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### School Board Control Over Education and a Teacher's Right to Privacy

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## SCHOOL BOARD CONTROL OVER EDUCATION AND A TEACHER'S RIGHT TO PRIVACY

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### I. INTRODUCTION

Privacy in its broadest meaning is the protection of an individual's interest in making decisions free of government interference.<sup>1</sup> The Supreme Court has recognized that the Liberty Clause of the Fourteenth Amendment<sup>2</sup> protects "a right of personal privacy"<sup>3</sup> that includes "the interest in independence in making certain kinds of important decisions."<sup>4</sup> However, the right to make decisions without government interference is not without limits. For public school teachers, their expectation of privacy is diminished by the reality that they have been employed to instruct students, most of whom are minors required under state compulsory attendance laws to attend school.

School boards entrust teachers with the responsibility to provide students with the knowledge and skills that comport with board policy. When teachers instruct students, board members expect that teachers will adhere to approved guidelines and conduct themselves in school settings in an appropriate and professional manner. When teachers deviate from these guidelines or act in a manner that board members and school officials consider not to be in the best interests of the school district, disciplinary action may result.

Privacy issues for teachers can arise in four areas: first, personal privacy, essentially freedom to make lifestyle choices; second, physical privacy, essentially freedom from search and seizure; third, instructional privacy,

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1. See, e.g., *Littlejohn v. Rose*, 768 F.2d 765 (6th Cir. 1985), *cert. denied*, 475 U.S. 1045 (1985) (non-tenured teacher's privacy right might have been violated if school board's non-renewal decision was based on her divorce).

2. U.S. CONST. amend. XIV, § 1 ("[No] State shall . . . deprive any person of life, liberty, or property, without due process of law.")

3. *Roe v. Wade*, 410 U.S. 113, 152 (1973).

4. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

essentially freedom to provide appropriate knowledge and skills in the educational setting; and fourth, associational privacy, essentially freedom to establish relationships with students and others in settings related or unrelated to the workplace.

Privacy as a protected right for employees in the United States is grounded in several constitutional provisions.<sup>5</sup> Most generally, the notion of privacy is associated with confidentiality of information, which is protected under both the Liberty Clause of the Constitution's Fourteenth Amendment<sup>6</sup> and the Fourth Amendment's protection from unreasonable searches and seizures.<sup>7</sup> However, an expanded understanding of privacy can find protection under the concepts of the right of association protected under the Liberty Clause and the First Amendment,<sup>8</sup> expression of ideas under the Free Speech Clause of the First Amendment,<sup>9</sup> and practice of one's religious beliefs under the Free Exercise of Religion Clause of the First Amendment.<sup>10</sup> In addition, every state has confidentiality statutes protecting disclosure of employee information and constitutional provisions similar to those in the Federal Constitution.<sup>11</sup>

## II. TEACHERS AND SCHOOL BOARDS: RIGHT TO PRIVACY VS. CONTROL

This article will examine teacher privacy and the authority of school boards to control teachers. The discussion of this topic will address four areas:

5. *See Roe*, 410 U.S. at 152-53.

6. U.S. CONST. amend. XIV, § 1 ("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 . . .").

7. U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .").

8. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("[w]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

9. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

10. *Id.* ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof").

11. For the differing approaches of two states, *cf. S. Bend Tribune v. S. Bend Community Sch. Corp.*, 740 N.E.2d 937 (Ind. Ct. App. 2000) (under state Public Records Act, school board was not required to reveal information about job applicants) *with State ex rel. Dayton Newspapers v. Dayton Bd. of Educ.*, 747 N.E.2d 255 (Ohio Ct. App. 2000) (under State Public Records Act, school board was required to reveal names, applications, and resumes of candidates for position of superintendent). *But see State ex rel. Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 788 N.E.2d 629 (Ohio 2003) (school district did not have to reveal to media employment application materials submitted to board members during executive session, but returned to each applicant at end of interview where materials had never been "kept" by board under state Public Records Act in order to make them public records).

personal privacy, physical privacy, instructional privacy, and associational privacy.

A. *Personal Privacy*

A teacher's personal life, as for most persons, touches upon a variety of areas, from choice of clothes and accessories<sup>12</sup> to sexual orientation.<sup>13</sup> While teachers have considerable latitude in making personal choices, state interest in avoiding Establishment Clause violations has been sufficient to uphold statutes prohibiting the wearing of religious garb in schools.<sup>14</sup> Similarly, teachers' challenges to dress codes requiring that they wear certain kinds of apparel have withstood constitutional privacy scrutiny.<sup>15</sup> The Second Circuit Court of Appeals in upholding a teacher dress code reasoned that:

Just as the individual has an interest in a choice among different styles of appearance and behavior, and a democratic society has an interest in fostering diverse choices, so also does society have a legitimate interest in placing limits on the exercise of that choice.<sup>16</sup>

However, newer areas of litigation concerning discrimination involving transsexual<sup>17</sup> and transvestite<sup>18</sup> individuals have recognized that, while choice of appearance is not a fundamental right, employers must have a rational basis

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12. *See, e.g.*, U.S. v. Bd. of Educ. for the Sch. Dist. of Philadelphia, 911 F.2d 882, 893-94 (3d Cir. 1990) (enforcement of Pennsylvania's religious garb statute prohibiting wearing of religious apparel, could be enforced against a Muslim teacher over against Title VII discrimination claim); Nichol v. ARIN Intermediate Unit 28, 268 F. Supp. 2d 536, 540, 560-61 (W.D.Pa. 2003) (elementary school instructional assistant suspended for wearing a cross, 1 & 7/16 inches in length and 15/16 inches in width, around her neck granted preliminary injunction reinstating her where court determined that she was likely to prevail on claim that school board's religious affiliations policy prohibiting the wearing of religious jewelry violated the Free Exercise Clause and the Free Speech Clause as a form of personal expressive speech on a matter of public concern).

13. *See* Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 948 (7th Cir. 2002); Lovell v. Comsewogue Sch. Dist., 214 F. Supp. 2d 319, 322 (E.D.N.Y. 2002) (teachers had protection under Equal Protection Clause for alleged discriminatory treatment regarding sexual orientation).

14. *See generally* Sch. Dist. of Philadelphia, 911 F.2d at 891; Cooper v. Eugene Sch. Dist. No. 41, 723 P.2d 298, 308, 311 (Or. 1986).

15. *See* East Hartford Educ. Ass'n v. Bd. of Educ. of Town of East Hartford, 562 F.2d 838, 855 (2d Cir. 1977) (school board teacher dress code requiring that men wear coats and ties upheld); Tardiff v. Quinn, 545 F.2d 761, 764 (1st Cir. 1976) (dismissal of teacher for too-short skirts upheld).

16. *East Hartford*, 562 F.2d at 862.

17. *See* Lie v. Sky Pub. Corp., 2002 WL 31492397 at \*1-\*2 (Mass. Super. Ct. 2002) (a transsexual is a person with the physical and genetic characteristics of one gender but who emotionally and mentally wants to be a member of the other sex).

18. *Id.* at \*2 (a transvestite, or cross-dresser, is a person who wears the clothes of the opposite sex). *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS ("DSM-IV") 533 (4th ed. 1994).

for their apparel decisions.<sup>19</sup> In a non-education case, the Illinois Supreme Court struck down a Chicago ordinance prohibiting a person from wearing clothing of the opposite sex with intent to conceal his or her sex.<sup>20</sup> The court found that the ordinance's purpose in prohibiting cross-dressing to prevent fraud on the public lacked a rational basis and was "fundamentally inconsistent" with "values of privacy, self-identity, autonomy, and personal integrity that . . . the Constitution was designed to protect."<sup>21</sup> Generally though, claims regarding what is referred to as "gender non-conformity" have come to be addressed in discrimination actions under federal or state law rather than under the Liberty Clause of the Fourteenth Amendment.<sup>22</sup>

Reported case law thus far involving privacy rights of teachers and gender non-conformity is minimal,<sup>23</sup> in large part because federal statutes prohibiting discrimination do not designate gender non-conformity as a protected category. However, the Supreme Court's pivotal case *Price Waterhouse v. Hopkins*<sup>24</sup> has had the effect of encouraging a rethinking of protected categories.<sup>25</sup> In *Price Waterhouse*, the Court broadened the understanding of "sex" under Title VII<sup>26</sup> to include stereotypical thinking about the employee based on sex.<sup>27</sup> Since *Price Waterhouse*, at least two federal circuits have weighed in, finding that sex under federal statutes encompasses both biological differences between men and women as well as actions based on failure to conform to socially-prescribed gender expectations.<sup>28</sup> However, at least one other federal circuit

19. See, e.g., *Richards v. Thurston*, 424 F.2d 1281, 1284-85 (1st Cir. 1970).

20. *City of Chicago v. Wilson*, 389 N.E.2d 522, 525 (Ill. 1978).

21. *Id.* at 531 (quoting *Kelley v. Johnson*, 425 U.S. 238, 251 (1976) (Marshall, J., dissenting)).

22. See, e.g., *Lie*, 2002 WL 31492397 at \*4.

23. For an example of an attenuated employee gender non-conformity case, see *Cruzan v. Special School Dist. No. 1*, 294 F.3d 981 (8th Cir. 2002) (Eighth Circuit rejected female teacher's claim that the school's permitting a transgendered male to use the female teachers' restroom constituted religious discrimination).

24. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

25. *Lie*, 2002 WL 31492397 at \*3.

26. 42 U.S.C. § 2000e-2(a)(1) (2004). Employers are prohibited from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." *Id.*

27. *Price Waterhouse*, 490 U.S. at 235. In a promotion review, one partner "described [the plaintiff in *Price Waterhouse*] as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course at charm school.'" *Id.* Furthermore, the partner who informed the plaintiff of the decision not to promote her advised her to "walk more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

28. See *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (pre-operative male-to-female prisoner had section 1983 claims under Eighth Amendment and Gender Motivated Violence Act, 42 U.S.C. § 13981(c) (2004), as a result of rape by a guard); *Rosa v. Park West Bank & Trust*, 214 F.3d 213, 214-15 (1st Cir. 2000) (biological man who was denied a loan

continues to define “sex” to mean “biological male or biological female” and not one’s sexuality or sexual orientation.<sup>29</sup>

As a general rule, the status of gender non-conformity under federal law or the Federal Constitution has become irrelevant because many states, local municipalities, and school districts have acted to afford protection.<sup>30</sup> In addition, the increasing number of successful harassment law suits, brought largely by students for damages under section 1983 and the Equal Protection Clause, has unquestionably mandated attention from school board members, administrators, and teachers, with the likelihood that the climate generally regarding gender non-conformity will change in schools.<sup>31</sup>

The effect of the recent Supreme Court decision *Lawrence v. Texas*<sup>32</sup> on privacy issues relevant to gender non-conformity remains to be seen. In *Lawrence*, the Court reversed the criminal conviction of two men for violating Texas’s anti-sodomy statute.<sup>33</sup> Although the defendants raised a number of constitutional arguments, Justice Kennedy, writing for the majority, resolved the case solely on the ground of whether “the petitioners were free as adults to

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application because he was dressed in traditionally female clothing established a *prima facie* case of sex discrimination under the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a) (2004), sufficient to avoid a motion to dismiss). For two cases from the same circuit prior to *Price Waterhouse*, see *Blackwell v. U.S. Dep’t of Treasury*, 830 F.2d 1183, 1183-84 (D.C. Cir. 1987) (recognizing an employment discrimination claim based on the handicap of transvestitism as covered by the Federal Rehabilitation Act of 1973 (FRA), 29 U.S.C. § 701-96, on the basis of transvestitism); *Doe v. United States Postal Service*, 37 Fair Empl. Prac. Cas. (BNA) 1867 (D.C. Cir. 1985) (plaintiff had an employment discrimination claim under the FRA on the basis of transexualism). However, FRA was amended in 1990 to exclude “gender identity disorders not resulting from physical impairments.” 29 U.S.C. § 705(8)(F)(i) (2000). For similar language under the Americans With Disabilities Act of 1990 (ADA), see 42 U.S.C. § 12208 (2000).

29. *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) (interpreting “sex” under Title VII).

30. See, e.g., *Goins v. West Group, Inc.*, 635 N.W.2d 717 (Minn. 2001) (transgender former employee had sexual orientation claim under state’s Human Rights Act); MADISON, WIS., MADISON CODE OF ORDINANCES ch. 3.23 available at <http://www.ci.madison.wi.us/eGov> (last visited Mar. 31, 2004) (sexual orientation protected under city ordinance).

31. See, e.g., *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1132, 1135 (9th Cir. 2003) (students who experienced anti-gay name-calling remarks could sue school officials for failing to enforce anti-harassment policy); *Massey v. Banning Unified Sch. Dist.*, 256 F. Supp. 2d 1090, 1091, 1093-94, 1096 (C.D. Cal. 2003) (eighth grade student barred from physical education class after she revealed that she was lesbian had equal protection claim, and school officials not entitled to Eleventh Amendment immunity); *Gay-Straight Alliance Network v. Visalia Unified Sch. Dist.*, 262 F. Supp. 2d 1088, 1095-96, 1098, 1111 (E.D. Cal. 2001) (students subjected to a variety of forms of harassment based on their sexual orientation had § 1983 and Equal Protection Clause claims against school officials for failing to address the harassment).

32. *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

33. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) (prohibits “deviate sexual intercourse” between members of the same sex). In this case, the sexual intercourse in question involved anal intercourse between two males. *Lawrence*, 123 S. Ct. at 2475-76.

engage in the private conduct in the exercise of their liberty under the Due Process Clause. . . .”<sup>34</sup> He cautioned states against controlling relationships that “whether or not entitled to formal recognition in the law, [are] within the liberty of persons to choose without being punished as criminals.”<sup>35</sup> Finally, because the act in this case occurred in a home, he opined 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>36</sup> In overruling *Bowers v. Hardwick*,<sup>37</sup> in which the Court upheld a conviction under Georgia’s anti-sodomy law, Justice Kennedy observed that the Court in *Bowers* incorrectly stated the key issue as being “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.”<sup>38</sup> In his opinion, this mistake demonstrated the Court’s “failure to appreciate the extent of the liberty at stake.”<sup>39</sup>

The extent to which *Lawrence* will affect privacy rights involving gender non-conformity of teachers is not clear and will probably not be clear for some time. Justice Kennedy’s observation that *Lawrence* did not involve minors<sup>40</sup> suggests the obvious, namely that *Lawrence* is not likely to provide privacy protection for teachers convicted for committing sexual acts with students. Aside from this obvious limitation, what implications might *Lawrence* have for teachers in school settings?

Justice Kennedy’s observation that the case did not address “whether the government must give formal recognition to any relationship that homosexual persons seek to enter”<sup>41</sup> suggests possible tensions among teacher privacy rights, federalism, and local school board control over education. For example, if states are free to prohibit homosexual marriages and are not required by the Full Faith and Credit Clause<sup>42</sup> to recognize such marriages from other states, what are the implications for teacher privacy rights concerning gender non-conformity in the classroom?<sup>43</sup> If State “A” does not permit homosexual

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34. *Lawrence*, 123 S. Ct. at 2476.

35. *Id.* at 2478.

36. *Id.*

37. *Bowers v. Hardwick*, 478 U.S. 186, 187-89 (1986).

38. *Lawrence*, 123 S. Ct. at 2478.

39. *Id.*

40. *Id.* at 2484.

41. *Id.*

42. U.S. CONST. art. 4, § 1 (“Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State . . .”).

43. *See, e.g.,* *Rosengarten v. Downes*, 802 A.2d 170, 172 (Conn. App. Ct. 2002) (upholding dismissal of an action seeking to dissolve a civil union marriage entered into in Vermont pursuant to that state’s civil union statute, VT. STAT. ANN. tit. 15 § 1202 (2002)). The court observed that because Connecticut recognized only marriage unions between men and women, courts in the state lacked jurisdiction to dissolve a homosexual union. However, the court skirted the Full Faith and Credit Clause issue because all of plaintiff’s contacts were with Connecticut and the

marriages and a teacher from State “A” enters into a marriage in State “B” that does permit such, could a school district in State “A” discharge the teacher? Does Justice Kennedy’s statement in *Lawrence* that petitioners were “entitled to respect for their private lives”<sup>44</sup> provide broad protection for teachers, or will *Lawrence* be limited to its facts, namely protecting acts occurring only in the home, as opposed to a school?<sup>45</sup> The key question yet unresolved is the extent to which the *Lawrence* Court, in overturning the criminal convictions, placed homosexuality (and in a broader sense, all gender non-conformity) on the same constitutional footing as traditional patterns of heterosexuality.<sup>46</sup> A broad reading of *Lawrence* suggests that Liberty Clause privacy rights may well extend to most forms of gender non-conformity. If so, school boards, for example, would have to provide a constitutionally sufficient rational basis for making employment decisions regarding gender non-conformity.<sup>47</sup>

### B. Physical Privacy

Physical privacy for teachers, as for other employees, means intrusion into their persons and property, particularly as related to searches of a person’s property and searches in the form of requiring urine samples for drug testing purposes. Searches are intrusions on a person’s privacy, and the Fourth

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only contact that plaintiff had with Vermont was entering into the civil union. *Id.* at 174-75, 178-79.

44. *Lawrence*, 123 S. Ct. at 2484.

45. *See id.* at 2478. Because the criminal convictions resulted from an act occurring in a home, the application of *Lawrence* to places other than the home is not clear in light of Justice Kennedy’s observation that the prohibited conduct touched “upon the most private human conduct, sexual behavior, and in the most private places, the home.” *Id.*

46. The *Lawrence* Court relied on *Griswold v. Connecticut*, in which the Court invalidated, on privacy grounds, a state statute prohibiting the use of contraceptive drugs, contraception, or counseling for married persons. 381 U.S. 479, 480, 485 (1965). However, in a subsequent case, *Eisenstadt v. Baird*, the Court, in striking down a law prohibiting the distribution of contraceptives for unmarried persons, appeared to expand privacy protection noting that although the *Griswold* Court placed emphasis on the marriage relationship and the marital bedroom, “[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.” 405 U.S. 438, 453 (1973) (emphasis in original).

47. *See* *Shahar v. Bowers*, 114 F.3d 1097, 1099, 1102-03, 1110 (11th Cir. 1997) (holding that Georgia Attorney General withdrawing an offer of employment after finding out about candidate’s lesbian marriage was not subject to strict scrutiny, and Attorney General had sufficient interest in promoting efficiency of important public service under *Pickering* balancing test to reject candidate.) For an example of balancing free speech rights involving expression about gender non-conformity, *see* *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (holding that a teacher opposed to homosexuality was not permitted to create his own bulletin board in the hallway to counter the school’s board on gay and lesbian month on which faculty were permitted to post items). The Ninth Circuit reasoned that the school’s bulletin board represented government speech and the teacher had no right to post different viewpoints about speech on which the school had expressed a viewpoint. *Id.* at 1016-17.



Amendment ensures that a person's expectation of privacy will not be intruded upon by government officers unless probable cause exists.<sup>48</sup>

However, not all public places are the same in terms of an expectation of privacy, as the Supreme Court indicated in three student search cases involving drugs, *New Jersey v. T.L.O.*,<sup>49</sup> *Vernonia School District 47J v. Acton*,<sup>50</sup> and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.<sup>51</sup> The Court held in all three cases that probable cause did not apply to searches of students by school officials and that officials needed only reasonable suspicion to conduct a search.<sup>52</sup> As the Supreme Court has yet to decide a school employee search and seizure case, the question becomes the extent to which diminished expectation of privacy for students, in large part because of the confined and custodial nature of schools, should also apply to teachers.

In *T.L.O.*, where the Court upheld an individualized suspicion search of a girl's purse that produced evidence of drug dealing, the Court, for the first time, articulated that student searches required only reasonable suspicion but had to be reasonable both as to inception of the search and the scope of the search.<sup>53</sup> Thus, in *T.L.O.*, a charge by the teacher that T.L.O. was smoking in the restroom, along with the girl's denial that she had been smoking, provided reasonable suspicion to open the purse and to look for cigarettes and, upon seeing and removing a pack of cigarettes, to continue the search when drug-related items were seen.<sup>54</sup>

The *T.L.O.* Court found the probable cause standard of the Fourth Amendment "unsuited to the school environment" because a requirement that school officials secure a search warrant before conducting student searches "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."<sup>55</sup> In finding that reasonable suspicion, despite diminishing the privacy rights of students, was an appropriate standard because of "the substantial need of teachers and

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48. See, e.g., *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (Court refused to create a "firearms exception" to reliable informant requirement for a probable cause search, where police had received an anonymous phone call that resulted in a gun being found).

49. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

50. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

51. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

52. *Id.* at 828-29; *Vernonia*, 515 U.S. at 652-53; *T.L.O.*, 469 U.S. 340-41.

53. Reasonable suspicion "is not a requirement of absolute certainty." *T.L.O.*, 469 U.S. at 346. The Court found that "[b]ecause the hypothesis that T.L.O. was carrying cigarettes in her purse was itself not unreasonable, it is irrelevant that other hypotheses were also consistent with the teacher's accusation." *Id.*

54. *Id.* at 346-47.

55. *Id.* at 340.

administrators for freedom to maintain order in the schools,”<sup>56</sup> could the Court apply that holding to teachers as well?

In *Earls*, the Court, reinforcing its decision in *Vernonia* by upholding mandatory universal and random drug testing for students participating in extracurricular activities, observed that individualized suspicion for a search was not required because of “the schools’ custodial and tutelary responsibility for children.”<sup>57</sup> The *Earls* Court opined that “[w]hile school children do not shed their constitutional rights when they enter the schoolhouse” under *Tinker v. Des Moines Independent Community School District*,<sup>58</sup> the Court in *Vernonia* added that “Fourth Amendment rights . . . are different in public schools than elsewhere.”<sup>59</sup> Clearly, the context for diminished privacy in *T.L.O.*, *Vernonia*, and *Earls* involves students, but one can argue that setting a lower reasonable suspicion standard for students and requiring a higher probable cause standard for teacher searches in the same school environment would be inconsistent and anomalous.<sup>60</sup> Because teacher constitutional rights in schools owe their origin to the same *Tinker* Court decision as for students,<sup>61</sup> teacher rights, arguably, should be subject to the same ebb and flow of Supreme Court interpretation as for student rights.

In the absence of a Supreme Court decision addressing school employee search and seizure, the closest case is *O’Connor v. Ortega* where the Court, relying heavily on *T.L.O.*, set forth guidelines for search and seizure of public employee property.<sup>62</sup> In *O’Connor*, public hospital supervisors conducted a search of the office of a doctor in charge of residents, purportedly looking for evidence of alleged sexual harassment and suspected coercion of past residents to donate money for the doctor’s new computer. The search, which involved mainly looking through the doctor’s personal possessions, revealed no

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56. *Id.* at 341.

57. *Earls*, 536 U.S. at 830 (quoting *Vernonia*, 515 U.S. at 656).

58. *Id.* (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

59. *Vernonia*, 515 U.S. at 656.

60. Of note is the qualification in *Tinker* where, in granting constitutional rights to teachers as well as students, the Court made the grant “in light of the special characteristics of the school environment . . .” *Tinker*, 393 U.S. at 506.

61. *Tinker* is an interesting decision because the case involved only student litigants and teachers were not a party to the lawsuit; nonetheless, the Court chose to gratuitously accord rights to teachers at the same time it did for students.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to *teachers* and students. It can hardly be argued that either students or *teachers* shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

*Id.* (emphasis added).

62. See *O’Connor v. Ortega*, 480 U.S. 709 (1987) (all facts in this section are taken from pages 712-14 of the Court’s opinion).

evidence of either allegation. When completed, the doctor's personal possessions and hospital property were boxed together, and despite the supervisors' claim that they entered the office in part to take inventory, no inventory in fact was taken.

In applying *T.L.O.*, the Court in *O'Connor* opined that the employer must "balance the invasion of the employee's legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace."<sup>63</sup> The Court defined workplace broadly so as to include all of those areas over which the employer exerts control, which for teachers could include areas such as hallways, break rooms, desks, file cabinets, and classrooms.<sup>64</sup>

An employee's expectation of privacy is determined by the circumstances of the workplace, which the *O'Connor* Court indicated is influenced by the amount of access employees have to an area.<sup>65</sup> In *O'Connor*, the Court suggested that the employee had a greater expectation of privacy where he did not share his locked office with other employees,<sup>66</sup> a marked difference, one could argue, from a teacher's classroom where school administrators, other teachers, substitute teachers, janitors, and students have ready access to the room.<sup>67</sup> The *O'Connor* Court also observed that the hospital had no policy regarding personal items at the workplace, although the Court cautioned that absence of such a policy did not create an expectation of privacy where one would not otherwise exist.<sup>68</sup> In other words, personal items, such as pictures and letters on a teacher's desk, are still part of the workplace and might be the subject of a search.

Applying the *T.L.O.* requirement of reasonableness for a search as to inception and scope, the *O'Connor* Court found reasonable grounds for searching an employee's office to include finding a record, report, or file, conducting an inventory of items in the office, and investigating alleged misconduct.<sup>69</sup> The scope of a search in the workplace was more problematic for the Court, and it cautioned that a workplace did not necessarily apply to a

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63. *Id.* at 719-20.

64. *Id.* at 715-16.

65. *Id.*

66. However, even locked offices would have a diminished expectation of privacy if they "are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits . . . [S]ome government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable." *Id.* at 717, 718.

67. *Accord see* *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 218 F. Supp. 2d 266 (N.D.N.Y. 2002) (school district not liable for allegedly not returning personal items of a teacher discharged for misconduct with students because teacher had been given two opportunities to remove the items and had failed to do so).

68. *O'Connor*, 480 U.S. at 719.

69. *Id.* at 725-26.

piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employee's workspace.<sup>70</sup> Whether an employer could search personal items would depend on whether the particular items for which the search has been conducted might reasonably be located in the places being searched.

Ultimately, the search in *O'Connor* failed the test under *T.L.O.* because it was "at best, a general and unbounded pursuit of anything that might tend to indicate any sort of malfeasance – a search that is almost by definition, unreasonable."<sup>71</sup> Seventeen years after filing his lawsuit for unlawful search and seizure (and eleven years after the Supreme Court decision), the doctor who had been discharged recovered \$376,000 in compensatory damages and \$60,000 in punitive damages against the two supervisors.<sup>72</sup>

Cases applying the search principles of *T.L.O.* and *O'Connor* to school employees are rare. However, a recent Ohio appeals court decision examined employees' expectation of privacy where a building principal, suspecting third shift janitors of taking unauthorized breaks, installed a hidden video camera in a break room.<sup>73</sup> The videotape revealed that janitors were taking unauthorized breaks and, upon being disciplined, they challenged the videotaping as an unlawful search. In upholding the principal's action, the court observed that the janitors could have no reasonable expectation of privacy in a break room that was accessible to all employees and contained a washing machine, a clothes dryer, cleaning supplies, lockers, a refrigerator, and a microwave oven.<sup>74</sup> The inception of the search was justified by the principal's reasonable suspicion about the unauthorized breaks, and the scope of the search was acceptable because it was less intrusive than it could have been as the principal had turned off the sound and recorded only the visual images.<sup>75</sup>

Both *T.L.O.* and *O'Connor* suggest that teachers would have a reduced expectation of privacy regarding most places in schools, at least as to classrooms where teachers work and file cabinets where teachers store items. In such places, school officials would need only reasonable suspicion that the search would turn up evidence of work-related misconduct or work-related items such as records or files. The scope of a search would meet Fourth Amendment requirements as long as the measures adopted for the search are reasonably related to the search's objectives and are not excessively intrusive

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70. *Id.* at 716.

71. *Ortega v. O'Connor*, 146 F.3d 1149, 1163 (9th Cir. 1998).

72. *See id.* at 1154.

73. *Brannen v. Kings Local Sch. Dist. Bd. of Educ.*, 761 N.E.2d 84 (Ohio Ct. App. 2001) (all facts in this section are taken from page 88 of the court's opinion).

74. *Id.* at 92.

75. *Id.* at 92-93.

“in light of . . . the nature of the [misconduct].”<sup>76</sup> Relying on *T.L.O.*, the *O’Connor* Court held that:

Public employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness.<sup>77</sup>

The Court is silent as to the appropriate standard for searches of personal places such as teacher purses or brief cases. However, it is arguable that the reasonable suspicion, inception, and scope tests from *T.L.O.* would apply in much the same way as for students.

Suspicionless searches of teachers would be difficult to justify using the student cases of *Vernonia* and *Earls*. In those cases, the Supreme Court supported drug testing for students in extracurricular activities because participation was voluntary and because the extracurricular groups had rules not applicable to non-participating students.<sup>78</sup> If students chose not to participate, or decided to cease participation, suspicionless searches would no longer apply and searches of those students could only be conducted under *T.L.O.*’s individualized suspicion standard.<sup>79</sup> If suspicionless searches are to be used for teachers, they obviously need a different legal rationale than the one used for students.

Although a number of courts have upheld the use of random drug tests for janitors<sup>80</sup> and school bus workers,<sup>81</sup> the Sixth Circuit’s opinion in *Knox County Education Association v. Knox County Board of Education*<sup>82</sup> is the highest court decision to date upholding random drug testing for teachers. The court in *Knox County* likened teachers to other “safety sensitive” positions, such as customs employees and railway employees, positions for which the Supreme

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76. *O’Connor v. Ortega*, 480 U.S. 709, 725 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

77. *Id.* at 725.

78. *Earls*, 536 U.S. at 831-32.

79. Although the *Earls* Court does not specifically reach this result, the Court’s observation that the results of the drug tests were not “turned over to any law enforcement authority” and did not “lead to the imposition of discipline or have any academic consequences” suggests very strongly that positive test results could not be used for the same kind of discipline associated with individualized suspicion. *Id.* at 833. See also *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F. Supp. 2d 919, 930 (N.D.Tex. 2001) (court invalidated school drug testing policy that applied to all students in junior and senior high schools); *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1109-10 (Colo. 1998) (court struck down random drug testing policy as applied to students involved in marching band for which academic credit was awarded).

80. See *Aubrey v. Sch. Bd. of Lafayette Parish*, 148 F.3d 559, 561 (5th Cir. 1998).

81. See *English v. Talledaga County Bd. of Educ.*, 938 F. Supp. 775, 782-83 (N.D.Ala. 1996).

82. See *Knox County Educ. Ass’n v. Knox County Bd. of Educ.*, 158 F.3d 361, 366-70 (6th Cir. 1998).

Court has upheld random drug testing.<sup>83</sup> The Sixth Circuit found that a school board has a very strong interest in having teachers (and administrators) sober and not under the influence of drugs, because they must act immediately to protect students when a dangerous event occurs and because they are in “a unique position to observe children and learn if they are involved in activities which can lead to harm or injury to themselves or others.”<sup>84</sup> The court determined that the teachers’ expectation of privacy was diminished because the taking of a drug sample was not intrusive and because the teaching profession is highly regulated.<sup>85</sup> The teachers’ concerns regarding the intrusiveness of the drug test was satisfied because providing the drug sample could be done in private without monitoring, except in cases where there is reason to believe a teacher will adulterate the sample.<sup>86</sup> The court also observed that “when people enter the education profession they do so with the understanding that the profession is heavily regulated as to the conduct of people in the field, as well as to the responsibilities that they undertake toward their students and colleagues . . . .”<sup>87</sup> As a result, “teachers should not be surprised if their own use of drugs is subject to regulation and testing . . . .”<sup>88</sup>

Absent state statutes, collective bargaining agreements, or school board policies regulating teacher searches,<sup>89</sup> the expectation of privacy that teachers have in their person or property follows the standard already set forth regarding students. Although only one federal appeals court has thus far ruled, suspicionless searches (drug testing) do not appear to be excessively intrusive on the privacy of teachers and are constitutionally permissible, although the justification for such testing differs from the one given for the testing of students.

### C. *Instructional Privacy*

The U.S. Supreme Court has given considerable authority to local school boards and school administrators to control schools. Teachers’ claims that they should be left alone in the classroom to instruct according to their own

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83. See generally *Nat’l Treasury Employees Union v. Von Raub*, 489 U.S. 656 (1989) (for customs employees); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602 (1989) (for railway workers).

84. *Knox County*, 158 F.3d at 379.

85. *Id.* at 379-84.

86. *Id.* at 380.

87. *Id.* at 384.

88. *Id.*

89. See, e.g., *Hearn v. Bd. of Pub. Educ.*, 191 F.3d 1329, 1332 (11th Cir. 1999) (school board policy providing for teacher consent for a search warrant for search of teacher’s personal property, in this case a car in the parking lot, not applicable where the basis for school official’s ordering a teacher to take a drug test occurred outside the parameters of the policy).

instructional techniques and methodologies have been framed under a variety of constitutional theories: privacy, free speech, and free exercise of religion.

Among the responsibilities of school administrators are the evaluation and supervision of teachers, which under state law and/or collective bargaining agreements generally require that administrators observe teachers in the classroom.<sup>90</sup> The extent to which teachers have protectable privacy interests in their classrooms has not been extensively litigated. However, the limited case law available indicates that the interest school administrators and school boards have in knowing what teachers are doing in the classroom and how they are performing overrides whatever privacy interests a teacher might have, even if classroom observations result in discipline.

In *Roberts v. Houston Independent School District*, a Texas appellate court permitted a school board to use a 30-minute videotape which included excerpts of five separate videotapes made of a teacher's classroom as the evidence for the termination of the teacher for inefficiency or incompetence.<sup>91</sup> The court observed that the teacher had no right of privacy to be free from intrusion into her classroom for purposes of videotaping her teaching, even though she had objected to the videotaping.<sup>92</sup> In upholding dismissal of the teacher, the court in *Roberts* reasoned that "the activity of teaching in a public classroom does not fall within the expected zone of privacy" and that this reasoning even applies when "involuntary videotaping" of a teacher's performance occurs.<sup>93</sup> The court also noted that the teacher "was videotaped in full view of her students, faculty members and administrators [and] at no point did the school district attempt to record [the teacher's] private affairs."<sup>94</sup>

In *Evens v. Superior Court*, a California appellate court held that a videotape surreptitiously taken by students of a teacher could be viewed by a school board for purposes of determining whether the teacher should be disciplined.<sup>95</sup> The court brushed aside the teacher's claim that, under state law, evidence of "a confidential communication" cannot be used in any administrative or judicial proceeding.<sup>96</sup> The court's response was that "the videotape recording at issue here was made in a public classroom" and was therefore not considered "a confidential communication."<sup>97</sup> In addition, the

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90. See, e.g., *Naylor v. Cardinal Local Sch. Dist. Bd. of Educ.*, 630 N.E.2d 725, 728-29 (Ohio 1994) (school board failed to satisfy statutory requirement regarding evaluation of teacher and therefore her probationary period was extended one additional year in order for board to properly provide appropriate evaluation).

91. *Roberts v. Houston Indep. Sch. Dist.*, 788 S.W.2d 107, 110 (Tex. Ct. App. 1990).

92. *Id.* at 111.

93. *Id.*

94. *Id.*

95. *Evens v. Super. Ct.*, 91 Cal. Rptr. 2d 497, 500 (Cal. Ct. App. 1999).

96. *Id.* at 499; CAL. PENAL CODE § 632(d) (West 1999).

97. *Evens*, 91 Cal. Rptr. 2d at 499.

court found inapplicable a criminal statute that prohibited the use of any electronic listening or recording device made in a classroom without the consent of “the teacher and the principal.”<sup>98</sup> Despite statutory language that any person other than a pupil committing a prohibited act was guilty of a misdemeanor and “any pupil violating this section shall be subject to disciplinary action,” the court determined that nothing in the act “prohibit[ed] entities such as the [School] Board and [School] District from using videotape recordings made by students in violation of the statute in disciplinary actions.”<sup>99</sup> In general, the court opined that, because students generally discuss their teacher’s actions with parents, administrators, and other students, “a teacher must always expect ‘public dissemination’ of his or her classroom ‘communications and activities.’”<sup>100</sup>

Teachers also argue under the Free Speech Clause of the First Amendment in protesting interference with their conduct in the classroom. As with cases involving physical privacy, Supreme Court guidance involving free speech comes not from school employee cases, but from two decisions involving students, *Bethel School District No. 402 v. Fraser*<sup>101</sup> and *Hazelwood School District v. Kuhlmeier*.<sup>102</sup>

In *Bethel*, the Supreme Court expanded the authority of schools to punish student speech that is vulgar.<sup>103</sup> The *Bethel* Court upheld suspension of a student who delivered a brief speech containing sexual innuendo.<sup>104</sup> The campaign speech, made on behalf of another student, was delivered in the school auditorium where other students were in attendance.<sup>105</sup> Although the disruption from the speech was minimal, the Court rejected the student’s free

98. *Id.*; CAL. EDUC. CODE § 51512 (West 1989).

99. *Evens*, 91 Cal. Rptr. 2d at 499; CAL. EDUC. CODE § 51512 (West 1989).

100. *Evens*, 91 Cal. Rptr. 2d at 499.

101. *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

102. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

103. *See Bethel*, 478 U.S. at 685-86.

104. *Id.* at 685, 687 (Brennan, J., concurring). The speech was as follows:

“I know a man who is firm — he’s firm in his pants, he’s firm in his shirt, his character is firm — but most . . . of all, his belief in you, the students of Bethel, is firm.”

“Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts — he drives hard, pushing and pushing until finally — he succeeds.”

“Jeff is a man who will go to the very end — even the climax, for each and every one of you.”

“So vote for Jeff for A.S.B. vice-president — he’ll never come between you and the best our high school can be.”

*Id.*

105. *Id.* at 677.



expression claim, reasoning that punishing such speech furthered the school's interest in "inculcat[ing] the habits and manners of civility."<sup>106</sup>

Two years later in *Hazelwood*, the Court upheld a school principal's decision to delete two pages of a school newspaper prepared by students.<sup>107</sup> The principal objected to two articles, one of which dealt with teen pregnancies, and even though the girls were not identified, he was concerned that they could be identified and their confidentiality violated. In addition "he also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students the school."<sup>108</sup> The second article dealt with a student's negative comments about her father regarding her parents' divorce.<sup>109</sup> The principal was concerned that the author of the article had not interviewed the father. Because the principal did not believe that sufficient time existed to make the changes and print the paper, he deleted two pages of the paper containing the two articles in question in addition to several others. In rejecting students' free expression claims, the Court reasoned that school administrators could act reasonably to edit the student newspaper because it was part of the regular curriculum of the journalism class.<sup>110</sup> Relying on *Bethel*, the Court observed that "a school need not tolerate student speech that is inconsistent with its 'basic educational mission' . . . even though the government could not censor similar speech outside the school."<sup>111</sup> In addition, as part of the curriculum, students could be expected to follow appropriate journalistic standards.<sup>112</sup> The Court reasoned broadly that:

[e]ducators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.<sup>113</sup>

Although the the Supreme Court granted broad discretion to school boards in *Bethel* and *Hazelwood* to regulate student expression in public schools, lower courts have relied on these cases to permit boards to regulate teacher

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106. *Id.* at 681.

107. *Hazelwood*, 484 U.S. at 274 (all facts in this section are taken from pages 262-64 of the Court's opinion).

108. *Id.* at 263.

109. *Id.* The principal's concerns were that "the divorce story had complained that her father 'wasn't spending enough time with my mom, my sister and I' prior to the divorce, 'was always out of town on business or out late playing cards with the guys,' and 'always argued about everything' with her mother." *Id.*

110. *Id.* at 273.

111. *Id.* at 266.

112. *Hazelwood*, 484 U.S. at 268.

113. *Id.* at 271.

expression during the school day and the content of their classroom instruction.<sup>114</sup> Efforts under a variety of legal theories by teachers to change or to personalize school curriculum have generally been rejected.

In *Lacks v. Ferguson Reorganized School District*,<sup>115</sup> the Eighth Circuit Court of Appeals upheld the dismissal of an English and Journalism teacher who permitted her students, as part of their junior English class, to perform and videotape a class play containing repeated profanity, contrary to a school disciplinary code prohibiting student use of profanity.<sup>116</sup> In reversing a \$500,000 jury verdict for the teacher on her free speech claim, the Eighth Circuit, finding support in both *Bethel* and *Hazelwood*, held as a matter of law that “the school board had a legitimate academic interest in prohibiting profanity by students in their creative writing . . . . A flat prohibition of profanity in the classroom is reasonably related to the legitimate pedagogical concern of promoting generally acceptable social standards.”<sup>117</sup>

The Fourth Circuit Court of Appeals, in *Boring v. Buncombe County Board of Education*, reached a result similar to *Lacks*, upholding transfer of a drama teacher for permitting her students to perform a play containing “mature subject matter.”<sup>118</sup> The Fourth Circuit, relying on *Hazelwood*, held that the teacher did not present a free speech claim because her selection and performance of the play “[did] not present a matter of public concern and [was] nothing more than an ordinary employment dispute.”<sup>119</sup>

In a California case that tangentially implicated a teacher, a California statute provided the framework for students to challenge the school board’s requirement that the students delete profanity from a film that they had written, which had been approved by the teacher of their Film Arts class.<sup>120</sup> Although the statute expressed the broad intent that students have “the right to exercise freedom of expression and the press,” it also charged the advisers of student publications “to maintain professional standards of English and journalism.”<sup>121</sup> The school district defined “profanity” in its regulations as “language which

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114. See discussion below, *infra* notes 115-142 and accompanying text.

115. *Lacks v. Ferguson Reorganized Sch. Dist. R-2*, 147 F.3d 718 (8th Cir. 1998) (the Eighth Circuit cites to both *Bethel* and *Hazelwood* for authority that regulation of teacher speech can be done by public school boards as long as the regulation meets legitimate pedagogical interests).

116. The words used were “fuck,” “shit,” “ass,” “bitch,” and “nigger.” *Id.* at 719.

117. *Id.* at 724.

118. *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir. 1998). According to the teacher’s complaint, the play “powerfully depicts the dynamics within a dysfunctional, single-family — a divorced mother and three daughters: one a lesbian, another pregnant with an illegitimate child.” *Id.* at 366.

119. *Id.* at 368.

120. *Lopez v. Tulare Joint Union High Sch. Dist. Bd. of Trs.*, 40 Cal. Rptr. 2d 762, 765 (Cal. Ct. App. 1995).

121. CAL. EDUC. CODE § 48907 (West 1993).

would be used in the Tulare Advance-Register or the Fresno Bee.”<sup>122</sup> Even though the statute prohibited school boards from disciplining students for engaging in protected speech, it did not prohibit a school board from requiring that students delete the language.<sup>123</sup>

Teachers generally are limited in their ability to change school board curriculum by adding to or deleting material. In *Newton v. Slye*, a federal district court in West Virginia held that a school administrator’s directive that an English teacher remove a “banned book” pamphlet from his class door was not a violation of free speech, even though the teacher could distribute the pamphlet in the classroom.<sup>124</sup> The court agreed with the administrator that the pamphlet was part of the curriculum which could be controlled under *Hazelwood*.<sup>125</sup> The court observed that the school board had “taken steps to control exposure of children to unsuitable matter” as reflected in the use of a district-wide filtering system and special curricular programs such as Family Life Education, Character Counts, the Code of Responsible Student Conduct, and a Substance Abuse Policy.<sup>126</sup> Posting the pamphlet, rather than handing it out in class, sent a message at odds with a school curriculum “based on community values . . . by the school board.”<sup>127</sup>

Similarly, in *Murray v. Pittsburgh Board of Education*, a teacher in an Alternative Learning Center who was a proponent of a classroom management technique known as Learnball could be ordered by her principal to stop using the technique and to remove all Learnball literature, symbols, and paraphernalia from her classroom.<sup>128</sup> In response to the teacher’s claim that her free speech rights had been violated, the court observed that “a public school classroom is a nonpublic forum,” and the principal had “the authority to make all of the school’s administrative and educational decisions . . . .”<sup>129</sup> The mere fact that the principal has permitted teachers to decorate their rooms does not mean that they have transformed the classroom into a limited public forum for the expressive activity of teachers. Because the principal had a reasonable basis for not favoring the Learnball approach based upon the technique’s ill-fit within the school’s curricular objectives, the prohibition was permissible because it did not represent viewpoint discrimination.<sup>130</sup>

Although school boards have broad authority to control instruction in classrooms, that authority applies only where teachers have been made aware

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122. *Lopez*, 40 Cal. Rptr. 2d at 765 n.3.

123. *Id.* at 768; CAL. EDUC. CODE § 48907 (West 1993).

124. *Newton v. Slye*, 116 F. Supp. 2d 677, 684 (W.D. Va. 2000).

125. *Id.* at 685.

126. *Id.*

127. *Id.*

128. *Murray v. Pittsburgh Bd. of Pub. Educ.*, 919 F. Supp. 838, 844-45 (W.D. Pa. 1996).

129. *Id.*

130. *Id.* at 844.

of board policies. In disputes involving a teacher's knowledge of school board policies, the teacher is likely to prevail against a school board under a free speech claim, when the policy under which the board acts in disciplining a teacher is vague and unenforceable or has never been distributed to the teachers. In *Wilder v. Board of Education of Jefferson County School District*, a teacher, terminated for showing an "R" rated film without following the school board's written controversial materials policy, succeeded in reversing his termination where the policy was not in the teacher handbook, most teachers were not aware of it, and the school's principal did not believe that the policy applied to the teacher.<sup>131</sup> Although school boards can regulate teacher classroom speech that is related to a legitimate pedagogical concern, they can do so only when the teacher has received notice of what conduct is prohibited. In a somewhat strained constitutional analysis, the court found that a teacher does have a First Amendment interest in choosing a particular pedagogical method for a course, but only to the extent to which the board has not clearly expressed its pedagogical choices.<sup>132</sup>

Occasionally, teachers claim that they have a right under free exercise of religion to inject personal religious elements into a classroom. Courts consistently find that teachers' inclusion of religion is not a protected activity because it violates the Establishment Clause.<sup>133</sup> Thus, in *Marchi v. Board of Cooperative Services of Albany*, the Second Circuit Court of Appeals upheld the directive of a director of special education to a teacher that:

Public schools are prohibited from offering instruction in support of religious beliefs or practices. Your personal beliefs about the role of religion in our society and its value to families and their children cannot be a part of the instruction given to your students.<sup>134</sup>

In asserting that a teacher "does not retain the full extent of free exercise rights that he would enjoy as a private citizen," the Second Circuit observed that a teacher's religious responses to student questions in the classroom<sup>135</sup> must give

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131. *Wilder v. Bd. of Jefferson County Sch. Dist.* R-1, 944 P.2d 598 (Colo. Ct. App. 1997). The film, *1900*, focusing on Italian life through the end of World War II, contained scenes of nudity, sexual conduct, drug use, and violence. *Id.* at 599 (all facts in this section are taken from pages 599-600 of the court's opinion).

132. *Id.* at 603.

133. *See, e.g., Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 472 (2d Cir. 1999).

134. *Id.*

135. Among the items considered objectionable were the teacher's modification of his instructional program "to discuss topics such as forgiveness, reconciliation, and God," and a letter to a parent that contained the following words:

Ryan had a good day today. I thank you and the LORD for the tape; it brings the Spirit of Peace to the classroom. Tomorrow is a teacher's conference and dismissal is at 11:30. May God Bless you all richly.

*Id.* at 472-73.

way to an employer's legitimate interest "in avoiding litigation by those contending that an employee's desire to exercise his freedom of religion has propelled his employer into an Establishment Clause violation."<sup>136</sup>

In another case, school district officials could reassign a tenth-grade biology teacher to teach ninth-grade earth science after he refused to teach evolution.<sup>137</sup> The court found little difficulty in concluding that the school administrators had an "important pedagogical interest in establishing the curriculum," and in pursuit of that interest, the court reasoned that they had "remained religiously neutral."<sup>138</sup> Likewise, a substitute teacher could be removed from the substitute list for reading the Bible to a fifth grade class.<sup>139</sup> When the teacher alleged that the school board had engaged in religious discrimination in violation of Title VII,<sup>140</sup> the court reasoned that school administrators' "repeated warnings against interjecting his religious beliefs into the classroom [constituted] legitimate nondiscriminatory reasons for dismissing him."<sup>141</sup>

Given the broad grant of authority the Supreme Court has bestowed upon school boards in *Hazelwood* and *Bethel* to control instruction, the rights of teachers to insert their personal views and instructional techniques are, at best, limited.<sup>142</sup> That which occurs in the classroom is at the heart of the educational process, and teachers will be expected to conform to the instructional guidelines of school boards.

#### D. Associational Privacy

Teacher contacts with students either inside or outside school hours can be the subject of school board discipline. Generally, the legal issues surrounding improper conduct involving a teacher and his or her students focus on the language of a state's teacher dismissal statute, as opposed to teachers' claims that their right of privacy to engage in conduct with students has been violated. Thus, under a broad penumbra of statutory language, including unprofessional conduct, unfitness, willful neglect of duty, and immorality, courts consistently

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136. *Id.* at 476.

137. *Levake v. Indep. Sch. Dist. No. 656*, 625 N.W.2d 502, 507-08 (Minn. Ct. App. 2001).

138. *Id.*

139. *See Helland v. South Bend Community Sch. Corp.*, 93 F.3d 327 (7th Cir. 1996).

140. 42 U.S.C. § 2000 *et seq.* (2000).

141. *Helland*, 93 F.3d at 330.

142. *Cf. Padilla v. South Harrison R-H Sch. Dist.*, 181 F.3d 992 (8th Cir. 1999) (probationary teacher who was acquitted of misdemeanor and felony charges involving alleged sexual assault on a student could still be dismissed by the school board for a statement he made at his trial, saying that he saw nothing wrong with consensual sex between a teacher and a student), *with Watson v. Eagle County Sch. Dist.*, 797 P.2d 768 (Colo. Ct. App. 1990) (probationary teacher who was adviser of school newspaper had free speech right to refuse principal's instruction to publish a retraction of articles in the newspaper presenting the school in a negative light).

have upheld dismissals of employees for misconduct involving students, regardless of whether the conduct involved sexual contact<sup>143</sup> or non-sexual conduct reflecting an improper relationship.<sup>144</sup> Courts tend to be very generous with school boards in discharging employees who have engaged in impermissible contact with students, even when that contact occurred in the past.<sup>145</sup>

Occasionally though, issues involving privacy do surface when school board disciplinary actions on teacher relationships with students are challenged. In *Holt v. Rapides School Board*, a Louisiana court of appeals affirmed the trial court's reversal of a school board's decision to terminate a female teacher for willful neglect of duty for sleeping with another female student at a slumber party, and for giving the student birthday gifts.<sup>146</sup> The court reasoned that the conduct was related to "a family relationship" between the teacher and the student.<sup>147</sup> Although the court determined that the school board's decision was arbitrary and capricious because it lacked a rational basis,<sup>148</sup> the teacher, arguably, could, just as easily, have raised the claim that the school board's decision intruded upon her privacy.

In *Roberts v. United States Jaycees*,<sup>149</sup> a non-education case, the Supreme Court reflected in dictum that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."<sup>150</sup> The family relationship is one entitled to the highest level of protection from intrusion by government because it "involve[s] deep attachments and commitments to the

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143. See, e.g., *Morris v. Clarksville-Montgomery County Consol. Bd. of Educ.*, 867 S.W.2d 324, 330 (Tenn. Ct. App. 1993) (even though sexual contact with students did not meet insubordination grounds for dismissal because there had been no order to cease conduct, the dismissal could be supported on the ground of unprofessional conduct).

144. See, e.g., *Kerin v. Bd. of Educ., Lamar Sch. Dist. No. RE-2, Prowers County*, 860 P.2d 574, 582-83 (Colo. Ct. App. 1993) (school board could dismiss teacher for fostering parent-child type relationship with fourth-grade student and engaging in custody dispute with parent).

145. See, e.g., *Parker v. Byron Center Pub. Schs.*, 582 N.W.2d 859 (Mich. Ct. App. 1998) (sexual relations with a student sixteen years earlier could support dismissal over teacher's evidentiary and probative claims); *Toney v. Fairbanks North Star Borough Sch. Dist., Bd. of Educ.*, 881 P.2d 1112 (Alaska 1994) (teacher could be dismissed for immorality for impregnating fifteen-year-old student ten years earlier in another school district); *Wright v. Mead Sch. Dist.*, 944 P.2d 1 (Wash. Ct. App. 1997) (sexual contact with students seven to ten years earlier supported dismissal of teacher).

146. *Holt v. Rapides Sch. Bd.*, 685 So.2d 501, 503-04 (La. Ct. App. 1996).

147. See *id.* at 503.

148. *Id.* at 504.

149. *Roberts v. United States Jaycees*, 468 U.S. 609, 621 (1984) (Supreme Court upheld state gender discrimination claim against Jaycees for refusing to admit women, opining that the organization's expressive views did not prohibit admission of women).

150. *Id.* at 617-18.

necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."<sup>151</sup> The kinds of personal family relationship areas where the Supreme Court has provided protection include marriage,<sup>152</sup> childbirth,<sup>153</sup> the raising and educating of children,<sup>154</sup> and cohabitation with one's relatives.<sup>155</sup> Although all of these Supreme Court decisions addressed statutes or ordinances that were facially unconstitutional, one could make an argument in *Holt* that application of a school board rule prohibiting willful neglect of duty to family relationships could also be subject to scrutiny under privacy analysis. As the cases cited in the *Roberts* dictum indicate, teachers with familial relationships can probably engage in certain kinds of conduct that would be considered inappropriate if done outside a family relationship.<sup>156</sup>

A school board's authority to intrude upon a teacher's private life outside the school is limited. In *LaSota v. Town of Topsfield*, an elementary school teacher's privacy rights were violated by a school district after she was terminated for living with a man whom she married the year after her dismissal.<sup>157</sup> Prior to her marriage, her husband had been charged and convicted of five counts of rape and abuse of his daughter. These charges were

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151. *Id.* at 619-20.

152. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 386 (1978). In that case, the Supreme Court struck down a Wisconsin statute prohibiting state residents with minor issue not in their custody from marrying without court permission because "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Id.*

153. *See, e.g., Carey v. Population Services. Int'l*, 431 U.S. 678, 685 (1977) (Supreme Court invalidated New York statute prohibiting distribution of contraceptives to persons over 16 years of age except from registered pharmacist because "the decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices. That decision holds a particularly important place in the history of the right of privacy").

154. *See, e.g., Smith v. Org. of Foster Families*, 431 U.S. 816, 844-45 (1977) (in upholding a New York statute that established procedures for removing children from foster homes, the Court nonetheless recognized privacy rights within such homes because "no one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship; . . . we cannot dismiss the foster family as a mere collection of unrelated individuals").

155. *See, e.g., Moore v. East Cleveland*, 431 U.S. 494, 503-05 (1977) (plurality opinion). In striking down city housing ordinance making it a "crime for homeowner to have living with her a son and grandson plus second grandson who was cousin of first grandson," the Court observed that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition . . . [d]ecisions concerning child rearing, which *Yoder*, *Meyer*, *Pierce* and other cases have recognized as entitled to constitutional protection, long have been shared with grandparents or other relatives who occupy the same household indeed — who may take on major responsibility for the rearing of the children." *Id.*

156. *See Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984).

157. *LaSota v. Town of Topsfield*, 979 F. Supp. 45, 51 (D. Mass. 1997) (all facts in this section are taken from pages 46-48 of the court's opinion).

reversed on appeal and eventually dismissed. In denying summary judgment for the school district, a federal district court in Massachusetts held that privacy rights protected under the Fourteenth Amendment include “the right to associate intimately with a person with whom one contemplates marriage, without fear of government interference.”<sup>158</sup> As a result, a teacher has “a constitutional right to associate intimately without fear that the government will use her associations when making decisions concerning her employment.”<sup>159</sup>

However, family relationships (or what are alleged to be family relationships) are not always outside the reach of school board control. In *Kerin v. Board of Education, Lamar School District*, a Colorado appeals court held that a school board had “good and just cause” to terminate a fourth grade teacher who, over a period of two years, had established a close relationship with a student, had persuaded the mother to give him power of attorney over the child, and had initiated a custody action when the mother took the child home to Mexico.<sup>160</sup> As a result of considerable turmoil in the school community when a court order that the teacher be given custody was dissolved, the court held that the school board’s legitimate interest “in protecting the school community from harm” outweighed the privacy interests of the teacher.<sup>161</sup> Similarly, a federal district court in Connecticut upheld the dismissal of an elementary school social worker for living with a non-custodial father of two children to whom she provided social services.<sup>162</sup> The court remarked that whatever rights of intimate association the social worker might have under the First Amendment and the Due Process Clause of the Fourteenth Amendment had to be balanced against those of the school board “in promoting the efficiency of public services it performs through its employees” and in achieving its goals as effectively and efficiently as possible.<sup>163</sup> In ruling for the school board, the court found persuasive the City Director of Health’s reasonable belief that the social worker might have violated the ethics code, brought discredit upon municipal service, and hindered other social workers in their work.<sup>164</sup>

However, even if teacher conduct can be addressed by school boards, it might not be subject to criminal prosecution. In a case with a remarkable

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158. *Id.* at 50.

159. *Id.* However, this privacy was considered by the court not to be clearly established at the time of the school board’s termination decision, and therefore, the administrators and individual school board members were entitled to qualified immunity. *Id.* at 48.

160. *Kerin v. Bd. of Educ., Lamar Sch. Dist. No. RE-2, Prowers County*, 860 P.2d 574, 582 (Colo. Ct. App. 1993).

161. *Id.*

162. *Kelly v. City of Meridien*, 120 F. Supp. 2d 191, 192, 196 (D. Conn. 2000).

163. *Id.* at 197.

164. *Id.* at 197-98.



result, *State v. Eastwood*, a Georgia appeals court affirmed a trial court decision voiding a conviction under two counts of sodomy between a high school teacher and a student at the ages of fifteen and seventeen.<sup>165</sup> At the time these acts occurred, Georgia's anti-sodomy statute set the age of consent at fourteen.<sup>166</sup> However, the Supreme Court of Georgia, two years earlier, had invalidated this statute because it included private, unforced, noncommercial acts of sodomy between consenting adults (over age fourteen).<sup>167</sup> Because the conduct between the student and the teacher was "consensual, unforced, private, and noncommercial" and the state legislature had not enacted a statute specifically prohibiting the conduct between the student and the teacher, the school district was not entitled to a special exception for teachers who engage in voluntary acts with students.<sup>168</sup> Thus, while the state "may impose limitations on the right to privacy by enacting criminal statutes narrowly tailored to prohibit such conduct,"<sup>169</sup> it had failed to do so in this case. Although this case was silent regarding whether the teacher could be dismissed for his conduct that did not violate a state criminal statute, the law is fairly well established that a school board can dismiss a teacher in an administrative proceeding, regardless of the applicability of criminal statutes.<sup>170</sup>

By the very nature of the teaching function, teachers become knowledgeable of, and occasionally involved in, the personal lives of their students. Invariably, school boards set high standards of professionalism for their teachers and will discipline those who cross over the limit of appropriate relationships. Teachers who find themselves inappropriately involved with their students will generally find little constitutional or statutory support for their conduct.

### III. CONCLUSION

The privacy rights of teachers in public schools are affected by the diminished expectation of privacy that comes with working with minors who are required to attend school. The personal privacy rights of teachers under the Liberty Clause are in transition. Even though issues regarding gender non-conformity will probably be resolved under state statutes, local ordinances, or school board rules protecting such status, as well as the Equal Protection Clause, emerging issues involving the Full Faith and Credit Clause remain to be resolved.

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165. *State v. Eastwood*, 535 S.E.2d 246, 247-48 (Ga. Ct. App. 2000). Subsequent to this case, the state legislature changed the legal age for consent to sixteen. *Id.* at 247 n.1.

166. *Id.* at 247.

167. *See generally* *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

168. *Eastwood*, 535 S.E.2d at 247-48.

169. *Id.*

170. *See, e.g.*, *Padilla v. South Harrison R-H Sch. Dist.*, 181 F.3d 992 (8th Cir. 1999); *Hudson v. Sch. Dist. No. 1*, 572 N.W.2d 379 (Neb. Ct. App. 1997).

Although the rights of teachers regarding search and seizure are not well defined, courts have taken their lead from the Supreme Court's search and seizure cases involving students and have given school boards considerable latitude in controlling teacher behavior in the classroom. Teachers have considerable control over what occurs in the classroom, but their actions are not outside the authority of school boards. Despite a number of constitutional theories that teachers can raise to defend their conduct within classrooms, that conduct is generally subject to school board discipline, especially when the conduct relates to course content and methodologies.

Teacher conduct outside the school has greater protection for the teacher, but if that conduct involves students, school boards have legitimate interests in protecting students. Courts are able to draw fine lines and distinguish between conduct that directly involves students with conduct that affects students only indirectly. When conduct involves non-student adults, school boards have a challenging task to connect associations outside the school to conduct within the school.

