FIRING "IMMORAL" PUBLIC EMPLOYEES: IF ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS PROTECTS EMPLOYEE PRIVACY RIGHTS, THEN WHY CAN'T WE?

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"You have zero privacy anyway. Get over it."[1]

I. INTRODUCTION

A school teacher, charged with the educational and social development of a child, becomes obsessed with a young pupil, stalks the student's family even after they move to another city and murders the student's father.[2] A female elementary school teacher dances erotically with an eleven year-old student in her class, seduces him in her car and has his child.[3] A police officer stops attractive young female motorists, only to let them out of tickets once they have sexually satisfied the officer and his patrol partner.[4] A corrections officer in a state-run

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1. Drew Clark, *PRIVACY: Sun's Privacy Officer Works to Enhance Firm's Security*, NATL. J.'S TECH. DAILY, Nov. 14, 2003 (*quoting* Scott McNealy, President and CEO of Sun Microsystems).

2. Osman v. U.K., 29 Eur. H.R. Rep. 245, 252-63 (2000) (noting the teacher's "disturbing" attachment to her pupil and bizarre course of events leading up to the teacher murdering the pupil's father in the determination of the student's complaint that the U.K. police failed to act on information prior to the crime).

3. Labeled a "sensational case of forbidden love," sixth-grade school teacher Mary Kay LaTourneau had sex with a thirteen year-old student in her class and later gave birth to the young boy's child. The daughter of a former U.S. Congressman, LaTourneau was a married mother of four and a well-regarded teacher in suburban Seattle. She pleaded guilty to two counts of second-degree child rape for the initial relations with the young male student and was terminated from her teaching position. Once she completed her jail time, the relationship between LaTourneau and her student rekindled and led to further legal proceedings. *The Geraldo Rivera Show: Forbidden Love; Panelists Discuss the Issue of Statutory Rape and Specifically the Case involving Mary Kay LaTourneau* (ABC television broadcast May 11, 1998).

4. Liam Pleven, *Police Sex Abuse Cases Put in Spotlight,* MILWAUKEE J. SENTINEL, Feb. 11, 2001, at 8A, *available at* LEXIS, News Library, Milw. J. Sentinel File (detailing two incidents in which Washington, D.C. police officer Derrick Brown pulled over cars, directed the drivers to secluded spots and then raped or sexually assaulted the female drivers).

prison buys and smuggles methamphetamines for inmates.[5] A municipal maintenance worker traffics child pornography on his home computer.[6] All of these employees were quite deservingly terminated from their public employment.

Most employers in the United States and Europe readily recognize that a public employee's criminal activity on the job is cause for termination.[7] However, when the public employee's activity is neither criminal nor on the job, but rather is viewed as "immoral" or "deviant," the salience of termination is far more tenuous. Many public employees have been dismissed for some alleged form of harm to the public resulting from purely legal actions away from work. For instance, an elementary school teacher was fired for being unmarried and pregnant because the school claimed the teacher's "immorality" would unduly harm the school children whom she was educating.[8] A librarian employed at a municipal library was also terminated for becoming pregnant out of wedlock.[9] A male police officer who provided a ride home to an underage girl was summarily dismissed due to the appearance of impropriety.[10] Female and male police officers who engaged in extramarital affairs or merely lived with another person out of wedlock have also been dismissed from their roles as public servants.[11] The question naturally arises: should public employers and the public-at-large force public employees to live their personal lives "according to a God-like standard of morality, above and beyond reproach"[12] in order to retain their positions as public servants? The competing interests of employee, employer and public-at-large make this balancing test wholly more complex than facially apparent.

In both the United States and Europe, "concealing the intimate details of one's private life from strangers and employers has grown increasingly

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5. U.S. v. Cui, No. 96-10065, 1997 U.S. App. LEXIS 1089 (9th Cir. Jan. 23, 1997) (describing block sergeant Cui's agreement with an inmate at the Halawa Correctional Facility to smuggle narcotics into the prison in exchange for a $200 payment).

6. *Child pornography conviction was valid basis for discharge*, NAT'L PUB. EMP. REP., Vol. 5 No. 11, Mar. 7, 2002 (describing how the Township of Harrison, Ohio, discharged a municipal maintenance worker for engaging in illegal and immoral conduct because he was receiving child pornography on his home computer).

7. Anita L. Allen, *Sexual Privacy and the Public Life: Panel II Privacy and the Public Official: Talking about Sex as a Dilemma for Democracy*, 67 GEO. WASH. L. REV. 1165, 1167 (1999).

8. Drake v. Covington County Bd. of Educ., 371 F. Supp. 974 (D. Ala. 1974).

9. Hollenbaugh v. Carnegie Free Library Et Al, 436 F. Supp. 1328 (D. Pa. 1977) *aff'd*, 578 F.2d 1374 (3rd Cir. 1978), *cert. denied,* 439 U.S. 1052 (1978).

10. Swank v. Smart, 898 F.2d 1247 (7th Cir. 1990), *cert. denied*, 498 U.S. 853 (1990).

11. Briggs v. City of North Muskegon Police Dep't, 563 F. Supp. 585 (D. Mich. 1983), *cert. denied*, 473 U.S. 909 (1985) (White, J., dissenting with Rehnquist, J. and Burger, C.J. concurring in dissent).

12. Joel Shafferman, Note, *The Privacy Plight of Public Employees*, 13 HOFSTRA L. REV. 189, 189 (1984) (*citing* Cerceo v. Darby, 3 Pa. Commw. 174, 183, 281 A.2d 251, 255 (1971)).

difficult."[13] The recent political and legal landscape is replete with examples of how private morality has been thrust into the forefront of national debate.[14] As one scholar noted, "the very changes in mores that have made public discussion and display of sex more acceptable and profitable appear to have also ended past eras' sense of reserve about investigating and judging the sex lives of public officials."[15] Perhaps none is more illustrative than the titillating personal information which surfaced in 1991 about then-aspiring U.S. Supreme Court Justice Clarence Thomas during his confirmation hearings in front of the U.S. Senate.

The nation was gripped by colorful stories of Thomas' alleged sexual harassment of former co-worker Anita Hill, which, if proven, would clearly have been regarded as an illegal act under color of law.[16] Although Hill's sexual harassment claim was ultimately not proven, ample evidence surfaced showing Thomas' penchant for other sordid, yet legal, activities.[17] The public learned about Thomas' passion for hard-core pornography.[18] His apartment was wallpapered in photographs of nude women, he often rented XXX movies from a Washington, D.C. movie rental store, and while in law school, he even carried pornographic magazines with him to class.[19] Yet Thomas' actions were not illegal; he did not seek to induce others to view or read his pornography, the pornography did not involve underage individuals, and he mostly confined his consumption of pornography to his own home. Despite his arguably immoral actions,[20] Thomas was indeed appointed to the U.S. Supreme Court[21] at the cost of

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13. Allen, *supra* note 7, at 1165. Allen notes that the "public demand for personal information is unrelenting. . . . The spate of humiliating public confessions that characterized the 1990s suggests that public servants' desire for privacy is being cooled with knowledge that the rewards of voluntary self-disclosure are great and the realization that what takes place in private, unless dull and routine, is likely to become public knowledge anyway. The expectation of privacy is diminishing with the knowledge that political enemies, journalists, paparazzi photographers, and intimate associates have strong incentives to disclose potentially embarrassing private facts." *Id.*

14. *See* Terry Morehead Dworkin, *It's My Life – Leave Me Alone: Off The-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47, 48 (1997); *See also* Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulations Banning Sex between Domestic Relations Attorneys and Their Clients*, 23 HARV. WOMEN'S L.J. 1, 5 (2000) (discussing President Bill Clinton's sexual affair with White House Intern Monica Lewinsky).

15. Allen, *supra* note 7, at 1171.

16. Ralph Gregory Elliot, *The Private Lives of Public Servants: What is the Public Entitled to Know?*, 27 CONN. L. REV. 821, 824-25 (1995) (book review). Under 42 U.S.C. §§ 2000e-2000e-17, commonly referred to as Title VII, sexual harassment is illegal.

17. Elliot, *supra* note 16, at 824-25.

18. *Id.*

19. *Id.*

20. The information disclosed during Thomas' confirmation hearings generated fears of Thomas' potential harm as a Justice since the materials he enjoyed so much actually

displaying his "perverse" personal proclivities to the world.[22] The proverbial adage that a man's home is his castle provided little protection to Justice Thomas' most guarded secrets.[23] As the world witnessed Thomas' most personal vices exposed on the evening news and in every newspaper, it also became clear that laws designed to deter highly offensive intrusions into one's personal life and public disclosure of private facts simply do not protect public figures and employees.[24]

This Note compares public employee firings based on "immoral" off-duty activities in the United States and European countries adhering to the European Convention on Human Rights.[25] The initial challenge of defining the amorphous modern concepts of morality, privacy and public harm is undertaken in Part II of the Note. Part III discusses the history and present scope of Article 8 of the European Convention on Human Rights as it pertains to the protection of public employee privacy and public harm through public employee actions. Part IV discusses Article 8's effect and implications on the privacy rights of public employees within the Convention states. Part V analyzes U.S. case law on employee morality firings and the lack of protections or standards within U.S. jurisprudence. Part VI proposes a nexus standard to protect employee and employer interests and dispel the myth that "the legitimate expectations of labour and of management belong to those which are inevitably in conflict."[26] Part VII of the Note concludes that although Article 8 of the European Convention on Human Rights provides a progressive grant of a right to a private life, even this progressive protection has done little to protect employee privacy rights, and as such, it is unlikely the United States will impart additional privacy protections to public employees.

"victimize, demean and degrade women…view[ing] them as objects designed to gratify the basest and often perverse appetites of men, hold[ing] them up as objects of scorn and ridicule and essentially treat[ing] them as chattel whose sole purpose is to serve men." *Id.* at 826.

21. *Id.* at 824-25.

22. *Id.*

23. Shafferman, *supra* note 12, at 191.

24. Allen, *supra* note 7, at 1165-66.

25. See *infra* Part III.A for detailed explanation of the Council of Europe's creation, adoption and enforcement of the European Convention on Human Rights in 1950 and the European Community's more recent adoption of the fundamental rights espoused in the Convention.

26. Douglas Brodie, *Mutual Trust and the Values of the Employment Contract*, 30 INDUS. L.J. 84 (2001).

II. DEFINING PRIVACY, MORALITY AND PUBLIC HARM

A. The Modern Concept of Privacy

In modern democratic societies, privacy is a basic right of citizens.[27] John Locke, from whom many of our modern concepts of privacy originated, stated that "[e]very Man has a Property in his own Person. This no Body has Right to but himself."[28] Privacy plays an important role in our society in both personal and societal terms.[29] Although everyone would like to believe that a person's private life stays at home while work life stays firmly planted at the office, there is more interaction between both parts of life in today's society.[30] Most employees believe that what they do off the job, especially in regards to legal activities within the confines of their own homes and own time, is an area where the employee's public employer should "stand clear…because I am entitled to keep some information and parts of my life to myself."[31] Employees believe they should be free to pursue activities, associations and identities however they choose.[32]

Inherent in the desire to preserve the privacy, individual liberty, and freedom of public employees from government intervention, however, is the danger of obfuscating a potential harmful impact on the public citizens public employees are hired to serve.[33] Employers have long monitored employee activities on the job to meet the demands of public accountability, thereby legally and rightfully impinging on employee privacy.[34] Before the advent of the Internet, office workers may have been monitored to ensure personal matters took up minimal time in the workday, while factory workers may have been monitored to ensure they were working after clocking in.[35] Today's infringements into employee privacy are becoming more noticeably high-tech.[36] As accessibility to digital information increases,[37] so does the employer's invasion into the public

27. Orla Ward, *Is Big Browser Watching You?*, 150 NEW L.J. 1414 (Sept. 29, 2000).

28. *Id.*

29. Dworkin, *supra* note 14, at 94.

30. Cindy Burnes, *Confidence and Data Protections*, *in* 1.2 PRIVACY AND DATA PROTECTION 4 (2000).

31. Dworkin, *supra* note 14, at 94.

32. *Id.* at 95.

33. *See* Susan Edwards, *No defence for a sado-masochistic libido*, 143 NEW L. J. 406 (1993). Although public employee conduct may be more closely scrutinized than private employee conduct, both public and private employees face many of the same challenges in protecting one's privacy. The principles of law and society governing private employee privacy are applicable to public employees despite the wide disparity in employer and client.

34. Ward, *supra* note 27.

35. *Id*.

36. *Id.*

37. The advent of the Internet has left individuals "no place to hide." For instance,

employee's private sphere.[38]

B. The Public Employer's Fundamental Charge: Serving the Public by Protecting it from Harm

Government paternalism does not extend so far as to protect a private individual from himself, but a fundamental charge of the government is to protect its citizens from public harm.[39] Assumedly, public servants should have "good" character and judgment because "public trust in government depends on them."[40] Undoubtedly, issues of morality are profoundly human problems of great difficulty.[41] Society is naturally entitled to protect itself from public harm, and if the potential or reality of harm arises from the state's own employees, then immediate action (legal or otherwise) to obviate such harm makes sense. The "law is about protecting from harm, the weak and vulnerable," not for protecting the immoral activities of public employees whose actions endanger those people and projects the public has entrusted with them.[42] Because the workplace fundamentally depends on functioning relationships with mutual respect and trust,[43] public employee morals are often relevant to the public at large.[44]

Both public employers and their employees are directly accountable to the public as citizens, voters, and funders. The doctrine of public accountability is not an amorphous concept. Rather, it can be found in statute, administrative law, and case law across all levels of courts and government in the United States and

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on Mapquest (www.mapquest.com), one can enter an address, find a map to that address and even get driving directions. On Switchboard (www.switchboard.com), AnyWho (www.anywho.com) and Infospace (www.infospace.com), phone directories from all over the world are collected in one easily searched database. Utilizing Google's phone book (www.google.com), one can type in a phone number with area code and find the name, address and a link to a map or directions to the address. Jan Dempsey, *Internet Gives Away Too Much Information*, POST-STANDARD (Syracuse, N.Y.), Nov. 5, 2003 at C6, *available at* LEXIS, News Library, Pstandard File. Employers may also use "net-nannys" to observe what their employees are utilizing their work computers to accomplish and may have other high-tech devices like surveillance cameras installed in work areas.

38. Pamela M. Prah, *Crackdown on Worker's Off-Duty Web Activities,* KIPLINGER BUS. FORECASTS, Sept. 6, 2000, at 908.

39. *See* Elliot, *supra* note 16, at 826-29. The concept of public harm is discussed in Part III of this note.

40. Allen, *supra* note 7, at 1167.

41. Sheffield & Horsham v. U.K., 27 Eur. H.R. Rep. 163, 200-04 (1998) (Bernhardt, Thsr, Vilhjalmsson, Spielman, Palm, Wildhaber, Makarczyk, and Voicu, J.J., partly dissenting) (citing the great difficulty the European Court of Human Rights faced when deciding the Article 8 rights applicable to transsexuals such as the right to marry as part of a private life).

42. Edwards, *supra* note 33 and accompanying footnote text.

43. Elliot, *supra* note 16, at 830-31.

44. Ward, *supra* note 27.

Europe.[45] The doctrine is used synonymously for "answerability, responsibility, efficient management and adherence to the rule of law."[46] Public employees are merely agents of the public employer and, as such, share the same or more responsibility for a public employer's accountability to the public it serves. Accountability is often touted as a way to bring government "back to the people."[47] But a new age of scandalous conduct, publicized on the news and the Internet, has exposed the personal lives of public officials more than ever. Their innermost secrets are discovered and divulged for the public to dissect and apply at will. Although public officials may be indicted for criminal activities on occasion, the public has become increasingly aware of, and frustrated by, the "immoral" yet non-criminal activities of public officers and employees.[48]

C. The Amorphous Concept of Morality

Naturally, a public employee who engages in criminal conduct clearly jeopardizes his own employment. U.S. courts and the public, however, have mixed sentiments about whether a public employee's private activities, decisions and actions outweigh the public's interests to such a degree that the employee can no longer serve in his public servant capacity.[49] Although "immorality" is a nebulous notion, many courts have adjudicated issues of public employee termination for such "immoral" activities over the past fifty years.[50]

While no clear definition of morality universally applies, common usages of the term must be explored to limit the scope of this Note. Morality has been debated since ancient times, and the diverse definitions of morality applied to public servants in antiquity guide our modern views of ethics and morality. The Greek philosopher Plato instructed that "the State exists to promote virtue among its citizens."[51] Under Plato's ideal, it was a "permissible extension of the state's parens patriae powers to promote morality within society."[52] Noted English legal

45. Stephen Bottomly, *Corporatisation and Accountability: The Case of Commonwealth Government Companies*, 7 AUSTRL. J. OF CORP. L. 3, *8-*10 (1997).

46. *Id.* at *10.

47. *Id.* at *13.

48. Allen, *supra* note 7, at 1165.

49. *Compare* Briggs v. City of North Muskegon Police Dept., 563 F. Supp. 585, 595 (D. Mich. 1983) *with* Fabio v. Civil Service Comm'n, 489 Pa. 309 (1980). Both police officers in the cases engaged in off-duty sexual activity that was labeled "immoral." However, the courts applied divergent standards and only one of the officers was fired while the other retained his position. With no guidance from the U.S. Supreme Court and few circuit opinions, it is clear that such results are not only common, but expected.

50. See *supra* notes 9-11 and accompanying text, for a discussion of morality firings of public employees during the last fifteen years.

51. S.I. Strong, Romer v. Evans *and the Permissibility of Morality Legislation*, 39 ARIZ. L. REV. 1259, 1269 (1997) (quoting PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 89 (1965)).

52. *Id.* at 1269-70.

scholar Lord Devlin, however, argued that the "Platonic model is not acceptable to Anglo-American thought in that it destroys freedom of conscience and is the paved road to tyranny."[53] On the other hand, Plato's argument maintains that "society cannot exist without some moral parameters, and in a democracy, the best arbiter of morality is the majority."[54] Aristotle meanwhile recognized that being "moral" was not a legitimate concern of the state, thereby laying the foundation for a non-coercive society.[55]

In the most simple modern form, "immoral" behaviors are those which violate a specific norm or taboo.[56] "Immoral" can also connote "conduct not in conformity with accepted principles of right and wrong behavior . . . [something] contrary to the moral code of the community."[57] Yet "immorality" is an imprecise word which means different things to different people.[58] Morality may also have a negative connotation. Consider Oscar Wilde's commentary on the subject: "[m]orality is simply the attitude we adopt toward the people we personally dislike."[59] "Immoral" activities commonly involve some facet of pornography, an extramarital affair, sexual preference or simply eschewing a community or religious tradition. However, "immoral" activities have also been suggested by employers and courts to include providing a young girl a ride home at night[60] or being an unwed pregnant school teacher.[61] Often, a public employer's secular definition of morality has notably religious origins and influences.[62]

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53. *Id.* at 1270 (quoting PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 89 (1965)).

54. *Id.* at 1271.

55. *Id.* at 1279-80.

56. *Id.* at 1261.

57. 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, 273 (2002).

58. *Id.* at 272. Fulmer asks what morality of school teachers encompasses by querying:

> Is a teacher's sexual orientation a moral question? Should the school board be able to dictate what a teacher does in her or her spare time, or with whom he or she associates after the school house doors have closed? If the law permits inquiry into a teacher's morality, what limits, if any, should be imposed? Should the definition differ from community to community as toleration levels vary?

Id.

59. OSCAR WILDE, *An Ideal Husband*, *in* SELECTED WRITINGS OF OSCAR WILDE 173 (R. Fraser ed., 1969).

60. Swank v. Smart, 898 F.2d 1247 (7th Cir. 1990), *cert. denied*, 498 U.S. 853 (1990).

61. Drake v. Covington County Bd. of Educ., 371 F. Supp. 974 (D. Ala. 1974).

62. Matthew A. Ritter, *Constitutional Jurisprudence of Law and Religion: Privacy v. Piety- Has the Supreme Court Petered Out?*, 40 CATH. LAW. 323 (2001). Secular morality has been referred to as a "truncated version of religious morality." *Id.* at 326. To justify civic morality, "secular jurisprudence eschews any particular religions revelation. . . ." *Id.* at 351. Others argue that "religion, however, offers a clear basis for human rights – the

The definition of "immorality" as applied by a particular community or public employer depends on many factors. Public morality concerns "laws and public actions focused on the moral conduct and especially the stable patterns of conduct (character) of individual citizens."[63] Public morality issues usually stem from four main "axes" including "from more serious to less serious evils, from more to less 'self-regarding,' from more strictly moral harms to mixed physical/moral harms and from more strictly moral harms to harm involving offensiveness to others."[64] Specific factors denoting immorality may include geographical location or the predominant religious beliefs of a certain community. Subjective qualifiers may also impact a community's view of morality. Such factors might include how serious the "lack of wisdom and professionalism" of the incident was[65] and a host of other sociological factors on which this Note will not focus.

There will be little uniformity in such a complex area where any legal change or action takes place against the background of government and individual traditions and culture.[66] One must accept that community standards criteria can change overnight and may "make the difference between what is and what is not acceptable behavior."[67] The most important factor is that the public considers a public employee's activities to be so morally repugnant that it not only infringes on the public's rights or causes public harm, but that it also may prevent the public employee from performing effectively.[68] While morality is not clearly defined in either the United States or European states adhering to the Convention, Article 8 attempts to limit the moral inquests permissible by the public by protecting an employee's right to a private life.

'higher law' of God that transcends any civil law." *See also* George Dent, Jr., 1999 B.Y.U. L. REV. 1, 31 (1999). Dent explains that "[m]oral decay infects slowly. Many people stick to bourgeois morality even after they cease to believe in it. Society lives off the moral capital accumulated by religion even after religion declines." *Id.* at 42. Theologians and legal scholars have long debated the existence of secular morality without religion as a foundation. A community's morals are no doubt influenced by all social constructs, including religion. A community's collective civic morality as it exists and influences employment decisions and subsequent jurisprudence is relevant to this Note.

63. Christopher Wolfe, *Forum on Public Morality: Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 65 (2000).

64. *Id.* at 66.

65. Osman v. U.K., 29 Eur. H.R. Rep. 245, 253 (2000).

66. Sheffield & Horsham v. U.K., 27 Eur. H.R. Rep. 163, 202 (1998).

67. Patricia E. Salkin, *Municipal Ethics Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers*, 14 B.Y.U. J. PUB. L. 209, 210 (2000).

68. *See* Thompson v. Southwest Sch. Dist., 483 F. Supp. 1170, 1174 (D. Mo. 1980) (discussing factors used by a school board to balance the employee's rights to privacy, the employer's right to enforce moral constraints on an employee who works with the public and how both may prevent the public employee from working effectively).

III. THE EUROPEAN CONVENTION ON HUMAN RIGHTS & ARTICLE 8

A. History and Interpretation of Article 8's Progressive Pledge to a "Right to a Private Life"

The European Convention on Human Rights ("Convention") was drafted and adopted by the Council of Europe[69] in November 1950.[70] Forty-five European countries ratified the Convention between 1950 and 2004.[71] The Convention "provides foundations on which to base the defence of human personality against all tyrannies and against all form of totalitarianism."[72] Twenty-seven general rights or freedoms are protected by the Convention; however, the thirteen original articles in the main body of the Convention articulate the most basic rights of individuals.[73] The original articles guarantee: the right to life (Article 2), the prohibition of torture (Article 3), the prohibition of slavery and forced labor (Article 4), the right to liberty and security (Article 5), the right to a fair trial (Article 6), no punishment without law (Article 7), the right to respect for a private life (Article 8), freedom of thought and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), the right to marry and have children (Article 12), the right to an effective remedy

69. The Council of Europe was created immediately after World War II by European nations who wished to avoid future wars "such as those which had ravaged Europe in 1939-45 and earlier in 1914-18." Ten European Nations were founding members: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000 4 (Robert Blackburn & Jorg Polakiewicz eds., Oxford University Press 2001) [hereinafter FUNDAMENTAL RIGHTS IN EUROPE].

70. *Id.* at 5.

71. European countries that have ratified the Convention include: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia and Montenegro, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. Not all Convention member countries have ratified Protocol 1, 4, 6 or 7. Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No.: 005, *available at* http://conventions.coe.int/treaty/Commun/ChercheSig.asp?NT=005&CM=D&F=&CL=ENG (last visited Mar. 22, 2004).

72. FUNDAMENTAL RIGHTS IN EUROPE, *supra* note 69, at 5.

73. *Id.* at 8-9. The original Convention on Human Rights contained thirteen rights or freedoms, now contained in Articles 2 through 14. The original articles drew heavily on the United Nations' Universal Declaration of Human Rights adopted on December 10, 1948. *Id.*

(Article 13), and the prohibition of discrimination in the enjoyment of Convention rights (Article 14).[74] The Convention is enforced by the European Court of Human Rights (ECHR).[75] Individual citizens of convention member states may apply to the ECHR to bring a complaint once state remedies have been exhausted or proven fruitless. The citizen's complaint must be deemed admissible, go through friendly settlement procedures, and meet other requirements before an ECHR hearing or appeal is scheduled.[76] Member states are under an international obligation to comply with the ECHR's judgments.[77] Member states typically use the ECHR's advisory opinions as persuasive authority.[78] The ECHR has "enjoyed amazing success in that the judgments which it has handed down have been respected by the contracting states."[79]

Over the past fifty years, the influence of the Convention has expanded with the changing face of Europe and two key developments. First, the European Community was established in 1992, and the treaty declared that the "Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States . . . ."[80] All

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74. *Id.* at 9.

75. *Id.* at 24 (describing in detail the underlying legal method employed by the ECHR). *See also* KAREN REID, A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS 1-30 (Sweet & Maxwell 1998) (describing in detail the actual complaint and disposition process by which complaints are adjudicated by the ECHR) [hereinafter PRACTITIONER'S GUIDE]. The acronym ECHR is often used interchangeably to describe the European Court on Human Rights and the European Convention on Human Rights. ECHR is strictly used to denote the European Court on Human Rights throughout this Note, while the European Convention on Human Rights is referred to as the Convention.

76. IAIN CAMERON, AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 38-40 (Iustus Forlag 1998). Cameron provides an excellent overview of the filing and disposition of a complaint in the ECHR, along with a flow chart detailing each step of the ECHR filing and adjudication process.

77. FUNDAMENTAL RIGHTS IN EUROPE, *supra* note 69, at 56. The member states' obligation arises from Convention Article 46 § 1 which states "[t]hat part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state." *Id.*

78. K.D. Ewing, *The Human Rights Act and Labour Law*, 27 INDUST. L.J. 275 (1998). Convention member states are directed to take the European Court of Human Rights decisions into account, but courts are not bound by the ECHR's advisory opinions. Courts are encouraged to utilize the rulings as persuasive authority. *Id.*

79. Jean M. Sera, Note, *The Case for Accession by the European Union to the European Convention for the Protection of Human Rights*, 14 B.U. INT'L L.J. 151, 151 (1996). The ECHR's success is "especially astounding in light of the well known fact that 'the history of the international legal discipline is replete with examples of carefully crafted norms disregarded in practice.'" *Id.*

80. TREATY ON EUROPEAN UNION, Feb. 7, 1992, art. 6, § 2, O.J. (C340) 173 (1997) [hereinafter TREATY ON EUROPEAN UNION]. *See also* Koen Lanaerts, *Respect for*

member states of the European Community (hereinafter EC) are obligated to respect the Convention as "general principles of Community law."[81] In fact, "[n]ational authorities in member states of the European Union are under an obligation to respect the Convention whenever they are acting in areas falling within the competence of the European Union."[82] In the 1990's, membership in the Council of Europe became a condition for new European Union membership.[83] It is important to note, however, that the Convention remains entirely separate from the treaties that established the European Community.[84] Second, the Human Rights Act of 1998 [hereinafter the Act] incorporated many articles of the Convention, including Article 8.[85] The Act gives further effect in domestic law to rights and freedoms guaranteed by the Convention.[86] The fundamental purpose of the Human Rights Act of 1998 is to augment the recognition and protection of human rights for citizens in member countries. Human rights under the Act are "rights that all humans possess by virtue of being human."[87] The Act has gradually been coming into force in EC member countries.[88] For instance, in October 2000, the Act came into force in the United Kingdom.[89]

Article 8 declares that all citizens of member states have a "right to respect for private and family life."[90] Article 8 is composed of two sections: Article 8, Section 1, which confers the express right to a private life and Article 8, Section 2, which limits this conferred privacy right.[91] Specifically, Article 8

Fundamental Rights as Constitutional Principle of the European Union, 6 COLUM. J. EUR. L. 1 (2000) (interpreting the history and impact of the EU's commitment to the Convention principles as fundamental human rights).

81. TREATY ON EUROPEAN UNION art. 6, § 2.

82. FUNDAMENTAL RIGHTS IN EUROPE, supra note 69, at 37.

83. *Id.* at 89. Interestingly, "ever since the European Community's foundation in the 1950s all its member states have also been members of the Council of Europe and parties to the Convention." *Id.*

84. *Human Rights*, EUROPEAN L. MONITOR 8.10(1) (Oct. 2000) [hereinafter *Human Rights*]. Although the EU and the Council of Europe remain distinct entities, some conflicts have arisen regarding the enforcement of human rights infractions by the ECHR and the European Court of Justice. See Elizabeth F. Defeis, *Human Rights and the European Union: Who Decides? Possible Conflicts Between the European Court of Justice and the European Court of Human Rights*, 19 DICK. J. INT'L L. 301 (2001), for a full discussion of such conflicts.

85. Burnes, *supra* note 30.

86. Gillian S. Morris, *Fundamental Rights: Exclusion by Agreement?*, 30 INDUS. L.J. 49 (2001).

87. *Id.*

88. *Human Rights*, *supra* note 84.

89. Burnes, *supra* note 30.

90. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4 1950, art. 8, 213 U.N.T.S. 222 (as amended by Protocol No. 11 in EUROP. T.S. No. 155), *available at* http://conventions.coe.int/treaty/en/Treaties/Word/005.doc (last visited Feb. 11, 2004).

91. *Id.*

states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[92]

Section 1 generally provides a right to respect for private and family life, home and correspondence.[93] The right to a private life "stands for the sphere of immediate personal autonomy" and covers aspects of "physical and moral integrity."[94] It confers a "positive protection obligation on the part of the state" and is not simply a "negative right to avoid state interference."[95] The right to a private life is not limited to "an inner circle in which the individual may live his own personal life as he chooses and exclude therefrom the outside world not encompassed within the circle, but extends further, comprising to a certain degree the right to establish and develop relationships with other human beings in the outside world."[96] This positive right extends to employees, both public and private.[97] It extends a public employee's right to privacy in both a physical and a non-physical sense.[98]

The rights conferred in Section 1 are not unqualified and must be approached cautiously.[99] None of the rights in the Act are absolute, and the Article 8 right to privacy may be overridden.[100] As with many of the articles of the Convention, Article 8 contains built-in exceptions.[101] The second part of Article 8 lays out the overriding circumstances when abrogation of the right to

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92. *Id. See also* Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) (integrating the language of the Convention into the European Union's Charter).

93. Helen Mountfield, *The Implications of the Human Rights Act of 1998 for the Law of Education*, 1 EDUC. L.J. 146 (2000).

94. PRACTITIONER'S GUIDE, *supra* note 75, at 323.

95. Mountfield, *supra* note 93.

96. PRACTITIONER'S GUIDE, *supra* note 75, at 323-24.

97. *Human Rights*, *supra* note 84.

98. Osman v. U.K., 29 Eur. H.R. Rep. 245, 309 (2000). Article 8's conference of the right to a private life extends to the physical integrity of privacy. A common example of this is the employee's right to privacy in his own office or belongings and, more obviously, in an employee's personal mail or personal belongings at the home.

99. Ewing, *supra* note 78.

100. Burnes, *supra* note 30.

101. *Human Rights*, *supra* note 84.

privacy is permissible.[102] Section 2's limitation on the right to privacy serves as an "ideological support to a certain conception of public order, public interest, and public policy."[103] The exceptions in Section 2 are strictly interpreted and employers must act as narrowly as possible to comply with the exception.[104] Therefore, any restriction on the Article 8 right to privacy may only reach so far as necessary to achieve its aim.[105] A public entity, however, has considerable discretion with which to make decisions because it is acting in the public's interest while balancing the fundamental freedoms recognized by the Convention.[106] The ECHR has clearly articulated that a "state properly enjoys a wide margin of appreciation in respect of its positive obligations under Article 8," especially in a gray moral area such as transsexualism,[107] "where there is no sufficiently broad consensus within the member states on how to address the complexity of legal, ethical, scientific, and social issues which arise."[108]

B. Article 8 Protections for Public Employees

The vast majority of the Act is concerned with the relationship between the state and the citizen.[109] However, Article 8 has been interpreted as extending into the workplace.[110] Employees clearly fall into the category of citizens in their personal and individual relationships with the state. Likewise, public employers fall into the state category when analyzing privacy rights between public employee and public employer. All levels of public employers are bound by Article 8, including state, local and national government authorities.[111] The Convention is directly enforceable by employees of bodies which are "manifestly public authorities," including government officers, local authorities, prison officials, and immigration officers.[112] Private employers are not bound by the Convention.[113] However, in the "new climate of human rights," even private

102. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 90, art. 8, § 2.

103. Edwards, *supra* note 33 and accompanying footnote text.

104. Burnes, *supra* note 30.

105. *Human Rights*, *supra* note 84.

106. Stanley Naismith, *Religion and the European Convention on Human Rights*, HUM. RTS. & U.K. PRAC. 2.1 8 (Mar. 1998).

107. A transsexual is an "[i]ndividual who experiences persistent psychological discomfort with the individual's own anatomical sexual identity combined with the drive to become a member of the opposite sex. Transsexuals may submit to medical procedures to change their bodies to match the desired sexual identity." MODERN DICTIONARY FOR THE LEGAL PROFESSION 923-24 (3d ed. 2001).

108. Sheffield & Horsham v. U.K., 27 Eur. H.R. Rep. 163, 189 (1998).

109. *Human Rights*, *supra* note 84.

110. Ward, *supra* note 27.

111. *Id*.

112. Ewing, *supra* note 78.

113. *Human Rights, supra* note 84.

employers may be behooved to afford employees Convention rights so as to avoid unnecessary litigation.[114]

From the viewpoint of both public and private employers across member nations, one of the most significant rights is the right to privacy enumerated in Article 8.[115] Many have reflected how interesting the evolution of this right will be for employment law jurisprudence in light of the passage of the Human Rights Act of 1998 and the integration of the Convention into the European Community.[116] For instance, the Human Rights Act of 1998 does not create any new human rights, but rather "improves the machinery for the enforcement of human rights" that are already espoused in the Convention.[117] Improving enforcement of existing rights, however, in practical terms is "almost as good as creating new rights."[118] Positive rights extend to public employees throughout the Convention member states,[119] but it is unclear whether Article 8 protections extend to quasi-public agencies under ECHR rulings.[120] However, Convention member governments have made it clear that the Convention protections such as Article 8 do not apply to any of the private acts of such "mixed function bodies."[121] Arguably, the Act "should apply to all the acts of an authority when acting in a public capacity (including the so-called private acts which might be incidental to such activity), but not to any of the acts of the authority when pursuing non-public activities."[122]

C. Striking a Fair Balance Between Protecting a Community from Harm and the Right to Privacy

The concept of "proportionality" is inherent in the Convention.[123] The rights articulated in Article 8 may be outweighed by other considerations in a democratic society. For example, invasion of an employee's right to privacy may be outweighed for a purpose such as detecting or preventing a crime. All

114. Ward, *supra* note 27.

115. Burnes, *supra* note 30.

116. *Id.* With the integration of Article 8 into the EC, the potential expansion of Article 8 rights is astronomical. If EC countries have statutes, regulations, or policies which conflict with Article 8 protections, the member countries may have ECHR or Court of Justice decisions which will encourage or force changes in that country's law. *Id.*

117. *Human Rights*, *supra* note 84.

118. *Id.*

119. *Id.*

120. Ewing, *supra* note 78.

121. *Id.* A "mixed-function body" describes a quasi-governmental status organization which operates either as a private enterprise or wholly as a government business. For example, a private prison operated solely for the use of the state and funded entirely by the state might fall into the mixed-function body due to the level of funding and state usage.

122. *Id.* at n.55.

123. Alec Samuels, *The Rights of Privacy and Freedom of Expression: The Drafting Challenge*, 20 STATUTE L. REV. 66 (1999).

responses must be proportionally balanced with the attendant trespass and damage to the right to privacy.[124] Proportionality, however, is not a new concept. In 1948, the United Nations' Declaration of Human Rights stated that the "'rights and freedoms of others' and the 'requirements of morality, public order and the general welfare' need to be taken into account, and a fair balance must be struck between the conflicting interests."[125] Despite previous enactments utilizing such a balancing test, proportionality is not a common statutory construct in most Convention nations.[126]

In enforcing Article 8, the European Court of Human Rights has clearly stated that a fair balance must be struck between the general interests of the community and the interests of the individual.[127] Benefits from legal enforcement of morality must be weighed against "misery caused directly and indirectly by legal punishments and by the consequent infringement of human freedom."[128] In weighing these interests, it is commonly noted that public employment has distinctive qualities that "necessitate regulation of the employment relationship within those services in areas beyond those covered by general law."[129] When balancing the interests involved in public employment cases, "the interest of the secular society lies *de plano* higher than the individual interest of the applicant."[130] Most recently, an emphasis on commercial entrepreneurial values within public employment has also been noted as equally important.[131]

While the concept of public interest has been identified as "long-standing," it is difficult to define and even more difficult to apply "public interest" due to its vagueness and ambiguity.[132] In fact, one scholar refers to public policy and public interest limitations such as those in Article 8 as "hopelessly vague, lacking parameters or boundaries."[133] Moreover, there is no uniform European conception of the requirements for the protection of the rights of others in relation to a public employee's immoral activities and subsequent termination.[134]

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124. *Id.*

125. Sheffield & Horsham v. U.K., 27 Eur. H.R. Rep. 163, 198 (1998).

126. Samuels, *supra* note 123.

127. *Sheffield & Horsham*, 27 Eur. H.R. Rep. at 191.

128. Nicole Padfield, *Consent and the Public Interest*, 143 NEW L.J. 430 (1992).

129. Gillian S. Morris, *Employment in Public Service: The Case for Special Treatment*, 20 OXFORD J. OF LEGAL STUD. 167 (2000).

130. Naismith, *supra* note 106.

131. Morris, *supra* note 129. This focus on outcomes-based evaluations may reflect a new trend in looking to the bottom line as an indicator of success even in public employment.

132. Samuels, *supra* note 123.

133. Edwards, *supra* note 33.

134. Naismith, *supra* note 106.

D. Implications of Article 8's "Right to a Private Life" on Employee Privacy Rights

Article 8 does not clearly define the notion of respect for private life.[135] To determine whether the respect owed to one's private life imposes a positive obligation, a fair balance must be struck between the general interests of the community and the interests of the individual.[136] The notion's requirements will vary widely from case to case.[137] In short, this proportionality test ultimately defines what respect is to be afforded to which individuals at what time and place. The ECHR has acknowledged that this search for balance is inherent in the whole of the Convention.[138]

> According to the Court's case law, a restriction on a Convention right cannot be regarded as necessary in a democratic society (two hallmarks of which are tolerance and broad-mindedness) unless, amongst other things, it is proportionate to the aim pursued…. It cannot be maintained in these circumstances that there is a pressing social need to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public.[139]

When faced with a potential Article 8 violation, employers have asserted that their actions were necessary in a democratic society to protect the rights of others.[140] In protecting the rights of "others," the ECHR has accepted the argument that the government itself qualifies as an "other" deserving protection.[141] Indeed, "an established morality is as necessary as good government to the welfare of society" and "the suppression of vice is as much the law's business as the suppression of subversive activities."[142] However, questions still remain as to what a "reasonable degree of infringement on privacy" is and to what degree employees should be exposed to such infringements.[143]

Although the Convention confers some right to privacy for public

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135. Sheffield & Horsham v. U.K., 27 Eur. H.R. Rep. 163, 191 (1998). The potential width of the term is vast and often overlaps with other interests protected under the Convention. A PRACTITIONER'S GUIDE, *supra* note 75, at 323.

136. *Sheffield & Horsham*, 27 Eur. H.R. Rep. at 191.

137. *Id.*

138. *Id.*

139. Padfield, *supra* note 128.

140. Burnes, *supra* note 30.

141. *See* Halford v. U.K., 24 Eur. H.R. Rep. 523 (1997)

142. Padfield, *supra* note 128.

143. Ward, *supra* note 27.

employees, the employee may waive this right.[144] If an employee agrees to waive his right to privacy, then the employee may not bring a cause of action based on the abridgement of his privacy rights at a later time.[145] Employees may waive privacy rights by signing a waiver that accompanies an employee handbook or by signing an employment contract with an explicit or implicit waiver contained therein.[146] Although the employee must clearly understand the waiver and its implications, such a waiver might decrease potential suits against employers who would otherwise be seen as infringing on an employee's privacy. Even if a waiver of the employee's privacy rights is not obtained, a warning from the employer that the employee's privacy may be breached is sufficient to extinguish the employee's rights.[147] For instance, in the United Kingdom, if an employee has been warned that his or her privacy is going to be infringed to promote a legitimate employer purpose, "then [his or her] expectation of privacy can, in principle, no longer exist."[148]

IV. THE IMPLICATIONS OF ARTICLE 8 ON PUBLIC EMPLOYEES AND PRIVACY

Public employees are held to a higher level of public accountability than private employees.[149] It is widely recognized, both in the United States and in European countries, that all employee acts and communications on the job have the capacity to damage an employer's interests.[150] Damages may range from merely wasting the employer's time to negatively impacting the employer's reputation or even ruining her business completely. One need only look to the evening news to hear of employee misconduct bringing down corporate stock to the point of bankruptcy to conceptualize the impact an employee's "immoral" activity might have on the employer and public alike.[151]

144. Burnes, *supra* note 30.
145. *Id.*
146. *Id.*
147. Ward, *supra* note 27.
148. *Id.*
149. *Human Rights, supra* note 84.
150. Ward, *supra* note 27.
151. For example, Martha Stewart ("the queen of all things house and home") was recently convicted on four counts for false statements made in connection with her decision to sell 3,928 shares ImClone Systems stock. Stewart sold her ImClone shares on December 27, 2001—one day before the Food and Drug Administration (FDA) publicly announced the decision to reject ImClone's application to market a new cancer drug. This debacle sent the stock of Martha Stewart Omnimedia in a downward spiral, with shares falling nearly 23 percent. *See* Warren L. Dennis & Bruce Boyden, *Stewart Prosecution Imperils Business Civil Liberties*, 18 LEGAL BACKGROUNDER 41, Oct. 3, 2003; Bethany McLean & Peter Elkind, *Uneven Justice*, N.Y. TIMES, Feb. 4, 2004, at A25; *see also* Jonathan D. Glater, *The Martha Stewart Verdict: News Analysis; Stewart's Lawyers Gambled with a Minimal*

A. Current Breadth of the Article 8 Right to Privacy under Current Case Law

Most Article 8 right to privacy cases brought by employees to the European Court of Human Rights have focused on issues of employee surveillance.[152] The implications of Article 8's rights were enunciated in *Halford v. U.K.* In *Halford*, the ECHR held that a public employer's interception of phone calls to use against the public employee in a sex discrimination case was a serious infringement of the employee's Article 8 rights.[153] Specifically, the ECHR held that the Chief Constable had a reasonable expectation of privacy in telephone conversations conducted on office phones.[154] While phone tapping and other forms of interception of telephone conversations represent a serious interference with the Article 8 right to a private life, the ECHR has acknowledged that the Convention does not necessarily afford adequate safeguards against possible abuses.[155] None of the cases have extended the Article 8 right to privacy to public employees terminated for private, albeit "immoral," actions.

B. Accepted Restrictions on Public Service

Judicial interpretation of other Convention rights are illustrative of the limitations imposed by the courts on the rights conferred by Article 8. The Convention recognizes, and the ECHR has upheld, public employee rights to freedom of thought, conscience, and religion,[156] as articulated in Article 9 of the Convention.[157] Even though this right is clearly articulated, significant

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Presentation, N.Y. TIMES, Mar. 6, 2004, at C1, *available at* LEXIS, News Library, Nytimes File; Floyd Norris, *The Martha Stewart Verdict: Market Place; Speculation Breaks Out as Verdict Comes In*, N.Y. TIMES, Mar. 6, 2004, at C5, *available at* LEXIS, News Library, Nytimes File.

152. *See* Ward, *supra* note 27 (discussing such recent ECHR cases as *Halford v. U.K.*, in which an employer intercepted phone calls to and from a public employee's telephone and *Franxhi v. Focus Management Consultants Ltd.*, in which an employer dismissed an employee for excessive personal use of the Internet on the job).

153. Halford v. U.K., 24 Eur. H.R. Rep. 523, 534-37(1997).

154. Ewing, *supra* note 78.

155. Huvig v. Fr., 12 Eur. H.R. Rep. 528, 545 (1990).

156. Naismith, *supra* note 106.

157. Article 9, Section 1 states: "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief or freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance." Section 2 states: "[f]reedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 90, art. 9.

interpretive questions remain. The most compelling question is whether the mere holding of particular beliefs or membership in religious groups or associations may be in itself incompatible with public office and justify dismissal.[158] While the Convention has clearly recognized Article 9 rights, the ECHR has been noticeably less sympathetic when individuals' personal beliefs have been expressed in positive acts or negative conduct which have had an adverse effect on the interests of others.[159] This result "is not surprising since the Convention is a secular instrument which has to be applied in a manner which will promote the democratic values which underlie it."[160]

Thus, the Court must balance the demands of a secular, democratic society with governmental commitment to values and obligations which directly conflict with the "immoral" activities of public employees.[161] When the activities of public employees have been perceived as presenting a "danger" to democratic society, the ECHR has shown little remorse at vitiating Convention rights.[162] The Court has generally been unenthusiastic about protecting Convention rights when a public employee's immoral activity has gone beyond the private sphere of his or her life and begun to impinge directly on the interests of others.[163] Employee terminations are generally upheld when the rights of others, including those of the employer, are infringed upon.[164] In this vein, a priest of a state church was fired for failing to perform his job duties in protest of a recently passed abortion statute.[165] The ECHR ruled that it was the priest's failure or inability to perform his duties rather than his views or personal activities that led to his dismissal.[166]

All employers must terminate employees "in accordance with the law,"[167] even if the employee is terminated for "immoral" activities. Under Article 8, Section 2, the expression "in accordance with the law" requires that the impugned measure should have some basis in domestic law and be known to the aggrieved individual.[168] Typically, an applicable law permitting the termination must be in force in a given legal system, either as common law, case law, or statutory law.[169] The employer's termination must be compatible with the rule of law.[170] The relevant law should also be accessible to the person implicated, who must

158. Naismith, *supra* note 106.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. Naismith, *supra* note 106.
165. *Id.* (*citing* Knudson v. Norway, No 11045/84, decision of 8/3/85, DR 42).
166. *Id.*
167. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 90, art. 9, § 2.
168. Huvig v. Fr., 12 Eur. H.R. Rep. 528, 541 (1990).
169. *Id.* at 541-42.
170. Naismith, *supra* note 106.

moreover be able to foresee its consequence for him.[171] Even if the termination complies with relevant law, and the individual had adequate notice, if the employer's interference with the employee's privacy rights is seen as arbitrary, the decision may be less protected. In *Huvig v. France,* the ECHR stated "there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded . . . . Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident."[172] The Court further stated that discretion cannot and should not be granted to a public employer "in terms of unfettered power . . . the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity . . . to give the individual adequate protection against arbitrary interference."[173]

V. EMPLOYEE MORALITY FIRINGS IN THE UNITED STATES AND EMPLOYEE PROTECTIONS

A. The Private Lives of Public Employees in the United States

The definition of "privacy" is as elusive and subjective as the definition of "morality." Justices Warren and Brandeis emphasized that the right to privacy is a "spiritual" value, which includes the "right to be left alone" and values "the individual's independence, dignity and integrity."[174] Privacy has also been said to include "an autonomy or control over the intimacies of personal identity."[175] Specifically, a public employee's privacy right can be defined as "freedom from unwarranted and unreasonable intrusions into activities that society recognizes as belonging to the realm of individual autonomy."[176] Privacy is not only important, but also necessary because "without it 'the pressure to live up to the details of all (and often conflicting) social norms would become literally unbearable; in a complex society, schizophrenic behavior would become the rule rather than the formidable exception it already is.'"[177] Privacy and the right to a private life are

171. Huvig v. Fr., 12 Eur. H.R. Rep. at 541. In the United States, an individual's knowledge of the law is generally irrelevant.

172. *Id.* at 543 (quoting Malone v. U.K., 7 Eur. H.R. Rep. 14 (1985)).

173. *Id.* at 543.

174. S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 832-33 (1998).

175. *Id.* at 833.

176. *Id.* Admittedly, the definition of privacy changes with the facts presented in each particular circumstance. This particular definition of privacy resolves few of the issues posed by even attempting to define such a term; however, it does provide a minimal framework within which the topic may be analyzed.

177. Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 969 (1989) (quoting R. MERTON, SOCIAL THEORY

the preconditions of personhood and make one's own existence his or her own.[178]

The at-will employment doctrine gives private employers the right to fire a non-union, at-will employee for almost any reason that is not protected in a workplace anti-discrimination statute.[179] Thus, the privacy rights enjoyed by an employee depend foremost on whether an employee is employed by a public or private agency.[180] Public employees enjoy far greater privacy rights than private sector employees.[181] This additional protection is implicitly extended to public employees by the U.S. Constitution.[182] One of the U.S. Constitution's main protections for individuals arises from governmental restrictions; the founders recognized the government as the greatest threat to personal autonomy, rather than citizens or private entities.[183] While a public employer cannot restrict the constitutional rights of the public at large in the name of efficiency, such as when a state invokes its police power, such restrictions may be appropriate when placed on someone whom the government is employing to achieve its goals efficiently and effectively.[184]

U.S. public employees surrender many privacy rights, both during and following the duration of their public employment.[185] Due to the public trust placed in public employees, the "ethical demands on them are greater than those on an ordinary citizen."[186] Public employees "knowingly sacrifice their privacy when they pursue public office or step into the limelight."[187] This knowing sacrifice does not lessen the needs a private citizen who enters public life has for spiritual, psychological or moral needs for privacy.[188] The public, however, is entitled to relevant data to "assess the qualifications of those who seek to serve

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AND SOCIAL STRUCTURE 429 (1968)).

178. *Id.* at 973-74.

179. Prah, *supra* note 38, at 908.

180. Wilborn, *supra* note 174, at 828.

181. *Id.*

182. The U.S. Constitution does not explicitly provide a right to privacy. The U.S. Supreme Court, however, has found that the Constitution implicitly protects two kinds of privacy interests: "[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 599-600 (1977). Such basic matters as contraception, abortion, marriage and family life are protected by the Constitution from unwarranted government intrusion. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113, 153 (1973); Kelley v. Johnson, 425 U.S. 238, 244 (1976); Griswold v. Connecticut, 381 U.S. 479 (1965).

183. Wilborn, *supra* note 174, at 829.

184. Hon. Harvey Brown & Sarah V. Kerrigan, *42 USC 1983: The Vehicle for Protecting Public Employees' Constitutional Rights*, 47 BAYLOR L. REV. 619, 658 (1995).

185. Elliot, *supra* note 16, at 829.

186. Charles R. Myers, *Officership and a Code of Ethics*, 5 USAFA J. LEG. STUD. 9, 9 (1994/1995).

187. Allen, *supra* note 7, at 1165.

188. *Id.* at 1166.

them and, once they are in office, their stewardship and continued worthiness to serve."[189] Commentators have "insisted that the public has a right to know about officials' personal lives if the way they handle sexual and familial intimacy interferes with the discharge of their public duties or raises doubts about their judgment or character."[190] In theory, public employees enjoy certain constitutional protections not available to private employees that should shield them from any constitutional violation, since public employers are considered state actors and, as such, must provide employees certain constitutional protections.[191] The intimate scrutiny a public employee will be subject to depends on the kind of role the public servant fills. One scholar states that "every kind of public servant who will be deemed of sufficient policy-making or policy-implementing authority" is subject to intense personal scrutiny.[192] The scholar, however, missed a key factor that will also immediately subject a public employee to heightened scrutiny: whether that employee can potentially impact another person's family, children or life. For example, law enforcement officials' lives are certainly subject to scrutiny since they have "discretion to curtail the personal liberty of others."[193]

Despite a growing threat to privacy, no legal remedy usually exists for public employees in the United States.[194] Little or no weight has been afforded to employee privacy interests by federal or state courts.[195] The quagmire facing employees seeking privacy may best be stated: "[n]either Congress nor state legislatures have acted to fill the void and provide comprehensive statutory protection to workers. Privacy, ostensibly one of our society's most cherished values, is gradually disappearing in the workplace."[196] Employees may attempt to challenge infringements on privacy through constitutional provisions protecting the right to privacy or the Fourth Amendment search and seizure provision.[197] Even though privacy rights are considered fundamental in many circumstances,[198] employee privacy rights are not absolute and must be balanced with the rights of others.

189. Elliot, *supra* note 16, at 829.
190. Allen, *supra* note 7, at 1165.
191. *Id.*
192. Elliot, *supra* note 16, at 826.
193. *Id.* at 829.
194. Wilborn, *supra* note 174, at 827.
195. *Id.*
196. *Id.* at 828.
197. *Id.* at 866-67.
198. Brenda Sue Thornton, *The New International Jurisprudence on the Right to Privacy: A Head-on Collision with Bowers v. Hardwick*, 58 ALB. L. REV. 725, 728 (1995).

B. The Importance of Public Trust and Accountability for Efficient and Safe Public Service

The notion prevails that "[g]ood government requires good people in government."[199] In the *Federalist Papers*, James Madison stated the fundamental principle that should guide public sentiment about ethics in government: "[t]he aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and the most virtue to pursue the common good of society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold the public trust."[200] John Stuart Mill's philosophy provides an individualist juxtaposition to Madison's call for the common good: "[a] government cannot have too much of the kind of activity which does not impede, but aids and stimulates, individual exertion and development. The mischief begins when, instead of calling forth the activity and powers of individuals . . . it makes them work in fetters . . . a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes."[201]

In modern society, the challenges and nature of public employment have drastically changed since Madison's statement of ideal public service. The role of government as a regulator, tax-gatherer and subsidizer has expanded exponentially in the United States.[202] Citizens and businesses are increasingly affected by the increased governmental role in our daily business and personal lives, whether through policies, executive decisions or administrative rulings.[203] As the government expands its role in citizens' daily lives, the responsibility and importance of trustworthy public servants to carry out more government activity is necessary. Attention to employee misconduct as it exposes the public to harm is a requirement of "good democratic self-government."[204] However, the fundamental nature of the fiduciary duty of the public servant has remained unchanged. The public employee is a trustee of the public's will and, as such, acts for the benefit of others. By assuming this duty, the public employee must "avoid any situation that would or might cause trust decisions to be influenced by anything other than the welfare of the beneficiaries. Because public officials have undertaken to act for the common good, they too must exclude conflicting concerns."[205] The importance of the community and what is best for the community requires our

199. Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y.L. SCH. L. REV. 177, 181 (1995).

200. THE FEDERALIST NO. 57 (James Madison).

201. JOHN STUART MILL, ON LIBERTY 113 (Elizabeth Rapaport ed., Hackett 1978) (1859).

202. Archibald Cox, *Ethics in Government: The Cornerstone of Public Trust*, 94 W. VA. L. REV. 281, 295 (1992).

203. *Id.*

204. Allen, *supra* note 7, at 1167.

205. Cox, *supra* note 202, at 287.

public servants to "base their conduct and decisions exclusively upon an appraisal of the common good. Both a free society and a democratic government require a high degree of public confidence in the integrity of those chosen to govern."[206]

When the moral constraints placed on a public servant's personal life become so onerous that good citizens refuse to serve, these moral constraints begin to foster bad government.[207] The "bottom line is . . . regulations must encourage, not discourage, good citizens from serving in government. If they do not do that, they have failed and belong in the rubbish heap."[208] Public opinion of public government and employers currently appears bleak from all reports. Civic republicans argue that "if we are to avoid becoming disenfranchised with and alienated from our democracy, we must be permitted to demand leaders who exemplify our substantive constitutive values."[209] The shameful records of public officials has also been attacked: "[w]hether measured by the rank or the sheer numbers of officials who have come under ethical suspicion and criminal investigation the amount of sleaze is awesome."[210] It is estimated that seventy-three percent of the public believes that the government is not concerned with the common good, and over half of the public believe their elected state officials are corrupt.[211] In response to this, the governing attitude on the U.S. Supreme Court is that the law may, and in fact should, be involved in the enforcement of morality.[212] Justice Scalia believes that legislating morality is not just an exercise in majoratarian power but that it can "preserve" and "enforce" traditional morality and "prevent" it from deteriorating.[213]

C. Defining Harm to the Public

Harm to the public may be defined as the harm that occurs to the

206. *Id.* at 288.

207. Davies, *supra* note 199, at 181. For example, retired General Colin Powell considered running for President of the United States in 1996. Soon after news stories broke detailing his wife's depression and use of drugs to treat the depression, Powell proclaimed he would not run for President, citing concerns about his privacy and lack of passion for political combat on personal matters. John M. Broder, *Powell Won't Run in 1996*, L.A. TIMES, Nov. 9, 1995, at A1, *available at* 1995 WL 9843761. One columnist claimed that "what stopped Colin Powell from running was a surfeit of natural Tagamet and Maalox: When it came to sacrificing privacy for power- to suffering indignity for a place at history's table- Powell had not nearly enough of that gnawing political motivator called 'fire in the belly.'" William Safire, *This Year's Cuomo*, N.Y. TIMES, Nov. 9, 1995, at A29, *available at* LEXIS, News Library, Nytimes File.

208. Davies, *supra* note 199, at 181.

209. Allen, *supra* note 7, at 1176-77.

210. Cox, *supra* note 202, at 281-82.

211. *Id.* at 282.

212. Strong, *supra* note 51, at 1309.

213. *Id.* at 1309.

observers of the actor's "attractive immoralities."[214] Attractive immoralities are those actions that "have some inherent positive value to the actor but that have either no tangible negative results to offset the immediate benefit to the actor or a sufficiently low level of negative results so as to justify the immorality in the mind of the actor."[215] Because the actor has no disincentive to avoid attractive immoralities, the state intervenes to protect "uncorrupted observers who might learn from the initial actor's bad example."[216] Under this approach, the state determines what is best for the observer.[217] This approach has been used in cases where public school teachers exhibit an attractive immorality, thereby influencing an impressionable student-observer who is unable to decide what is best for herself under the state's watchful moral arm.[218] As John Stuart Mill declared, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. . . . To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else."[219]

Other legal scholars have used alternate definitions of public harm to permit political will to have ultimate jurisdiction over morality. Noted English legal scholar Lord Devlin argued that "society may act to protect and perpetuate popular morality not because the breach of moral principle is an injury to the individual (for many immoral acts are practices by consenting adults), but because society as a whole suffers harm."[220] According to Devlin, "there is disintegration [in a society] where no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration."[221] Devlin supported morality as a means of preventing the collapse of society.[222] The most important distinction when defining public harm is discerning actual negative impact from threatened impact. This distinction is crucial because courts may require actual proof of negative impact or harm as opposed to the mere possibility of public harm or negative impact.[223] Regardless, the precise meaning of harm is subject to great dispute and a very fine line exists between harmful and harmless.

D. Firing "Immoral" Public Employees in the United States

Where clear public harm results from an employee's "immoral" and

214. *Id.* at 1284.

215. *Id.* Inherent positive value to the actor might include pleasure, profit or even revenge.

216. *Id.*

217. *Id.*

218. Strong, *supra* note 51, at 1284.

219. MILL, *supra* note 201, at 9.

220. Strong, *supra* note 51, at 1295.

221. *Id.*

222. *Id.*

223. Dworkin, *supra* note 14, at 88.

illegal actions, courts have not hesitated to uphold a public employer's decision to terminate the employee for his or her reprehensible acts. In *Colorado Springs v. Givan*, the interplay between public harm and pure morality judgment is evident.[224] The city employee, Givan, pled guilty to incest with his adopted daughter.[225] Givan was fired from his supervisory role in the City's utility department because his continued employment would "reflect on the moral character of every City employee by association" and the nature of his crime would "affect the morale of his subordinates and other employees."[226] The court held that Givan would undoubtedly injure or jeopardize the public employer's legitimate business interests, had caused public harm and had the propensity to cause further direct public harm.[227] Although Givan's conduct was morally reprehensible, the Court painstakingly showed that the conviction for his crime would also render him unfit for his job and cause public harm.[228]

Public school teachers as a group have long been faced with morality firings for purely "immoral" acts, even without the presence of any illegality. Public schools are taking increasing responsibility for teaching children morals and ethics. Teaching these complex notions falls to the nation's teachers, which in turn leads to in-depth evaluations of teachers' own characters.[229] Teachers are regarded as exemplars "whose words and actions are likely to be followed by the students coming under [their] care and protection."[230] While federal laws protect a teacher's personal phone calls at work and restricts access to her personnel file, few laws or courts have uniformly protected the teacher's off-duty privacy.[231] In fact, teachers have been subjected to dismissal for pregnancy, sexual orientation, sexual relationships outside of marriage and living with significant others outside of marriage.[232]

Although a teacher's "immoral" behavior typically occurs away from the learning environment, school employers usually claim that harm to the public in general, and students in particular, is caused by the immoral conduct itself.[233]

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224. 897 P.2d 753 (Colo. 1995).

225. *Id.*

226. *Id.* at 756.

227. *Id.*

228. *Id. See also* Hughes v. Whitmer, 714 F.2d 1407, 1422-23 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984) (holding that a "reasonable possibility of adverse harm will generally be enough to invoke the full force of judicial solicitude for a police department's internal morale and discipline); Matherne v. Wilson, 851 F.2d 752, 761 n. 53 (5th Cir. 1998) (partially quoting Gonzalez v. Benavides, 774 F.2d 1295, 1302 (5th Cir. 1985), *cert. denied,* 475 U.S. 1140 (1986)) (stating the employer's burden to justify its actions "may be as light as merely proving that the employer 'reasonably believed the employee's speech was likely to disrupt its operations.'").

229. Fulmer, *supra* note 57, at 271.

230. *Id.* at 275.

231. *Id.* at 281.

232. *Id.* at 272.

233. *Id.* at 271.

Employers steadfastly claim that even if no child is present, exposed or ever hears of the teacher's "immoral" behavior, the harm still occurs. In fact, six state statutes recognize "immorality" as grounds for a public school employee's dismissal, including Alaska, California, Georgia, Missouri, Tennessee and West Virginia.[234] Even with statutory guidance on "immorality," it is unclear what conduct is required in order to terminate a teacher on these grounds or if a student must actually be harmed or know of the conduct to merit the teacher's subsequent termination.[235] This conundrum is best described as "the imperfect human teacher hold[ing] his breath waiting to see whether other imperfect humans will determine that his conduct has become immoral."[236] What is judged to be "immoral" depends on the community, yet most courts agree that the conduct must adversely affect the teacher's performance to merit termination.[237]

The moral impositions teachers bear from public employers is evidenced in *Thompson v. Southwest School District*. Ms. Thompson taught in the same school district for over eleven years.[238] She was first suspended and then terminated for living with a man she had not married, but planned to marry in the future.[239] Even after marrying the man she lived with, Thompson was suspended from her teaching position because of the charge of "immorality" brought against her by the school board.[240] School board members indicated that her conduct was "immoral" based on the board members' interpretation of the Bible and their strong personal convictions.[241] Even though Thompson's conduct was unknown to any of her elementary school pupils or even anyone in the community, the Board still felt it jeopardized her ability to perform as a teacher.[242] The *Thompson* Court clarified that:

> [T]he [school] board's power to dismiss and discipline teachers is not merely punitive in nature and is not intended to permit the exercise of personal moral judgments by board members. Rather, it exists and finds its justification in the state's legitimate interest in protecting the school community from harm, and its exercise can only be justified upon a showing that such harm has or is likely to occur.[243]

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234. ALASKA STAT. § 14.20.170(2) (Michie 1999), CAL. EDUC. CODE § 44434 (West 1999), GA. CODE ANN. § 20-2-940(A)(4) (2000), MO. REV. STAT. § 168.114(2) (1999), TENN. CODE ANN. § 49-5-501 (1999), and W. VA. CODE ANN. § 18A-2-8 (Michie 2000).

235. Fulmer, *supra* note 57, at 272.

236. *Id.* at 273.

237. *Id.* at 274.

238. Thompson v. Southwest Sch. Dist., 483 F. Supp. 1170, 1173 (D. Mo. 1980).

239. *Id.*

240. *Id.*

241. *Id.* at 1174.

242. *Id.*

243. *Id.* at 1181.

The Court considered many factors in determining whether Thompson's conduct amounted to harm rendering her unfit to teach. Factors included: the age and maturity of the students; the likelihood that Thompson's alleged immoral conduct would have a negative impact on the students or teachers; the degree of anticipated adversity; the recentness of the conduct; the likelihood of repetition of the alleged immoral conduct; any extenuating or aggravating circumstances surrounding her conduct; her underlying motives for the conduct; and whether the conduct would have a chilling effect on the rights of Thompson or other teachers.[244] Even though the Court ultimately reversed Thompson's suspension, her reputation and ability to teach were damaged.[245]

Just as being a teacher may require a "moral" character, there are unique characteristics and requirements of individuals who serve as publicly employed police officers.[246] More deference to the public employer in preserving the police department's morale and integrity may be allowed than in other contexts.[247] This may be attributed to the fact that "[t]here is a particularly urgent need for close teamwork among those involved in the 'high stakes' field of law enforcement."[248] The burden public safety employees bear with respect to their personal activities increases because of the higher amount of authority and public accountability entailed in serving as an officer.[249] In fact, some courts have considered a mere reasonable possibility of adverse harm to the public to be sufficient to terminate a police officer's employment.[250]

Police officers and police department employees have been fired for myriad "immoral" actions and have generally been afforded very little protection.[251] In *Briggs v. North Muskegon Police Department*, a police officer was discharged from the police department for cohabitating with a married woman who was not his wife.[252] The Chief of Police found that his conduct was

244. *Thompson*, 483 F.Supp. at 1182.

245. *Id.* at 1181.

246. Brown & Kerrigan, *supra* note 184, at 654.

247. *Id.*

248. *Id.*

249. *Id.* at 655.

250. *Id.* at 654.

251. Police officers may be held to the same high moral and ethical standards by the public as military officers are held to under U.S. military law. The moral dimension to military service in the United States is evidenced by the flexibility of the military justice system to "recognize the judgment of the military community 'concerning that which is honorable, decent and right.'" Under military law, the offense of adultery or wrongful sexual intercourse can be punished by court-martial or under code sections which penalize all conduct unbecoming an officer. William T. Barto, *The Scarlet Letter and the Military Justice System*, 1997 ARMY LAW. 3, 5-8 (1997) (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).

252. Briggs v. City of North Muskegon Police Dep't, 563 F. Supp. 585 (D. Mich. 1983).

unbecoming of a police officer.[253] The Court, however, did not accept the City's reasoning that the officer's off-duty cohabitation with the married woman, despite the officer's legal separation from his wife, was likely to cause a loss of credibility with citizens.[254] Greater latitude was not given to the public employer to restrict the activity of the police officers than the City would have to restrict the rights of other public employees or citizens, despite a claimed need for maintenance of public respect for police officers. [255] The Court determined the actual reason for the officer's termination was that his "conduct did not conform with what the [public employer] perceived to have been the morals of the community."[256] The Court also declared that "constitutional rights should not depend on popularity polls or the whims of public opinion."[257] Despite a compensatory damages award, Briggs was never reinstated to his position as a police officer.[258]

In contrast, Officer Nicholas Fabio did not enjoy the relatively progressive protection meted out by the *Briggs* Court.[259] Fabio was fired from the City of Philadelphia police force for conduct unbecoming of an officer.[260] Instead of cohabitating with another woman, Fabio engaged in an extramarital affair with another police officer's girlfriend.[261] The Court accepted the city's argument that Fabio's affair had an adverse affect on the morale and efficiency of the department, had undermined public respect and confidence in the police and that the officer demonstrated his lack of discipline.[262] The Court went on to state:

> America has the right to demand for itself, and the obligation to secure for its citizens, law enforcement personnel whose conduct is above and beyond reproach. He who fails to comport brings upon the law grave shadows of public distrust. It demands that in both an officer's private and official lives

253. *Id.* at 586.
254. *Id.* at 590.
255. *Id.*
256. *Id.* at 586.
257. *Id.* at 592.
258. Briggs was awarded $35,000 in compensatory damages; however, Briggs was not reinstated to the North Muskegon police force. This award was upheld on appeal. *Briggs*, 563 F. Supp. at 592. *See also* Briggs v. City of North Muskegon Police Dep't, 746 F.2d 1475 (6th Cir. 1984). Although no information is available, one can conjecture that Briggs' employment opportunities as a police officer were limited after this case in North Muskegon and likely in other city police departments. A police department may legally choose not to hire someone based on their litigiousness or other legal factors, and Briggs' settlement may not have amply compensated him for the future earnings and potential lost. The court may have been assigning some of the blame to Briggs since it was his voluntary, albeit legal, actions which began the entire process of termination from his employment.
259. Fabio v. Civil Service Comm'n, 489 Pa. 309 (1980).
260. *Id.* at 313.
261. *Id.* at 313-14.
262. *Id.* at 317.

> he do nothing to bring dishonor upon his noble calling and in no way contribute to a weakening of the public confidence and trust of which he is a repository.[263]

The Court's standard and subsequent outcome in *Fabio* is far more common in discharge cases against employees and highlights the differences between standards imposed and outcomes found by varying courts.[264]

VI. IMPLICATIONS OF MORALITY FIRINGS ON EMPLOYEE PRIVACY

A. Lessons Learned from U.S. Public Employee Firing Cases

To obviate a fate similar to Officer Fabio's, employees today are using many statutory and common law theories to challenge employer intrusions into their personal lives.[265] Yet the full extent of the problem is not wholly revealed by published court opinions.[266] Employees who are fired due to a public employer's moral judgment of off-duty activities often do not challenge the firings because of the psychological stress and embarrassment of revealing one's most private activities.[267] Even though U.S. courts have considered public employee firings, the Supreme Court has never expressly ruled on whether the right of privacy extends to a public employee's termination for seemingly protected, off-duty conduct.[268] In fact, the Supreme Court denied certiorari in two cases in which circuit courts held that an employee's extramarital relationship was protected by the right of privacy.[269] Justice White dissented from the denial of certiorari in

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263. *Id.* at 309.

264. *Id.*

265. Dworkin, *supra* note 14, at 48. For example, the disclosure and publicizing of private information may form the basis for a tort claim for invasion of privacy. *See* Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683 (1996) (describing the development and current case law of invasion of privacy tort claims as it pertains to employees and other public figures).

266. Shafferman, *supra* note 12, at 211.

267. *See id.*

268. Robert E. L. Richardson, Note*, A Police Officer's Legal, Consensual, Off-Duty Sexual Relationship is Not Protected by the Right of Privacy under either the Federal or Texas Constitutions:* City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996)*, 28 TEX. TECH L. REV. 187, 190 (1997).

269. *See* City of North Muskegon v. Briggs, 473 U.S. 909, 910 (1985); s*ee also* City of El Segundo v. Thorne, 469 U.S. 979 (1984). In *Thorne*, a female employee of the city police department took a polygraph in order to become a police officer. 726 F.2d 459, 462 (9th Cir. 1983). During the polygraph portion of the entrance exam, she was questioned about her sexual relationship with a married police officer and the miscarriage of the child from that relationship. *Id.* The Ninth Circuit reversed the District Court's dismissal of the

Briggs. Justice White argued that the contour of the right of privacy afforded individuals for sexual matters, specifically whether any privacy right the police officers had was overridden by the governmental interests at stake, was an important yet unresolved issue of constitutional law.[270] While many lower courts have heard such cases, very little continuity exists in the reasoning or holdings of courts in similar cases.[271] In fact, highly disparate outcomes from cases with virtually identical fact patterns constitute the norm. Typically, the courts grant public employers broad deference in making such "management decisions."[272]

Although scholars and public employees prefer the notion that immorality judged by popular feeling is not a sufficient basis for state-sanctioned punishment, it appears this is the minority view among public employers and courts.[273] From a constitutional perspective, if an individual's act is "'implicit in the concept of ordered liberty' or 'deeply rooted in this Nation's history and tradition,' it is that individual's right to engage in legal conduct in private without fear of government interference or intrusion."[274] However, as U.S. case law suggests, such is not the situation for public employees. One commentator laments that the courts have been eager to revive a time when adultery was criminal and have opened a "potential floodgate which will give public employers virtually free reign to impose their moral convictions upon their employees."[275] Generally, the more controversial the public employee's action is, the less protection it is afforded.[276]

However, the slippery slope created by public employers imposing moral judgments must be pondered: to what extent will courts permit public employer intrusions based on claims of harm? Indeed, concern with public opinion can be carried to extremes; "one might foresee a case in which one or two members of the community refused to use a public library because they did not like the librarian, perhaps because she played cards, or bet on horses, or drank alcohol on occasion, or simply had red hair."[277] Will an alcoholic employee who uses only

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plaintiff's section 1983 claim and the judgment against her on her Title VII employment discrimination claim. *Id.* at 471-72. The City's application for certiorari was also denied in *Thorne.* 469 U.S. at 979.

270. *Briggs*, 473 U.S. at 910.

271. *Id.* at 191. In his dissent in *Briggs*, Justice White notes that the "differences between the approaches of these two federal courts is evidence of broader disagreement over whether extramarital sexual activity, including allegedly unlawful adulterous activity, is constitutionally protected in a way that forbids public employers to discipline employees who engage in such activities." *Id.* at 910.

272. Dworkin, *supra* note 14, at 61.

273. Mischler, *supra* note 14, at 84.

274. Richardson, *supra* note 268, at 207.

275. *Id.* at 214.

276. Dworkin, *supra* note 14, at 62.

277. Mischler, *supra* note 14, at 84 (quoting Candace Groot Hill, Note, *Public Employees & Private Conduct: Cohabitation and the Vagueness of "Immorality,"* 23 J. FAM. L. 111, 114-15 (1984-85).

lawful products off the job be subject to termination due to his compulsion?[278] Similarly, consider an obese school teacher who abuses fast food off the job in a completely lawful yet unhealthy manner. Should such a teacher's implicit statement on weight issues to the children she teaches simply by being overweight be grounds for termination?[279] For socially disfavored activities such as excessive drinking and eating, smoking, or maintaining non-traditional relationships, courts seem clearly unwilling to protect against such invasions.[280]

B. Comparing the "Progressive" European Convention Article 8 "Protections" with U.S. Law

Convention member states and the United States continue to define the parameters of privacy and face similar struggles. Extending privacy protections to matters of sexuality appear to be particularly troublesome decisions for all parties. While the Convention established early on that "a person's sexual life was undoubtedly part of his private life of which it constitutes an important aspect,"[281] the ECHR has been faced with a barrage of privacy cases revolving around homosexuals and transsexuals.[282] Many such questions involve whether said individuals should be allowed to serve in military forces around Europe.[283] Homosexuality has also been at the forefront of political debate in the United States over the past two decades. In 1994, President Bill Clinton implemented the "don't ask, don't tell" policy in the military as a measure to protect the privacy surrounding an individual's sexuality.[284] The United States has also been

278. Dworkin, *supra* note 14, at 52.

279. *Id.* at 52.

280. *Id.* at 81-82.

281. PRACTITIONER'S GUIDE, *supra* note 75, at 330.

282. *See* Dudgeon v. U.K., 4 Eur. H.R. Rep. 149 (1981) (interpreting that Article 8 of the Convention did not allow the ECHR to require a member state to declare a civil servant would not be discriminated against on the basis of his homosexuality).

283. *See* Beck v. United Kingdom, App. No. 48535/99 (2002), *available at* http://www.echr.coe.int/Eng/Judgments.htm (holding that unfettered investigations into homosexual members of the U.K. armed forces violated the Article 8 right to a private life under the Convention, even though the policy at the time was not to allow homosexuals to serve in the armed forces); B v. France, 16 Eur. H.R. Rep. 1 (1992) (holding that a transsexual who previously served in the military as a man was entitled to Article 8 protections striking a fair balance between the general interest and the interests of the individual).

284. The "don't ask, don't tell" policy allows homosexuals to serve in the U.S. military as long as they keep their sexuality private. President Clinton initially signed a Uniformed Code of Military Justice section in 1993, which banned homosexuals from service in the military. Sodomy was banned under the Uniformed Code of Military Justice in 1993. Rowan Scarbrough, *'Don't Ask, Don't Tell' Faces Challenge; Sodomy Ruling Threatens Military Gay Ban*, WASH. TIMES, July 7, 2003, at A01, *available at* LEXIS, News Library, Wtimes File.

ensconced in the debate over the legality (or illegality) of state statutes that criminalize homosexual acts like sodomy.[285] In 2003, the Supreme Court finally determined that private, consensual, homosexual conduct within one's home cannot be punished under criminal statutes.[286]

The United States and the Convention states face vastly different domestic and international forces molding their concept of appropriate privacy protections. The changing face of Europe[287] has exposed Convention member states to the social mores of other countries, regions and people, especially given the diverse membership on the ECHR.[288] Although the United States is not a party to the Convention or the subsequent acts or treaties incorporating the Convention, there has been an international call for the United States to utilize and respect international human rights norms in U.S. jurisprudence.[289] Some scholars even suggest that the international human rights norms should be directly binding on U.S. federal and state courts.[290] However, given the isolationist bent of the American legal system, it is highly unlikely that international human rights law will ever be incorporated into U.S. jurisprudence.[291]

Despite divergent forces affecting U.S. and Convention member state law, the decision to become a public servant across any of these countries may

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285. In *Bowers v. Hardwick*, the U.S. Supreme Court upheld a Georgia statute criminalizing sodomy. 478 U.S. 186, 196 (1986). Hardwick was engaged in consensual sexual activity with another man in the privacy of his home when he was arrested and charged under the statute. *Id.* at 187. The Court held that sodomy was not a fundamental right "rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Id.* at 194.

286. In 2003, the Supreme Court essentially overruled *Bowers v. Hardwick*. Lawrence v. Texas, 123 S. Ct. 2472 (2003). Lawrence was arrested for engaging in a consensual sexual act with another man when a police officer came to Lawrence's residence on a reported weapons disturbance. *Id.* at 2475. A Texas statute criminalized the act of two persons of the same sex engaging in "certain intimate conduct." *Id*. The Court determined that a state's majoritarian morality was an insufficient basis for upholding a law prohibiting sodomy. *Id.* at 2481.

287. *See supra* Part III.A (discussing the development of the European Community and the Human Rights Act of 1998).

288. The total number of judges on the ECHR is equal to the number of member states. Forty-four countries are currently members of the Convention and so forty-four judges sit on the ECHR. Each member state nominates a judge (either a professor or a trained legal professional). Judges may be assigned to any case which is granted a hearing by the Committee of Ministers. FUNDAMENTAL RIGHTS IN EUROPE, *supra* note 69, at 17-20. Clearly, the diversity in judges and term limitations create new and unique decisions, which may not be representative of the country's policies or overarching social norms.

289 Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 805 (1990).

290. *Id.*

291. *Id.*

result in an "irretrievable loss of any reasonable expectation of privacy."[292] Currently, there is no enforceable U.S. or Convention right balancing the public's need to know and its servants' need "for a piece of their lives they can call their own."[293] While the Convention language purports to protect a right to a private life more so than any U.S. law, the results have been virtually the same for employees. Under the Convention, terminated employees must demonstrate that the respondent state has a positive obligation under Article 8 to recognize a right to hold one's job and a right to act in the manner leading to dismissal.[294] If the member state has not chosen to codify or recognize such a right, the burden falls on the employee. No cases appear in the ECHR's history where this burden has been met, so it is likely the employee will fail to meet this burden. Terminated employees in the United States bear the same burden and must demonstrate that some positive right protected their actions leading to termination. As in Convention states, employees universally fail to meet this burden.

While scholars and courts have stated time and time again that the "perceived moral stance of the community should not outweigh an individual's privacy interests," this warning is empty of protection for public employees in the United States and Convention states.[295] Qualified individuals increasingly shun public employment as a result of this lack of privacy.[296] Calls echo in the United States and Convention states for some form of accommodation to preserve "the very human needs of good men and women to preserve a space of personal privacy while still serving their fellow citizens."[297] The personal sentiment of many public employees is that the public and their public employers should "[s]tand clear . . . because I am entitled to keep some information and parts of my life to myself."[298] In fact, the difficulties public employees face may bloom into the chilling of essential speech due to employer over-regulation and employee self-censorship.[299] Although substantial duties of service and loyalty are expected of public servants, the importance of the officials' duties do not presuppose officials' rights to privacy in either the United States or in Convention states.[300]

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292. Elliot, *supra* note 16, at 830.

293. *Id.* at 831.

294. Sheffield & Horsham v. U.K., 27 Eur. H.R. Rep. 163, 191 (1998).

295. Richardson, *supra* note 268, at 190.

296. Elliot, *supra* note 16, at 826.

297. *Id.*

298. Dworkin, *supra* note 14, at 94.

299. Ross G. Shank, Note*, Speech, Service and Sex: The Limits of First Amendment Protection of Sexual Expression in the Military*, 51 VAND. L. REV. 1093, 1106 (1998).

300. *See* Davies, *supra* note 199, at 188. ("The German system imposes upon higher-level public servants (generally those with discretionary authority) substantial duties of service and loyalty; but the duty of service is legally and financially secured by an appointment for life, and the duty of loyalty requires that the government provide for welfare of the public official. The German Constitution itself guarantees these rights to public officials and enshrines in constitutional law the officials' independence in office.")

Clearly, "[c]haracter and competence are separate attributes that cannot be conflated without compromising the professional pool of talent."[301] The public's imposition of a morality ensnares public servants in the mire of an imposed code of morality without codification or explanation despite Article 8 protections and because of the lack of protections in U.S. case law.

C. Utilizing a Nexus Test to Protect Public Employee Rights and Public Employer Interests

From the lessons learned in Convention member states and the United States, development of a nexus test may be a logical next step in protecting both employers and employees. Even where courts and legislatures have protected public employee privacy rights, the decision makers have been very mindful of public employer interests.[302] In fact, "public sector employers have traditionally been granted considerable latitude in disciplining or firing employees who do not adhere to the requisite standard of morality set forth in so-called 'good conduct' statutes."[303] Discharge or demotion of a public employee may be the most appropriate action by an employer where contact and cooperation are necessary in a work environment, depending on the disruption and harm caused by the public employee.[304] The Supreme Court declared that substantial weight must be given to an employer's reasonable predictions of disruption, thereby cementing the great deference given to public employers in employee terminations and discipline.[305]

The public employer with foresight will strike a balance between the employee's privacy rights and interests and the employer's interests.[306] The public employer should tailor its intrusions into the employee's personal zone of privacy narrowly and cautiously in order to avoid costly litigation. The public employer must also carefully evaluate the conduct of an employee which might be characterized as protected speech.[307] In *Thorne v. City of El Segundo*, the court recommended the city only regulate the private sexual conduct of its employees through regulations carefully tailored to meet the city's specified needs.[308] Such asserted interests may include the promotion of order and discipline, fear of community disapproval of employees' private conduct and impedement of the

301. Mischler, *supra* note 14, at 19.
302. Dworkin, *supra* note 14, at 81.
303. Shafferman, *supra* note 12, at 197.
304. Brown & Kerrigan, *supra* note 184, at 656-57.
305. Waters v. Churchill, 511 U.S. 661 (1994).
306. Dworkin, *supra* note 14, at 81.
307. Fulmer, *supra* note 57, at 282.
308. Thorne v. City of El Segundo, 726 F.2d 459, 469 (9th Cir. 1983) ("the City must show that its inquiry into appellant's sex life was justified by the legitimate interests of the police department, that the inquiry was narrowly tailored to meet those legitimate interests, and that the department's use of the information it obtained about appellant's sexual history was proper in light of the state's interests").

employee's ability to function effectively.[309] Several factors could be used to determine whether the public employer or the public itself has suffered enough harm in order to necessitate firing an employee. Factors include: the position of the employee in the organization; the size of the organization; the size of the community; the nature of the organization or entity; a conflict of interest; public or private conduct; effect on on-duty performance; effect on co-workers; illegal conduct; and moral reprehensibility.[310] Although courts have upheld decisions based merely on the public employer's view of the morality of the employee's decisions rather than on the public harm the employee's action had or would have had, the aforementioned standard provides a more objective standard which would more often pass muster.[311]

Furthermore, a public employer must at least have a "legitimate interest" before invading an employee's protected zone of privacy.[312] Simply stated, public employers should be "neutral about the morality of conduct that does not harm others."[313] Courts have repeatedly noted that public employers have the right to invade an employee's privacy when the public employer can show a legitimate business or employment reason.[314] In other words, a public employer's invasion of personal privacy and moral autonomy is only justified when there is a nexus between the public employee's activity and the employee's job performance.[315] Such a nexus might include a conflict of interest, an employee in a sensitive or confidential management position, and a personal, private or social relationship that endangered, injured or jeopardized the employer's legitimate business interests.[316] It does not matter if the conduct is illegal or legal.[317]

The U.S. Supreme Court has proclaimed some support for this nexus or legitimate interest test. In his dissent from the Supreme Court's denial of certiorari in *Hollenbaugh v. Carnegie Free Library*,[318] Justice Marshall expressed concern regarding morality regulations and proposed just such a balancing test. In *Hollenbaugh*, a public library dismissed a librarian and a janitor for living in "open adultery."[319] Justice Marshall stated that disciplinary regulations for public employees should govern only that behavior related to actual job performance.[320] He characterized the disciplinary action as an "unwarranted governmental

309. Shafferman, *supra* note 12, at 208.
310. Dworkin, *supra* note 14, at 84.
311. *Id.* at 47.
312. Richardson, *supra* note 268, at 189.
313. Dent, *supra* note 62, at 15.
314. Dworkin, *supra* note 14, at 81.
315. Mischler, *supra* note 14, at 6.
316. Dworkin, *supra* note 14, at 81.
317. Richardson, *supra* note 268, at 199.
318. 439 U.S. 1052 (1978) (Marshall, J., dissenting).
319. *See* Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328, 1333 (W.D. Pa. 1977), *aff'd*, 578 F.2d 1374 (3rd Cir. 1978), *cert. denied,* 439 U.S. 1052 (1978).
320. *Hollenbaugh*, 439 U.S. at 1052 (Marshall, J., dissenting).

intrusion into . . . privacy [permitting] a public employer to dictate the sexual conduct and family living arrangements of its employees, without a meaningful showing that these private choices have any relation to job performance."[321] While the library as a public employer has a permissible interest in providing safe, high quality public services, regulating the employee's living arrangements or sexual relationships was not adequately related to that interest since there was no proof it affected the public, harmed the public or impeded the employees' abilities to do their jobs.[322] There have been scholarly calls for the Supreme Court to "explicitly acknowledge that privacy is a fundamental right based on personal autonomy, and that its scope covers private sexual activities."[323] The Supreme Court has not followed Justice Marshall's suggestions and has remained silent in this area.

U.S. court decisions emphatically support public employer decisions to punish public employees for their legal, private conduct if some element of public harm is evident.[324] Although advisable, it does not appear vital that a public employer have a policy, regulation or code provision condoning or authorizing such punishment.[325] Three states in the entire United States – North Dakota, New York, and Colorado – currently have a statute specifically protecting all legal off-hours employee activity, as long as the activities do not pose a threat to the employer's legitimate business interests.[326] A clear policy that provides ample warning of the public employer's expectations and the potential ramifications of an "immoral" action may alleviate some unnecessary lawsuits. The employer must also carefully balance its interest in recruiting and retaining talented, diverse employees who will best meet the organization's needs.[327] Public employers face an increasingly competitive global market and are vying for talented employees.[328] The employer must "create an environment within their organization that will attract the best new talent and will make it possible for employees to make their fullest contribution."[329] An environment in which the employee has a "nagging fear of censure"[330] by the public employer or state is not likely to create such an environment.

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321. *See Hollenbaugh*, 436 F. Supp. at 1333.

322. *Hollenbaugh*, 439 U.S. at 1052 (Marshall, J., dissenting).

323. Shafferman, *supra* note 12, at 213.

324. Richardson, *supra* note 268, at 214.

325. *Id.* at 187.

326. Jennifer L. Dean, Note, *Employer Regulation of Employee Personal Relationships*, 76 B.U. L. REV. 1051, 1067 (1996).

327. Dworkin, *supra* note 14, at 96.

328. *Id.*

329. *Id.*

330. Shafferman, *supra* note 12, at 213.

VII. CONCLUSION

Neither the United States nor the European Convention grant an absolute right to privacy,[331] yet both share the principle of democratic accountability in public service and the ensuing constraints.[332] All public employers must be careful not to transform the anachronistic notions of unacceptable social conduct into law.[333] The United States is something of a developing country in the area of labor and employment law;[334] however, even under Europe's progressive human rights enactments like the Convention and the European Human Rights Act of 1998, public employees have gained little, if any, substantive rights to a private life. The balancing of the employee's privacy engaging in off-duty activities and the public employer's need for supervision, control and the efficient service of the public have led both the United States and many European member countries to continue recognizing employer's rights and interests as paramount. Public trust in public organizations must be sustained, but fundamental constitutional or Convention rights should not rise and fall based solely on the prejudices of a few.[335] Public employees should "be the kind of people whose vices – sexual or otherwise – do not amount to abuse of power, corruption, and injustice."[336] Although some judges have held that courts are not "at liberty to bind society to the moral judgments of its ancestors,"[337] it appears clear that courts are at liberty to bind public employees to the moral judgments of the public employer and the community despite outdated beliefs and possibly unconstitutional intrusions into an employee's privacy. Although many states have some form of off-the-job privacy protection laws, the protection of these laws does not apply to the public employees of the state in many instances, especially if their activities have any possible on the job impact.[338]

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331. *Id.* at 204.

332. Morris, *supra* note 129.

333. Briggs v. City of North Muskegon Police Dep't, 563 F. Supp. 585, 590 (D. Mich. 1983).

334. Thomas C. Kohler, *The Employment Relation and Its Ordering at Century's End: Reflections on Emerging Trends in the United States*, 41 B.C. L. REV. 103, 104 (1999). According to Kohler, "[d]espite our renown for relatively abstemious public intervention in workplace relationships and our general preference for private ordering, the previous ten to fifteen years have been a period of unusual legislative and judicial activity." *Id.* He cites two key developments accountable for the U.S. status as a developing country in employment and labor law: the decline of unions and rise of collective bargaining and the employee rights revolution characterized by growth of legally cognizable individual rights which have only developed in the past thirty years.

335. Richardson, *supra* note 268, at 209.

336. Allen, *supra* note 7, at 1179-80.

337. Richardson, *supra* note 268, at 212.

338. Dworkin, *supra* note 14, at 52-53. Although public employee conduct may be more closely scrutinized than private employee conduct, both public and private employees face many of the same challenges in protecting one's privacy. The principles of law and

Public employees who seek privacy are not able to take steps that the ordinary citizen seeking privacy can take in order to avoid unwanted intrusions. Likewise, courts are unlikely to protect such employees.[339] It therefore becomes paramount that any employee privacy protections emanate from the employer. Employers should adopt a consistent standard of what constitutes business necessity and public harm to justify employee termination.[340] Protecting employee privacy is not only good public policy but also is good business practice.[341] A uniform standard by which to judge public employer's interference with off the job actions and activities embodies a good business practice in this increasingly litigious era.[342] This standard would put employees on notice of what immoral conduct would be grounds for termination. This is especially important since "[o]ur judicial system has always insisted that laws give persons of ordinary intelligence an opportunity to know what conduct is prohibited so as to avoid that type of conduct."[343] The standard would also provide an objective standard which could be used in court proceedings instead of forcing the court to adopt a wholly different standard, usually involving extended litigation and appeals. By requiring the employer to show a detrimental connection or nexus to the public or the public employer from the public employee's off-the-job actions, employees, employers and the public will all be protected from needless harm.[344]

The public employer's selfish concern for its public image, rather than protecting the public from harm generally or specifically, should not be the driving force behind employee firings for off-the-job conduct.[345] Restraints on moral majoritarianism are vital since legislation cannot "be justified on grounds that deny the fundamental equality of human beings, or that reflect contempt for fellow citizens, or that attempt to humiliate them."[346] Politically or socially unpopular yet benign behaviors by public employees should not be denigrated unless the public harm survives the nexus test referred to in Section VI, B.[347] The talented and innovative employees that public employers manage to attract should focus unrelenting attention on their core public responsibilities, and not be

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society governing private employee privacy are applicable to public employees despite the wide disparity in employer and client.

339. Allen, *supra* note 7, at 1166.

340. Dworkin, *supra* note 14, at 84.

341. *Id.* at 54. The arguments describing the business benefits of protecting private-sector employee privacy also apply to public-sector employers and employees. Protecting employee privacy may lead to more employee allegiance to an employer who is perceived as treating the employee well, may lead to a more diverse and talented pool of applicants and may increase employee productivity.

342. *Id.* at 98.

343. Fulmer, *supra* note 57, at 274.

344. Dworkin, *supra* note 14, at 84.

345. Mischler, *supra* note 14, at 17.

346. *Id.* at 45 (quoting Cass R. Sunstein, *One Case at a time: Judicial Minimalism on the Supreme Court*, 25 (1999)).

347. *Id.* at 18.

consumed with worry that their off-the-job sexual misconduct or impropriety will lead them to the unemployment line.[348] Regardless of whether we approve of an employee's off-duty choices, an individual's choices regarding their private life deserve more than "token protection."[349] The ultimate public concern should be actual job performance,[350] not morality. Public employers who seek the most qualified candidates should embrace the "nexus test" in order to preserve rights and protect the public simultaneously.[351]

348. Allen, *supra* note 7, at 1179.
349. Shafferman, *supra* note 12, at 206.
350. Mischler, *supra* note 14, at 19.
351. *Id.* at 81.