but it does not establish his fitness to teach or rebut the presumption of misconduct arising from his criminal conviction. It is [the teacher's] conviction, and not his arrest, which represents a binding judicial determination of his guilt of the criminal conduct charged.⁵²

Even acknowledging that a role-model influence exists under certain circumstances, the effect of a criminal conviction on that image is not necessarily bad. As the Supreme Court of California said, "the teacher who committed an indiscretion, paid the penalty, and now seeks to discourage his students from committing similar acts may well be a more effective supporter of legal and moral standards than the one who has never been found to violate those standards."⁵³

Speculation concerning the role-model effect of teacher misconduct, therefore, can produce equally plausible but contradictory conclusions. What is needed is expert evidence concerning the effect of teacher misconduct and/or criminal convictions on fitness to teach, the effect on students, the probability of recurrence, the effect of public awareness of the misconduct, and mitigating or aggravating factors.

School administrators should be qualified to testify about various aspects of school management, including the extent to which public knowledge of a teacher's behavior affects the operation of a school. Although public notoriety was not included in the *Morrison* court's list of relevant job-relatedness tests,⁵⁴ the court did remark that there was no evidence that the teacher's conduct had become "so notorious as to impair [his] ability to command the respect and confidence of students and fellow teachers in

⁵²*Board of Educ. of the Frontier Central School Dist.*, 23 Ed. Dept. Rep. 339 at 343; *Community School Dist. No. 13 v. Normal Goodman*, N.Y. St. Ed. Dept., File No. 1386, 13, 19-20 (1984).

⁵³*Board of Educ. of Long Beach Unified School Dist. of Los Angeles County v. Jack M.*, 566 P.2d 602, 606, n. 4.

⁵⁴See text at notes 40, 41.

[the school district].”⁵⁵ Since in *Morrison* notoriety must be related to job performance and loss of efficiency, mere declaration that conduct has become notorious is insufficient.

Often public notoriety is engendered by a school board, not by a teacher’s conduct. The *Goldin* court required not only a nexus between “public notoriety” and impairment of teaching performance but also that the public notoriety be “without contribution on the part of school officials.”⁵⁶

The key test, even when it can be shown that a teacher’s conduct has become sufficiently notorious to affect the “operation of the enterprise,” is whether the degree of risk to the institution warrants ending a teacher’s career. That determination requires the production and evaluation of evidence concerning such factors as the level or type of school involved, the age of the students, the subjects taught, the likelihood that the act will be repeated, the recentness or remoteness of the incident, as well as the degree of notoriety.⁵⁷ School districts should be required to prove that the harm to the educational process is more than speculative.

The Nature of the Educational Process

In determining whether the educational process has been affected by teacher misconduct, a deciding body must do more than analyze the misconduct; it must determine the nature and meaning of the educational process itself. The style and quality of teaching that actually occurs is directly influenced by many factors, including the existence of multiple and often conflicting educational objectives.

In general, there are two fundamentally different conceptions of teaching. Somewhat oversimplified, the first is prescriptive education, which involves value inculcation whereby “information and accepted truths are furnished to a theoretically passive, absorbent student.”⁵⁸ Traditionally this approach has characterized elementary and even secondary school education in this country.

⁵⁵*Supra* note 14, at 392.

⁵⁶*Supra* note 49, at 446.

⁵⁷Willett, *supra* note 37, at 1454–55.

⁵⁸Goldstein, *supra* note 48, at 1297, 1342.

The second approach is analytical, which is more likely to be found in higher education, where teachers and students are active participants in a search for truth through research and inquiry that challenges all dogma “by bombarding students with all conceivable ideas, from which they may discern truth, if it exists, by and for themselves.”⁵⁹

Neither approach is constitutionally compelled since the U.S. Supreme Court has endorsed both. In *Ambach*, for example, the Court emphasized that public schools prepare students for participation as citizens and perpetuate “the values on which our society rests.” The Court perceived public schools “as inculcating fundamental values necessary to the maintenance of a democratic political system.”⁶⁰

No evidence concerning the implementation of either or both of these approaches to education has been considered or even introduced in any of the conduct-unbecoming cases decided pursuant to the New York State Education Law. As with so many other important questions raised by these cases, the deciding bodies’ answers are based on opinion or unsubstantiated assumptions about the relative merits of the two approaches to education. In the prescriptive model, a teacher may be simply a mechanical instrument of a school board’s rigidly predetermined design. On the other hand, the openness of the analytical or marketplace-of-ideas approach has a much wider tolerance for diversity of teacher conduct in and outside the classroom.

Conclusion

Not long ago female teachers who married were automatically dismissed, as were women teachers who attended minstrel shows, worked as waitresses serving beer, dated married men, divorced, or had “illegitimate” children. Often they were not hired unless they pledged to abstain from drinking, dancing, or falling in love.⁶¹

⁵⁹*Id.*

⁶⁰*Supra*, note 28 at 76–77; see also *West Virginia State Bd of Educ. v. Barnette*, 319 U.S. 624 (1943), where the Supreme Court saw the public school “inspiring patriotism and love of country.”

⁶¹Melnick and Twyman, *supra* note 3, at 301, 304; Goldstein, *supra* note 48, at 1305 n. 36; Pungler, *supra* note 3, at 1, 3; Winks, *Legal Implications of Sexual Contact Between Teacher and Student*, 11 J. L. & Educ. 437, 451, 453.

In one sense these are merely "quaint reminders of a bygone era,"⁶² evidence that "[t]oday's morals may become tomorrow's ancient and absurd customs."⁶³ Unfortunately that perception is always retrospective. In the meantime, certain notions of morality unjustifiably destroy lives and careers. The danger, as documented in this study, is that school boards, hearing panels, commissioners of education, and court justices will impose their own values indiscriminately upon teachers. When these personal or local community notions of morality are coupled with unsubstantiated role-model perceptions, teachers are denied a fair and reasonable opportunity to defend themselves.

Replacing the subjective role-model presumption with a nexus test requiring evidence of a direct work-related connection between teacher conduct and teacher performance would go far toward creating an objective standard and limiting erratic and prejudiced exercises of authority and personal morality by school boards, panels, commissioners of education, and court justices.

⁶²Winks, *supra* note 61, at 453.

⁶³Melnick and Twyman, *supra* note 3, at 301, quoting *Horosko v. School Dist. of Mt. Pleasant*, 6 A.2d 866 (Pa. 1939).