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## SEXUAL ORIENTATION AND THE PUBLIC SCHOOL TEACHER

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Who shall teach our children? Society has long debated this question, perhaps agreeing only on this simple truth: "Who teaches matters."<sup>1</sup> Education is important<sup>2</sup> because, as Tyack and Cuban write, the "debate over education" is a "potent means of defining the present and shaping the future"; it is "one way that Americans make sense of their lives."<sup>3</sup> And standing at the crossroads of education is the classroom teacher.

Every state in America establishes its own criteria for public school teacher certification, effectively outlining the knowledge, skills, and attributes required for the teacher to stand in front of a class. These requirements are in place because it is largely through the efforts of classroom teachers that the goals of education are met or thwarted. A teacher's ability to convey knowledge, to teach skills, to challenge, and to inspire students should determine who should teach our children.

Unfortunately, the nation's gay, lesbian, bisexual, and transgendered (GLBT)

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<sup>1</sup> SUSAN MOORE JOHNSON, *TEACHERS AT WORK: ACHIEVING SUCCESS IN OUR SCHOOLS* xiii (1990).

<sup>2</sup> *Williams v. Bd. of Trs. of Stanton Common Sch. Dist.*, 173 Ky. 708 (1893) ("The common school, however humble its surroundings or deficient its curriculum, is the most valuable public institution in the state . . .").

<sup>3</sup> DAVID B. TYACK & LARRY CUBAN, *TINKERING TOWARD UTOPIA: A CENTURY OF PUBLIC SCHOOL REFORM* 42 (1995).

teachers are often judged by different standards than those that apply to other teachers. In staffing decisions, the consistent use of quality teaching practices, the ability to inspire students, and the tenacity to believe in students and to help them achieve more than they thought possible too often take a back seat to concerns about the private sexuality of the teacher. In fact, only thirty years ago, California's electorate voted on Proposition 6, a law that would have prohibited gay and lesbians from teaching in the public schools and would have banned teachers and school employees "from saying anything positive about homosexuality on school grounds."<sup>4</sup> While Proposition 6 failed in 1978 in California, Arizona more recently passed a state law prohibiting any instruction that "[p]ortrays homosexuality as a positive alternative life-style."<sup>5</sup> The issue of sexual orientation, part of a larger culture war in the United States, is played out in the nation's schools in disputes about what students are taught in the school curriculum<sup>6</sup> and in student club activities<sup>7</sup> and for teachers in their employment as professional educators.

The U.S. Supreme Court noted that professional educators serve as role models for students.<sup>8</sup> Following from this assertion, school officials have often justified their discrimination against GLBT teachers by arguing that GLBT teachers do not serve as proper role models for students. For example, Willett noted several varieties of harm that have been advanced to justify the dismissal of teachers who have engaged in alleged immoral acts including, "[t]hat the teacher's sexual orientation, even if not revealed publicly, will be subconsciously perceived and internalized by his or her students."<sup>9</sup> This type of discrimination against GLBT teachers has been challenged under the Fourteenth Amendment's Equal Protection Clause, Title VII of the Civil Rights Act of

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<sup>4</sup> Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 TULSA L. REV. 95, 126 (2003) (providing a review of legal responses to the sexual orientation of America's citizens and the history of sodomy laws).

<sup>5</sup> ARIZ. REV. STAT. ANN. § 15-716 (C2) (2009).

<sup>6</sup> See RICHARD FOSSEY, TODD A. DEMITCHELL & SUZANNE ECKES, *SEXUAL ORIENTATION, PUBLIC SCHOOLS, AND THE LAW* 91-101 (2007) (discussing litigation about school curricula that address sexual orientation).

<sup>7</sup> See Todd A. DeMitchell & Richard Fossey, *Student Speech: School Boards, Gay/Straight Alliances, and the Equal Access Act*, 2008 BYU EDUC. & L.J. 89 (2008) (discussing litigation over the legal right of gay and lesbian student groups to be recognized in the public schools).

<sup>8</sup> *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979) ("[A] teacher serves as a role model for [his/her] students, exerting a subtle but important influence over their perceptions and values."). See also *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952) ("A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live.").

<sup>9</sup> Robert E. Willett, Comment, *Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 CAL. L. REV. 1442, 1445 (1973).

1964, and under state statutes that grant specific protections to GLBT public employees.<sup>10</sup> However, only about twenty states have such statutes, and, under the Equal Protection Clause, school officials only need a rational reason to treat GLBT educators differently.<sup>11</sup> Thus, GLBT teachers continue to face discrimination in public schools throughout the country. "The history of the climate for gay and lesbian teachers reveals how contentious being gay and being a teacher has been and still is."<sup>12</sup> Senator Hillary Clinton, in the concession speech she gave after running to be the Democratic Party's nominee for President in 2008, stated that "[t]here are no acceptable limits, and there are no acceptable prejudices in the 21st century . . ."<sup>13</sup> Nevertheless, prejudice against GLBT teachers is still an accepted practice in the 21st century. For example, Justice Brennan posed the question that focuses the analysis in his dissent for the denial of certiorari in the dismissal of a bisexual school counselor. He wrote, "[M]ay a State dismiss a public employee based on her bisexual status alone?"<sup>14</sup>

This article will explore the legal status of non-heterosexual teachers as it has evolved since the early twentieth century. We will first review the history of the concept of exemplar as the standard for evaluating a teacher's sexual status,<sup>15</sup> the development of nexus as an alternative legal theory, and the application of both theories to gay and lesbian teachers. Next, the article will address legal protections for gay and lesbian teachers provided by Title VII of the Civil Rights Act of 1964, the Equal Protection Clause, the notion of privacy under the Fourteenth Amendment, and state anti-discrimination statutes. Finally, we conclude with recommendations for how teachers can be protected so that their sexual orientation does not become an automatic trigger that drives them out of the profession.

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<sup>10</sup> See, e.g., *Burton v. Cascade Sch. Dist. Union High Sch. No. 5*, 353 F. Supp. 254 (D. Or. 1973); *Acanfora v. Bd. of Educ.*, 491 F.2d 498 (4th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974).

<sup>11</sup> See, e.g., *Stimler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir. 1997); *Nabozny v. Podlesny*, 92 F.3d 446, 456–58 (7th Cir. 1996).

<sup>12</sup> JANNA M. JACKSON, *UNMASKING IDENTITIES: AN EXPLORATION OF THE LIVES OF GAY AND LESBIAN TEACHERS* 8 (2007). See also *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) (recognizing that "homosexuals have suffered a history of discrimination").

<sup>13</sup> Senator Hillary Rodham Clinton, 2008 Democratic Presidential Primary Concession Speech (June 7, 2008), available at [http://www.nytimes.com/2008/06/07/us/politics/07text-clinton.html?pagewanted=3&\\_r=](http://www.nytimes.com/2008/06/07/us/politics/07text-clinton.html?pagewanted=3&_r=).

<sup>14</sup> *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1011 (1985) (Brennan, J., dissenting).

<sup>15</sup> See *Bd. of Educ. v. Wood*, 717 S.W.2d 837, 839 (Ky. 1986) ("The school teacher has traditionally been regarded as a moral example for the students.").

## I. EXEMPLAR AND NEXUS

*Exemplar*

Teachers have long been considered holders of a special position of trust and responsibility because of their relationship with the community's children. Consequently, "[s]ince the early history of this country, the public has been far more restrictive in its expectation for the conduct of teachers than for the conduct of the average lay citizen."<sup>16</sup> This unique position ultimately translated into a legal concept termed "exemplar."<sup>17</sup> Teachers, as exemplars, are held to a higher standard of personal conduct than the average citizen.<sup>18</sup> Because of their relationship to students, teachers were and still are considered role models. Their actions away from school are judged as if their conduct would set an example for how students should act.

The conduct of American schoolteachers has always been a matter of public concern.<sup>19</sup> While teachers were required to be good employees, they were also required to be good, moral, and upstanding citizens.<sup>20</sup> Thus, the teacher's life was scrutinized inside the classroom as an employee and watched over outside the classroom as a role model for his or her students. This obligation of exemplar "rests on the belief that students, at least in part, acquire their social attitudes and behaviors by copying those of their teachers."<sup>21</sup> Consequently, because teachers are mandatory role models conduct in their private lives can

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<sup>16</sup> FLOYD G. DELON, *LEGAL CONTROLS ON TEACHER CONDUCT: TEACHER DISCIPLINE 2* (1977).

<sup>17</sup> Jason R. Fulmer, *Dismissing the "Immoral" Teacher for Conduct Outside the Workplace—Do Current Laws Protect the Interests of Both School Authorities and Teachers?*, 31 J.L. & EDUC. 271, 276 (2002).

<sup>18</sup> Todd A. DeMitchell & Terri A. DeMitchell, *The Law in Relation to Teacher Out of School Behavior*, 110 EDUC. 381 (1990). See also *Goldsmith v. Bd. of Educ.*, 225 P. 783, 787 (Cal. Ct. App. 1924) for a discussion of how teachers' private lives are viewed differently from other professionals' private lives. ("[T]he calling [of the teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous, that they are incapable of enumeration in any legislative enactment. The intimate personal life and habits of a physician or dentist do not necessarily affect his usefulness; he deals with adult persons or children under his protection. But the teacher is entrusted with the custody of children and their high preparation for useful life.").

<sup>19</sup> See generally WILLARD S. ELSBREE, *THE AMERICAN TEACHER: EVOLUTION OF A PROFESSIONAL IN A DEMOCRACY* (1939).

<sup>20</sup> See generally HOWARD K. BEALE, *A HISTORY OF FREEDOM IN TEACHING IN AMERICAN SCHOOLS* 244 (1941) ("The significant fact is that the teacher is still subjected to all sorts of regulations and prohibitions that are not applied to members of the community in other callings. It is the community mores that have changed, not the relation of the teacher to the community.").

<sup>21</sup> Clifford P. Hooker, *Terminating Teachers and Revoking Their Licensure for Conduct Beyond the Schoolhouse Gate*, 96 EDUC. L. REP. 1, 2 (1994).

affect their job security.<sup>22</sup>

The history of education in the United States is replete with examples of stringent ordinances and school board regulations mandating a higher standard of conduct for teachers than for other community members. The predominantly rural schools of the early twentieth century were considered an extension of the local community. The control and degree of pressure that the community brought to bear on a teacher was formidable. "Parents who smoked, drank, gambled, lied, and committed adultery demanded that a teacher's conduct be above their own. It was and still is believed that teachers must lead an exemplary life so as to properly mold children's virtues."<sup>23</sup> With great sincerity, parents and the community believed a teacher should serve "the community through an upright exemplary life and whose influence will give their children the characters they themselves aspired to and failed to attain."<sup>24</sup> Even marriage resulted at various times in dismissal under the assertion it could be a distraction to the teacher's complete dedication to the children of the community.<sup>25</sup> A Mississippi school district in the mid-1970s passed a policy prohibiting the employment of teachers who were not married but had children.<sup>26</sup> As late as 1985 a teacher was dismissed for going through a divorce.<sup>27</sup>

In the past, the community's control over teachers was pervasive. Not only were the teacher's classroom conduct and skills keenly evaluated, almost all facets of the teacher's out of school conduct were scrutinized.<sup>28</sup> Some communities kept a tight watch over teachers' private lives. The generalized moral expectations of the community shaped the behavior of educators both inside and outside the classroom. Tyack and Hansot note that "[e]vidence abounds that townspeople kept a vigilant eye on the out-of-class behavior of educators, and that moral 'lapses' resulted in firings far more often than did incompetence

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<sup>22</sup> See *Tingley v. Vaughn*, 17 Ill. App. 347, 351 (Ill. App. Ct. 1885) ("If suspicion of vice or immorality be once entertained against a teacher, his influence for good is gone. The parents become distrustful, the pupils contemptuous and the school discipline essential to success is at an end.").

<sup>23</sup> TODD A. DEMITCHELL & RICHARD FOSSEY, *THE LIMITS OF LAW-BASED SCHOOL REFORM: VAIN HOPES AND FALSE PROMISES* 53 (1997).

<sup>24</sup> HOWARD K. BEALE, *ARE AMERICAN TEACHERS FREE? AN ANALYSIS OF RESTRAINTS UPON THE FREEDOM OF TEACHING IN AMERICAN SCHOOLS* 407 (1936).

<sup>25</sup> Former School Board Official, *What About the Married Teacher?*, 71 THE AM. SCH. BD. J. 42 (1925).

<sup>26</sup> *Andrews v. Drew Mun. Separate Sch. Dist.*, 507 F.2d 611 (5th Cir. 1975) (ruling that the policy was unconstitutional). Even though the federal appellate court invalidated the policy, it is striking that such a policy was adopted so late in the twentieth century.

<sup>27</sup> *Littlejohn v. Rose*, 786 F.2d 765 (6th Cir. 1985).

<sup>28</sup> See *Chi. Bd. of Educ. v. Payne*, 430 N.E.2d 310, 315 (Ill. App. Ct. 1981) ("We are aware of the special position occupied by a teacher in our society. As a consequence of that elevated stature, a teacher's actions are subject to much greater scrutiny than that given to the activities of the average person.").

in teaching."<sup>29</sup>

For example, in 1944, even though the school board found Edward Schweitzer to be well qualified, conscientious, and professional, he was fired because of public statements that he made affirming that he was a pacifist and would not aid the United States during the war, either as a combatant or non-combatant.<sup>30</sup> The school board considered his conduct and statements to be "inimical to the ideals of citizenship and responsibilities of citizens to their country," thus rendering him "incapable and incompetent . . . to perform his full duty as a teacher."<sup>31</sup> Even though Schweitzer was exercising his right to free speech, the court upheld his dismissal.<sup>32</sup> The court expected the teacher to uphold and adhere to the community standards of thought and action.<sup>33</sup> Beale wrote, "The teacher is still 'only a teacher,' not entitled to vigorous views on things that really matter in the community if his [or her] views differ from those generally accepted."<sup>34</sup>

Teachers led precarious professional lives. They were scrutinized in the classroom and dictated to outside of it. One teacher, reflecting on this phenomena, remarked, "How I conduct my classes seems to be of no great interest to the school authorities, but what I do when school is not in session concerns them tremendously."<sup>35</sup> *Horosko v. School District of Mount Pleasant Township*<sup>36</sup> illustrates the reach of exemplar into the private lives of teachers. Horosko was a primary school teacher in the small Pennsylvania community of Mount Pleasant.<sup>37</sup> She married the owner of a restaurant located 125 feet from the school where she taught.<sup>38</sup> The restaurant served beer and maintained a pinball machine and a slot machine for the patrons' pleasure.<sup>39</sup> The patrons played various dice games on the premises.<sup>40</sup> Horosko worked as a waitress after school hours and during the summer months.<sup>41</sup> Students and citizens of the community saw her take an occasional drink of beer, shake dice with the customers, and instruct customers how to play the pinball machine.<sup>42</sup>

Although there was no charge and no evidence of disorderly conduct or ex-

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<sup>29</sup> DAVID B. TYACK & ELISABETH HANSOT, *MANAGERS OF VIRTUE: PUBLIC SsCHOOL LEADERSHIP IN AMERICA, 1820-1980*, 174 (1982).

<sup>30</sup> *State ex rel. Schweitzer v. Turner*, 19 So. 2d 832, 833 (Fla. 1944).

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

<sup>32</sup> *Id.* at 834.

<sup>33</sup> *Id.* at 833.

<sup>34</sup> BEALE, *supra* note 20, at 244.

<sup>35</sup> BEALE, *supra* note 24, at 395.

<sup>36</sup> 6 A.2d 866 (Pa. 1939).

<sup>37</sup> *Id.* at 868.

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

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

cessive drinking, the school board dismissed Horosko for immorality.<sup>43</sup> She fought her dismissal all the way to the Supreme Court of Pennsylvania, which upheld her dismissal.<sup>44</sup> The court discussed the exemplary status in which teachers were placed and its relationship to immorality:

It has always been the recognized duty of the teacher to conduct himself in such a way as to command the respect and good will of the community, though one result of the choice of a teacher's vocation may be to deprive him of the same freedom of action enjoyed by persons in other vocations . . . . [I]mmorality is not essentially confined to a deviation from sex morality; it may be such a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and to elevate<sup>45</sup>

The breadth of control that the community had over the private lives of its teachers throughout the nineteenth and early twentieth centuries was extensive. The community decided who should teach its children not just through the teacher selection process but also through the retention process. At various times, communities asserted that "a teacher should not be allowed to make pacifist statements during World War II"; wear "transparent hosiery, low-necked dresses, [or] cosmetics"; or fasten "their galoshes all the way up."<sup>46</sup> Reflecting on these prohibitions placed on teachers' private conduct, Elsbree wrote:

Emphasis has been placed upon the peculiar nature of the vocation of teaching—the fashioning of human lives—and upon the importance of exemplary conduct on the part of teachers, both within and without the classroom. At no time in our history have lawyers, doctors, and other professional workers been expected to maintain a comparable level of righteousness with that required of schoolteachers.<sup>47</sup>

Exemplar holds that a teacher is a mandatory role model because of the special role that teachers play in our society.<sup>48</sup> For example, a dean of students on Staten Island was responsible for enforcing rules prohibiting drug use among

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<sup>43</sup> *Id.* at 870.

<sup>44</sup> *Id.* at 868.

<sup>45</sup> *Id.*

<sup>46</sup> Todd A. DeMitchell, *Private Lives: Community Control vs. Professional Autonomy*, 78 *EDUC. L. REP.* 187, 188 (1993).

<sup>47</sup> Elsbree, *supra* note 19, at 535.

<sup>48</sup> See *McBroom v. Bd. of Educ.*, 494 N.E.2d 1191, 1196 (Ill. App. Ct. 1986) ("We are cognizant of the special position of leadership occupied by a teacher who serves as a role model and instills the basic values of our society."); *Perryman v. Sch. Comm. of Boston*, 458 N.E.2d 748, 750 (Mass. App. Ct. 1983) "Teachers hold a position of special public trust because '[a]s role models for our children they have an "extensive and peculiar opportunity to impress [their] attitude and views" upon their pupils.'" (quoting *Dupree v. Sch. Comm. of Boston*, 446 N.E.2d 1099, 1101 (Mass. App. Ct. 1983)).



students.<sup>49</sup> The Dean was arrested in Brooklyn with one bag of marijuana on his person and ten bags of cocaine in his car.<sup>50</sup> He pled guilty to attempted criminal possession of a controlled substance.<sup>51</sup> The felony charges were dismissed against him in exchange for participating in a drug program, but the school board dismissed him.<sup>52</sup> The hearing officer held that the Dean should be able to be reinstated in the school district upon the successful completion of the treatment program.<sup>53</sup> The school district brought suit.<sup>54</sup>

On appeal, a New York appeals court considered the hearing officer's determination that the Dean "be returned to his former or similar position in the District . . . to be irrational and to defy common sense. Such a conclusion, essentially, would allow him to be placed back into a position where he would administer a program to discourage drug use among students."<sup>55</sup> In other words, how could the Dean enforce a regulation he himself broke? The Dean did not model that behavior which he was required to enforce.

In the not so distant past, the contours of exemplar were oftentimes oppressive, smothering the private lives of teachers and reducing them to mere appendages of the community. How has the concept of exemplar affected the lives of GLBT teachers? An examination of *Gaylord v. Tacoma School District No. 10*<sup>56</sup> provides a window into the prejudice that GLBT teachers often suffer.

On November 21, 1972, James Gaylord, a Phi Beta Kappa graduate from the University of Washington, received a letter from his employer, the Board of Directors of the Tacoma School District No. 10, which stated, "The specific probable cause for your discharge is that you have admitted occupying a public status that is incompatible with the conduct required of teachers in this district. Specifically, that you have admitted being a publicly known homosexual."<sup>57</sup> Gaylord had taught for twelve years in the school district with no problems.<sup>58</sup> He consistently received "favorable evaluations of his teaching."<sup>59</sup> The precipitating event that moved Gaylord from a "favorable" teacher to an immoral teacher was the revelation that Gaylord was gay.<sup>60</sup> He was dismissed for his

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<sup>49</sup> City Sch. Dist. of N.Y. v. Campbell, 798 N.Y.S.2d 54, 55 (N.Y. App. Div. 2005).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 55-56.

<sup>52</sup> *Id.* at 56.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 559 P.2d 1340 (Wash. 1977).

<sup>57</sup> Gaylord v. Tacoma Sch. Dist. No. 10, 535 P.2d 804, 807 (Wash. 1975) (Ringold, J. pro tem., concurring in part and dissenting in part).

<sup>58</sup> Gaylord, 559 P.2d at 1346.

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

<sup>60</sup> The vice principal of Gaylord's school received a communication in which a former

status of being gay, not for any specific act.<sup>61</sup> Specifically, he was dismissed for immorality on the basis that he was gay.<sup>62</sup>

Gaylord sought relief from the state courts.<sup>63</sup> He lost and appealed.<sup>64</sup> The appeal resulted in a remand, but the ultimate result was the same.<sup>65</sup> His appeal reached the Washington Supreme Court, which settled the matter of his dismissal by affirming the state court's decision.<sup>66</sup>

The court considered immorality to be a personal choice.<sup>67</sup> The court offered an odd explanation of choice, stating: "One who has a disease, for example, cannot be held morally responsible for his condition. Homosexuality is not a disease, however."<sup>68</sup> Yet, the court then noted that Gaylord was "comfortable" with his sexuality and did not seek psychiatric help to change his orientation.<sup>69</sup> Therefore, the court asserted, "He has made a voluntary choice for which he must be held morally responsible."<sup>70</sup> Gaylord "chose" to be gay or to remain gay and that choice was a choice to be immoral, or so the Washington Supreme Court reasoned.<sup>71</sup>

Next, the State's high court turned to whether public knowledge that Gaylord was a gay teacher would sufficiently impair his performance.<sup>72</sup> The court found that the knowledge of his sexual orientation would result in impairment.<sup>73</sup> The State Supreme Court cited one of the trial court's findings of fact:

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

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student stated "he thought Gaylord was a homosexual." The vice principal confronted Gaylord who admitted that he was gay. *Id.* at 1342.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Gaylord v. Tacoma Sch. Dist. No. 10*, 535 P.2d 804, 805 (Wash. 1975).

<sup>64</sup> *Gaylord*, 559 P.2d at 1341.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1347.

<sup>67</sup> *Id.* at 1345.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1345-46.

<sup>70</sup> *Id.* at 1346. To support its contention that homosexuality is immoral, the court stated, "Homosexuality is widely condemned as immoral and was so condemned as immoral during Biblical times." *Id.* at 1345. The court went so far as to state that Gaylord's sexual orientation would "hurt his parents." *Id.* at 1342.

<sup>71</sup> *See id.* at 1346.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

[Gaylord's] efficiency as a teacher and injure the school.<sup>74</sup>

In other words, Gaylord's sexual orientation was immoral and could cause harm once his sexual orientation became public knowledge.<sup>75</sup> According to the Washington Supreme Court, gay and lesbian teachers could not be role models because of their sexual orientation.<sup>76</sup> Being a gay or a lesbian, the Washington Supreme Court reasoned, was per se immoral.<sup>77</sup>

The dissent pointed out that "homosexuality per se does not preclude competence."<sup>78</sup> And, in a nod to *Morrison v. State Board of Education*,<sup>79</sup> the California Supreme Court opinion that was decided earlier and which is discussed below, the dissent stated that "[m]ere speculation coupled with status alone is not enough."<sup>80</sup> Just being gay, the dissent argued, should not automatically lead to an irrebuttable conclusion of immorality.<sup>81</sup>

### *Nexus*

The concept of exemplar as a standard of behavior to be applied to school teachers was challenged in the latter half of the twentieth century. The 1960s ushered in a new national era. The civil rights movement shined a light on the excesses and abuses of government. The college free speech movement, the baby boomer generation, and serious scholars and policy makers called many long-held beliefs about the relationship between government and the individual before the bar of reason and found some practices lacking. There was a swing toward greater freedom of action and speech. Individual rights began to be balanced against community interests. As one commentator has noted, "A local school board's power to control the personal lives of its teachers has unquestionably diminished during the second half of this century."<sup>82</sup> Writing in 1976, McGhehey stated that the courts within the past ten years "appear to be fashioning a requirement that the public employer show a causal connection, a nexus, between illegal or immoral behavior, and performance on the job."<sup>83</sup> The grip of the preexisting, yet not necessarily clearly stated, norms of behavior that formed the status of exemplar loosened.

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<sup>74</sup> *Id.* at 1346 (citing Finding of fact No. 10).

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

<sup>76</sup> *See id.* at 1347.

<sup>77</sup> *See id.*

<sup>78</sup> *Id.* at 1349 (Dolliver, J., dissenting) (citing *Acanfora v. Bd. of Educ.*, 359 F. Supp. 843 (D. Md. 1973)).

<sup>79</sup> 461 P.2d 375 (Cal. 1969).

<sup>80</sup> *Gaylord*, 559 P.2d at 1350.

<sup>81</sup> *Id.*

<sup>82</sup> Donal M. Sacken, *The Limits to a Teacher's Privacy Rights: Ponton v. Newport News Sch. Bd.*, 42 ED. LAW. REP. 19, 19 (1988).

<sup>83</sup> M. McGhehey, *Illegal or Immoral Behavior and Performance in the Classroom: The Necessary Nexus*, NEW DIRECTIONS IN SCHOOL LAW 162 (1976).

One group of teachers who historically have not fared well under the glare of the exemplar standard are GLBT teachers, not because they were not good teachers but because of prejudice toward their sexual orientation.<sup>84</sup> However, “case law suggests that there has been a shift in condoning dismissals for merely being GLBT to requiring evidence that an individual’s sexual orientation has an adverse impact on job performance.”<sup>85</sup> This is the nexus standard of drawing a connection between the out of school conduct and a corresponding detriment to the school. In 1969, in a case involving homosexual contact between two male teachers, the California Supreme Court articulated this new standard for evaluating a public school teacher’s private sexual conduct—nexus.<sup>86</sup> In *Morrison v. State Board of Education*, California’s highest court ruled that the private behavior of a teacher could only result in employment sanctions if the conduct affects the teacher’s ability to teach or harms the learning environment.<sup>87</sup> Nexus seeks, in many ways, to balance competing legitimate interests—the private life of a teacher and the school district’s “strong interest in protecting the school community.”<sup>88</sup>

The facts of *Morrison* follow. Marc Morrison was a successful teacher in the Lowell Joint School District for a number of years prior to 1964.<sup>89</sup> A review of his record revealed no complaints or criticism of his performance as a teacher.<sup>90</sup> In 1963, he developed a close friendship with Mr. and Mrs. Schneringer; Mr. Schneringer taught in the same school district as Morrison.<sup>91</sup> When the Schneringers experienced marital and financial difficulties, Morrison gave counsel and advice to Mr. Schneringer, who visited Morrison’s apartment frequently.<sup>92</sup> During a one-week period in April 1963, the two men engaged in a limited, non-criminal physical relationship in Morrison’s apartment.<sup>93</sup> Morrison described these activities as being homosexual in nature.<sup>94</sup> Morrison was never accused or convicted of any criminal activity, nor was there any evidence

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<sup>84</sup> See, e.g., *Acanfora v. Bd. of Educ.*, 359 F. Supp. 843, 851 (D. Md. 1973), *aff’d on other grounds*, 491 F.2d 498 (4th Cir. 1974).

<sup>85</sup> NELDA H. CAMBRON-McCABE, MARTHA M. MCCARTHY & STEPHEN B. THOMAS, *PUBLIC SCHOOL LAW: TEACHER’S AND STUDENT’S RIGHTS* 345 (6th ed. 2008).

<sup>86</sup> *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 386 (Cal. 1969).

<sup>87</sup> *Id.* at 386. See also W. VA. CODE § 18A-3-6 (2007), which reads in pertinent part: “[T]here must be a rational nexus between the conduct of the teacher and the performance of his or her job.” This code section was applied to a teacher who was convicted, under a plea agreement, to one count of a misdemeanor offense for domestic battery for beating his son with a belt. *Powell v. Paine*, 655 S.E.2d 204 (W. Va. 2007).

<sup>88</sup> Fulmer, *supra* note 17, at 282.

<sup>89</sup> *Morrison*, 461 P.2d at 377.

<sup>90</sup> *Id.*

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

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 377–78.

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

of continued homosexual activity by Morrison after the incidents.<sup>95</sup> After Schneringer separated from his wife, Morrison suggested a number of women whom Schneringer might date.<sup>96</sup>

One year after the April incidents, Schneringer reported his homosexual conduct with Morrison to the superintendent of the district.<sup>97</sup> Morrison resigned his teaching position in May 1964.<sup>98</sup> Nineteen months after the report was made, the State Board of Education of California conducted a hearing concerning the possible revocation of Morrison's life teaching credentials.<sup>99</sup> The Board presented no evidence at the hearing that Morrison had ever committed any act of misconduct while teaching.<sup>100</sup> Nevertheless, the Board of Education revoked Morrison's credentials some three years after the Schneringer incidents, concluding that Morrison's behavior constituted immorality and unprofessional conduct.<sup>101</sup>

Morrison sought a writ of mandamus from the Superior Court of Los Angeles to compel the Board to set aside its decision and restore his teaching credential.<sup>102</sup> The court denied the writ.<sup>103</sup> The trial court held that Morrison had "committed the homosexual acts involving moral turpitude and that such acts constituted immoral and unprofessional conduct."<sup>104</sup> On appeal, however, the Supreme Court of California sided with Morrison and reversed the lower court's ruling.<sup>105</sup>

The California State Supreme Court's *Morrison* decision was and remains an important case for its impact on the employment status of GLBT teachers in schools. To help phrase the issue of human conduct, the court stated: "'Today's morals may be tomorrow's ancient and absurd customs.' And conversely, conduct socially acceptable today may be anathema tomorrow."<sup>106</sup> To help determine what was immoral and unprofessional conduct as envisioned by the Education Code, the California Supreme Court cited a 1965 study of the Report of the Subcommittee on Personnel Problems of the Assembly Interim Commit-

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<sup>95</sup> *Id.* at 378.

<sup>96</sup> *Id.*

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

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

<sup>99</sup> *Id.*

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

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

<sup>102</sup> *Id.* at 375.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 396. Since the acts were not criminal it can be inferred from this statement by the court that the homosexual acts were considered to be per se immoral and unprofessional, thus creating an irrebuttable conclusion. Consequently, the *Morrison* court's perception of homosexuality is somewhat similar to the view expressed by the Washington Supreme Court in *Gaylord*. See *supra* text accompanying notes 56-81.

<sup>105</sup> *Morrison*, 461 P.2d at 377.

<sup>106</sup> *Id.* at 383-84 (citation omitted).

tee on Education.<sup>107</sup> The court noted that “[i]n the opinion of many people laziness, gluttony, vanity, selfishness, avarice, and cowardice constitute immoral conduct”; and, according to the Report, “‘unprofessional conduct’ might include ‘imbibing alcoholic beverages, use of tobacco, signing petitions, revealing contents of school documents to legislative committees, appealing directly to one’s legislative representative, and opposing majority opinions.’”<sup>108</sup> This list of immoral and unprofessional conduct may have reinforced the court’s caution about the use of “ancient and absurd customs” to define morality.<sup>109</sup> Indeed, the court observed, “extramarital heterosexual conduct against a background of years of satisfactory teaching [would not constitute ‘immoral conduct’ sufficient to justify revocation of a [teaching credential] without any showing of an adverse effect on fitness to teach.”<sup>110</sup> In pursuit of the relationship between a teacher’s out-of-school activities and dismissal for immorality or unprofessional conduct, the court held:

Terms such as “immoral or unprofessional conduct” or “moral turpitude” stretch over so wide a range that they embrace an unlimited area of conduct. In using them the Legislature surely did not mean to endow the employing agency with the power to dismiss any employee whose personal, private conduct incurred its disapproval.<sup>111</sup>

The court offered a number of considerations for determining the impact of a teacher’s out-of-school conduct on the school setting including:

1. whether the conduct would adversely affect the students or fellow teachers;
2. “the proximity or remoteness in time of the conduct”;
3. the age of the students that the teacher works with;
4. “the extenuating or aggravating circumstances . . . surrounding the conduct”;
5. “the praiseworthiness or blameworthiness of the motives resulting in the conduct”;
6. the likelihood of recurrence; and
7. “the extent to which disciplinary action may inflict a . . . chilling effect” on the rights of teachers.<sup>112</sup>

Thus, the California Supreme Court endorsed the theory of nexus rather than exemplar as the basis for determining when a teacher could be fired or face license revocation.<sup>113</sup> This theory asserts that it must be demonstrated that the

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 383.

<sup>109</sup> *Id.* (citation omitted).

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

<sup>111</sup> *Id.* at 382.

<sup>112</sup> *Id.* at 386.

<sup>113</sup> *See id.* at 386–87.

teacher's behavior has adversely affected the school or reduced the teacher's effectiveness in the classroom. The court held that "an individual can be removed from the teaching profession only upon a showing that [his/her] retention in the profession poses a significant danger of harm to either students, school employees, or others who might be affected by [his/her] actions as a teacher."<sup>114</sup> When applying this standard, the mere suspicion of wrongdoing is balanced with a demonstration of harm, not an inference of harm.<sup>115</sup> While the California Supreme Court did not hold that gay and lesbian teachers must be permitted to teach in the public schools,<sup>116</sup> the practical application of the court's decision was a repudiation of homosexual conduct as a basis for license revocation or termination without a showing of harm. Being gay or a lesbian no longer meant that a teacher was automatically immoral or unprofessional. Under the nexus theory, a school board cannot take adverse action against a teacher for his or her out-of-school behavior without a showing of harm to the students, other teachers, or the school.<sup>117</sup> As one commentator noted, this development seems fair. "By requiring a sufficient showing that the teacher's fitness to teach has been hampered, both the interests of the school authorities and teachers will have to be addressed."<sup>118</sup> Of course, this standard would apply to heterosexual teachers' conduct outside of school as well.

The next example illustrates how the concept of a nexus has been applied in subsequent cases. In *Satterfield v. Board of Education of Grand Rapids Public Schools*,<sup>119</sup> the court accepted testimony that a teacher's conviction for embezzlement created a nexus between his non-teaching behavior and his professional duties that had an impact on his teaching.<sup>120</sup> The testimony asserted that "retaining [Satterfield] would affect the school's reputation, would affect referrals, and would make it more difficult to work in a team."<sup>121</sup> The court af-

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<sup>114</sup> *Id.* at 391.

<sup>115</sup> See, e.g., *Gover v. Stovall*, 35 S.W.2d 24 (Ky. Ct. App. 1931). Gover, a teacher, was in the school between eight and nine o'clock at night with another man and three young ladies, one of whom was a pupil in the school. The group kept the lights off and kept the meeting a secret for several days. Even though no immoral act was perpetrated or attempted, Gover was dismissed because his conduct invited criticism and produced suspicions of immorality.

<sup>116</sup> *Morrison*, 461 P.2d at 397.

<sup>117</sup> The California Supreme Court noted: "By limiting the application of [Section 13202] to conduct shown to indicate unfitness to teach, we substantially reduce the incentive to inquire into the private lives of otherwise sound and competent teachers." *Id.* at 390-91.

<sup>118</sup> Fulmer, *supra* note 17, at 289.

<sup>119</sup> 556 N.W.2d 888 (Mich. Ct. App. 1996).

<sup>120</sup> *Id.* at 889. Satterfield embezzled from a company where he worked part time. Although this case involves criminal conduct, it is important to note that this paper is not in any way suggesting that a homosexual lifestyle is similar to criminal conduct. Instead, the case was chosen because it demonstrates how the nexus has been applied in subsequent cases.

<sup>121</sup> *Id.* at 890.

firmed Satterfield's dismissal.<sup>122</sup> Thus, nexus is not a bar to the dismissal of an educator whose behavior directly harms the school, the students, or the teacher's ability to be effective.

Both exemplar and nexus continue to play a role in determining who will teach our children. Exemplar without nexus gives the community too much unchecked control over the lives of educators. For example, it is possible under an exemplar standard for a liberal community that has a curriculum that promotes tolerance for diversity to sanction a teacher who publicly expresses during off duty hours a deeply held belief that a non-heterosexual orientation is morally wrong. How would such a scenario differ from *Gaylord v. Tacoma School District No. 10*, in which a conservative community with negative views toward homosexuality pressured the school board to fire a gay teacher?<sup>123</sup>

On the other hand, nexus without an attachment to the community elevates the educator's personal conduct over the importance of community values and the importance that a community attaches to having teachers inculcate community values in its youth. Exemplar acknowledges the important modeling elements of character, integrity, trustworthiness, and honesty as important components of teaching. Nexus keeps a focus on the impact of behavior and provides a bridle for unconstrained and unrelated inquiry into an employee's non-work life.

It is also important to note that public school officials who relied either on exemplar or nexus often used state teacher dismissal statutes when attempting to terminate GLBT teachers.<sup>124</sup> Most states have statutes regulating the grounds on which a public educator can be dismissed, and immorality or moral turpitude were sometimes cited in the termination of GLBT teachers.<sup>125</sup> Currently, immorality or moral turpitude constitutes a legitimate reason for dismissal in thirty-seven states.<sup>126</sup> When such statutes are used by school districts to justify dismissals of teachers based on their sexual orientation, legal challenges can arise that focus on whether being GLBT should be considered immoral. To defend themselves against dismissal, teachers might rely on Title VII, the Equal Protection Clause, and the Due Process Clause of the Fourteenth Amendment, as well as state or local laws. Each of these protections will be discussed below.

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<sup>122</sup> *Id.*

<sup>123</sup> *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340 (Wash. 1977).

<sup>124</sup> See generally Suzanne Eckes & Martha McCarthy, *GLBT Teachers: The Evolving Legal Protections*, 45 AM. EDUC. RES. J. 530 (2008), for further information on privacy issues.

<sup>125</sup> See, e.g., *Gaylord v. Tacoma Sch. Dist. No. 10*, 559 P.2d 1340 (Wash. 1977).

<sup>126</sup> Enotes.com, *Encyclopedia of Everyday Law: Teachers' Rights* (2006), <http://www.enotes.com/everyday-law-encyclopedia/teachers-rights/print> (last visited Oct. 24, 2009).



## II. TITLE VII

Title VII of the Civil Rights Act of 1964 is the crowning achievement of the civil rights decade of the 1960s. Title VII makes it unlawful for an employer “to discriminate against any individual with respect to [his/her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>127</sup> Noticeably missing from the list of protected categories is sexual orientation, which is still not a protected category under federal law.<sup>128</sup> Title VII of the Civil Rights Act of 1964 is the “centerpiece” of federal discrimination law.<sup>129</sup> Title VII is enforced by the Equal Employment Opportunity Commission (EEOC).

Title VII claims can be categorized into two main causes of action: disparate treatment and disparate impact. Disparate treatment is used when an individual alleges that he or she has been discriminated against in hiring, promotion, compensation, or other benefits of employment.<sup>130</sup> A disparate impact claim, the second type of Title VII discrimination case, asserts that a facially nondiscriminatory employment policy has a discriminatory impact on a class of persons protected by Title VII.<sup>131</sup> The EEOC Compliance Manual states that a victim of discrimination must show that same-sex harassment was based on sex and not on sexual orientation.<sup>132</sup>

*“Because of Sex”*

As stated above, sexual orientation is not one of the protected classes of Title VII.<sup>133</sup> However, in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>134</sup> the Unit-

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<sup>127</sup> 42 U.S.C. § 2000e-2(a)(1) (2000).

<sup>128</sup> See *Williams v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989); Colleen C. Keaney, *Expanding the Protectional Scope of Title VII “Because of Sex” to Include Discrimination Based on Sexuality and Sexual Orientation*, 51 ST. LOUIS U. L.J. 581 (2007); Barbara Osborne, “No Drinking, No Drugs, No Lesbians”: *Sexual Orientation Discrimination in Intercollegiate Athletics*, 17 MARQ. SPORTS L.J. 481, 490 (2007) (“There are no federal laws prohibiting employment discrimination based on sexual orientation.”). However, the Employment Non-Discrimination Act (S. 1584/H.R. 3017) introduced in 2009 “would provide basic protections against workplace discrimination on the basis of sexual orientation or gender identity. [The Employment Non-Discrimination Act] simply affords to all Americans basic employment protection from discrimination based on irrational prejudice.” Human Rights Campaign, *Employment Non-Discrimination Act*, [http://www.hrc.org/laws\\_and\\_elections/enda.asp](http://www.hrc.org/laws_and_elections/enda.asp) (last visited Nov. 3, 2009).

<sup>129</sup> KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 795 (6th ed. 2005).

<sup>130</sup> See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>131</sup> See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>132</sup> EEOC Compliance Manual, § 615.2(b)(3) (2009).

<sup>133</sup> See, e.g., *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999).

<sup>134</sup> 523 U.S. 75 (1998).

ed States Supreme Court may have opened a door for protection under Title VII for GLBT employees. The Court held in a unanimous decision that Title VII covers same-sex harassment.<sup>135</sup> While the Court clearly stated that Title VII is not a general civility code, it forbade conduct based on the sex of the plaintiff that is so objectively offensive that it alters the conditions of employment.<sup>136</sup> Oncale was a roustabout on an oilrig in the Gulf of Mexico.<sup>137</sup> He sued his employer, alleging that he was forced to quit because of sexual harassment by the other males on his crew.<sup>138</sup> The Court noted that male-on-male sexual harassment was not the target of Title VII; however, no justification existed “for a categorical ruling excluding same-sex harassment claims.”<sup>139</sup> The Court developed the concept of the “because of sex” query, which asks whether the alleged harasser harassed the victim because of the victim’s gender.<sup>140</sup> Thus, in examining a Title IX claim, courts can conduct a “because of sex” inquiry in addition to determining whether the harasser’s conduct was motivated by sexual desire for the victim.<sup>141</sup>

The Supreme Court addressed the practice of sex stereotyping in *Price Waterhouse v. Hopkins*.<sup>142</sup> Those engaging in sex stereotyping target behavior they believe is “appropriate only for members of the opposite sex.”<sup>143</sup> In *Price Waterhouse*, Ann Hopkins was not promoted to partner of the firm where she worked.<sup>144</sup> Partners at the firm suggested that she “take a ‘course at charm school’ and ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.’”<sup>145</sup> Justice Brennan wrote: “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”<sup>146</sup> The United States District Court for the District of Massachusetts stated the rule in the following way: “If an employer acts upon stereotypes about sexual roles in making employment decisions, or allows the use of these stereotypes in the creation of a hostile or abusive work environment, then the employer opens itself up to liability under Title VII’s prohibition of discrimination on the basis of sex.”<sup>147</sup> It has been asserted that the gender-non-

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<sup>135</sup> See *id.*

<sup>136</sup> *Id.* at 81.

<sup>137</sup> *Id.* at 77.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 79.

<sup>140</sup> *Id.* at 80.

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

<sup>142</sup> 490 U.S. 228 (1989).

<sup>143</sup> Mary Ann Connell, *Evolving Law in Same-Sex Sexual Harassment and Sexual Orientation Discrimination*, 31 J.C. & U.L. 193, 208 (2004).

<sup>144</sup> *Price Waterhouse*, 490 U.S. at 231.

<sup>145</sup> *Id.* at 235.

<sup>146</sup> *Id.* at 251.

<sup>147</sup> *Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002).

conforming behavior doctrine articulated by the Supreme Court fights “the harms associated with gender stereotyping.”<sup>148</sup>

The concept of discrimination-based sex stereotyping has a potential impact not only on gays and lesbians but also on transgendered and transsexual individuals.<sup>149</sup> Some courts have extended to GLBT employees the *Oncale* “because of sex” analysis and the *Price Waterhouse* discrimination-based-on-gender-stereotyping analysis.<sup>150</sup> The Sixth Circuit extended the protection to a lieutenant in the Salem, Ohio fire department who was diagnosed with Gender Identity Disorder and had begun to express himself at work in a more feminine manner.<sup>151</sup> The Ninth Circuit applied *Price Waterhouse* in a case in which an employee endured a relentless campaign of verbal abuse and taunts about his feminine mannerisms.<sup>152</sup>

This treatment of sexual stereotyping by the courts has not overcome the explicit statements by the EEOC and court cases ruling that sexual orientation is not a protected category under Title VII. Plaintiffs still have had difficulty in navigating the space between discrimination based on sexual orientation and discrimination based on sex stereotyping.<sup>153</sup> However, the Court in *Price Waterhouse* prohibited the “entire spectrum” of sex-based discrimination, including discrimination based on gender stereotyping.<sup>154</sup> This issue is made more complicated by the fact that not all gays or lesbians exhibit their sexual orientation by opposite-sex sexual identity patterns. In other words, not all gays have feminine characteristics and not all lesbians have masculine characteristics. While sex stereotyping may provide some legal relief to some GLBT employees, it does not provide a robust and easily identifiable protection for sexual orientation.

### III. EQUAL PROTECTION CLAUSE

Section 1 of the Fourteenth Amendment reads:

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<sup>148</sup> Ryan M. Martin, *Return to Gender: Finding a Middle Ground in Sex Stereotyping Claims Involving Homosexual Plaintiffs Under Title VII*, 75 U. CIN. L. REV. 371, 374 (2006).

<sup>149</sup> For a discussion of the application of sex stereotyping to transgender and transsexual individuals, see Keaney, *supra* note 128.

<sup>150</sup> See *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864 (9th Cir. 2001).

<sup>151</sup> *Smith*, 378 F.3d 566. See also *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005), *cert. denied*, 56 U.S. 1003 (2005). In *Barnes*, the jury returned a verdict for Barnes in the amount of \$320,511 for discrimination based on his overtly feminine behavior, such as arched eyebrows, occasionally wearing lipstick and makeup at work, and because he did not appear masculine enough. *Id.* at 734.

<sup>152</sup> *Nichols*, 256 F.3d 864.

<sup>153</sup> See e.g., *Dandan v. Radisson Hotel Lisle*, No. 97 C 8342, 2000 WL 336528 (N.D. Ill. Mar. 28, 2000).

<sup>154</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234–35 (1989).

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>155</sup>

Equal protection was originally directed at the States to redress the abuse of their power over their citizens,<sup>156</sup> but now also applies to the federal government.<sup>157</sup> Nowak, Rotunda, and Young consider the Equal Protection Clause to be "the single most important concept in the Constitution for the protection of individual rights."<sup>158</sup>

Most laws attempt to classify persons for purposes of distributing social and economic benefits or establishing order. For example, welfare laws distribute benefits only to those persons classified as "needy"; compulsory education laws apply only to children; persons under the age of 16 may not be licensed to drive; persons under the age of twenty-one may not legally purchase alcohol; and an employer cannot discriminate in employment practices against individuals over the age of forty on the basis of their age.

The Equal Protection Clause requires that "persons similarly circumstanced . . . be treated alike."<sup>159</sup> As Justice Powell made clear in *Regents of University of California v. Bakke*,<sup>160</sup> "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."<sup>161</sup> The Seventh Circuit Court of Appeals applied this rule in an equal protection case involving a gay student, stating that "[t]he Equal Protection Clause does, however, require the state to treat each person with equal regard, as having equal worth, regardless of his or her status."<sup>162</sup> The United States Supreme Court earlier foreshadowed this statement in *Loving v. Virginia*, writing that we are "a free people whose institutions are founded upon the doctrine of equality."<sup>163</sup>

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<sup>155</sup> U.S. CONST. amend. XIV, § 1.

<sup>156</sup> *Shaw v. Reno*, 509 U.S. 630, 642 (1993) (holding that the central purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race").

<sup>157</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>158</sup> JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, *CONSTITUTIONAL LAW* 524 (3d ed. 1986).

<sup>159</sup> *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

<sup>160</sup> 438 U.S. 265 (1978).

<sup>161</sup> *Id.* at 289–90.

<sup>162</sup> *Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir. 1996).

<sup>163</sup> 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

When a court is presented with a case involving equal protection, the court must decide which of three tests to use. The decision of which test to use is of great importance because the more stringent the test, the more difficult it is for the state to justify its rule or regulation. Typically, the plaintiff wants the court to use the most stringent test and the defendant wants the court to use the least stringent test. Even though discrimination is usually against a class of persons, a single individual may invoke the Constitution's Equal Protection Clause by making a "class of one" argument that also shows unequal treatment based on discrimination.<sup>164</sup> The three tests, from the least deferential to the state to the most deferential, are strict scrutiny analysis, heightened scrutiny or middle level analysis, and rational basis. Regardless of which test is used, only intentional, purposeful discrimination violates the Equal Protection Clause.<sup>165</sup>

### *Strict Scrutiny Analysis*

As the most stringent test, strict scrutiny shows the least deference to the State. Under strict scrutiny, the State is not entitled to a presumption of validity; instead, the State carries a heavy burden of justification.<sup>166</sup> When a state action discriminates against a suspect class<sup>167</sup> or infringes upon a fundamental right, the State must prove that the rule or regulation is necessary (the least burdensome alternative available) to accomplish a compelling state interest.<sup>168</sup> In strict scrutiny analysis, the burden is placed on the State.<sup>169</sup>

A suspect class, with its immutable characteristics, is a group that has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."<sup>170</sup> Race has been considered a suspect class since the 1944 case *Kore-*

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<sup>164</sup> See, e.g., *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000).

<sup>165</sup> See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976); *Nabozny v. Podlesny*, 92 F.3d 446, 453 (7th Cir. 1996) ("The gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action. A plaintiff must demonstrate intentional or purposeful discrimination to show an equal protection violation." (quoting *Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 1982))).

<sup>166</sup> *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

<sup>167</sup> See *Swift v. United States*, 649 F. Supp. 596, 602 (D.D.C. 1986) ("Homosexual conduct may not be protected under the right of privacy, and homosexuals may not qualify as a suspect class. Nonetheless, the government may not discriminate against homosexuals for the sake of discrimination, or for no reason at all.").

<sup>168</sup> See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>169</sup> *Blumstein*, 405 U.S. at 343.

<sup>170</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). See also *Rowland v. Mad River Sch. Dist.*, 470 U.S. 1009 (1985), *cert. denied*, (Brennan, J., dissenting). In *Rowland*, a bisexual guidance counselor was dismissed and her equal protection claim failed.

*matsu v. United States*.<sup>171</sup> Strict scrutiny analysis is also triggered when state action affects the exercise of a fundamental right, such as the right to speech, press, association, religion, marriage, access to the courts, interstate travel, or the right to vote.<sup>172</sup>

### *Heightened Scrutiny (Middle Level Analysis)*

Heightened scrutiny is a relatively new standard, and is still being developed. Courts generally apply it when a regulation discriminates on the basis of a "sensitive" classification or quasi-suspect class such as gender,<sup>173</sup> immigrant children/students,<sup>174</sup> and illegitimacy.<sup>175</sup> Under this standard, a rule or regulation is invalid unless the state can show that the rule or regulation serves an important state interest and that the classification is substantially related to that interest.<sup>176</sup> A quasi-suspect classification is used for this level of scrutiny.<sup>177</sup>

### *Rational Basis*

Rational basis is the most permissive of the Supreme Court's three equal-protection tests. If the plaintiff does not meet the requirements of a suspect class under strict scrutiny or a quasi-suspect class under heightened scrutiny, then rational basis is used in the equal protection analysis. Rational basis is the "most deferential . . . , presuming validity and placing the burden of proof on the plaintiff."<sup>178</sup> To pass the rational basis test, the state action must serve a legitimate state interest and be rationally related to that interest.<sup>179</sup>

Sexual orientation equal protection claims are brought under the rational basis test.<sup>180</sup> This most deferential test affords the defendant a greater likelihood of prevailing over the plaintiff's suit.<sup>181</sup> Under the rational basis test, it is often

Justice Brennan asserted in his dissent that "homosexuals have historically been the object of pernicious and sustained hostility." *Id.* at 1014.

<sup>171</sup> 323 U.S. 214 (1944). The Supreme Court has argued that the central purpose of the Equal Protection Clause "is to prevent the states from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

<sup>172</sup> *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>173</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>174</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>175</sup> *Mathews v. Lucas*, 427 U.S. 495 (1976).

<sup>176</sup> *Craig v. Boren*, 429 U.S. at 197.

<sup>177</sup> *See Exploring Constitutional Conflicts, Levels of Scrutiny Under the Equal Protection Clause*, <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/epscrutiny.htm> (last visited Nov. 1, 2009).

<sup>178</sup> KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 782 (5th ed. 2001).

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

<sup>180</sup> *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (applying rational basis scrutiny to a state constitutional amendment discriminating on the basis of sexual orientation).

<sup>181</sup> For an argument against the use of the rational basis test for issues concerning sexual

easy for the state to demonstrate that its actions meet the two prongs of the test. The state does not always prevail, however. For example, in *Romer v. Evans*,<sup>182</sup> the Supreme Court applied the rational basis test to an amendment to the Colorado Constitution that attempted to invalidate all state laws protecting gays and lesbians.<sup>183</sup> Thus, even under the most generous of Supreme Court standards, the Colorado amendment did not withstand constitutional scrutiny; the law unconstitutionally deprived gays and lesbians of equal protection under the laws.<sup>184</sup>

The Equal Protection Clause has been applied in several cases involving GLBT teachers. In these cases, school officials needed to demonstrate that there was a rational reason for treating GLBT teachers differently from other similarly situated teachers.<sup>185</sup> The cases below illustrate how the Equal Protection Clause has been applied to GLBT teachers.

*Jantz v. Muci*

Vernon Jantz applied for a teaching position in the Wichita school system after teaching for one year in New Mexico and substitute teaching in Kansas.<sup>186</sup> He was turned down for a position at Wichita North High School.<sup>187</sup> Reportedly, the Principal, Cleofas Muci, stated that Jantz was not offered the position because Jantz had "homosexual tendencies."<sup>188</sup> Jantz was married with two children and did not claim to be gay or bisexual.<sup>189</sup> He brought suit in federal court on the grounds that he had been denied his right to equal protection.<sup>190</sup>

On summary judgment, the court concluded that Jantz's claim, if proven at trial, set forth a violation of his constitutional rights.<sup>191</sup> The court quoted *Acanfora v. Board of Education*<sup>192</sup> for its starting point: "[T]he time has come

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orientation, see Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2770 (2005) ("This Note suggests that the *Romer* and *Lawrence* decisions imply that the Supreme Court not only ought to make gay men and lesbians a suspect or quasi-suspect class, but that it has in practice already done so, albeit without the sufficient binding force of precedent.").

<sup>182</sup> 517 U.S. 620 (1996).

<sup>183</sup> *Id.* at 631-36.

<sup>184</sup> *Id.*

<sup>185</sup> *E.g.*, *Jantz v. Muci*, 759 F. Supp. 1543 (D. Kan. 1991), *rev'd*, 976 F.2d 623 (10th Cir. 1992).

<sup>186</sup> *Id.* at 1544.

<sup>187</sup> *Id.* at 1545.

<sup>188</sup> *Id.*

<sup>189</sup> *Jantz*, 976 F.2d at 626.

<sup>190</sup> *Jantz*, 759 F. Supp. at 1543.

<sup>191</sup> *Id.* at 1545.

<sup>192</sup> 359 F. Supp. 843 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974).

today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectable interests."<sup>193</sup> The court reviewed sexual orientation under two of the equal protection tests: heightened scrutiny and rational basis.<sup>194</sup> The court found that a governmental classification based on an individual's sexual orientation "is inherently suspect."<sup>195</sup> However, the court did not provide relief based on this analysis, holding that the suspect nature of the classification was not clearly established as of 1988.<sup>196</sup>

Turning to the rational basis analysis, the court asked "whether there is any rational basis for the consideration of sexual orientation in public employment decision making."<sup>197</sup> The court found that the refusal to rehire Jantz based on his perceived sexual orientation was "arbitrary and capricious in nature."<sup>198</sup> Thus, the decision was without a rational basis and therefore a violation of Jantz's constitutional right to equal protection of the law. The defendant school district lost its summary judgment motion.<sup>199</sup>

The defendant appealed to the Tenth Circuit Court of Appeals.<sup>200</sup> The appellate court addressed the question of whether the defendant had qualified immunity.<sup>201</sup> This analysis entailed two questions. First, whether the defendant's alleged conduct violated a clearly established law that a reasonable official would have been aware of in 1988.<sup>202</sup> Second, whether the defendant had final

<sup>193</sup> *Jantz*, 759 F. Supp. at 1545 (quoting *Acanfora v. Bd. of Educ.*, 359 F. Supp. 843, 851 (D. Md. 1973), *aff'd on other grounds*, 491 F.2d 498 (4th Cir. 1974)).

<sup>194</sup> *Id.* at 1546–52. While the court used the term heightened scrutiny, its analysis used the following considerations:

The discrimination must be invidious and unjustifiable . . . based upon an obvious, immutable, or distinguishing trait which frequently bears no relation to ability to perform or contribute to society. A second factor is whether the class historically has suffered from purposeful discrimination. Third . . . the class must lack the political power necessary to obtain protection from . . . government.

*Id.* at 1547. This line of analysis appears to be consistent with establishing a suspect classification, but given the use of the term heightened scrutiny, it may be establishing a quasi-suspect classification. The court was not clear on this point and it did not finish the analysis of whether the regulation served a compelling state interest (strict scrutiny) or was substantially related to an important state interest.

<sup>195</sup> *Id.* at 1551. "Sexual orientation is not a matter of choice; it is a central and defining aspect of the personality of every individual. Homosexuals have been and remain the subject of invidious discrimination. No other identifiable minority group faces the dilemma dealt with every day by the homosexual community—the combination of active and virulent prejudice with the lack of an effective political voice." *Id.*

<sup>196</sup> *Id.* at 1552.

<sup>197</sup> *Id.* at 1551.

<sup>198</sup> *Id.* at 1552.

<sup>199</sup> *Id.* at 1554.

<sup>200</sup> *Jantz v. Mucci*, 976 F.2d 623 (10th Cir. 1992).

<sup>201</sup> *Id.* at 627–30.

<sup>202</sup> *Id.*



decision-making authority.<sup>203</sup> On appeal the plaintiff conceded that sexual orientation in 1988 was considered neither an inherently suspect class (strict scrutiny) nor a quasi-suspect class (heightened scrutiny).<sup>204</sup> The plaintiff's argument centered on the assertion that the decision to not offer the job based on perceived sexual orientation "could not withstand . . . rational basis review" because the decision was motivated by a desire to harm an unpopular group—homosexuals.<sup>205</sup> The Tenth Circuit's analysis of 1988 case law led it to the conclusion that the law in 1988 was not well-settled and was in a "state of confusion". However, the court did acknowledge that teachers may not be denied positions based on perception of their sexual orientation.<sup>206</sup> Nevertheless, the defendant was entitled to qualified immunity.<sup>207</sup> Similarly, the court offered the defendant qualified immunity on the question of delegation of authority.<sup>208</sup> The school board had not delegated its discretionary decisions to the school and consequently retained final decision-making authority.<sup>209</sup>

*Weaver v. Nebo School District*

Wendy Weaver earned an unblemished record as a teacher.<sup>210</sup> In addition to her teaching duties, she served as the girls' volleyball coach at Spanish Forks High School in Nebo, Utah.<sup>211</sup> After a hiatus from coaching, Weaver informed the principal that she was ready to return to coaching.<sup>212</sup> As in the past, Weaver organized two summer volleyball camps.<sup>213</sup> She telephoned prospective volleyball team members to inform them of the schedule.<sup>214</sup> During one of these calls, a senior team member asked her if she was gay.<sup>215</sup> Weaver responded truthfully that she was gay.<sup>216</sup> The team member informed Weaver that "she would not play on the volleyball team in the fall."<sup>217</sup> That single question and Weaver's truthful response led to the loss of Weaver's coaching position, a

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<sup>203</sup> *Id.* at 630–31.

<sup>204</sup> *Id.* at 628.

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

<sup>206</sup> *Id.* at 630.

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

<sup>208</sup> *Id.* at 631.

<sup>209</sup> *Id.* See also *Milligan-Hitt v. Bd. of Tr. of Sheridan County Sch. Dist. No. 2*, 523 F.3d 1219 (10th Cir. 2008) (holding that a superintendent was not the final decision-maker in a case involving discriminatory conduct based on sexual orientation).

<sup>210</sup> *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1280 (D. Utah 1998).

<sup>211</sup> *Id.* at 1280–81.

<sup>212</sup> *Id.* at 1281.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

letter directing what Weaver could say to students, and a federal lawsuit.<sup>218</sup>

Weaver alleged that the letter, which limited her speech, violated her constitutional right to free speech and that she was denied the equal protection of the law.<sup>219</sup> Both parties filed for summary judgment.<sup>220</sup> This discussion will only focus on the equal protection portion of the proceedings.<sup>221</sup>

The first task in an equal protection analysis is the selection of the appropriate test.<sup>222</sup> Weaver asserted that she was denied her right to equal protection when the school district removed her from the coaching position solely on the basis of her sexual orientation.<sup>223</sup> The court started with the proposition that the Supreme Court had “not yet recognized a person’s sexual orientation as a status that deserves heightened protection.”<sup>224</sup> Consequently, the court in *Weaver* used the lowest standard—rational basis.<sup>225</sup>

The rational basis analysis began with the United States Supreme Court’s proposition that an “‘irrational prejudice’” cannot provide the rational basis to support state action against an equal protection challenge.<sup>226</sup> Acknowledging that prejudices exist, District Court Judge Jenkins noted that “[a]lthough the Constitution cannot control prejudices, neither this court nor any other court should, directly or indirectly, legitimize them.”<sup>227</sup> The defendant asserted that the rational basis for removing Weaver as volleyball coach was the negative reaction within the community.<sup>228</sup> Consequently, the court found that this basis of negative reaction for the adverse employment decision “failed to advance any justification for not assigning” Weaver to the position.<sup>229</sup> Accordingly, Weaver prevailed on her motion for summary judgment.<sup>230</sup>

With regard to her second equal protection claim—that the prohibition on discussing her sexual orientation constituted an impermissible viewpoint and

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<sup>218</sup> *Id.* at 1281–82.

<sup>219</sup> *Id.* at 1282.

<sup>220</sup> *Id.*

<sup>221</sup> “Ms. Weaver [was] entitled to summary judgment on her First Amendment claim.” *Id.* at 1286.

<sup>222</sup> See *supra* text accompanying notes 155–185.

<sup>223</sup> *Weaver*, 29 F. Supp. 2d at 1282.

<sup>224</sup> *Id.* at 1287.

<sup>225</sup> *Id.* See also *Romer v. Evans*, 517 U.S. 620 (1996) (establishing rational basis review as the appropriate standard for classifications on the basis of sexual orientation).

<sup>226</sup> *Weaver*, 29 F. Supp. 2d at 1288. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Id.* at 1289 (quoting *Romer*, 517 U.S. at 634).

<sup>227</sup> *Id.* at 1289 (citing *City of Cleburne, Tex. v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

<sup>228</sup> *Id.* at 1289.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 1291.

content-based restriction on speech—Weaver was also successful.<sup>231</sup> The court quickly dispatched this claim by writing: “[s]imple as it may sound, as a matter of fairness and evenhandedness, homosexuals should not be sanctioned or restricted for speech that heterosexuals are not likewise sanctioned or restricted for.”<sup>232</sup> In other words, heterosexual teachers had not been restricted from discussing their sexual orientation, and a lesbian teacher could therefore not be restricted in discussing her sexual orientation.

While Weaver won her case on a motion for summary judgment, the issue of her sexual orientation was not without further controversy. Soon after Weaver initiated the lawsuit discussed above, parents, students, and community members began submitting formal complaints to the school board.<sup>233</sup> A group called the Citizens of Nebo School District for Moral and Legal Values sought a redress of their grievances by submitting a petition signed by 3,000 school district residents.<sup>234</sup> When their requests were not met, they sought relief in the state courts.<sup>235</sup> The plaintiffs essentially wanted the courts to do what neither the school district nor the State Board of Education would do—declare that Weaver was violating the statutes and regulations—by allowing students to bring a private right of action against a teacher (Weaver).<sup>236</sup> They alleged that Weaver violated state law concerning the conduct of teachers, and they wanted the law, as they interpreted it, enforced by the court.<sup>237</sup> They further argued that they had the right to bring a private right of action “to enforce statutory and regulatory requirements for public school employees.”<sup>238</sup> The plaintiffs lost at the trial court level and did not prevail on appeal.<sup>239</sup> The Citizens of Nebo School District lost their case, and the court granted Weaver her costs on appeal.<sup>240</sup>

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<sup>231</sup> *Id.* at 1290. The District directive stated, in pertinent part:

—You are not to make any comments, announcements or statements to students, staff members, or parents of students regarding your homosexual orientation or lifestyle.

—If students, staff members, or parents of students ask about your sexual orientation or anything concerning the subject, you shall tell them that the subject is private and personal and inappropriate to discuss with them.

*Id.* at 1281–82.

<sup>232</sup> *Id.* at 1290.

<sup>233</sup> *Citizens for Nebo Sch. Dist. for Moral & Legal Values v. Weaver & Utah State Bd. of Educ.*, 66 P.3d 592, 594 (Utah 2003).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 597 (Plaintiffs argued for “a private right of action by or on behalf of a student against a teacher for violation of any statute that concerns the professional competence or performance, or ethical conduct, of a teacher . . .”).

<sup>237</sup> *Id.* at 600.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 601.

<sup>240</sup> *Id.* The court did “not review the trial court’s ruling that the fundamental parental rights [found in the Utah Constitution] asserted by the plaintiffs were not protected.” *Id.*

*Lovell v. Comsewogue School District*

Several years after Weaver's successful use of the Equal Protection Clause to invalidate a classification based on sexual orientation, Joan Lovell, a twenty-seven-year veteran teacher in White Plains, New York, filed suit claiming that her principal violated her constitutional right to equal protection under the Fourteenth Amendment.<sup>241</sup> The plaintiff teacher was a lesbian.<sup>242</sup> Three students filed a sexual harassment claim against Lovell.<sup>243</sup> The principal investigated the complaint and dismissed it as frivolous, but he did not discipline the students.<sup>244</sup> Soon after, one student started calling Lovell a "dyke," and another said that she was "disgusting."<sup>245</sup> Two female students began to hug each other when they saw Lovell walking down the hallway.<sup>246</sup> Despite complaining to the principal about the rude and disrespectful behavior aimed at her, the principal failed to take disciplinary action.<sup>247</sup> Lovell sued.

The court found that Lovell had made out a *prima facie* case for an equal protection claim—she alleged that she was treated differently than other similarly situated teachers with respect to the handling of a false sexual harassment claim, and school officials handled her complaints differently from complaints of harassment based on race.<sup>248</sup> For example, Lovell alleged that school authorities called in the Police Bias Unit when a racial epithet was written on her blackboard.<sup>249</sup> On the other hand, nothing was done when Lovell was called a "dyke" and harassed because of her sexual orientation.<sup>250</sup> The court found that the use of disparaging remarks about Lovell's sexual orientation were similar to the use of racial epithets but school authorities handled the two incidents of harassment differently.<sup>251</sup> Therefore, Lovell had stated an equal protection claim.<sup>252</sup>

The school district argued that the principal had acted reasonably, and therefore Lovell's complaint should be dismissed.<sup>253</sup> The court rejected this argument, however, stating that the reasonableness of the defendant's actions was

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<sup>241</sup> *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319 (E.D.N.Y. 2002).

<sup>242</sup> *Id.* at 321.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> The court stated that "[a]n equal protection claim has two essential elements: (1) the plaintiff was treated differently than others similarly situated, and (2) the differential treatment was motivated by an intent to discriminate on the basis of impermissible considerations, such as race." *Id.* at 321–23.

<sup>249</sup> *Id.* at 322.

<sup>250</sup> *Id.*

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

<sup>252</sup> *Id.* at 323.

<sup>253</sup> *Id.*

not an issue before the court.<sup>254</sup> When ruling on the school district's motion to dismiss, the judge ruled that the only issue for consideration was whether Lowell had stated a valid cause of action.<sup>255</sup> Based on Lovell's factual allegations, the court concluded that she had stated a valid claim that she had been denied the equal protection of the law because of her sexual orientation.<sup>256</sup>

*Glover v. Williamsburg Local School District Board of Education*

Bruce Glover was a gay teacher.<sup>257</sup> Glover was white and his partner, John Wright, was African American.<sup>258</sup> Glover brought suit under the Equal Protection Clause along with other causes of action when his teaching contract was not renewed.<sup>259</sup>

Glover was offered a one-year contract to teach at Williamsburg Elementary School teaching English and Social Studies to sixth grade students.<sup>260</sup> His first semester evaluation was positive with most scores "above average," but he received two "below average" scores for managing student behavior and for conformity with professional standards.<sup>261</sup> The principal asserted that Glover was too quick to send students to the office.<sup>262</sup> But two teachers with adjoining classrooms testified that Glover "[kept] kids 'on task'" and that they did not hear disruptions coming from his classroom.<sup>263</sup>

For the second below average score, the principal wrote: "Mr. Glover has used some indiscretions which may have had a detrimental effect on the respect he receives from students. He was warned at the beginning of the school year not to repeat such behavior."<sup>264</sup> The problem that the court pointed out was that there was no previous warning that Glover had committed any indiscretion "whatsoever."<sup>265</sup>

It appears that the genesis of the principal's statement was the false rumor that Glover was seen holding hands with his partner, John Wright, at the sixth grade Christmas party.<sup>266</sup> It was not unusual for teachers to invite friends and

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 324.

<sup>256</sup> *Id.* at 325.

<sup>257</sup> *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1162 (S.D. Ohio 1998).

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 1163.

<sup>261</sup> *Id.* at 1163-64. The principal's observation notes included comments such as "Glover's lessons were 'well-organized 'and' purposeful,' and the students were 'quiet and focused.'" *Id.* at 1163.

<sup>262</sup> *Id.* at 1164.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

spouses to help out with holiday parties.<sup>267</sup> Wright attended briefly, then left, and “[a]t no time did Glover and Wright hold hands.”<sup>268</sup> A number of weeks passed, and after the evaluation had been written, the principal checked with “parents who had attended the party and learned that the rumor was false.”<sup>269</sup> The principal changed the evaluation but warned Glover “to be careful not to do anything which might fuel rumors and upset the community.”<sup>270</sup>

In the second semester, the principal received a complaint about Glover from a parent who was also a member of the school board.<sup>271</sup> The principal failed to follow the master contract, which required the principal to notify the teacher of a complaint.<sup>272</sup> At the end of the semester, Glover and Theresa Whiteman, a white heterosexual teacher, were not recommended for renewal of their contracts.<sup>273</sup> “Whiteman’s evaluations were in fact worse than Glover’s and were described . . . as ‘very, very bad.’”<sup>274</sup> Both Glover and Whiteman appealed the non-renewal decision to the school board.<sup>275</sup> The board reversed the decision to non-renew Whiteman, but it unanimously upheld Glover’s nonrenewal, citing his inability to manage student behavior.<sup>276</sup> Glover brought suit under the Equal Protection Clause.<sup>277</sup>

At the trial, the defendant school district asserted “that the Equal Protection Clause simply does not prohibit discrimination based on sexual orientation.”<sup>278</sup> The United States District Court, brushing aside the defense, utilized the rational basis test.<sup>279</sup> The court began with a review of the actions of the principal and superintendent.<sup>280</sup> The court characterized their behavior as “at times unprofessional, and it can be inferred that they would have acted differently if Glover were not homosexual.”<sup>281</sup> The court pointed to the hand holding incident as an illustration.<sup>282</sup> The court continued its analysis by reviewing the difference between the eventual renewal of Whiteman and the unanimous deci-

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<sup>267</sup> *Id.*

<sup>268</sup> *Id.* “[No administrator] checked out the rumor [when it was first received] or asked Glover about it.” *Id.*

<sup>269</sup> *Id.* at 1165.

<sup>270</sup> *Id.*

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

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 1166.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 1167.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 1168.

<sup>278</sup> *Id.* at 1169.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 1171.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

sion to dismiss Glover.<sup>283</sup> Comparing the evaluation scores of Glover and Whiteman, the court found that behavior management is a common problem that plagues beginning teachers, and that Whiteman's scores were worse.<sup>284</sup> Whiteman received ratings of "poor" and "below average"<sup>285</sup> while Glover received ratings of "below average" for both semesters.<sup>286</sup> An expert witness testified that it was a "mystery" why Glover showed a "quick and drastic decline in basic teaching skills" from the first semester to the second semester.<sup>287</sup>

The court found that the school board's purported reason for Glover's nonrenewal was pretextual, and "in fact the Board discriminated against Glover on the basis of his sexual orientation."<sup>288</sup> Glover established his equal protection claim based on a rational basis review, and the court ruled that he was entitled to reinstatement, back pay, and damages for mental and emotional distress.<sup>289</sup>

### *Schroeder v. Hamilton School District*

*Weaver*, *Lovell*, and *Glover* prevailed in their equal protection claims, but Tommy Schroeder did not. Schroeder, a gay elementary-school teacher in a Wisconsin school district, endured taunts and harassment from students and parents over a period of several years.<sup>290</sup> Schroeder demanded that school officials conduct "sensitivity training" for faculty and staff in order to condemn discrimination against homosexuals.<sup>291</sup> School authorities declined to do this, but the associate principal at Schroeder's school circulated a memorandum to teachers and staff that directed them to punish students who used "inappropriate and offensive racial and/or gender-related words or phrases."<sup>292</sup> Most of the harassment was anonymous, but the school disciplined students who could be identified.<sup>293</sup>

In February 1998, Schroeder experienced a "mental breakdown" and resigned from his teaching post.<sup>294</sup> He then sued the school district and several school officials, claiming they had violated his right to equal protection by failing to take reasonable measures to prevent the harassment.<sup>295</sup> In particular, he argued that school authorities had done less to protect him from harassment

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<sup>283</sup> *Id.* at 1172.

<sup>284</sup> *Id.*

<sup>285</sup> The court pointed to the fact that a student was injured in Whiteman's class. *Id.*

<sup>286</sup> *Id.* In addition, a teacher who taught "directly across the hallway" from Glover, testified that "she had never heard disruptions from Glover's classroom." *Id.*

<sup>287</sup> *Id.* at 1174 n.22.

<sup>288</sup> *Id.* at 1174.

<sup>289</sup> *Id.* at 1175.

<sup>290</sup> *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 948 (7th Cir. 2002).

<sup>291</sup> *Id.* at 949.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 956.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 950.

than they had done to address racial discrimination against students.<sup>296</sup>

The trial court dismissed Schroeder's suit, and the Seventh Circuit affirmed.<sup>297</sup> Although the appellate court relied on *Nabozny v. Podlesny*<sup>298</sup> for its analysis, it concluded that Schroeder had failed to demonstrate that his complaints about harassment had been treated differently than complaints by non-homosexual teachers, or that school officials had intentionally discriminated against him or acted with deliberate indifference to his complaints because he was gay.<sup>299</sup>

The Seventh Circuit emphatically rejected Schroeder's arguments that school authorities had not done enough to stop the harassment against him, most of which was anonymous.<sup>300</sup> Officials had disciplined the student harassers who could be identified, the court pointed out.<sup>301</sup> "By punishing these students, the defendants made it abundantly clear to the student population that such terms were totally unacceptable in polite society. This is all that was required of them."<sup>302</sup> In fact, the court expressed skepticism that anything more could have been done on Schroeder's behalf "without expending a disproportionate commitment of resources, or fashioning a draconian response that would unnecessarily infringe on the rights of the non-offending students."<sup>303</sup>

Judge Posner filed a concurring opinion in *Schroeder*, in which he voiced an appreciation of the difficulties school officials face when discussing sexual topics with children:

[W]hen harassment of a teacher or a student is based upon his sexual orientation or activity, the school authorities' options are limited by an understandable reticence about flagging issues of sex for children. . . . [I]t is possible for a rational school administration to fear that if it explains sexual phenomena, including homosexuality, to schoolchildren in an effort to get them to understand that it is wrong to abuse homosexuals, it will make children prematurely preoccupied with issues of sexuality.<sup>304</sup>

Posner also distinguished the case before it from *Nabozny*, upon which Schroeder had principally relied. In *Nabozny*, Posner pointed out, students physically assaulted another student and school officials allegedly did nothing at all.<sup>305</sup> The *Nabozny* court had ruled that there was no rational basis for

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<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 956.

<sup>298</sup> 92 F.3d 446 (7th Cir. 1996). For a discussion of *Nabozny*, see FOSSEY ET AL., *supra* note 6.

<sup>299</sup> *Schroeder*, 282 F.3d at 956.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.* at 956.

<sup>304</sup> *Id.* at 958 (Posner, J., concurring).

<sup>305</sup> *Id.*



permitting a student to assault another based on the sexual orientation of the victim; thus, it concluded that the plaintiff in that case had alleged a violation of his constitutional right to equal protection.<sup>306</sup>

In *Schroeder*, Judge Posner emphasized that school officials were confronted with verbal harassment of a teacher—harassment that they made at least some effort to prevent.<sup>307</sup> In such a case, Posner argued, a court should not use the rational basis test to second guess the adequacies of the authorities' response:

The administration of the public schools of this country in the current climate of rancid identity politics, pervasive challenges to authority, and mounting litigiousness is an undertaking at once daunting and thankless. We judges should not make it even more daunting by injecting our own social and educational values in the name of "rationality review." So while in hindsight it appears that the defendants could have done more to protect Schroeder from abuse, it is equally important to emphasize that lackluster is not a synonym for invidious or irrational. There is no evidence that the defendants were hostile to Schroeder because of his sexual orientation—or because of anything else, for that matter. And they cannot be said to have been irrational in failing to do more than they did, as there were rational considerations counseling against more vigorous action.<sup>308</sup>

Equal Protection analysis under the rational basis test has had mixed success as a cause of action protecting GLBT teachers from discrimination in public schools. However, equal protection case law may be building a foundation in which action based primarily, if not solely, on sexual orientation may be actionable as an Equal Protection violation. For example, in *Nabozny*, the court held that it was "unable to garner any rational basis for permitting one student to assault another based on the victim's sexual orientation."<sup>309</sup> In *Stemler v. City of Florence*,<sup>310</sup> the court stated that a "desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose, a state action based on that animus alone violates the Equal Protection Clause."<sup>311</sup> And Justice O'Connor, in her *Lawrence v. Texas* concurrence, argued for "a more searching form of rational basis" when a statute has a "desire to harm a politically unpopular group."<sup>312</sup> Furthermore, it remains to be seen how GLBT teachers and students would fare under a heightened test, but given the increased requirements of the state to protect those in the classification, it can

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<sup>306</sup> *Id.* at 958–59 (citing *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir. 1996)).

<sup>307</sup> *Id.* at 959.

<sup>308</sup> *Id.*

<sup>309</sup> *Nabozny*, 92 F.3d at 458.

<sup>310</sup> 126 F.3d 856 (6th Cir. 1997).

<sup>311</sup> *Id.* at 874.

<sup>312</sup> *Lawrence v. Tex.*, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring).

safely be asserted that they may fare better but would not be worse off.<sup>313</sup> The tide of protection against discrimination for GLBT individuals under equal protection appears to be on the flood and not at slack tide.

#### IV. THE RIGHT TO PRIVACY

The Fourteenth Amendment requires that no "State deprive any person of life, liberty or property, without due process of law."<sup>314</sup> The right to privacy is a right implied in the concept of personal liberty as embodied in the Fourteenth Amendment, although the U.S. Constitution makes no direct reference to the existence of a right to privacy.<sup>315</sup> Specifically, the Fourteenth Amendment Due Process Clause's substantive component derives mainly from the interpretation of the term "liberty."<sup>316</sup> As a result, an unreasonable denial of "liberty" may be found when certain types of government limits on individual conduct unreasonably interfere with important individual rights.<sup>317</sup>

As noted by Justice Kennedy, "there is a substantive component to the due process clause' and 'the value of privacy is a very important part of that substantive component.'"<sup>318</sup> Accordingly, there are certain protected zones of privacy where the government should not interfere, regardless of the government interest asserted.

Although an explicit constitutional right to privacy was first recognized by the Supreme Court in *Griswold v. Connecticut*,<sup>319</sup> the Supreme Court had recognized an individual's constitutionally protected right to make at least some personal decisions free of governmental intrusion as early as the 1920s.<sup>320</sup> Justice Brandeis argued that the U.S. Constitution provides protection for the "pri-

<sup>313</sup> See Eric A. Roberts, *Heightened Scrutiny Under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation*, 42 DRAKE L. REV. 485, 495 (1993).

<sup>314</sup> U.S. CONST. amend. XIV § 1.

<sup>315</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (reaffirming *Roe v. Wade*, 410 U.S. 113 (1973), and emphasizing the importance of a right to control one's body and life).

<sup>316</sup> See *id.*

<sup>317</sup> See *id.*

<sup>318</sup> Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 238-39 (2005).

<sup>319</sup> 381 U.S. 479 (1965). "It is fair to say that the right to privacy was created in *Griswold*: no specific, Court-defined right to engage in private acts had existed before this decision." JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 760 (4th ed. 1991).

<sup>320</sup> See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing the constitutionally protected right of the individual "to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

vacuity of the individual" as a fundamental right.<sup>321</sup> Brandeis took the position that an individual's private life should be free from government intrusion and that all individuals have "the right to be let alone."<sup>322</sup>

In several subsequent cases, the U.S. Supreme Court extended this zone of privacy under the Fourteenth Amendment. In 1965, the Court held in *Griswold v. Connecticut*<sup>323</sup> that a state law prohibiting the use of contraceptives violated the right of marital privacy, thereby affirming privacy as a fundamental right.<sup>324</sup> In 1972, the Court extended this ruling to unmarried couples in *Eisenstadt v. Baird*.<sup>325</sup> In both *Griswold* and *Eisenstadt*, then, the Court recognized private sexual activity as a constitutionally protected privacy right. In 1973, *Roe v. Wade* expanded privacy rights to include a woman's right to have an abortion.<sup>326</sup> In this case, the Court found that the substantive rights under the Due Process Clause of the Fourteenth Amendment guaranteed privacy rights.<sup>327</sup> Other Supreme Court decisions protected child-rearing and other family practices under the banner of privacy as well.<sup>328</sup>

*Griswold* and *Eisenstadt* are not the only examples of the Court's efforts to define the boundaries of privacy in sexual activity and other areas. In a 1986 decision, *Bowers v. Hardwick*,<sup>329</sup> the Court held that the right to privacy did not include all private sexual activity.<sup>330</sup> In this case, the Supreme Court upheld a Georgia anti-sodomy statute in the face of Hardwick's argument that the law was unconstitutional because it violated his right to privacy.<sup>331</sup> The Court held that the privacy rights discussed in earlier cases focused on family marriage and procreation, thereby limiting privacy in sexual activity to a particular realm.<sup>332</sup>

The Supreme Court overruled this decision only seventeen years later. In

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<sup>321</sup> John Trebilcock, Comment, *Off Campus: School Board Control Over Teacher Conduct*, 35 TULSA L.J. 445, 450 n.57 (2000).

<sup>322</sup> See, e.g., *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>323</sup> 381 U.S. 479 (1965).

<sup>324</sup> *Id.* at 486.

<sup>325</sup> 405 U.S. 438 (1972).

<sup>326</sup> 410 U.S. 113 (1973).

<sup>327</sup> *Id.*

<sup>328</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (finding a Virginia law prohibiting marriages based on racial classification unconstitutional); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (finding a "private realm of family life which the state cannot enter"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (recognizing parents' liberty interest in directing the upbringing and education of their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing the important interest of parents in raising their children and the need to permit some decisions to be free from state control).

<sup>329</sup> 478 U.S. 186 (1986).

<sup>330</sup> *Id.* at 196.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

*Lawrence v. Texas*,<sup>333</sup> the Supreme Court held that a Texas law criminalizing sodomy between members of the same sex violated the Due Process Clause of the Fourteenth Amendment, bypassing the Equal Protection Clause.<sup>334</sup> Finding that the *Bowers* Court failed to comprehend the scope of the individual liberty, the *Lawrence* majority noted that the anti-sodomy law attempted to criminalize one of the most private areas of human behavior—sexual conduct—in the most private of places—one’s home.<sup>335</sup> In *Lawrence*, the Court effectively declared that consensual sexual behavior in the privacy of the home is constitutionally protected and cannot be the basis for a crime.<sup>336</sup> More specifically, it stated that “adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”<sup>337</sup> Speaking specifically to the *Bowers* decision, the Court noted that it was “not correct when it was decided, and it is not correct today.”<sup>338</sup> Ultimately, *Lawrence* established that liberty interests include “freedom of thought, belief, expression, and certain intimate conduct.”<sup>339</sup>

In deciding *Lawrence*, the Court revisited *Griswold*, *Eisenstadt*, and *Roe*, which, as discussed, found protected liberty rights under the Due Process Clause in areas such as marriage, procreation, and child rearing.<sup>340</sup> In fact, the *Lawrence* Court noted that the “pertinent beginning point” for its holding was *Griswold*, which prohibited the government from intruding upon the private intimacies associated with marriage.<sup>341</sup> *Eisenhardt*, the Court went on to say, confirmed that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>342</sup> The *Lawrence* Court noted that these cases provided the context for *Roe*, the widely publicized decision legalizing abortions.<sup>343</sup> To further support the principle that Fourteenth Amendment liberty rights extend beyond the rights of married adults, the *Lawrence* Court also cited the 1977 Supreme Court ruling striking down a New York law forbidding the distribution of contraceptives to persons less than sixteen years of age.<sup>344</sup>

Suzanne Eckes and Martha McCarthy contend that the *Lawrence* decision

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<sup>333</sup> 539 U.S. 558 (2003).

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 567.

<sup>336</sup> *Id.* at 575–79.

<sup>337</sup> *Id.* at 567.

<sup>338</sup> *Id.* at 578.

<sup>339</sup> *Id.* at 562.

<sup>340</sup> See *supra* text accompanying notes 323–327.

<sup>341</sup> *Lawrence*, 539 U.S. at 564.

<sup>342</sup> *Id.* at 565 (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 566 (citing *Carey v. Population Serv. Int’l*, 431 U.S. 678 (1977)).

has recognized a new zone of privacy that may impact teachers' rights.<sup>345</sup> Before *Lawrence*, engaging in sodomy was illegal in some states, so arguably a teacher's conduct in this regard could be considered immoral. If engaging in sodomy in the privacy of one's home is no longer a crime, it would seem to be impossible for school teachers to be dismissed for such "criminal conduct."<sup>346</sup> No matter what argument a school employer might raise to justify sanctions against a teacher based solely on the teacher's sexual identify, it is difficult to see how any argument could outweigh the constitutional privacy rights of homosexual school employees after *Lawrence*.<sup>347</sup>

McCarthy and Eckes argue that the *Lawrence* ruling raises questions about the continued vitality of earlier lower court teacher-lifestyle decisions.<sup>348</sup> Specifically, it is arguable regarding whether a teacher could still be dismissed if a school demonstrates a supposed causal nexus between a teacher's sexual orientation and the teacher's effectiveness in the classroom in light of *Lawrence*.<sup>349</sup> For example, if a teacher is openly gay in the school and his community believes that he is unfit to teach because of his recent notoriety, how would this impact his employment in light of *Lawrence*? Eckes and McCarthy note that Justice Kennedy wrote in the *Lawrence* majority that "[t]he central holding in *Bowers* . . . demeans the lives of homosexual persons."<sup>350</sup> Without demonstrating that his lifestyle impacted his teaching, could a school's need to respond to adverse notoriety trump the teacher's right to privacy? Conversely, could *Lawrence* protect the teacher from an adverse employment decision because an adverse employment decision based on her sexual orientation would demean her? It is quite likely that the scenario would result in a hybrid of *Lawrence* and nexus with a diminished emphasis on adverse notoriety.<sup>351</sup>

For example, the holding in *Jarvella v. Willoughby-Eastlake City School District Board of Education*<sup>352</sup> could be instructive in finding this balance. In this case, which involved a teacher's questionable letters to a former student, the court overturned the teacher's dismissal, writing:

The private conduct of a man, who is also a teacher, is a proper concern to those who employ him only to the extent it mars him as a teacher, who is also a man. Where his professional achievement is unaffected, where the school community is placed in no jeopardy, his private acts are his own

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<sup>345</sup> See Eckes & McCarthy, *supra* note 124, at 536.

<sup>346</sup> Suzanne E. Eckes, & Martha M. McCarthy, *Lawrence v. Texas: Does This Mean Increased Privacy Rights for Gay and Lesbian Teachers?*, 2 J. OF WOMEN IN EDUC. LEADERSHIP 73, 83 (2004).

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 84.

<sup>350</sup> *Lawrence*, 539 U.S. at 575.

<sup>351</sup> Eckes & McCarthy, *supra* note 346, at 84.

<sup>352</sup> 233 N.E.2d 143 (Ohio 1967).

business and may not be the basis of discipline.<sup>353</sup>

Although the Supreme Court in *Lawrence* did not directly address the issue of a nexus and disruption in the workplace, some jurisdictions have found no basis for firing a GLBT teacher, regardless of community disruption.<sup>354</sup> Other courts have also downplayed the disruption that parents or students may cause by opposing any type of sensitivity toward gays and lesbians.<sup>355</sup>

Despite this silence in *Lawrence*, lower courts may be reluctant to support dismissal actions based on notoriety involving sexual orientation in the same way that the courts have been hesitant to support dismissal actions based on marital status and pregnancy. While it remains to be seen how lower courts will interpret the scope of *Lawrence*, GLBT teachers have reason to be optimistic about the potential success of legal challenges to employment decisions.<sup>356</sup>

## V. STATE AND LOCAL ANTIDISCRIMINATION PROTECTIONS

Because of the lack of federal protection granted to GLBT employees, some states have passed antidiscrimination employment laws. Lambda Legal, a civil rights organization focusing on GLBT issues, argues that state laws can have the best impact on bigotry against GLBT individuals in schools.<sup>357</sup> Specifically, twenty states and Washington, D.C. ban discrimination against employees based on sexual orientation. The states are: California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.<sup>358</sup> Most of the provisions “generally prohibit discrimination” against employees of all sexual orientations (heterosexual, bisexual, gay, and lesbian).<sup>359</sup> Some laws protect individuals against discrimination based on *perceived* sexual orientation, allowing someone to state a claim even if that individual is not GLBT.<sup>360</sup>

In most states—Minnesota, Nevada, Hawaii, New Hampshire, and Illinois, for example—prohibition of discrimination based on sexual orientation is included in prohibitions on other factors like race, religion, or disability.<sup>361</sup> For

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<sup>353</sup> *Id.* at 146.

<sup>354</sup> *E.g.*, *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998).

<sup>355</sup> *E.g.*, *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003).

<sup>356</sup> Eckes & McCarthy, *supra* note 346, at 84.

<sup>357</sup> Lambda Legal, *Working on State Laws to Protect GLBT Students from Discrimination in Schools*, <http://www.lambdalegal.org/our-work/in-court/other/working-on-state-laws-to.html> (last visited Nov. 15, 2009).

<sup>358</sup> *See* Eckes & McCarthy, *supra* note 124, at 541.

<sup>359</sup> Lambda Legal, *The Rights of LGBT Public Employees* (Jan. 10, 2006), <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page-31986660.html>.

<sup>360</sup> *Id.*

<sup>361</sup> Eckes & McCarthy, *supra* note 124, at 541–42.

example, Illinois' statute reflects that:

It is the public policy of this State:

(A) Freedom from Unlawful Discrimination. To secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, military status, sexual orientation, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.<sup>362</sup>

States like Connecticut, Oregon, and Wisconsin, however, have separate statutory language that deals specifically with discrimination against individuals *based on* sexual orientation.<sup>363</sup> These statutes exist separate from or in addition to general employment discrimination laws. For example, Wisconsin's statute says that it constitutes a discriminatory practice:

For any employer, labor organization, licensing agency or employment agency or other person to refuse to hire, employ, admit or license, or to bar or terminate from employment, membership or licensure any individual, or to discriminate against an individual in promotion, compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation.<sup>364</sup>

Colorado, New York, and North Dakota have passed "lifestyle protection" laws, which prohibit adverse employment actions as a result of an employee's off-duty conduct.<sup>365</sup> For example, Colorado's law states that it is unlawful "for an employer to terminate any employee due to that employee's engaging in any lawful activity off the premises of the employer during the nonworking hours."<sup>366</sup>

Eckes and McCarthy note that in addition to state passage of anti-discrimination statutes, some cities and school districts have enacted laws protecting GLBT public employees.<sup>367</sup> Approximately 100 cities and counties have local

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<sup>362</sup> 775 ILL. COMP. STAT. 5/1-102 (2007). *See also* N.H. REV. STAT. ANN. § 354-A:6 (2008), which states:

Opportunity for Employment Without Discrimination a Civil Right.—The opportunity to obtain employment without discrimination because of age, sex, race, creed, color, marital status, physical or mental disability or national origin is hereby recognized and declared to be a civil right. In addition, no person shall be denied the benefits of the rights afforded by this section on account of that person's sexual orientation.

<sup>363</sup> *E.g.*, WIS. STAT. § 111.36 (2006).

<sup>364</sup> *Id.*

<sup>365</sup> Erich Shiner, Comment, *Keeping the Boss Out of the Bedroom: California's Constitutional Right of Privacy as a Limitation on Private Employer's Regulation of Employees' Off-Duty Intimate Association*, 37 MCGEORGE L. REV. 449, 462 (2006).

<sup>366</sup> COLO. REV. STAT. ANN. § 23-34-402.5(1) (2008).

<sup>367</sup> *See* Eckes & McCarthy, *supra* note 124, at 543-44.

regulations in place.<sup>368</sup> Similarly, there at least twenty-one school districts that have adopted similar anti-discrimination policies.<sup>369</sup> Additionally, union contracts in some districts may include sexual orientation and gender identity in their non-discrimination clauses.<sup>370</sup> Public educators can use these protections in challenging harassment, dismissal, or other adverse employment consequences based on their sexual orientation.

In fact, a few GLBT teachers have already begun to rely on these state and local laws for protection. For example, a California labor law provided one teacher with additional protection against harassment while teaching in a public school.<sup>371</sup> In this case, a biology teacher with a strong classroom reputation succeeded in challenging years of harassment by colleagues based on her sexual orientation. The teacher used the labor law to support her claim that school officials did not investigate several incidents of harassment against her. Reversing the court below, a California appeals court found that the nondiscrimination statute prohibiting anti-gay discrimination in hiring, firing, and promotion protects employees against harassment based on sexual orientation.<sup>372</sup> The court interpreted the labor code's prohibition on "discriminatory treatment in employment" to encompass discrimination "based on actual and/or perceived sexual orientation."<sup>373</sup> The school district was ordered to pay the teacher over \$140,000 and to provide sensitivity training about sexual orientation to its employees.<sup>374</sup>

While state and local laws appear to be a step forward for GLBT employees, relatively few teachers have used these protections to challenge employment decisions. This may be because most of the state and local laws protecting GLBT employees are fairly new. Another explanation for the lack of litigation in this area may be that the state and local laws protecting GLBT teachers may actually be working as a deterrent to discriminating conduct. Time will tell if state and local laws focused on protecting GLBT teachers are having the de-

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<sup>368</sup> National Education Association, *Strengthening the Learning Environment: A School Employee's Guide to Gay, Lesbian, Bisexual, and Transgender Issues* (2006), [http://www.nea.org/assets/docs/mf\\_glbguide.pdf](http://www.nea.org/assets/docs/mf_glbguide.pdf).

<sup>369</sup> Human Rights Campaign, *Hatred in the Hallways* (2001), <http://www.hrw.org/legacy/reports/2001/uslgbt/toc.htm>.

<sup>370</sup> Lambda Legal, *The Rights of LGBT Public Employees* (Jan. 10, 2006), <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/page.jsp?itemID=31986660>.

<sup>371</sup> *Kavanaugh v. Hemet Unified Sch. Dist.*, No. 99-04090, CA Dept. Indus. Relations (2000). See also *Curcio v. Collingswood Bd. of Educ.*, No. CIV.A.04-5100(JBS), 2006 WL 1806455, at \*1 (D.N.J. June 28, 2006) (finding discrimination against gay teacher unlawful).

<sup>372</sup> *Murray v. Oceanside Unified Sch. Dist.*, 95 Cal. Rptr. 2d 28, 28 (Cal. Ct. App. 2000).

<sup>373</sup> *Id.* at 31.

<sup>374</sup> Lambda Legal, *California Teacher Settles Sexual Orientation Discrimination Suit with School District* (2002), <http://www.lambdalegal.org/news/pr/california-teacher-settles.html>.



sired impact. In the meantime, it is recommended that more states adopt laws protecting GLBT employees from discrimination and harassment.

## VI. CONCLUSION

The litigation involving GLBT teachers has focused on the concept that public school teachers guide their students by the examples they set. The U.S. Supreme Court has recognized that teachers serve as a role model for students. While many observers would argue that GLBT teachers can serve as positive role models for teaching respect and tolerance regarding sexual orientation, courts have not spoken with a clear voice about whether GLBT teachers are less able than their heterosexual peers to serve as appropriate role models for students. Indeed, discrimination against GLBT teachers is damaging not only to the teachers but also to their students.

It is an unfortunate reality that GLBT teachers experience harassment in public schools. Even more unfortunate is the lack of federal protections available for GLBT teachers. As noted, Title VII is unlikely to protect GLBT teachers from discrimination based on sexual orientation unless Congress amends Title VII to specifically prohibit employment discrimination against GLBT teachers, which does not seem likely given its historical reluctance to pass legislation to redress discrimination against lesbians and gays.<sup>375</sup> As a result, the Equal Protection Clause, privacy rights under the Due Process Clause, and state or local laws are their best and possibly only legal recourse.

Some day, perhaps, all courts will find that there is no rational reason to treat GLBT teachers differently than their heterosexual counterparts. Students are not well-served when an employer discriminates against a highly qualified teacher because of characteristics unrelated to professional competence.<sup>376</sup> As

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<sup>375</sup> Log Cabin Republicans, arguing for passage of the Employment Non-Discrimination Act, observed:

Job discrimination, for any reason, is un-American, unfair, and unwise. Our nation's economic success depends on having the most qualified, dedicated, and competent people as part of the workforce, regardless of sexual orientation. Too many gay and lesbian Americans still face job discrimination because of their perceived or actual sexual orientation. This should not be allowed to happen in our modern society.

Workplace discrimination affects hundreds of thousands of gay and lesbian Americans. This issue goes to the core of what it means to live in a free society. Freedom depends on people having the opportunity to pursue any career they wish. Any person's progress in the workplace should depend solely on his or her skills and ability, not their sexual orientation.

The Log Cabin Republicans, *Issue: Workplace Discrimination*, <http://www.logcabin.org/logcabin/workplace.html> (last visited Oct. 25, 2009).

<sup>376</sup> It is highly questionable that the sexual orientation of an educator is a bona fide occupational qualification. "A prudent employer won't make decisions based on factors or characteristics unrelated to the job (such as sexual orientation), even if no law explicitly prohibits it." Nolo, *Preventing Sexual Orientation Discrimination in the Workplace*, <http://www.nolo.com/legal-encyclopedia/article-30213.html> (last visited Oct. 25, 2009).

discussed above, educators are role models for students; but school board members and school administrators are role models as well. Board members and administrators must protect teachers from discrimination just as they must protect students from discrimination. If important figures in the life of a student cannot be protected, is it a stretch for students to question whether those same board members and school administrators can protect them?<sup>377</sup>

If schools are not safe for the most vulnerable, are they safe for anyone? Educators build what they value; they are responsible for the culture of their school. We must establish a professional culture in which all teachers can be judged for their professional service and not their personal sexual orientation. There have always been gay and lesbian teachers in our classrooms; their presence, however, in many cases has been invisible.<sup>378</sup> This invisibility should not mask the answer to the question whether it makes a difference that a teacher is gay or lesbian; the answer is no. Laws, professional ethics, and community standards should and must make sexual orientation irrelevant in deciding who will teach our children. Quality teachers are the core of a quality educational system. A person's sexual orientation has no place in defining quality. Quality is asexual in practice, and asexual in orientation.

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<sup>377</sup> The National Education Association Task Force on Sexual Orientation similarly states:

Moreover, when students observe employment discrimination on the basis of sexual orientation/gender discrimination, it reinforces attitudes in a way that places g/l/b/t students in a form of double jeopardy: "Abusive youth justify their harassment by pointing to societal and governmental support for discrimination, and abused youth get the message that even adults in positions of authority can be attacked because of who they are.

The Gay, Lesbian and Straight Education Network, *Report of the National Education Association Task Force on Sexual Orientation* 6 (2002), [http://www.glsen.org/binary-data/GLSEN\\_ATTACHMENTS/file/225-1.pdf](http://www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/225-1.pdf).

<sup>378</sup> See Carla Washburne Rensenbrink, *What Difference Does It Make? The Story of a Lesbian Teacher*, 66 HARV. EDUC. REV. 257 (1996).

