DISMISSAL OF TEACHERS FOR OUT-OF-SCHOOL SEXUAL IMMORALITY NOT INVOLVING STUDENTS: LIMITATIONS AND GUIDELINES REGARDING THE PRIVACY RIGHTS OF TEACHERS

DISSEETATION

Presented in Partial Fulfillment of the Requirements for the Degree Doctor of Philosophy in the Graduate School of The Ohio State University

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DEDICATION

To my wife, son, and parents.
ACKNOWLEDGMENTS

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FIELD OF STUDY

Education

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CHAPTER I

INTRODUCTION

The law has long been recognized that public school authorities have the right to demand high standards of moral conduct of all teachers employed within their districts. This right also encompasses a duty to remove from the profession those teachers who fail to adhere to such moral standards. The power of school boards to exercise such control over the conduct of teachers was clearly acknowledged by the United States Supreme Court over forty years ago in Adler v. Board of Education of City of New York, 342 U.S. 485 (1952):

A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds toward the society in which they live. In this, the state has a vital concern. That the school authorities have the right and duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. (p. 493).
The statutes of most states provide for dismissal of teachers on grounds of immorality or other similar misconduct. Immorality is perhaps the most widespread single statutory cause for dismissal of public school teachers (Landauer, Spangler, & Van Horn, 1983). Although the scope of immorality as a ground for teacher termination is not limited to sexual immorality, dismissals for sexual immorality appear to be "the most sensitive, the most controversial, and perhaps the most frequent" (Dutile, 1986, p. 104) among actions to fire teachers for cause.

Even more controversial and especially difficult are teacher dismissals in which the alleged acts of sexual immorality are committed or practiced outside of the school environment and do not directly involve students (Keating, 1992). Matters of sexual immorality outside the classroom and not involving students raise significant issues regarding the privacy rights of teachers and the relevance of the alleged misconduct to job performance and/or fitness to teach. Therefore, dismissal of teachers for sexual immorality under such circumstances can be fraught with peril for both school boards and teachers.
The purpose of this study is to present an analysis and summary of the relevant legal issues surrounding matters of teacher dismissals for acts of sexual immorality committed outside of school and not involving students. This research will examine the specific parameters created by case law, applicable statutory enactments, and constitutional provisions that define the limits and restraints imposed upon the employment termination process in cases involving such sexual acts.

Summary Statement of the Problem

The legal rights of public school teachers who engage in sexually immoral conduct outside of school have not been clearly defined by case law or statute; therefore, dismissal of teachers for such sexual activity raises many potential problems for both school districts and teaching employees.

The inquiry herein examines and analyzes the significant legal issues surrounding employment termination of teachers for out-of-school sexual misconduct not involving students. The core problem addressed by this research concerns the inevitable collision of competing interests between the right of school boards to demand
high standards of personal morality and the constitutional rights of teachers to pursue their individual lifestyles outside the classroom. In essence, this research investigates the classic "conflict between teacher freedom and community control" (Fischer, Schimmel, & Kelly, 1981, p. 215).

Some of the most problematic issues raised by teacher dismissals for out-of-school sexual misconduct can be summarized as follows:

1. The Elusive and Shifting Standards of Morality: The relative morality of modern living and general liberalization of moral standards regarding sexual conduct both contribute to widespread confusion over the identity and status of prevailing moral standards within a given community. As pointed out by Delon (1977) acceptable codes of moral conduct for public school teachers are not uniform:

Standards of morality differ from community to community and change from year to year. For this reason, caution must be used in attempting to specify what conduct currently represents 'immorality', especially immorality of sufficient magnitude to justify the legal revocation of a teaching certificate. (p. 21).
Since moral standards appear to fluctuate and shift rather frequently, it may therefore be difficult for public school teachers and administrators to know with any degree of certainty what standard of morality is expected.

2. **Such Dismissals May Violate Privacy Rights:** School board efforts to regulate and/or monitor sexual conduct of teachers outside the school environment may violate constitutionally protected rights. The constitutional right to privacy arising from judicial interpretations of the United States Constitution applies to teachers as well as to all other citizens. Privacy rights may well be relevant to certain dismissals of teachers for sexual immorality as noted by Beckham and Zirkel (1983):

The issue of the constitutional right to privacy is raised when school administrators and local boards attempt to control the activities of teachers outside the classroom and off the school campus. Teachers properly complain that attempts to control their lives away from school violate their rights to privacy and freedom of association. Thus the constitutional rights to privacy and free association can conflict with the axiom that teachers be exemplary models in the community. (p. 69).
3. **Application of Privacy Doctrine to Sexual Conduct is Not Clear:**
The right to privacy is not explicitly mentioned in the United States Constitution. It is a creation of judicial interpretation by the United States Supreme Court. Although it has been found to be a fundamental right under the U.S. Constitution (*Griswold v. Connecticut*, 381 U.S. 479, 1965), the precise contours of the federal right to privacy have not yet been clearly determined or defined (McCarthy & Cambron-McCabe, 1987). In some respects, the right to privacy has limited application to the dismissal of teachers for immorality. For example, the federal privacy doctrine as defined by U.S. Supreme Court decisions has not yet been expanded to protect private homosexual conduct (*Bowers v. Hardwick*, 478 U.S. 186, 1986). There is a considerable divergence of opinion, however, among lower court decisions addressing the scope of the right to privacy regarding adult heterosexual behavior. What is clear, however, is that when privacy rights are applicable, violation thereof may have disastrous consequences in terms of potential civil liability for not only school districts, but for individual school administrators.

Intended Contribution to Theory and Practice

This research contributes to the field of public education in the following ways:

1. This study provides an analysis and summary of relevant state and federal court decisions regarding the dismissal of teachers for out-of-school sexual misconduct not involving students. The distillation of the data will provide practical guidelines for predicting outcomes associated with specific acts of sexual misconduct by teachers. The analysis will enable both teachers and school board representatives to be more aware of their respective rights and liabilities in such matters.

2. The study provides a review of the federal privacy doctrine that will enlighten interested parties as to the scope and limitations of the right to privacy as it has evolved through the decisions of the United States Supreme Court since 1964. This will more clearly
identify the parameters of the right to privacy. This will also promote greater understanding of the application of the right to privacy to personnel disputes and employment terminations in public education.

3. This study provides information that will alert school officials to the types of employment issues to which privacy rights may attach. Greater awareness on the part of public school officials regarding the constitutional rights of employees will help school districts avoid needless and expensive litigation. Increased knowledge and understanding of the law regarding privacy rights will encourage public school officials to be more proactive in avoiding violations of constitutional rights.

4. This research combines the two major streams of case law relevant to out-of-school sexual misconduct by teachers not involving students: (a) cases regarding the dismissal of teachers from employment for sexual immorality as limited above, and (b) cases regarding the right to privacy.
Specific Research Questions

The specific research questions presented for review by this study are summarized as follows:

1. Under what conditions may a school board dismiss a teacher for out-of-school sexual misconduct not involving students?

2. Under what conditions may a school board not dismiss a teacher for out-of-school sexual misconduct not involving students?

3. To what extent does the right to privacy, as guaranteed by the United States Constitution, protect a public school teacher from dismissal for alleged acts of sexual immorality?

4. To what extent may a school board infringe upon a teacher's constitutional right to privacy and personal liberty outside of school in order to maintain high standards of personal morality as a condition of continuing teacher employment during the contract term?
Limitations of the Study

This study is subject to the following limitations:

1. Case law dealing with the dismissal of teachers or other school employees for cause is limited to cases involving the following fact patterns: (a) Grounds for dismissal were based on sexual immorality or other similar acts constituting sexual misconduct. Other categories of nonsexual immoral conduct were not considered. (b) The alleged sexual immorality occurred outside the classroom. (c) The acts complained of did not directly involve immoral sexual misconduct with students.

2. The case law analysis does not include or address unreported local, state, or federal decisions. Only those cases cited in the national and/or state official reporting systems are reported.

3. Legal analysis of the right to privacy focuses on the constitutional rights of individuals to make decisions and/or to engage in conduct regarding personal sexual matters. This study does not address the common law right to privacy based on tort law that is primarily concerned with the right of the individual to control the dissemination of personal information (Note, "Reversals", 1992).
Privacy issues regarding Fourth Amendment protections against unreasonable searches and seizures are also not considered.

4. The review of case law regarding the right to privacy is not restricted to decisions defining the privacy rights of teachers. A broader range of cases is surveyed in order to more clearly identify the parameters of the right to privacy.

Procedure

The procedure used for this study follows that of traditional legal research (Cohen, Berring, & Olson, 1989), including the review and analysis of primary sources of legal authority relevant to the topic of inquiry. Primary sources examined for this study include the following:

1. State and federal court decisions cited in national and state reporting systems dealing with the dismissal of teachers for out-of-school sexual immorality not involving students.

2. Reported state and federal court decisions addressing the right of privacy under the provisions of the United States Constitution.

Additional information was obtained through secondary sources such as books, treatises, legal encyclopedias, law reviews,
dissertations, educational journals and legal annotations. Secondary sources were located through searches of the following resources: Index to Annotations, Index to Legal Periodicals, Current Law Index, Current Index to Journals in Education and ERIC.

Overview of Remaining Chapters

Chapter II consists of a review of the literature relevant to the two major substantive areas of this research: (a) sexual immorality as grounds for dismissal of public school teachers; and (b) the history, development and scope of the constitutional right to privacy. The literature under review includes research and commentary from both legal and educational scholars. Case law is reviewed in subsequent chapters.

Chapter III examines the law regarding the dismissal of teachers for sexual immorality, including a review of both applicable statutory law and court decisions. Cases are organized according to categories of sexual misconduct.

Chapter IV examines the case law regarding the creation and development of the federal right to privacy guaranteed by the United States Constitution. The case analysis focuses primarily on
key decisions of the U.S. Supreme Court that created and defined the constitutional right to privacy. In addition, selected lower court decisions from both state and federal jurisdictions are reviewed as to the outer limits of privacy rights.

Chapter V reviews the case law specifically addressing the application of the right to privacy to employment rights of public employees. The case analysis includes not only decisions involving school teachers, but other public employees as well.

Chapter VI presents a summary of the findings of this study and proposes guidelines for evaluating the privacy rights of teachers facing termination for out-of-school sexual misconduct.

Definition of Terms

The cases cited herein will define "immorality" and other similar terms in various ways depending upon the jurisdiction involved and the statutory framework of the particular state in question. Notwithstanding the foregoing, the following terms are defined for purposes of clarification:

1. Certiorari: "To be informed of. A writ of common law origin issued by a superior to an inferior court requiring
the latter to produce a certified record of a particular case tried therein. The writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities. It is most commonly used to refer to the Supreme Court of the United States, which uses the writ of certiorari as a discretionary device to choose the cases it wishes to hear. ***The Supreme Court denies most writs of certiorari (i.e., "cert. den"). (Black’s Law Dictionary, 1990).

2. **Exemplar:** “A model to be imitated.” (Webster’s Dictionary, 1988).

3. **Immoral:** “Contrary to good morals; inconsistent with the rules and principles of morality; inimical to public welfare according to the standards of a given community, as expressed in law or otherwise”. (Black’s Law Dictionary, 1990).

4. **Immoral conduct:** “...That conduct which is willful, flagrant, or shameless, and which shows a moral indifference to the opinions of the good and respectable
members of the community”. (Black’s Law Dictionary, 1990).


6. **Nexus**: “A tie, link, connection between members of a group; a connected group or series”. (Webster’s Dictionary, 1988).


8. **Penumbra doctrine**: “The implied powers of the federal government predicatetl on the Necessary and Proper Clause of the U.S. Const., Art. I, Sec. 8(18), permits one implied power to be engrafted on another implied power.” (Black’s Law Dictionary, 1990).
CHAPTER II

REVIEW OF THE LITERATURE

Introduction

The purpose of this chapter is to review the literature addressing the two major substantive areas of this research: (a) the dismissal of public school teachers for sexual immorality; and (b) the application of the right to privacy under the United States Constitution. The literature is divided into six broad categories organized as follows: (a) historical background; (b) teacher as a role model/exemplar for students; (c) rational nexus theory; (d) sexual misconduct by teachers; (e) categories of sexual misconduct; and (f) the right to privacy.

The sources of the literature under review include books, treatises, law reviews, law journals, educational journals and unpublished dissertations. Specific court decisions are reviewed and analyzed in subsequent chapters of this study.
Historical Background

Throughout the history of American education, teachers have been held to a much higher standard of personal conduct than those in other professions (Delon, 1982). In the past, it was often assumed that a teaching career required a substantial sacrifice of individual freedom and privacy in the personal lives of teachers (Hooker, 1994). This rigorous standard of morality for teachers extends as far back in history as the colonial era when education and religion were very closely related (Delon, 1982). A brief review of the historical background surrounding the development of unusually restrictive rules of conduct for teachers is necessary for adequately analyzing the present status of teacher autonomy and the limitations thereof.

During the colonial period, the quality of education left much to be desired in both instructional content and the qualifications of those doing the teaching. According to Beale (1941), colonial schooling did little more than provide minimal literacy skills, usually just enough to enable pupils to read the Bible. Colonial teachers, except for those teaching in colleges or Latin grammar schools, earned little public respect for their role in educating the young
(Lewis, 1925). The lack of public esteem for teachers was often justified by the inferior status of most teachers during that time (Knight, 1941). Knight described the shortcomings of the colonial teacher as follows:

Often he was ignorant, sometimes almost illiterate, and knew little more than his pupils, if any more. Occasionally, he was a man of doubtful probity in his private life, unapproved for moral excellence. He was shiftless, migratory and itinerant, poorly paid and as poorly esteemed by the public, and lacked in professional standards largely because no such standards had been established. (pp. 347-348)

Teaching during this period was often viewed as a temporary occupation rather than a profession. It was something to be pursued mainly by those who had no other employment options (Beale, 1941). Since the pay was so meager, “the teaching profession attracted people whose professional and personal characteristics were often less than desirable” (Harbeck, 1987, p. 58). The colonial teaching ranks were generally filled by the very young, the very old, the physically infirm, and other incompetents unfit for the more
vigorously and demanding opportunities of a pioneer society (Lewis, 1925).

Colonial communities had great difficulty in finding teachers at all, regardless of their qualifications or capabilities. In essence, communities simply had to take what they could get. One method often resorted to by colonists was to purchase indentured servants to serve as teachers (Beale, 1941). Beale noted the often disappointing results yielded by such purchases:

Too often, however, indentured teachers were convicts shipped from English prisons to America. Whatever their origin, they were likely not to be of the best character. Advertisements frequently specified sobriety in prospective teachers. One master advertising for a runaway servant described him as “schoolmaster, much given to drinking and gambling.” (p. 13)

Drunkenness was apparently a common vice of teachers during this period (Elsbree, 1939). Knight (1941) observed that the colonial teacher “...was generally poor in spirit except when he was in a state of inebriety, a not uncommon condition of the teacher in the early days” (p. 348). In addition, early records of colonial education
indicate that sexual immorality was not an uncommon vice among teachers (Elsbree, 1939).

Given the fact that religion was the primary motivating force behind education during the colonial period, teachers were often subjected to considerable supervision by the local clergy (Beale, 1941). The personal deficiencies in the character, morality and manner of the colonial teachers were often in direct conflict with the religious objectives of those who hired them. This inevitably led to the development of an extremely intensive and restrictive regulation of teachers' personal conduct, both in and out of school (Harbeck, 1987).

During the early- to mid-Nineteenth Century, the status of teachers did not improve dramatically. Cubberley (1934) described the teachers of this period as follows:

Many of the teachers were incompetent adventurers, migratory, odd in their ways, crude in their manners, and often questionable as to character. Terms were short, wages low and paid in part through "boarding-around" arrangements, classes often inordinately large, and professional standards, outside of a few cities, were almost completely absent. The best were kept out and
the most poorly prepared were brought in by these conditions. (p. 325)

Knight (1941), in commenting on the status of American teachers during the second quarter of the Nineteenth Century, cited the following reasons as to why the teaching profession attracted the unfit teachers and excluded the fit:

Those who were capable of teaching regarded the occupation as disreputable. The work was considered too laborious, and it paid too little. It attracted those who could do nothing else, those who had some physical misfortune, and those who could outbid capable teachers. (p. 352)

Knight (1941) further illustrated this point by reference to the following statement written by a newspaper correspondent for a Virginia newspaper in 1843:

In the schoolhouse there is often installed a man with a heart of stone and hands of iron; too lazy to work, too ignorant to live by his wits in any other way, whose chief recommendation is his cheapness, and whose chief capacity to instruct is predicated by this incapacity for other employment. (p. 352)
The accumulation in the teaching ranks of those deficient in skill, knowledge and ability caused the teaching profession to remain largely unworthy of public confidence and trust (Lewis, 1925). While other professions during this period grew in stature and professional competence, the teaching profession in many ways perpetuated nonsuccess and disappointment. This professional stagnation was summarized by Lewis as follows:

So strong was the competition in other professions like law and medicine that these professions were able to cast off their failures. But the reverse was true in teaching. Other trades and professions were more attractive. Consequently, the teaching profession cast off its successes rather than its failures. (pp. 455-456)

Some of the most rigid moral and religious standards were imposed on teachers during the first half of the Nineteenth Century (Delon, 1982; Elsbree, 1939). Given the dismal state of the teaching profession at the time as previously noted, the public had just cause to be concerned about controlling the behavior of teachers. During this period teachers were often held to a separate and higher standard of conduct than those outside the profession. Teachers were frequently denied the common social pleasures freely enjoyed by other members of the community. For example, teachers were
often prohibited from smoking tobacco or drinking alcoholic beverages, although such indulgences were then widespread and socially acceptable for non-teachers in many communities (Rich, 1986). Dating by single teachers was also carefully scrutinized and even strictly prohibited in some locations. Teachers were often expected to attend church on a regular basis and to actively participate in church programs (Beale, 1941; Rich, 1986).

Although such attempts to regulate teacher conduct were arguably in reaction to an untrained and undisciplined teaching force, many of these restrictions on personal freedom remained in place well after teacher preparation improved and professional qualifications increased (Rich, 1986). For example, efforts by school boards to control the conduct of teachers still existed in some parts of America well into the Twentieth Century. La Morte (1993) cited the following list of rules for teachers issued by a West Virginia Board of Education in 1915:

**Rules for Conduct for Teachers**

1. You will not marry during the term of your contract.
2. You are not to keep company with men.
3. You must be home between the hours of 8:00 p.m. and 6:00 a.m. unless attending a school function.
4. You may not loiter downtown in ice cream stores.
5. You may not travel beyond the city limits unless you have the permission of the chairman of the board.
6. You may not ride in a carriage or automobile with any man unless he is your father or brother.
7. You may not smoke cigarettes.
8. You may not dress in bright colors.
9. You may under no circumstances dye your hair.
10. You must wear at least two petticoats.
11. Your dresses must not be any shorter than two inches above the ankle.
12. To keep the schoolroom neat and clean, you must sweep the floor at least once daily; scrub the floor at least once a week with hot, scapy water; clean the blackboards at least once a day; and start the fire at 7:00 a.m. so the room will be warm by 8:00 a.m. (p. 226)

Beale (1936) cited numerous examples of attempts by state and local authorities to control the personal lives of teachers during the late 1920s and early 1930s:

(1) Eleven high school teachers in Ottawa, Kansas were fired in 1929 for attending a country club dance (p. 375).

(2) A 1927 South Carolina statute permitted the revocation of teaching certificates for use of profanity (p. 376).

(3) The Kansas State Superintendent refused to make recommendations for any school positions on behalf of any persons who used tobacco "in any form" (p. 377).

(4) In 1932, a Seattle teacher was forced to resign his teaching position because liquor was discovered in his apartment (p. 380).
(5) In 1933, a female teacher in Ohio was fired because she “visited a speakeasy” (p. 380).

(6) As late as 1931, some boards of education required teachers who married to resign their positions (p. 384).

(7) In 1928, female teachers in a West Virginia town were required to buckle up their galoshes “all the way” (p. 391).

Perhaps one of the most striking examples cited by Beale (1936) regarding excessive school board control over the lives of teachers during this period is illustrated by the following excerpt from a teaching contract accepted by a teacher in North Carolina:

. . . I promise to abstain from all dancing, immodest dressing, and other conduct unbecoming a teacher and a lady. I promise not to go out with any young men except insofar as it may be necessary to stimulate Sunday School work. I promise not to fall in love, to become engaged or secretly married. I promise to remain in the dormitory or on the school grounds when not actively engaged in school or church work elsewhere. I promise not to encourage or tolerate the least familiarity on the part of any of my boy pupils. I promise to sleep at least eight hours a night, to eat carefully, and to take every precaution to keep in the best of health and spirits in order that I may be better able to render efficient service to my pupils. . . (pp. 395-396)
A significant factor contributing to the long-term continuation of such intrusive regulation of teacher conduct may have been the subservient acceptance thereof by the teachers themselves. As pointed out by Lewis (1925), large numbers of women entered the teaching profession during the first half of the Nineteenth Century and "teaching became feminized" (p. 456). During the colonial era nearly all teachers were men; by the early Nineteenth Century, a gender shift had occurred and the teaching field had become predominantly female (Harbeck, 1987; Spring, 1986).

The entry of women into the teaching workforce, therefore, may have delayed opportunities to improve the professional rights and status of teachers. Part of the negative impact was economic, as noted by Lewis (1925):

Women could be hired at a pittance. They had practically no economic status. By hiring women, taxes could be kept down. Thus the stigma of being a poorly paid and undesirable occupation was clearly established. (p. 456)

Harbeck (1987) maintained that including women into the teaching profession contributed to the continuation of intrusive
teacher regulation. Such women were often “marginally educated” and “easily controlled because of their youth” (p. 62). Harbeck further stressed that, although women became a numerical majority, the power structure in public education was still dominated by men during the early Nineteenth Century:

Despite this new occupational niche for women in the elementary classrooms of the common school movement, the societal hierarchy of men as managers and women as workers prevailed. Women were to bring their innate skills as nurturing, maternal figures to the classroom to gently mold the personalities of their young charges. Men remained the mentally gifted, managerial wizards who would transpose the world of business on to the educational setting. Thus, much of the workforce was female, and subservient to their superiors because of the socialization process and the general character of their hierarchical gender-segregated society. (p. 62)

In summary, the aforesaid historical references reveal that several fundamental assumptions about the rights and responsibilities of teachers emerged and evolved from the early years of American education:

1. The board has the right and duty to exercise significant control over the lives of teachers.

2. Such board control is both necessary and justified in order to hold teachers to high standards of morality.
3. Teachers are and should be held to a higher standard of moral conduct than those of other professions.

As will be shown in subsequent sections of this Chapter, these basic assumptions had an important impact on the development of two competing theories regarding the review and judgment of teacher misconduct: (1) the role model/exemplar theory; and (2) the rational nexus theory.

Teacher As Role Model/Exemplar

Since the earliest beginnings of American education, the moral development of children has been a primary objective of the educational process (Harbeck, 1987). As far back as colonial times, teachers have been expected to inculcate youth with moral values and precepts (Harbeck, 1987). Clay (1976) noted that “A cornerstone of American public education has been the assumption that students, in order to become well-balanced human beings and stable members of the community, must be taught to discern moral values” (p. 911). Since the colonial period one of the most accepted ways to teach morality has been simply to “expose children to persons who would model exemplary behavior” (Harbeck, p. 81).
It has long been recognized that the public school teacher has a legal duty to serve as a positive role model and moral exemplar for his/her students (Clay, 1976; Reutter, 1970). Delon (1982) observed the following regarding the rationale underlying this role modeling requirement for teachers:

Any legal obligation a teacher has to serve as an exemplar or role model for pupils rests on the belief that pupils, at least in part, acquire their social attitudes and behaviors by copying those of their teachers. (p. 6)

Brubacher (1927), in addressing the state of professional standards for teachers, as such existed in 1927, maintained that exemplary conduct and high character were attributes which competent teachers were required to possess in order to demonstrate fitness to teach:

It is because of the place he holds in the community, as guide and preceptor of the very young, that the teacher must have high character. His obligations to the community can be paid only in terms of character. For his knowledge and skill in instruction have no value when divorced from sound principles of conduct. In fact, character is the irreducible minimum of the teacher’s equipment. It is a part of the professional outfit that
cannot be measured in tangible terms other than conduct. Teachers are taken at face value and kept on a purely pragmatic basis. If character is sufficient to produce good conduct, and as long as it yields dividends in good conduct, the teacher is kept at work; as soon as character yields misconduct, he is and ought to be dismissed as professionally unfit. (pp. 133-134)

Avent (1931) characterized the excellent or ideal teacher as one who taught by example and who offered his/her own lifestyle as a model for imitation. According to Avent, the manner in which a teacher lived was much more important than what a teacher verbalized through formal instruction. The obligation to serve as a moral exemplar was not limited to the classroom, but rather encompassed all facets of the teacher's life. Avent described how the excellent teacher, in his opinion, should behave away from school:

He does not use profane, vulgar, or indecent language. He does not attend dance halls at night. He does not bet on the outcome of the game. He does not use intoxicating liquors. He does not encourage by his habits law violators. He does not engage in immorality or practice habits not approved by the community. He omits questionable amusements. He finds out community attitudes on cards, dancing, and the like, and abides by them. He engages in no cheap joking. He does not frequent poolrooms or consort with disorderly persons. At the same time, he neither rides pet hobbies
unadvisedly, nor becomes the slave of undesirable habits. (p. 284)

The traditional recognition of the teacher as a moral exemplar has often resulted in a substantial sacrifice of individual freedom and privacy for those entering the teaching profession (Hooker, 1994). Hamilton (1954) observed the following regarding the diminution of rights yielded by teachers:

When he enters the teaching profession, a person legally surrenders a measure of his freedom of action. It should be remembered that a teacher may legally be free to be immoral, so long as he violates no law, but he is not free to be a teacher and engage in immoral conduct. (p. 87; Hooker, 1994, p. 1)

Public expectation that teachers serve as exemplars of morality for their students has also led to the creation and perpetuation of a double standard of moral conduct for teachers. Teachers have generally been held to a much higher and more rigid moral code than those in other vocations (Punke, 1965). Davis (1972) concluded that such restrictions are justified because of the duty of teachers to foster character development in their students. Reutter (1970)
pointed out that higher moral standards for teachers are both appropriate and necessary because of the very unique nature of the teaching relationship: "His character and conduct may be expected to be above those of the average individual not working in so sensitive a relationship as that of teacher to pupil" (p. 451).

Hooker (1994) asserted that the widespread belief that teachers are and should be role models permeates the social sciences and is supported not only by educational theory, but is also found in medical theory, sociological theory, and psychological theory as well. Early court decisions dealing with teacher dismissals for immoral conduct often accepted the role-modeling obligation as conclusive, self-evident fact (Delon, 1982). Delon pointed out, however, that later decisions reflected a tactical shift by plaintiffs in presenting the role model issue in teacher termination cases:

In recent years in litigation stemming from teacher dismissal for personal conduct, school officials have attempted, with some success, to support this underlying assumption with scientific evidence presented through expert testimony of psychologists and professional educators. (p. 6)
According to Clay (1976) the modeling of sexual values is an especially sensitive issue concerning the duty of teachers to serve as role models. During the formative and adolescent years, children are influenced, sometimes unconsciously, by a teacher’s attitudes and beliefs toward sexual values. Clay cited several tenets from case law that recognize the potential for teachers to affect the attitudes of students about sexual morality:

First, teachers are in a position to affect the unformed sexual values of their students. Second, school children are entitled to protection by the state from teachers who would distort those values. Third, because of the development of a student’s attitudes could be affected by scandal within the school community, the teacher must adversely affect neither faculty members nor the reputation of the school through his own sexual conduct. Therefore, the state should be able to place limitations on any sexual conduct of a teacher which has public ramifications, and if those limitations are breached, that teacher should be dismissed. (pp. 912-913)

Early court decisions involving the dismissal of teachers for sexual immorality reflected a theme that the appearance of misconduct was just as potentially harmful as the actual misconduct itself (Delon, 1982). As pointed out by Koenig (1968), mere
allegations of wrongdoing could be sufficiently damaging to a teacher’s reputation to warrant dismissal from employment:

Even cases involving alleged immorality, which are later proven to be fallacious, may constitute grounds for dismissal in given situations. Thus, it is not only good character which is required of a teacher, but a good reputation as well. (p. 16)

In commenting on the importance of an honorable and respectable reputation, K. and M.D. Alexander (1992) stated the following:

Every teacher is charged with the responsibility of setting a good example. Not only must teachers be of good moral character, but their general reputation must attest to this fact. Teachers must not only be moral persons, but must conduct themselves in such a manner that others will know of their virtue. (p. 574)

The use of the role model/exemplar rationale by courts in teacher dismissal cases changed very little from the earliest decisions in the 1880s until well into the 1960s (Delon, 1982). The advancement of civil rights during the 1960s encouraged teachers to challenge dismissals for personal conduct, especially those based on
alleged failures to function as proper role models. Delon found that by the 1970s teachers were frequently alleging violations of federal constitutional and civil rights in dismissal cases for immorality. As will be shown in the next section of this chapter, the role model/exemplar theory for judging the personal conduct of teachers came under serious attack during the late 1960s.

Rational Nexus Theory

An alternative rationale for reviewing allegations of immoral conduct in teacher termination cases emerged in the late 1960s (Delon, 1982). This competing rationale, commonly referred to as the "rational nexus theory", differed dramatically from the previously discussed role model/exemplar theory of teacher accountability. Its name was derived from the term "nexus" which Delon defined as "a connection or link" (p. 20). In essence, this theory required that school officials establish a reasonable or rational connection between a teacher's personal misconduct and that teacher's unfitness to teach in order to warrant termination of employment (Delon, 1982). Under the exemplar theory, the primary issue was whether the conduct of the teacher set a bad example for students (Delon, 1982; McCarthy &
Cambron-McCabe, 1987). The exemplar theory focused on the conduct itself rather than the impact thereof on the educational environment (Delon, 1977). The rational nexus theory, however, prohibited automatic dismissals based solely on evidence that immoral conduct merely occurred or was reputed to have occurred. McGhee (1976) emphasized this distinction by stating the following regarding the nexus theory: "Instead, the courts 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" (p. 162; Delon, 1977, p. 56).

According to McCarthy and Cambron-McCabe (1987), many courts in recent years have adopted the nexus analysis and "have become more restrictive in construing immoral conduct and have required that school officials show that misconduct has an adverse impact on fitness to teach" (pp. 397-398). Fischer and Schimmel (1987) noted that in order to successfully dismiss a teacher for immorality under the nexus theory "there must be substantial evidence that the immorality is likely to have a negative effect on his or her teaching" (p. 242).
In 1969, the California Supreme Court adopted and applied the nexus rationale in the landmark decision of *Morrison v. State Board of Education*, 461 P.2d 375 (CA 1969). This case will be discussed in detail in Chapter III herein; however, it should be noted at this point that numerous scholars have regarded *Morrison* as the watershed decision representing a shift from the exemplar rationale to the rational nexus theory (Delon, 1982; Hooker, 1994; Fischer & Schimmel, 1987; McCarthy & Cambron-McCabe, 1987). The following observation was offered by Fischer and Schimmel:

*Morrison* marked a change in the way many courts considered questions of teachers' immoral conduct. In the past, the fact that a teacher engaged in behavior a community considered immoral would have been enough to support his dismissai. After *Morrison*, other courts began to rule that teachers could not be dismissed simply because of such conduct unless there was evidence that it was clearly related to teacher effectiveness.  (p. 221)

Although courts in California and in other states were slow to embrace the nexus requirement espoused in *Morrison*, Delon (1982) concluded that the impact of this decision eventually altered the law governing teacher dismissals for immorality. Hooker (1994),
commenting on the significance of *Morrison* and the influence thereof on subsequent case law, stated the following:

Overall, the past twenty-five years have seen a general trend of judicial leniency towards the teaching profession. While the courts are extremely aware of the "special role" teachers play in society, they nonetheless seem to have a growing tendency to balance these societal interests with those private "rights" of the teacher. Virtually no behavior except criminal offenses and student/teacher sexual relationships constitute immorality per se. The courts, since *Morrison*, evaluate each situation on a case-by-case basis to determine whether the teacher's actions have rendered him or her unfit... (pp. 12-13)

Valente (1987) concluded that prior to the *Morrison* decision, courts were generally divided on the measure of proof required to sustain the dismissal of a teacher for immorality, especially in those cases where the conduct did not constitute a criminal act, but merely involved a deviation from an accepted norm of morality. Valente asserted the following regarding such cases:

Dismissal may thus hinge upon one of two inconsistent tests, namely, that a teacher who acts immorally is unfit because immorality destroys the basis for student respect; or because he or she is no longer a suitable role
model and exemplar for students, irrespective of proof of actual job impact. (p. 214)

According to Valente (1987), the Morrison decision attempted to reconcile these two inconsistent tests by requiring evidence of a nexus between the immoral act and job performance.

The nexus requirements recognized in Morrison have also attempted to reconcile the violation of privacy rights that may occur when out-of-school private behavior becomes the basis for employment termination. McCarthy and Cambron-McCabe (1987) noted the following regarding the privacy issue:

Courts have recognized that allowing dismissal merely upon a showing of immoral behavior without consideration of the nexus between the conduct and fitness to teach would be an unwarranted intrusion upon a teacher’s right to privacy. (p. 398)

Although the rational nexus theory has clearly overshadowed the role model rationale in recent years, Hooker (1994) warned that the exemplar theory is not completely dead yet. Hooker suggested two reasons for its survival:
First, the recent conservative political and moral swing in this country will be reflected in judicial rulings. More conservative judges will be appointed or elected to office. A more pragmatic reason to believe that the role model theory will survive exists in the utility of the theory itself. Courts can resurrect it any time they feel inclined to support a decision to terminate a teacher's contract or revoke his certificate and no better legal tools are available. (p. 13)

Sexual Misconduct by Teachers

Attitudes about sexual behavior have traditionally been extremely divergent, often evoking very dogmatic opinions about acceptable standards of sexual morality (Bolmeier, 1975). In reference to such divergence of viewpoints and beliefs about sexual issues, Bolmeier observed the following:

To some people, sex is associated mainly with lust, degrading passion and the baser elements of sexual behavior. To others, it is associated mutually with the proper roles of the man and the woman in all human activities and as a positive and creative force. Home background and religious scruples are potent factors in determining attitudes toward sex. (p. 1)
As previously noted, teachers are role models for their students, whether unconsciously or by design, primarily because of the unique nature of the student/teacher relationship. An immoral teacher, especially one prone to sexual immorality, raises many concerns about the possible effect that his or her immoral character may have on students. As pointed out by Dutile (1986), the sexually immoral teacher presents special problems for school authorities:

Since teachers may even unconsciously convey their values to students, an immoral teacher may not be able to shed his outlook upon entering the classroom. Moreover, a school district retaining a teacher who acts in a sexually immoral way, whether in or out of the classroom, may lend an air of approval to that conduct. The delicacy of sexual matters for schoolchildren, who are in the most formative period of their sexual and moral development, only exacerbates the situation. (p. 103)

Stelzer and Banthin (1980) recognized that standards of sexual morality changed significantly during the 1960s and 1970s when social conformity gave way to more emphasis being placed on individual freedom. During this period of social upheaval and reappraisal of basic core values within American society, alternative sexual lifestyles began to gain acceptance (Stelzer & Banthin, 1980).
Such relaxation of traditional sexual mores did not, however, necessarily extend to public school teachers. A degree of conformity to traditional values by teachers remained a reasonable expectation for most school authorities even during a period of sexual liberalization (Stelzer & Banthin). In examining the limits of the rights of teachers to pursue alternative sexual lifestyles, Stelzer and Banthin identified two issues for consideration: “(1) How does a given behavior affect students, co-workers or the school? (2) How important is the behavior or activity to the teacher’s sense of self?” (p. 138). They further concluded that in evaluating specific sexual conduct, school officials should determine whether it is harmful to students. “Benign behavior is acceptable; harmful behavior is not” (Stelzer & Banthin, p. 138).

According to Stelzer and Banthin (1980), the determination of what sexual behavior is harmful to students rests, within reasonable limits, with the local school board:

This is part of the board’s representative responsibility. Courts have given boards wide latitude and discretion in deciding whether a teacher’s activities are harmful. However, their judgments and actions cannot be arbitrary
or capricious. A school board must demonstrate that its determination is the result of a reasoned process and that there is evidence to support its belief that a teacher's behavior is harmful to the school. (p. 138)

Peterson and Rossmiller (1978) noted that even with the general loosening of attitudes toward the expression of sexuality, the rights of teachers to pursue unconventional sexual lifestyles are not unlimited. The issue is still whether the unusual lifestyle negatively impacts the school environment.

While increasing evidence indicates that lifestyles of teachers which vary from the norm are less likely to result in their dismissal than formerly, teachers may not engage in activities which are clearly detrimental to classroom teaching and the sound operation of the school. Courts still hold that the rights of teachers to teach does not depend solely on their conduct in the classroom. Offensive actions outside the school can pervade the classroom and make effective instruction impossible. (p. 454)

In evaluating the propriety of sexual conduct, standards appear to vary from community to community and from state to state. The following observation was expressed in Comment, The Dwindling
Rights of Teachers and the Closing Courthouse Door, 44 Fordham L. Rev. 511 (1975) regarding this issue:

In the areas of permissible sexual conduct, the courts seem to be gravitating toward allowing the community standards of morality to control, similar to the modified community standard the Supreme Court has applied in obscenity cases. Whether a teacher’s conduct will be protected will depend, therefore, not only on the conduct itself, but also on the moral standards of the community in which he chooses to work. (p. 529)

As pointed out by Strahan and Turner (1987), it is ironic that “the size and attitude of a particular community may be more crucial than the particular behavior” (p. 153). Teachers, therefore, may be able to have greater freedom to pursue unconventional sexual lifestyles in large, urban school districts than in smaller, more rural communities. Community attitudes alone, however, cannot control the private sexual conduct of teachers (Comment, 44 Fordham L. Rev. 511, 1975).

In addition to the nature and size of the community, Dutile (1986) identified other contextual factors to be considered by school
boards in assessing the seriousness of alleged sexual misconduct by teachers:

1. **Notoriety of the Misconduct:**

   Notoriety should be discounted in cases where it was created or caused by school officials rather than by the teacher. Knowledge of the misconduct by parents and students, in and of itself, is not a sufficient reason for dismissal unless a substantial impact on the teacher’s fitness is established.

2. **Parental Complaints:**

   The number and intensity of parental complaints may be relevant in assessing the extent of negative impact that the misconduct may have had on the school environment. Dutile cautioned, however, such complaints alone should not be the sole basis for termination of employment without further proof of direct and substantial impact upon the classroom or school. “In any event, to the extent that complaints against the teacher are considered, any protestation in favor of the teacher, or other
community support, real or likely, should also be put into the balance” (p. 134).

3. **Remoteness in Time and Duration of the Misconduct:**

The relevance of misconduct diminishes over time. The longer the time period between the commission of the offending act and disciplinary action by the school board, “the more irrelevant the conduct to an assessment of current fitness” (p. 135). Conduct which only happened once is generally not as troublesome as a persistent pattern of improper conduct.

4. **Likelihood of Repetition:**

If misconduct is likely to be repeated in the future, this fact may be highly relevant to a determination of fitness to teach. “With regard to this point, courts may heavily rely on the expert testimony of psychologists and psychiatrists” (p. 135).

5. **Remediability of the Misconduct:**

“If the conduct is remediable, the teacher must be given the opportunity to correct the problem prior to any
discharge. A dismissal cause is irremediable when there is harm to the students, faculty or the school and the conduct could not have been corrected through the warnings of superiors” (p. 136).

Categories of Sexual Misconduct

The following review of the literature relative to the dismissal of teachers for sexual immorality is organized according to specific types of sexual behavior. Sexual misconduct by teachers relevant to this study includes not only heterosexual behavior but homosexual practices as well. Heterosexual misconduct sufficient to challenge continued teacher employment generally falls within one of four categories of specific behavior or status: (a) adultery/fornication, (b) cohabitation, (c) unwed pregnancy, or (d) miscellaneous unorthodox sexual practices.

Adultery/Fornication

Sexual activities involving adultery or fornication should be of particular concern to those teachers who participate in such things since behavior of that nature could constitute a criminal offense in many states. For example, Green (1989) noted that twenty-five
states and the District of Columbia still criminalize adultery and that thirteen states and the District of Columbia continue to view fornication as a crime. For purposes of clarification, adultery should be distinguished from fornication. According to Black’s Law Dictionary, “adultery” is defined as “voluntary sexual intercourse of a married person with a person other than the offender’s husband or wife”; whereas “fornication” is defined as “unlawful sexual intercourse between two unmarried persons.”

If prostitution is truly the oldest profession, “fornication is surely among our oldest crimes” (Note, Fornication, Cohabitation, and the Constitution, p. 253). The incidence of fornication in American society is significantly high as indicated by the following statement from the 1991 Harvard Law Review, Note, Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex:

The average American adult has sex fifty-seven times a year, and over ninety-seven percent of adults have had intercourse at least once. This libidinous activity is not confined to marriage: over seventy-five percent of women and over eighty percent of men have had premarital sex by age nineteen. The average American has had premarital intercourse with seven partners. (pp. 1660-1661)
Adultery, like fornication, is also widespread and commonly practiced in American society. "A majority of men and a near-majority of women admit to having engaged in extramarital sex" (Note, Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex, p. 1671).

Although apparently common and frequent practices by the American public, both fornication and adultery are generally viewed as immoral, especially when committed by public school teachers. The immoral nature of such conduct is exacerbated when the commission thereof constitutes a criminal act. Teachers, therefore, may well act at their peril when engaging in illicit sexual behavior such as fornication and/or adultery, especially in those jurisdictions where such conduct is criminalized. Notwithstanding the foregoing, Melnick and Twyman (1985-1986) concluded that, even when a teacher is involved in adultery or fornication with non-students, the test is whether the misconduct negatively affected the teacher's ability to teach. According to Melnick and Twyman, even community disapproval of such illicit sexual conduct should not, in
their opinion, be the basis for termination of a teacher’s employment unless job performance is adversely affected.

Valente (1987) noted that episodic adultery by a teacher may not be sufficient to sustain dismissal from employment when past teaching performance has been satisfactory and community support for the teacher is strong.

**Cohabitation**

Cohabitation of unwed teachers with members of the opposite sex, like fornication and adultery, has the potential of creating serious problems for both teachers and administrators (Francis & Stacey, 1977). Although cohabitation may well have been judged as clearly immoral in the past, such behavior is now evaluated in terms of the impact that it has on the teacher’s performance and fitness to teach (Francis & Stacey, 1977).

The 1978 Michigan Law Review, *Note. Fornication, Cohabitation, and the Constitution*, indicated that cohabitation is an increasingly common fact of life in American society, as evidenced by the following observation: “It has been estimated that six to eight million people are cohabitating without benefit of clergy and that the
number of such couples increased from 1960 to 1970 by over 700 percent” (p. 254).

Fischer, Schimmel, and Kelly (1987) concluded that court decisions are varied on the issue of opposite sex cohabitation. In essence, such cases depend on the circumstances involved. Cohabitation in small rural communities may provoke more public outrage and negative impact on the school environment than such conduct in more metropolitan areas.

**Unwed Pregnancy**

Although unmarried pregnant teachers may have been routinely dismissed in years past on the basis of self-evident immorality, courts since the mid to late 1970s have tended to uphold the rights of such teachers to continue their employment (Francis & Stacey, 1977). Unwed pregnancies present special problems for school administrators because local communities may not agree with the judicial trend toward more liberal decisions on this issue. Delon (1982) observed that “Although standards of morality have changed in recent years, it is probably safe to say that a substantial segment
of the population views pregnancy out of wedlock, with a few exceptions, as indicative of immoral conduct” (p. 9).

The primary basis for judicial reluctance to uphold the termination of unwed pregnant teachers appears to be founded on the constitutional right to privacy recognized by the United States Supreme Court. Underwood (1989) stated the following regarding the applicability of the federal right to privacy doctrine to the employment rights of unwed pregnant teachers:

...a person’s decision to conceive and bear a child is within the constitutionally protected zone of privacy. This is true even if the person is an unmarried teacher. This would not prohibit a district from dismissing an unwed pregnant teacher, but would require evidence of immorality based on constitutionally acceptable criteria. In addition, the district must prove that the alleged immoral behavior has a negative impact on the person’s effectiveness as a teacher. (pp. 537-538)

Permitting unmarried pregnant teachers to continue teaching arguably may contradict the role-modeling function of teachers to serve as moral exemplars for their students. This is especially true since teen pregnancy is such a significant problem in American society. Kenney (1987) found that approximately sixty-five percent
of public school administrators consider teen pregnancy as one of the top ten problems confronting their districts. According to Kenney "About half of U.S. teenagers are sexually active by the time they leave school, and one in four young women have experienced a pregnancy" (p. 728). Kenney further estimated that "more than four out of ten young women in the United States become pregnant before they turn 20" (p. 728).

Given the scope of the problem concerning teen pregnancy, it may seem reasonable to expect public schools to make an effort to discourage illicit sexual relations among students. One time honored method would be for teachers to model appropriate behavior for student to emulate. Sacken (1988) addressed the obvious problem with the role-modeling function in this regard:

The dilemma, then, of a principle of virtually absolute protection of an unwed teacher's childbearing decision is that protecting the teacher's decision, at least for the female teacher, ensures that teachers may "model" values and behaviors antithetical to the school district's educational goals and to social policy generally in this country. ***this doctrine would require toleration of teacher conduct that subverts, if only symbolically, an explicit component of most schools' educational mission, the inculcation of desirable norms. (p. 290)
Frye (1989), in response to Sacken's concerns about the apparent violation of role-modeling responsibilities by unmarried pregnant teachers, articulated a contrary view of this problematic issue:

The right to bear and raise a child is simply too fundamental, too precious, to be sacrificed to vague notions of how teachers ought to behave, to unsupported theories of role-modeling, or to assumptions about the possible disruptive effects of an unmarried pregnant teacher in the classroom. Teachers are individuals, with all the dreams and aspirations of other people; and teachers who are single parents have to support their children just like other people do. (p. 535)

Underwood (1989) expressed yet another view of the role-modeling function of teachers regarding unwed pregnancies:

Teachers are expected to be role models for students. Additionally, a public school should model civic ideals for those students. A public school should not only teach students about their constitutional responsibilities as citizens, but should respect the rights and liberties afforded by the Constitution. (p. 546)
Even though unwed pregnancies constitute a serious social problem, courts have been reluctant “to accept the assertion, without further proof, that students model their behavior after that of their teachers” (Delon, 1982, p. 13). Delon further maintained that in order for a school district to successfully dismiss an unwed pregnant teacher for immorality, “school officials must either show a compelling state interest for their action or prove by a preponderance of evidence that they would have dismissed the teacher for constitutionally permissible reasons” (p. 13).

Miscellaneous Unorthodox Sexual Practices

Teachers have been terminated from employment for a variety of unconventional sexual acts or practices on the basis of immorality or other similar grounds (Fischer, Schimmel, & Kelly, 1987). Three other such grounds closely related to immorality are unprofessional conduct, conduct unbecoming a teacher, and unfitness to teach (McCarthy & Cambron-McCabe, 1987). The prohibited activities have ranged from such things as a female elementary teacher engaging in oral sex with several men at a swinger’s club party to a male
teacher’s decision to undergo a sex change operation whereby he became a woman (Fischer, Schimmel, & Kelly).

Delon (1982) cited the case of a sixth grade teacher who was fired for fondling, in a sexually suggestive manner, a mannequin dressed in feminine clothing which the teacher played with in his own front yard (Wishart v. McDonald, 500 F.2d 1110, 1974).

All of the aforesaid cases will be discussed in detail in Chapter III of this study. These decisions will clearly demonstrate that what a public school teacher can permissibly engage in is limited, even on his or her own time away from the school environment.

Homosexuality

One of the most controversial and problematic issues facing employers in the 1990s will be the rights of homosexual employees in the workplace (Simon & Daly, 1992). Olson (1987) indicated that this is especially true in public education which may well represent the most discriminatory profession against homosexuals. Rivera (1985) acknowledged the controversy surrounding the employment of gay teachers in the public schools by observing that “No other area of employment for gay people attracts such condemnation by the
general public” (p. 514-515). Rivera cited three possible explanations for the unusually negative public reaction to hiring homosexual persons as teachers: (a) the stereotype of homosexual persons as child molesters; (b) the danger that a homosexual teacher could convert an otherwise heterosexual student into a homosexual student; and (c) the belief that a homosexual teacher is an immoral role model for children. Although Rivera suggested that homosexual teachers are in fact no more a threat to children than are heterosexual teachers, she indicated that the role-modeling issue is particularly difficult for homosexual educators. The widely held view that homosexual teachers are immoral role models is especially troublesome since it could essentially exclude all gay persons from employment in public education. In response to this problem, Rivera (1985) stated the following regarding the role model dilemma:

Such an approach labels all gays as immoral per se. Once so labeled, a gay person becomes ineligible for teaching because teachers are supposed to be positive role models for students. This final argument is based not on conduct but on status: the gay person is excluded not for what he or she does, but for who he or she is. (p. 515)
Rivera (1985) concluded that gay persons will continue to be discriminated against in public education as long as homosexuality is equated with immorality. According to Rivera “the idea of a healthy gay role model is anathema to persons who believe gay persons are per se immoral and conclude that no gay person can ever be healthy” (p. 517).

One of the reasons that homosexual rights create such a serious challenge for public education is the relatively large number of gay persons already employed in the teaching profession. Harbeck (1992) estimated that there are approximately 2,724,000 teachers employed in the United States. In calculating the probable number of gay teachers represented in that total, Harbeck observed the following:

Using Kinsey's often quoted estimate of 10 percent, there are at least 272,400 homosexual educators currently employed in schools around the nation - a number equal to the entire teaching staff of the States of California and Minnesota combined. Another way to look at this figure is to realize that if the national average of number of teachers in every school is 24.8, then it is statistically likely that two or more educators per school are homosexuals. In fact, the numbers may be much higher in light of the lesbian and gay rights movement that
occurred after the original 1948 estimate of the homosexual population, and because teaching is an occupation that historically has attracted single women and non-traditional men. (p. 123)

Despite the estimated large number of homosexual teachers currently working in public schools, there appears to be significant opposition to having homosexuals serve as teachers. Dressler (1985) noted that a majority of Americans believe that homosexuals should not be permitted to teach. Olson (1987) cited a 1970 survey conducted by the National Institute of Mental Health which found that 75 percent of Americans were against hiring gay persons as teachers (See Levitt & Klassen, 1974). The American culture often reflects hostile attitudes toward homosexuality, which one writer characterized as "institutionalized homophobia" (Comment, Remedial Balancing Decisions and the Rights of Homosexual Teachers, 1976, p. 1080.) La Morte (1975) concluded that much of this homophobic hostility could be traced back to biblical prohibitions against homosexuality found in both the Old and New Testament. Such public hostility is especially strong when employment involves direct contact with children (Dressler, 1978).
The prejudice against homosexuals creates grave difficulties for gay persons employed in public education. Dressler (1978) described the status of homosexual teachers as follows:

The position of the gay teacher in American society is unenviable. Public prejudice against gays is severe while public idealism of the role of the teacher is extreme. Neither of these societal attitudes is justifiable and the infringement of the rights of gay teachers which resulted from these attitudes should not be tolerated. (p. 445)

Job security for homosexual teachers, when compared to that of heterosexual teachers, is uncertain at best (Walden & Culverhouse, 1989). Although gay teachers have received some protection from the courts, they certainly are more at risk than heterosexual colleagues regarding employment security (Walden & Culverhouse, 1989).

Court decisions dealing with the rights of homosexual teachers have been “even more mixed than those dealing with heterosexual immorality” (Valente, 1987, p. 215). Such cases often reflect the personal attitudes of particular judges regarding the issue of homosexuality (Schneider-Vogel, 1986). La Morte (1975) suggested
that decisions in homosexual teacher cases often indicate an antihomosexual bias among some judges. Judicial opinions on this issue have been varied and have resulted in a wide range of interpretations. Consequently, future court decisions are often difficult to predict (Schneider-Vogel, 1986). A significant reason for the apparent uncertainty of outcomes in such cases is that the United States Supreme Court has not yet dealt directly with the issue of the homosexual teacher (Walden & Culverhouse, 1989).

McCarthy and Cambron-McCabe (1987) concluded that decisions will continue to vary in the absence of some direction by the U.S. Supreme Court: “Since the Supreme Court has not recognized a constitutional privacy right to engage in homosexual conduct, a range of interpretations among lower courts regarding homosexual teachers’ rights seems likely to persist” (p. 304).

Notwithstanding the inconsistent holdings in a number of homosexual teacher cases, Dressler (1978) maintained that two major principles may be extracted from a review of such court decisions:

First, a teacher may not be discharged solely because of immoral (homosexual) conduct or status, but only upon
proof of unfitness to teach. Second, that unfitness may be proven if the teacher’s conduct or status: (1) precludes him from teaching a statutorily required “subject” such as morality or law and order; (2) jeopardizes the physical well-being of the students; (3) renders him an inadequate role model; or (4) is known or likely to become known to parents, students or colleagues, thereby causing a disruption of school activities or a reduction in the teacher’s effectiveness. (p. 430)

Valente (1987) summarized some of the grounds that have been cited by a number of courts upholding the dismissals of homosexual teachers. Such grounds have included the following: (a) that status as a homosexual alone justifies dismissal; (b) that the teacher failed to disclose homosexuality in application for employment; and (c) that the homosexual teacher “publicized and flaunted unconventional sexual conduct” (p. 216).

Given the somewhat unpredictable nature of the case law on the issue, the decision as to whether to seek dismissal of a homosexual teacher can be a very difficult dilemma for school boards and administrators. The eventual outcome of any attempt to terminate the employment of a gay teacher may prove to be very expensive as well as uncertain. Harbeck (1992) noted that such contingencies may cause school boards to seek more negotiated
resolutions to disputes over the rights of homosexual teachers in the future:

Because of the complexities of the legal and social issues, and because of the seemingly limitless legal and financial resources on both sides, the courts appear to have tried to avoid a direct declaration concerning whether or not gay men and lesbians have a constitutional right to teach school. As long as the judiciary chooses to avoid taking the initiative on the controversial issue, tremendous room is left for negotiation and education. School boards seem more willing to look the other way with respect to a teacher's sexual orientation unless some indiscretion has occurred, and they certainly seem to be more willing to negotiate than to face the costly expense of litigation. (pp. 130-131)

The Right to Privacy

The remainder of the literature review presented in this Chapter focuses on the origins, development, and impact of the right to privacy doctrine that has evolved under the protection of the United States Constitution. Although the review of this literature includes some references to specific court decisions, case law regarding the right to privacy is presented and analyzed in Chapter IV of this study.
Although the right of privacy has evolved into a powerful constitutional doctrine that has significantly impacted American jurisprudence, that there is no explicit reference to such a right in either the United States Constitution or the Bill of Rights (O’Brien, 1995). In fact, it was not even recognized as a legal right under common law or constitutional law until the late nineteenth century (O’Brien). In 1888, Judge Thomas Cooley first characterized the privacy concept as “a right to be let alone” that was based on common law tort principles (O’Brien, p. 1168). In 1890, Samuel Warren and Louis D. Brandeis co-authored a profoundly influential article for the Harvard Law Review that incorporated Cooley’s privacy concept and further advocated the recognition of an independent right of privacy that would protect the “inviolate personality” of each person (Warren & Brandeis, 1890, p. 211; Note, “Penumbras and Privacy”, 1985). Warren and Brandeis (1890) were concerned about the technological advancements of that era that enabled newspapers to invade the private domains of citizens and gather news for public dissemination, as illustrated by the following statement from their article:
Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone". Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops" (Warren & Brandeis, 1890, p. 195)

The Warren and Brandeis article is considered by many legal commentators to be one of the most influential law reviews ever written because of the impact that it had on the development of the law of privacy (Kramer, 1990). According to Rotunda and Nowak (1992), this law review article helped "to establish recognition in American legal thought that each person had a cognizable legal interest in a private life, both physical and emotional". (p. 298). Kramer (1990) noted that:

Few scholars can help but admire the incredible impact of two young lawyers who, in a single law review article published a century ago, created an entire field of law that may continue to intrigue courts and commentators for centuries to come. (p. 724)
O’Brien (1995) observed the following about the significance of the Warren and Brandeis article and its effect on privacy law:

Their analysis of privacy as the right to be let alone sparked the development of a right of privacy in tort law (law dealing with private injuries, such as the public revelations of embarrassing personal facts and the appropriation for commercial purposes of an individual’s name or likeness). Between 1890 and 1941, state courts in twelve states recognized a right of privacy; the number increased to eighteen by 1956 and then to more than thirty-one states by 1960. (pp. 1168-1169)

Thirty-eight years after co-authoring his famous law review article with Samuel Warren, Louis D. Brandeis, as a Justice of the United States Supreme Court, formally asserted the legal framework from which the modern right of privacy evolved (Rotunda & Nowak, 1992). In Olmstead v. United States, 277 U.S. 438 (1928), Justice Brandeis voiced a powerful dissent in which he argued that the right to let alone was “the most comprehensive of rights and the right most valued by civilized man.” (p. 478).

Rotunda and Nowak (1992) cited two important decisions by the United States Supreme Court rendered during the first part of
this century that were significant influences on the development of modern privacy theory. In *Meyers v. Nebraska*, 262 U.S. 390 (1923), the Court struck down a statute which prohibited all public and private schools from teaching subjects in any language other than English. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court invalidated a statute that required all students to attend public schools rather than private schools. In both of these decisions, the state laws at issue were found to restrict individual freedom without serving any legitimate state interest. Although neither of these cases dealt directly with the right to privacy, the significance of their holdings to the evolution of the privacy doctrine was addressed by Rotunda and Nowak (1992):

> While these decisions might today be grounded on the first amendment, their existence is important to the growth of the right to privacy. If nothing else, they show a historical recognition of a right to private decision making regarding family matters as inherent in the concept of liberty. (p. 299)

The first exposition of the right to privacy through a Supreme Court decision was presented by Justice Harlan in his dissenting
opinion in *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Rotunda & Nowak, 1992). In *Poe*, Harlan asserted that a Connecticut statute prohibiting the use of contraceptives by married couples infringed upon marital privacy as guaranteed by the Due Process Clause of the Fourteenth Amendment (Lively, 1992). Harlan urged that the statute be declared unconstitutional through "an expansive interpretation of 'liberty' in the Fourteenth Amendment to extend protection to unenumerated, non-economic, fundamental rights" (Comment, "*U.S. v. Fagg*", 1993, p. 1199). Justice Douglas, in a separate dissent in *Poe*, also agreed with Harlan that the statute was unconstitutional because of the liberty interest grounded in the Fourteenth Amendment (Henly, 1987).

Four years after his dissent in *Poe*, Justice Douglas wrote the majority opinion in the landmark decision, *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court in *Griswold* was asked to review again the same anti-contraceptive statute that it had previously upheld in *Poe*. This time the majority opinion declared the statute unconstitutional as Douglas had previously urged in his dissent in the *Poe* decision. His reasons for finding the statute invalid had,
however, significantly changed. In Poe, Douglas and Harlan had advocated that a right to marital privacy was guaranteed by the Due Process Clause of the Fourteenth Amendment. In Griswold, Douglas retracted from the fourteenth amendment argument that he had espoused in Poe and instead created a "penumbral" right to privacy as the legal basis for invalidating the statute (Henly, 1987, p. 92).

Although the Constitution did not explicitly mention any right to privacy, the majority in Griswold held that the Constitution contained an implicit privacy right that emerged from the penumbras and emanations surrounding particular rights that were explicitly enumerated in the Bill of Rights (McDowell, 1993). As pointed out by McDowell, "This unenumerated right, once discerned and decreed by the Court, became equal in power to those rights that are enumerated" (p. 20).

The Griswold decision's primary significance was "its legitimization of the right to privacy" (Note, "Penumbras and Privacy", 1985, p. 876). Rotunda and Nowak (1992) assessed the impact of the Griswold case in a positive light as follows:
It is fair to say that the right of privacy was created in *Griswold*: no specific, court-defined right to engage in private acts had existed before this decision. But the opinion was nonetheless correct in finding that the values of privacy, including freedom from government intrusion with private thoughts, association, and liberty, had long been part of American legal philosophy. These values indeed had been the basis for the arguments of Brandeis and the earlier opinions cited by Justice Douglas. (p. 302)

Not all legal scholars and commentators embraced the *Griswold* decision with enthusiasm. Many were concerned about the ambiguity created by the penumbra fiction utilized by Justice Douglas to justify the recognition of the right to privacy as a fundamental constitutional right. McDowell (1993) expressed his reservations as follows:

By definition, such a broad and unenumerated right must depend for its form on judicial decree. What is included and excluded by the right to privacy must remain a matter of judicial discretion on a case-by-case basis. This is why Judge Robert Bork has called the right “the loose cannon of constitutional law”. Its lines and limits depend not upon any clear textual provision but only upon judicial predilection. (p. 21)
Judge Robert H. Bork is perhaps one of the best known critics of the *Griswold* rationale and its creation of a constitutional right to privacy. The following comments by Judge Bork reflect his misgivings about the wisdom of *Griswold*:

*Griswold*, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines it. We are left with no idea of the sweep of the right of privacy and hence no notion of the cases to which it may or may not be applied in the future. The truth is that the Court could not reach its result in *Griswold* through principle. The reason is obvious. Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups. When the Constitution has not spoken, the Court will be able to find no scale, other than its own value preferences, upon which to weigh the respective claims to pleasure”. (Bork, 1971, p. 9)

Henly (1987), in commenting on the penumbra metaphor used by Justice Douglas in *Griswold*, cautioned that the absence of any clearly defined boundaries regarding the limits and scope of penumbral privacy creates opportunities for judicial excesses:

In the penumbra, judges are, to some extent, free from text and precedent as well as reason. But they are never
freed from responsibility, including the responsibility to try to penetrate what Cardoza called “the mists of metaphor”. Metaphors like “penumbra” are useful and are even, at some level, inescapable. In the long run, though, they are not a substitute for theory. (p. 100)

The majority opinion in *Griswold* created a new zone of constitutionally protected privacy; however, the ambiguity in defining the perimeters of that zone made it difficult to apply the *Griswold* holding to other fact patterns in subsequent cases. The New York University Law Review Note, *On Privacy: Constitutional Protection for Personal Liberty* (1973), maintained that an analysis of the factual context of *Griswold* revealed three basic themes regarding the scope and application of the newly created right to privacy, “which various Justices found relevant in differing ways” (p. 687):

1. the protected activity took place in the privacy of the home;

2. the protected activity involved intimacies of the marital relationship; and

3. the protected activity involved the decision of whether or not to have a child.
Although *Griswold* protected the right of married couples to use contraceptives free of governmental interference, subsequent Supreme Court decisions regarding the access to birth control technologies went far beyond the borders of the marital bedroom. (Tribe & Dorg, 1991). In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court struck down a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons. The Court held that the right to receive contraceptives is a protected right that must be the same for both married and unmarried persons. The decision in *Eisenstadt* was based on equal protection rather than on a fundamental right to privacy (Rotunda & Nowak, 1992). *Eisenstadt*, however, has been widely cited as an example of a deliberate expansion of the *Griswold* privacy doctrine (Dolgin, 1994; Rice, 1984). There is some divergence of opinion as to just how far *Eisenstadt* broadens the *Griswold* concept of privacy as illustrated by the following observation expressed in the University of Miami Law Review, Comment, *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity* (1986):
The majority in *Eisenstadt* based the decision on individual choice, but the individual choice at issue was procreational - not sexual. Thus, the holding in *Eisenstadt* may be narrowly construed to limit an unmarried individual's right to privacy to procreative decisions. Such decisions are familial in nature.***

Within the marital context of *Griswold*, *Eisenstadt* merely held that individuals may have equal access to contraceptives, and not that transient, consensual, sexual intimacy is protected by the right of privacy. (p. 574)

In *Carey v. Population Services International*, 431 U.S. 678 (1977), the right to access birth control devices was extended to minors. According to Rotunda and Nowak (1992), the *Carey* decision did not grant minors the constitutional right to engage in sexual activity, nor did it prohibit states from strictly regulating the sexual conduct of minors. *Carey* simply held that it was a violation of due process to prohibit minors from purchasing contraceptives. Rotunda and Nowak (1992) summarized the Court's rationale as follows:

But, as there has never been any evidence that denial of contraceptives to young persons deterred them from such activities, for the state to require them to assume greater risks of pregnancy and disease if they violated the law was therefore so arbitrary as to violate due process. (p. 305)
Perhaps the most frequently cited case for the recognition of a right to privacy is *Roe v. Wade*, 410 U.S. 113 (1973). Gromley (1992) referred to *Roe* as “the single most noteworthy and (simultaneously) notorious decision of the twentieth century” (p. 1392). The constitutional debate surrounding the creation of the right to privacy in *Griswold*, “erupted into a major political controversy with the Burger Court’s 1973 ruling in *Roe v. Wade*” (O’Brien, 1995, p. 1171). The controversy stemmed from the fact that the Court’s decision upheld the right to abortion for the first time. In *Roe*, the Court struck down a Texas statute prohibiting abortion except when necessary to protect the life of the mother. The statute was held to violate a woman’s right to privacy in that it constituted a deprivation of a liberty interest guaranteed by the due process clause of the fourteenth amendment (Nowak, et al., 1986). O’Brien (1995) summarized the significance of the *Roe* decision as follows:

When handing down *Roe v. Wade* the Court elevated the issue of abortion to the national political agenda and sparked a larger political struggle in the country. States could no longer categorically proscribe abortions or make
them unnecessarily difficult to obtain. The promotion of maternal care and the preservation of the life of a fetus were not sufficiently "compelling state interests" to justify restrictive abortion laws. (p. 1174)

The majority opinion in Roe, written by Justice Blackmun, created a timeline for determining when the state could and could not regulate a woman’s right to an abortion. Blackmun devised the so called "trimester" analysis whereby the pregnancy term was divided into three trimesters of three months duration each. O’Brien (1995) described the trimester concept as follows:

During roughly the first trimester (three months) of a pregnancy, the decision on abortion is that of a woman and her doctor. During the second, the Court ruled, states may regulate abortions, but only in ways reasonably related to its interest in safeguarding the health of women. In the third trimester, states’ interests in preserving the life of the unborn become compelling, and they may limit, even ban, abortions except when necessary to save a woman’s life. (p. 1174)

The Roe decision was therefore controversial not only because it stretched the right to privacy to include abortions, but also because of the unusual trimester approach used by Justice Blackmun for
balancing the interest of pregnant women and those of the states (O'Brien, 1995).

The controversial nature of Roe fostered significant criticism, not only from the religious and political right but also from many experts and scholars within the legal community. Perhaps one of the most important and respected legal critiques of Roe v. Wade was written by Professor John Hart Ely (Garrow, 1994). Ely (1973) authored the highly acclaimed law review article, The Wages of Crying Wolf: A Comment on Roe v. Wade, which critiqued the Roe decision and found it deficient both in result and in legal reasoning. Ely (1973) asserted that the holding in Roe was founded on a faulty constitutional analysis that went far beyond the traditional role of the Court in deciding such matters. Specifically, Ely (1973) argued the following as to why the decision was improper:

The point that often gets lost in the commentary, and obviously got lost in Roe, is that before the Court can get to the “balancing” stage, before it can worry about the next case and the case after that (or even about its institutional position) it is under an obligation to trace its premises to the charter from which it derives its authority. A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks
connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it. (pp. 948-949)

BeVier (1989) presented yet another attack on the holding in Roe by arguing that it represents more of an example of judicial abuse rather than a legitimate recognition of a right to privacy. In this regard BeVier (1989) contended that the Roe decision is distorted to the degree that it is actually misleading to the public:

...its effect has been to mask from most citizens the full implications of Roe v. Wade as an exercise of judicial power. Labeling the abortion right as “privacy” made the decision appear to be part of the gradual evolution of judicial protection for individual rights, which it was not, instead of a substantial departure from existing precedent for the right to privacy, which it was. Labeling the abortion right as “privacy” made it possible to imply that any future extensions of the right would be mere refinements of already well-established limitations on the powers of elected officials, which would not be the case. (p. 102)

The law of abortion is relevant to this study only to the extent that it provides some insight into the contours and outer boundaries of the constitutional right to privacy. Additional cases regarding the status of abortion rights after Roe v. Wade will be addressed in
Chapter IV of the research. Two further references to post-Roe cases will be briefly addressed at this point to conclude the literature review regarding abortion rights. Dellinger and Sperling (1989) pointed out that Roe came very close to being overruled by the Court in Webster v. Reproduction Health Services, 109 S. Ct. 3040 (1989).

In a plurality opinion, the Webster decision abandoned the standard of protection previously provided by Roe and indicated that the right to have an abortion is no longer a fundamental constitutional right. (Dallinger & Sperling, 1989). Without expressly overruling Roe, the Webster decision arguably cast serious doubt on the continued authority of Roe v. Wade as precedent for constitutional protection for abortion. Dellinger and Sperling (1989) expressed the following regarding the significance of Webster:

The plurality only implicitly suggested that a woman’s right to choose to terminate a pregnancy would no longer receive heightened judicial protection. In these ways, the Court avoided explicitly overruling Roe, or even confronting the arguments that have emerged over the past sixteen years in defense of Roe. The end result was that the Webster plurality rejected a decision recognizing a fundamental constitutional right without explaining what, if anything, was wrong with the decision. (p. 84)
Several years after *Webster*, the Supreme Court rendered another major decision regarding post-*Roe* abortion rights in the case of *Planned Parenthood of Southwestern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992). The *Casey* decision went a long way to repair the damage inflicted upon *Roe v. Wade* by the *Webster* holding. Garrow (1994) offered the following insight into the importance of the *Casey* decision by his most interesting account of the manner in which it was announced:

Hence on Monday morning, June 29, 1992, the final day of the Supreme Court's term, virtually no one in the press or spectator sections of the courtroom was at all prepared for what ensued after the Chief Justice announced that the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* was ready for announcement. For more than twenty-three years, ever since the Little Rock school case of *Cooper v. Aaron*, when all nine justices had jointly signed their names to a ringing reaffirmation of *Brown v. Board of Education of Topeka*, every signed opinion of the Court had borne the name of a single principle author. But on this day, in what scholars would later acknowledge as the most important statement by the Court in more than twenty-eight years, the decisive opinion in *Planned Parenthood v. Casey* would jointly bear the names of three co-authors: Sandra Day O'Connor, Anthony M. Kennedy, and David H. Souter.
Only on unusual occasions would any justice recite a sizable portion of a decision from the bench, but on this morning all three of the co-authors would read successive sections of their joint opinion, sections that had also been joined by both Harry Blackmun and John Paul Stevens, thus making them a full-fledged majority holding. As the realization of what the trio had wrought spread through the courtroom, tears came to the eyes of even experienced journalists as the language of the joint opinion gradually made more and more clear that the constitutional legacy of *Roe v. Wade* was not dead but instead was very much alive. (pp. 692-693)

Although the holdings in *Griswold*, *Eisenstadt*, *Casey*, and *Roe* recognized fundamental privacy rights regarding contraception, procreation and abortion, the application of the privacy doctrine to consensual sexual activity outside of marriage was not clearly defined. In addition to the ambiguity surrounding heterosexual activity outside the marital relationship, the Supreme Court had not addressed whether homosexual activity was entitled to any protection under the privacy doctrine. The Court was presented with a golden opportunity to clarify those issues in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Hardwick*, the Court reviewed the constitutionality of a Georgia statute prohibiting sodomy. Michael Hardwick was arrested in his home while engaging in consensual
sodomy with another adult male. Hardwick argued that the anti-sodomy statute violated his right to privacy. The Court rejected all of Hardwick’s major arguments and upheld the constitutionality of the Georgia statute.

The Hardwick decision was widely criticized by scholarly commentary (Bradley, 1990). Currie (1990) argued that the state statute in Bowers v. Hardwick was not nearly as intrusive as that struck down in Roe:

…it was even arguable that the state had less of an interest in suppressing sodomy than in restricting abortion. In the abortion cases the woman’s interest could be protected only by permitting destruction of an unborn child; the statute in Bowers outlawed conduct in private between consenting adults. (p. 476)

A common complaint voiced by critics of the Bowers v. Hardwick decision was that it was not consistent with the holdings in prior cases regarding the right to privacy. The Women’s Rights Law Reporter offered this criticism in the Note, Substantive Due Process Comes Home to Roost (1988):
Like the opinions in *Griswold* and *Roe, Bowers* does not provide a satisfactory analysis of how the cases that had gone before it commanded the result which was reached. Nearly absent from *Bowers* is discussion of the right to privacy which *Roe* had held to be implicit in the due process clause. Gone completely is the view that such a right is mandated by the Bill of Rights, either in the penumbras of the first eight amendments or by force of the ninth. Instead, the case is pure substantive due process: homosexuals have no right to engage in acts of sodomy because that right cannot be located in ordered liberty of American tradition. How discrete rights to obtain an abortion or use contraceptives can be so located is not explained. (p. 207)

Tribe and Dorf (1991) expressed the following about the failure of the *Hardwick* decision to follow past privacy precedents:

What emerges is largely arbitrary fiat. The Court will protect unenumerated, traditional, family-oriented rights, even outside of marriage - as in the case of *Eisenstadt v. Baird*. It will protect such rights even among unmarried teenagers, as in a case from New York, *Carey v. Population Services International*, which invalidated a ban on the sale or distribution of contraceptives to children under age sixteen. But anatomical combinations that do not seem as traditional to the Court will not be protected. Somewhere among the "tacit postulates" of the Constitution there is apparently an anatomical catalogue which the Court consults. This seems like the wrong way to go about developing principles of privacy. (p. 58)
Sheppard (1988) asserted that the Court in *Hardwick* undermined the logic of prior sexual privacy cases by refusing to recognize a right to engage in sexual activity outside of marriage. Sheppard maintained that this was the key to understanding the reasoning behind the decision:

Ultimately the key to *Bowers* is found not in the majority's concern for the constraints of federalism, nor even in its antipathy toward homosexual conduct, but in its substantive unwillingness to sever the link between constitutionally authorized sexual intimacy and state-sanctioned marriage. To grant Hardwick a constitutional right of sexual expression outside of marriage was to shatter that connection, not only for homosexual partners who are denied the right to marry, but for heterosexual partners who choose not to marry. The majority declined to "start down the road", a road that dissenters were apparently prepared to travel in pursuit of a coherent privacy approach. (pp. 534-535)

Laurence H. Tribe (1987), who argued the case on behalf of Michael Hardwick before the Supreme Court, was especially critical of the majority's reasoning in *Bowers v. Hardwick*:

Of all the cases I have argued there, I find this outcome the most difficult to accept. It is not that I expected to prevail in *Hardwick*; I am too much a realist for that. But
I had hoped at least to receive from the Court a reasoned explanation of the line it drew - a line that announced a constitutional distinction, as it turned out, between the traditional heterosexual intimacies to which prior decisions about contraception had given special protection, and the intimate acts that the Court transparently deemed to be beyond the pale in the Hardwick case. (p. 106)

Hunter (1992) maintained that despite its inconsistencies, "Bowers v. Hardwick will dominate the law concerning government regulation of sexuality" (p. 531). Unless or until it is overruled or modified, the right to privacy regarding sexual matters will undoubtedly be narrowly construed and confined essentially to heterosexual sex within the confines of marriage. The lesson to be learned from the Hardwick case was well summarized by Sheppard (1988):

It teaches that the government may constitutionally interdict and punish non-marital sexual relations, homosexual or heterosexual, irrespective of the adulthood, competence, consent or human needs of the participants and without regard to the privacy of the setting in which their sexual conduct takes place. (p. 559)
In summary, the right to privacy encompasses many constitutionally protected rights that shield the individual from unwarranted governmental intrusion into his or her personal life. A. Doss and D.K. Doss (1971) observed the following regarding the scope of the privacy right:

The right of privacy is not one right but many rights, some of which have nothing to do with concealment from public view. The right of privacy is the right of the individual to exist and act in accordance with his own conscience, free from governmental interference so long as he does not harm others (p. 418)

Rubenfeld (1989) concluded that the underlying rationale that supports or justifies the judicial recognition of privacy rights is political in nature and not merely a legal theory:

The right to privacy is a political doctrine. It does not exist because individuals have a sphere of “private” life with which the state has nothing to do. The state has everything to do with our private life; and the freedom that privacy protects equally extends, as we have seen, into “public” as well as “private” matters. The right to privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives. (p. 804)
As the foregoing review of the literature regarding the right to privacy illustrates that, notwithstanding its ambiguity, and unchartered outer boundaries, the constitutional right to privacy remains a powerful protection for the preservation of individual liberties in a democracy.
CHAPTER III

CASE LAW: DISMISSAL OF TEACHERS FOR SEXUAL IMMORALITY

Introduction

This Chapter is a review and analysis of court decisions addressing the dismissal of public school teachers for sexual immorality or other similar grounds stemming from illicit sexual conduct. The scope of this review is limited to cases in which the offending conduct occurred outside of the classroom environment and did not directly involve students. Although nearly any case falling within the above described limitations could arguably involve issues of privacy, only those decisions not addressing privacy rights are included in this Chapter. Cases involving the constitutional right to privacy regarding termination of employment are addressed in Chapter V of this study.

The cases under review are organized according to the following categories of sexual activity or circumstance: (a) adultery,
(b) cohabitation, (c) unwed pregnancy, (d) miscellaneous unorthodox sexual practices; and (e) homosexual conduct or status.

Dismissal for Adultery

In *Erb v. Iowa State Board of Public Instruction*, 216 N.W.2d 339 (1974), the Supreme Court of Iowa reviewed the revocation of a teacher's teaching certificate by the Iowa State Board of Public Instruction. The certificate was revoked on the ground of immorality stemming from adultery. The teacher, Richard Erb, was married with children when he had a sexual affair with fellow teacher, Margaret Johnson, who was also married. The complaint of adultery was filed by Margaret's husband, Robert Johnson, after Robert and his friends caught Erb having sexual relations with Margaret in a parked car.

Apparently remorseful after being caught in the act of adultery, Erb informed his wife of his actions and offered to resign his teaching position. The School Board refused to accept his resignation because Erb's wife had forgiven him and the community displayed strong support for Erb. Nevertheless, the Iowa State Board of Public Instruction revoked Erb's teaching certificate on the basis of his admitted adulterous conduct.
On appeal, Erb argued that the State Board's revocation of his certificate was illegal in that substantial evidence was not presented to show that he was morally unfit to teach. The Court agreed with Erb and noted that the discretionary power of the State Board did not include the power to punish behavior that its members disapproved of:

We emphasize the board's power to revoke teaching certificates is neither punitive nor intended to permit exercise of personal moral judgment by members of the board. Punishment is left to the criminal law, and the personal moral views of board members cannot be relevant. A subjective standard is impermissible and contrary to obvious legislative intent. The sole purpose of the board's power under Section 260.23 is to provide a means of protecting the school community from harm. Its exercise is unlawful to the extent it is exercised for any other purpose. (Erb, 1974, pp. 343-344)

The Court in Erb provided a well reasoned analysis for evaluating the impact of a sexually immoral act, such as adultery, on the fitness of a teacher to continue teaching. The Court in Erb reviewed the relevant factors to be considered in determining whether teacher effectiveness has been sufficiently harmed to
warrant dismissal or certificate revocation. As applied to the facts in Erb, the Court noted the following:

The evidence showed Erb to be a teacher of exceptional merit. He is dedicated, hardworking and effective. There was no evidence to show his affair with Margaret Johnson had or is likely to have an adverse effect upon his relationship with the school administration, fellow teachers, the student body, or the community. Overwhelming and uncontroverted evidence of local regard and support for Erb is a remarkable testament to the ability of a community to understand, forgive and reconcile. There was no evidence other than that Erb’s misconduct was an isolated occurrence in an otherwise unblemished past and is not likely to recur. The conduct itself was not an open or public affront to community mores; it became public only because it was discovered with considerable effort and made public by others. ***Erb made no effort to justify it; instead he sought to show he regretted it, it did not reflect his true character, and it would not be repeated. (Erb, 1974, p. 344)

In Stoddard v. School District No. 1, Etc., 590 F.2d 829 (1979), the Tenth Circuit, United States Court of Appeals ruled that mere rumors of adultery are not enough to deprive a teacher of employment. The teacher, Annabel Stoddard, did not have her contract renewed because of community displeasure over rumors of adultery. When Stoddard confronted her principal about the reasons
for her nonrenewal, she protested that the rumors were not true. The principal indicated that it did not matter whether the rumors were true or false, but only that the community perceived them to be true. The Court in Stoddard held that the teacher’s contract was non-renewed on the basis of impermissible reasons and was therefore invalid.

Neither Erb nor Stoddard condone adultery or suggest that teachers are free to engage in adulterous conduct with impunity. These decisions do point out, however, that mere community displeasure with sexually improper behavior will not necessarily justify denial of employment unless the conduct negatively impacts the teacher’s ability to do his or her job.

Dismissal for Cohabitation

Although cohabitation between unmarried persons of the opposite sex may not seem as morally offensive or as socially harmful as adultery, the Supreme Court of Montana illustrated that under certain circumstances cohabitation may justify employment termination of a teacher. In Yanzick v. School District No. 23, Etc., 641 P.2d 431 (1982), Tim Yanzick, a seventh grade science teacher,
openly cohabitated with his girlfriend and fellow teacher, Sharon Scott, in a small, rural community in Montana. He was admonished numerous times by the administration for his illicit living arrangement and was told that his actions were causing an uproar in the community. At some point Yanzick became concerned enough that he asked his girlfriend to move out of his home. He complained to his class, however, that he could no longer live with his girlfriend because some people were disturbed by it. He made the situation worse by discussing the details of his personal dilemma with his seventh grade students.

In discussing the matter with the administration, Yanzick admitted that his lifestyle and inappropriate comments to his students had created problems within the classroom and had affected his teaching. The Board of Trustees refused to renew his contract because of the adverse impact that his cohabitation had on the performance of his teaching duties. The Supreme Court of Montana agreed that the decision of the Board of Trustees was “supported by reliable, probative and substantial evidence” (Yanzick, 1982, p. 445).
The Court in *Yanzick* went on to state the following regarding the Board’s action:

...we further conclude that the record is sufficient to support the administrative conclusion that Mr. Yanzick demonstrated a lack of fitness as a teacher, and to establish good cause for the decision by the Board of Trustees not to renew his contract. (*Yanzick*, 1982. p. 445)

An opposite result was reached in *Fisher v. Snyder*, 476 F.2d 375 (1973), which involved a single, middle-aged divorcée, who taught at the high school in Tryon, Nebraska. Frances Fisher lived along in a one bedroom apartment and entertained friends of her adult son from time to time. In the spring of 1972, a 26 year old college student, Cliff Rowan, spent a week in Tryon visiting classes at the high school as part of a college course requirement. Fisher invited Rowan to stay with her since hotel and motel accommodations were not available. After Rowan’s visit, Fisher was notified that her teaching contract would not be renewed because of her practice of allowing young men to spend the night in her apartment. The School Board concluded that there was a strong
possibility that sexual misconduct may have occurred between Fisher and her overnight guests. The Court, however, disagreed with the Board's conclusion:

But here, there is no proof of improper conduct. The only whit of evidence offered as support for the board's conclusion that Mrs. Fisher was guilty of unbecoming conduct was the fact that she had overnight guests. But the presence of these guests in her home provides no inkling beyond subtle implication and innuendo which would impugn Mrs. Fisher's morality. Idle speculation certainly does not provide a basis in fact for the board's conclusionary inference that "there was strong potential of sexual misconduct" and that, therefore, Mrs. Fisher's activity was "social misbehavior that is not conducive to the maintenance of the integrity of the public school system". (Fisher, 1973, pp. 377-378)

The tone of the Court's comments in Fisher, however, suggests that the result may have been different if Frances Fisher had indeed been engaged in a sexually active cohabitation. The fact that the Court stressed that there was a lack of evidence regarding sexual misconduct, indicates that proof of illicit sexual behavior might support a nonrenewal. In any event, the Fisher holding does not grant much protection to unmarried couples who openly live in a
sexually active relationship. This is especially true if the cohabitation takes place in a small, conservative, rural town.

In Thompson v. Southwest School District, 483 F. Supp. 1170 (1980), a second grade teacher, Diane Thompson, was suspended from her teaching position because of her brief cohabitation with a divorced man whom she eventually married. The Court in Thompson stressed that immoral sexual conduct, in and of itself, is not sufficient cause to justify suspension or termination of employment as a teacher unless the immoral conduct adversely affects teaching performance. In determining whether the immoral conduct of the teacher renders him or her unfit to teach, the Thompson Court held that the following factors, first identified in Morrison v. State Board of Education, 461 P.2d 375 (1969), should be considered:

(1) the age and maturity of the students of the teacher involved; (2) the likelihood that the teacher’s conduct will have adversely affected students or other teachers; (3) the degree of the anticipated adversity; (4) the proximity or remoteness in time of the conduct; (5) extenuating or aggravating circumstances surrounding the conduct; (6) the likelihood that the conduct may be repeated; (7) the motives underlying the conduct; (8) whether the conduct will have a chilling effect on the rights of teachers involved or of other teachers. (Thompson, 1980, p. 1182)
Under the Thompson rationale, cohabitation by teachers may or may not result in termination for immorality depending on the overall effect of the immorality on the fitness to teach and actual impact on the classroom.

Dismissal for Unwed Pregnancy

Attempts to dismiss teachers for becoming pregnant while unmarried are rarely successful, as previously discussed in Chapter II of this study. The following cases illustrate the reluctance of courts to uphold terminations of teachers on grounds of immorality stemming from the mere status of being single and pregnant. Similar cases involving right to privacy claims are reviewed in Chapter V.

In Reinhardt v. Board of Education, Etc., 311 N.E.2d 710 (1974), Elizabeth Reinhardt requested maternity leave during Christmas break. At the time of her request she was 8 1/2 months pregnant but had only been married for less than one month. The superintendent suggested that she resign, which she did. Two days later, however, she withdrew her resignation and was placed on leave until March 1, 1972. The day before she was to return to
teaching the Board adopted a resolution to dismiss her for immorality. Reinhardt challenged her dismissal on the ground that her unwed pregnancy did not adversely impact her job. The trial court reversed her dismissal and the Board appealed. In reviewing the issues, the Appellate Court of Illinois also held that Reinhardt's dismissal was improper. The Court noted the following reasons in support of its decision:

The record of the hearings before the Board discloses no injury to the students, faculty or school. No parents of children in her classroom complained. No students complained. There is no evidence of any breakdown in her relationship with other teachers, no evidence that her teaching ability was affected in any manner, and no evidence that the standing of the school as an educational institution was in any manner affected by appellee's actions. (Reinhardt, 1974, p. 712)

In Brown v. Bathke, 566 F.2d 588 (1977), Barbara Brown, a junior high school teacher in Omaha, Nebraska, was terminated for being seven months pregnant while single, but was not given a pre-termination hearing. She was apparently informed that she was entitled to a hearing; however, she was not told that she must initiate the hearing process by specifically requesting it. In any event, she
was not given a due process hearing prior to her dismissal. The District Court upheld the dismissal holding that the failure of the Board to provide a pre-termination hearing was cured by giving the teacher a post-termination hearing.

The Court of Appeals reversed the District Court without ever reaching the merits of the immorality issue. The dismissal was reversed on the ground that no pre-termination was given to Ms. Brown and that this defect could not be cured by a post-termination hearing.

The merits of an unwed pregnancy dismissal were addressed, however, in *New Mexico State Board of Education v. Stoudt*, 571 P.2d 1186 (1977). In *Stoudt*, the Supreme Court of New Mexico reviewed the termination of Katherine Stoudt, a high school physical education teacher, who became pregnant while unmarried. Stoudt advised the administration of her pregnancy and shortly thereafter was given notice of re-employment for the following year. Over the summer, the Board apparently decided that she should not have been offered another contract and demanded that Stoudt be asked to resign and indefinitely suspended if she refused to resign. Stoudt refused to
resign and was thereafter discharged from her teaching duties. Although the Board took action against Stoudt, five other unwed mothers were then serving as teachers in the district.

The State Board of Education upheld Stoudt's dismissal on the ground that her pregnancy was evidence of her participation in premarital sexual intercourse which the school community considered to be immoral conduct. The New Mexico Supreme Court reversed, holding that the decision of the State Board of Education was illegal. The Stoudt Court stated the following regarding the illegality of the dismissal:

Ms. Stoudt was recommended by the high school principal and superintendent for re-employment and re-employed by the Taos Board for the 1976-77 school year. School officials knew of her pregnant condition and the Taos Board nonetheless offered re-employment, which was accepted by Ms. Stoudt. Further, Ms. Stoudt wrote to the Taos Board requesting maternity leave but no action was taken by the Taos Board on this request. Ms. Stoudt was rated better than satisfactory in her duties and capabilities as a teacher. There were other unwed mothers who remained employed as teachers in the Taos Municipal Schools and no action had been taken against them. Teachers, administrators, school children and parents came to Ms. Stoudt's defense, urging that she be retained.***
Based upon the undisputed facts and the failure of the Board to meet a prima facia showing that good cause existed for terminating Ms. Stoudt's employment, the action of the New Mexico State Board of Education was arbitrary, unreasonable and not supported by substantial evidence. (Stoudt, 1977, pp. 1189-1190)

In Avery v. Homewood City Board of Education, 674 F.2d 337 (1982), an unwed pregnant teacher was dismissed on several grounds in addition to allegations of immorality. Jean Avery, an unmarried elementary reading teacher with five years of successful teaching experience in the school district was terminated after she notified the administration that she was 8 months pregnant. A written Board policy required that pregnant teachers must notify the superintendent no later than the fourth month of pregnancy. The superintendent advised Avery that she had violated the notice policy and that she should resign since her unwed pregnancy was indicative of immorality. Avery refused to resign and was thereafter dismissed on the grounds of insubordination, neglect of duty, and immorality. The first two grounds referred to Avery's violation of the notice policy, the immorality allegation referred to her status of being unwed and pregnant.
Avery challenged her dismissal in the U.S. District Court. The trial court upheld Avery’s dismissal even though it conceded that it was illegal to fire her on the basis of her unwed pregnancy. The trial court upheld her dismissal because the Board had proven other grounds that were legally permissible reasons for her termination. The trial court concluded that since Avery had violated the Board policy regarding notice of pregnancy, that alone was sufficient to support grounds of insubordination and/or neglect of duty.

The U.S. Court of Appeals, Fifth Circuit, reversed the trial court’s finding because the proper test for evaluating a mixed-motive discharge was not used by the trial court. The appropriate test in such cases, according to the Court of Appeals, is whether a teacher would have been dismissed even if she had not suffered an unwed pregnancy. According to the Court of Appeal’s test, Avery’s dismissal was illegal unless the Board established by a preponderance of evidence that Avery would have been dismissed even in the absence of her unwed pregnancy. The Court of Appeals observed the following regarding the mixed-motive discharge test:
The appellees insist that the record shows that Avery's violation of the notice rule was a substantial factor in the Board's decision to discharge her. This is correct, but irrelevant; the appellees' burden was to prove not that their decision was substantially motivated by that violation, but rather that Avery would have been dismissed even in the absence of her out of wedlock pregnancy. The record includes no evidence whatever to permit that inference. Dr. French charged Avery with immorality when he recommended her discharge and according to Dr. French's testimony, the reasons for her discharge were that the three grounds specified in his December 15 letter. Neither Dr. French nor the one Board member who testified offered any evidence, direct or circumstantial, to suggest what they would have done about Avery's violation of the notice rule if she had been married. The appellees offered no evidence of the Board's treatment of married teachers who had violated the notice rule. Since no evidence in the record supports the proposition that Avery would have been dismissed absent considerations of her out of wedlock pregnancy, we would set aside as clearly erroneous a finding by the district court that appellees proved that proposition by a preponderance of the evidence. ***Therefore, we find that the appellees did not carry their burden to show that they would have discharged Avery even absent her asserted immorality. (Avery, 1982, p. 341)

In Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (1975), the Court was required to review a school district rule that prohibited parents of illegitimate children from being hired as teacher aides. The rule was created by the Superintendent of the Drew Municipal Separate School District after he learned that some of
the teacher aides working in the district were parents of illegitimate children. The Superintendent’s purpose in implementing the rule was to promote the moral development of children.

The rule was challenged in court by two women. One was an employee of the district that was informed that she would not be rehired the next year due to the fact that she had an illegitimate child. The other person was seeking a job as an aide but was rejected because of being the parent of an illegitimate child. The Court in Andrews held that the rule was unconstitutional in that it violated both equal protection and due process. The Court stressed that it was unfair to forever punish a person for giving birth to an illegitimate child. The Court observed the following regarding the constitutional infirmities of the rule:

We observe also that there are reasonable alternative means through which to remove or suspend teachers engaging in immoral conduct; means that guarantee the teacher a public hearing on the merits and right of appeal. ***By denying a public hearing to which all other teachers charged with immoral conduct are entitled, the policy denies unwed parents equal protection of the laws. Insofar as the rule inextricably binds unwed parental status to irredeemable immorality, it violates both due process and equal protection. (Andrews, 1875, p. 616)
Dismissal for Miscellaneous Sexual Activities

Participation in unconventional sexual acts or practices by public school teachers may result in dismissal from employment on the basis of immorality or other similar grounds such as unprofessional conduct, conduct unbecoming a teacher or unfitness to teach. The following cases illustrate some of the unusual circumstances under which the sexual conduct of teachers has been challenged as being immoral or improper under similar grounds.

In Pettit v. State Board of Education, 513, P.2d 889 (1973), the State Board of Education of California revoked the life diploma of an elementary teacher who was arrested at a “swingers” party held in a private home in Los Angeles. An undercover police officer attended the party and observed the teacher, Elizabeth Pettit, commit three separate acts of oral copulation with three different men, none of whom were Mrs. Pettit’s husband. She was arrested at the party for committing oral copulation, a criminal offense in California at that time. Pursuant to a plea bargain, the charge was reduced to outraging public decency, a misdemeanor. Mrs. Pettit was placed on
probation and given a fine. Upon payment of the fine the criminal proceeding was dismissed and she was released from probation.

The State Board of Education held a hearing to seek revocation of Mrs. Pettit's teaching diploma on the ground that she was unfit to teach. She did not testify at the hearing. Her husband did, however, testify at the hearing and shared the following regarding the sexual practices of their marriage:

(a) He had, with his wife's consent, observed her have sexual relations with other men both at the swingers party at issue and on other occasions.

(b) He and his wife had appeared on a local television talk show and had discussed their sexual lifestyle that included "wife swapping" and adultery.

The Superintendent of the district in which Pettit taught testified that some of her fellow teachers had seen the aforesaid television show and had recognized Pettit even though she wore a mask. It was a topic of conversation among the staff of the school. Pettit's principal testified and introduced evidence of her teaching evaluations that established that she was a satisfactory teacher.
clinical psychologist, Dr. William Hartman, testified that in his professional opinion Pettit’s conduct at the swingers party did not render her unfit to teach.

The hearing officer found that Pettit had engaged in immoral and unprofessional conduct of such a nature as to render her unfit to teach. The hearing officer recommended revocation of Pettit’s life diploma and said recommendation was adopted by the State Board of Education. Pettit sought judicial review of the State Board’s action. The Supreme Court of California eventually reviewed the appeal and upheld the revocation imposed by the State Board of Education. In commenting on Pettit’s conduct, the Supreme Court stated the following:

...plaintiff’s indiscretions involved three different “partners”, were witnessed by several strangers and took place in a semipublic atmosphere of a club party. Plaintiff’s performance certainly reflected a total lack of concern for privacy, decorum or preservation of her dignity and reputation. Even without expert testimony, the board was entitled to conclude that plaintiff’s flagrant display indicated a serious defect of moral character, normal prudence and good common sense. A further indication that plaintiff lacked that minimum degree of discretion and regard for propriety expected of a public school teacher is disclosed by her television appearances,
giving notoriety to her unorthodox views regarding sexual morals. *(Pettit, 1973, p. 893)*

The Court concluded that although the State Board of Education found that it was unlikely that Pettit would repeat the sexual misconduct complained of, the potential of harm to students was not removed simply by Pettit’s avoidance of such activity in the future. The Court pointed out the following regarding this issue:

Plaintiff points to the finding of the board that she is unlikely to repeat the misconduct which led to her suspension. Yet the “risk of harm” which justified revocation of plaintiff’s license in this case is not the likelihood that plaintiff will perform additional sexual offenses but instead that she will be unable to teach moral principles, to act as an exemplar for her pupils, or to offer them suitable moral guidance. *(Pettit, 1973, p. 894, footnote 7)*

A teacher challenged the constitutionality of a Florida statute listing “immorality” as a ground for dismissal in *Tomerlin v. Dade County School Board*, 318 So.2d 159 (1975). James Tomerlin, an elementary teacher in Dade County, Florida, was fired for immoral conduct involving his nine year old stepdaughter. Specifically, Tomerlin performed cunnilingus on his stepdaughter in his home and after
school hours. Tomerlin argued on appeal that the statute was void for vagueness, alleging that the term "immorality" was not clear enough to give prior notice of precisely what type of conduct was prohibited. The Court quickly disposed of that argument by stating: "Any reasonable person should know that the act performed by Tomerlin was immoral, and was prohibited by the statute" (Tomerlin, 1975, p. 160).

Tomerlin also argued that the Florida statute was unconstitutional as applied to him if his immoral conduct was not in some way connected to his teaching performance. His point was that since the immoral acts occurred at his home and had nothing to do with school or his classroom, it should not be construed as immorality sufficient to terminate his employment. Again, the Court found little merit in Tomerlin's constitutional arguments. In this regard, the Court observed the following:

Although Tomerlin's immoral act was done at his home and after school hours, it was indirectly related to his job. His conduct is an incident of a perverse personality which makes him a danger to school children and unfit to teach them. Mothers and fathers would question the safety of their children; children would discuss Tomerlin's conduct
and morals. All of these relate to Tomerlin's job performance. (Tomerlin, 1975, p. 160)

The Court in Tomerlin summarized the role of the teacher and the right and duty of the Board to demand high moral standards for teachers:

A school teacher holds a position of great trust. We entrust the custody of our children to the teacher. We look to the teacher to educate and to prepare our children for their adult lives. To fulfill this trust, the teacher must be of good moral character; to require less would jeopardize the future lives of our children. (Tomerlin, 1975, p. 160)

In Weissbaum v. Hannon, 439 F. Supp. 873 (1977), a Chicago high school biology teacher was terminated for his involvement in the publication of an obscene magazine entitled, "Sasha's World". In addition to being a part owner of said magazine publication, the teacher, Mr. Weissbaum, appeared in a photograph with a woman nude from the waist up. Said photograph was published in an issue of "Sasha's World" along with the following caption:
No. 004C, ILLINOIS: Young, attractive couple desire serious lovers of B & D, leather, French and Greek cultures to help us pursue our sociological studies. Single bi-females, couples, and largely endowed safe males preferred. No prejudices - We are an equal opportunity couple.*** (Weissbaum, 1977, p. 877)

The Court held that it was constitutionally permissible to inquire into the character and integrity of Mr. Weissbaum as a teacher and that such immoral conduct on his part justified termination of his employment. Although his improper conduct was not directly related to his classroom performance, Weissbaum’s immoral behavior cast serious doubt on his fitness to teach. Weissbaum argued that he had a First Amendment right to publish a magazine and that he should not be fired for exercising a recognized constitutional right. The Court, however, disposed of that argument by holding as a matter of law that “Sasha’s World” was an obscene publication not entitled to First Amendment protection.

The case of Boyette v. State Professional Practices Council, 346, So.2d 598 (1977), involved allegations against a Florida teacher of committing a forcible rape on another teacher. Leonard Boyette, a high school physical education teacher and coach at Crystal River
High School, had his teaching certificate revoked by the State Board of Education for a period of five years because of the allegations against him. The facts surrounding the incident raised many questions as to what actually transpired. The Court found the facts to include the following:

(a) Boyette had a blind date with a female elementary teacher in December, 1993.

(b) They went to Boyette’s trailer for dinner.

(c) They eventually had sexual intercourse. The female teacher said that she was forced. Boyette said that the sexual intercourse was consensual.

(d) After having sexual intercourse, the female teacher called her roommate but did not mention the alleged rape.

(e) After the telephone call, Boyette and the woman had sexual intercourse a second time.

(f) After being escorted home by Boyette, the female teacher told her roommate that she had been raped by Boyette, then she went to bed.
(g) No criminal charges were ever filed. No police report was ever filed. No report was made by the female teacher to the State Board of Education or to the school district where she and Boyette were both employed.

(h) In October, 1974 the female teacher was contacted by the Professional Practices Council (PPC) about the incident. Apparently her roommate had informed the PPC about the allegations of rape.

The PPC conducted a hearing and submitted the following findings of fact, conclusions and recommendations to the State Board of Education:

During the 1973-74 school year Leonard Robert Boyette did commit forcible rape on a fellow school teacher who was a virgin, and thereby conducted himself in a manner which seriously reduces his effectiveness as an employee of the school board. (Boyette, 1977, p. 598)

Boyette then sought a hearing before the State Board of Education contesting the findings of the PPC. The State Board hearing examiner found that the evidence submitted by the female teacher was not competent or substantial enough to warrant disciplinary
action against Boyette. The State Board of Education rejected the hearing examiner’s findings and voted 4 to 1 to revoke Boyette’s teaching certificate for a period of five years.

On appeal, the Court in Boyette reversed the revocation on the ground that it was not supported by competent substantial evidence. In response to the finding by the PPC that the incident seriously reduced Boyette’s effectiveness as a teacher, the Court observed the following:

We can only conclude from this record that the incident became community knowledge after an investigation had been launched by the PPC. Thus the agency’s action made it community knowledge and appears to be the sole motivating force in reducing Boyette’s effectiveness as a teacher. We cannot assume that the Citrus County School Board would have voted to place Boyette on a continuing contract more than four months after the occurrence of the incident if indeed it was then community knowledge. (Boyette, 1977, p. 601)

The case of In Re Grossman, 316 A.2d 39 (1974), involved an unusual issue concerning the fitness to teach. The teacher, Paul Grossman, taught vocal music in an elementary school in Somerset County, New Jersey. He was married and the father of three
children. At age 50 he elected to have a sex-reassignment surgery performed in order to have his gender changed from male to female. He had the sex change performed in March, 1971; however, he did not disclose the nature of his surgery to the school district until late April or May of 1971. He returned to school to finish out the academic year in male attire. Thereafter he changed his name to Paula Grossman and began living openly in the community as a woman. In August, 1971, the school board terminated her employment and Paula filed suit challenging her dismissal.

The Court in Grossman upheld the termination despite the fact that the evidence showed that the sex change had not altered her ability to teach and that she was able to continue to function as a competent teacher. The Court sustained her dismissal on the ground that Paul was incapacitated to teach children at her home school. The Court stated the following regarding the rationale of its holding:

We think it would be wrong to measure a teacher’s fitness solely by his or her ability to perform the teaching function and to ignore the fact that the teacher’s presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency. We are convinced that where, as has been
found in this case, a teacher’s presence in the classroom would create a potential for psychological harm to the students, the teacher is unable to properly fulfill his or her role and his or her incapacity has been established within the purview of the statute. (Grossman, 1974, p. 49)

In Stephens v. Board of Education of School District No. 5, 428 N.W.2d 722 (Neb. 1988), Lyle Stephens, a high school teacher at the Plainview Public Schools, was dismissed for unprofessional conduct and immorality stemming from an incident in the teachers’ lounge. Stephens was in the lounge when a typewriter salesman, Gerald Zimmerman, came in for a cup of coffee. Stephens and Zimmerman engaged in a conversation about woodworking and building bar stools. Zimmerman later testified that Stephens appeared restless during the conversation and was rubbing his own genital area. When Zimmerman got up to leave the lounge, Stephens approached him, grabbed Zimmerman’s genital area and made several fondling motions with his hand as the conversation ended and Zimmerman departed.

Upon investigation it was discovered that Stephens had been involved in another similar incident in the men’s room of the
American Legion Club in Plainview during a Christmas party. Del Beaudette, husband of a secretary at a Plainview school, stated that while washing his hands in the men’s room, Stephens grabbed him in the genital area after Stephens was observed flipping his own penis in the presence of Beaudette.

Stephens argued that his dismissal was invalid since his alleged conduct was not directly related to his teaching performance and did not involved any of his students. The Court, in upholding Stephen’s dismissal, stressed that it was not necessary to establish proof of direct adverse impact on teaching in this case. Stephens’ unfitness to teach was evident from the conduct itself. The Court observed the following:

The perpetration of an aggressive or uncontrollable third degree sexual assault in the school premises, with the evident purpose of sexual arousal, is a clear departure from moral behavior and professional standards. *(Stephens, 1988, p. 725)*

**Dismissal for Homosexual Conduct**

As previously mentioned in Chapter II, there is considerable controversy surrounding the issue of whether homosexual conduct
by teachers constitutes immorality for purposes of employment termination. The following cases illustrate the various fact patterns and circumstances from which teacher dismissals involving homosexuality have arisen. The cases also serve to demonstrate how different courts have approached the issue of homosexual teachers in the classroom.

In Sarac v. State Board of Education, 57 Cal. Rptr. 69 (1967), the California State Board of Education revoked the general secondary teaching credential of Thomas Sarac, a male teacher. The revocation resulted from the arrest of Sarac for homosexual conduct at a public beach. Sarac was charged with rubbing and touching the private sexual parts of another man on the beach with the intent to sexually arouse both himself and the other man. The conduct constituted a crime under California law at that time. In addition, Sarac allegedly admitted that he had a problem with homosexual desires and conduct for the past twenty years and that his most recent homosexual encounter had occurred about three weeks prior to his admission.
Sarac filed suit to have the revocation of his teaching credential reversed. The trial court held that Sarac's homosexual conduct constituted both immoral and unprofessional behavior and that the revocation of his certification was proper and necessary. On appeal, Sarac argued that the revocation of his teaching credential was illegal because no connection was established between the alleged misconduct and his fitness to teach. Sarac asserted that his conduct on the beach should be limited to the beach and should not be projected to his role in the classroom. The Court in Sarac held that the conduct was sufficiently immoral to raise concerns about Sarac's fitness to continue to serve as a teacher in the classroom. The Court stated the following regarding this issue raised by Sarac on appeal:

Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the people of California as it has been since antiquity to those of many other peoples. It is clearly, therefore, immoral conduct within the meaning of Education Code, Section 13202. It may also constitute unprofessional conduct within the meaning of that same statute as such conduct is not limited to classroom misconduct or misconduct with children. ***It certainly constitutes evident unfitness for service in the public school system within the meaning of that statute. ***In view of the appellant's statutory duty as a teacher to "endeavor to impress upon the minds of
the pupils the principles of morality” (Ed. Code, Section 7851) and his necessarily close association with children in the discharge of his professional duties as a teacher, there is to our minds an obvious rational connection between his homosexual conduct on the beach and the consequent action of respondent in revoking his secondary teaching credential on the statutory grounds of immoral and unprofessional conduct and evident unfitness for service in the public school system of this State. (Sarac, 1967, pp. 72-73)

Perhaps the most often cited case regarding dismissals for homosexual conduct and terminations for immorality in general is Morrison v. State Board of Education, 461 P.2d 375 (1969). In Morrison, the Supreme Court of California rendered a landmark decision regarding the dismissal of teachers for immorality. Marc Morrison, a high school teacher, resigned his position after his homosexuality was disclosed to school officials by a former sexual partner. The conduct at issue was not criminal, as in Sarac, but was merely private homosexual activity that occurred over a one week period. The State Board of Education sought to revoke his teaching certificate because of the homosexual activity admitted by Morrison.

Morrison challenged the revocation of his general secondary life diploma by instituting court action. In reviewing the issues
raised by Morrison, the California Supreme Court set forth the so-called “nexus” test for teacher dismissal cases involving allegations of immorality. The nexus test developed in Morrison is often followed by other courts in other states. The Morrison Court held that the mere finding of homosexual status or homosexual conduct, standing alone, is not sufficient to revoke a teacher’s certification. In order to dismiss a teacher for immorality or revoke a teacher’s certification, a board must demonstrate that the immoral conduct adversely affected the teacher’s fitness to perform his/her duties as a teacher. In other words, the board must establish a “nexus” or connection between the immorality and the job.

The Morrison Court set forth a number of factors that courts and boards may consider in determining whether a teacher’s immoral conduct constitutes unfitness to teach. Specifically, the Court included the following as factors to be considered:

...the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances. if any, surrounding the conduct, the
praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to the extent that they assist the board in determining a teacher’s fitness to teach, i.e., in determining whether the teacher’s future classroom performance and overall impact on his students are likely to meet the board’s standards. (Morrison, 1969, pp. 386-387)

The Court in Morrison reversed the revocation of Morrison’s teaching diploma by the State Board of Education on the ground that no nexus was established connecting the immoral conduct with his teaching performance.

In Moser v. State Board of Education, 101 Cal. Rptr. 86 (1972), Brent Moser had his teaching credentials revoked by the State Board of Education for immoral conduct. Moser was arrested and convicted for masturbating his exposed penis in public view in a public restroom. In addition, Moser then touched the private parts of another male person who was in the restroom. The State Board of Education revoked his teaching credentials on the ground that
Moser's actions in the aforesaid restroom constituted unprofessional and immoral conduct.

Moser appealed the revocation in reliance on the holding in *Morrison v. State Board of Education*, 461 P.2d 375 (1969). The Moser Court, however, distinguished the facts in Morrison from those in Moser. Morrison did not involve criminal homosexual conduct nor public homosexual conduct. Morrison dealt with private, noncriminal homosexual activity. Moser on the other hand, involved the commission of a crime in a very public place and in plain view of other people that were present. In upholding the revocation of Moser's credentials, the Moser Court cited the Sarac decision as being more applicable to Moser than Morrison. The Court noted the following:

The criminal conduct of appellant is very similar to that which was involved in *Sarac v. State Board of Education*, 249 Cal. App. 2d 58, 57 Cal. Rptr. 69, wherein this court sustained the revocation of the teaching credential of a teacher who had been convicted on a charge of disorderly conduct arising out of his homosexual advances toward a police officer on a public beach. Although some of the dicta in Sarac was disapproved in Morrison, the decision was undisturbed in its essential holding that the evidence of homosexual behavior in a public place constituted
sufficient proof of unfitness for service in the public school system. (Moser, 1972, p. 88)

In Governing Board of Mountain View School District v. Metcalf, 111 Cal. Rptr. 724 (1974), a sixth grade teacher, Frank Metcalf, was convicted of the criminal act of oral copulation in a doorless toilet stall in a public restroom located in a department store. Metcalf was dismissed from his teaching job as a result of his homosexual behavior and criminal conduct. On appeal, Metcalf argued that his conduct was not immoral and it did not evidence unfitness to teach. The Court held that Metcalf’s conduct indicated a “serious defect of moral character, normal prudence and good common sense” (Metcalf, 1974, p. 727). This, the Metcalf Court concluded, amounted to sufficient evidence of unfitness to teach.

In addition, the Court noted that Metcalf’s misconduct undermined his ability to function as an exemplar, especially if the children in his class would find out about the incident. The Court observed the following regarding this issue:

Children of the age of his pupils tend to idolize their teachers. Although the restroom incident involving
Metcalf became known only to the district superintendent, his secretary and the principal of Metcalf’s school, it was the principal’s professional opinion that if the incident ever became known to Metcalf’s fellow teachers, his pupils or to parents of those pupils, Metcalf would have been unable to function effectively thereafter as a teacher and his exemplar image would have been destroyed.

This expert opinion of Metcalf’s principal in itself might be regarded as sufficient evidence of Metcalf’s potential unfitness to teach at the school. (Metcalf, 1974, p. 727)

In Board of Education of El Monte School District v. Calderon, 100 Cal. Rptr. 916 (1974), teacher, Marcus Calderon, was arrested on the campus of the Los Angeles City College for engaging in oral copulation with another man. Calderon was placed on a leave of absence without pay. Ten months later Calderon was acquitted of the criminal charge. He then notified his employer that he wanted his job back and also payment for back pay. Pursuant to statute a civil court hearing was held to review the incident. The court concluded that Calderon did in fact engage in an act of oral copulation with another man. The court held that Calderon had committed an immoral act and was therefore entitled to neither back pay nor restoration to his teaching position.
Calderon appealed on the basis that his acquittal in the criminal case should operate as a bar to any further civil disciplinary action against him by the school district.

The California Court of Appeals pointed out to Calderon that there is a difference in the standards of proof required when comparing criminal trials with civil proceedings. Criminal trials require proof beyond a reasonable doubt for the conviction of a crime, whereas civil trials merely require proof by a preponderance of the evidence. The civil burden of proof is much lower and less demanding than the burden of proof in a criminal case. The Court noted that an acquittal in a criminal case does not necessarily mean that the act did not take place. It merely means that the commission of the act was not proved beyond a reasonable doubt. The Court of Appeals affirmed the decision of the lower court denying payment of back pay to Calderon and upholding his dismissal.

In yet another "restroom arrest" case, the Court in Board of Education of Long Beach, Etc. v. Jack M., 566 P.2d 602 (1977) reached an opposite result regarding teacher dismissal for immorality. In Jack M., an elementary teacher was arrested in a department store
restroom for lewd conduct in a public place and for homosexual solicitation. The only two people present in the restroom were Jack M. and the arresting officer. The police officer testified that as he occupied a doorless stall in the restroom, Jack M. entered the adjoining stall. The officer looked into Jack M.’s stall as he was leaving and observed him masturbating. According to the officer, Jack M. said “come here, you will like this” (Jack M., 1977, p. 603). Despite the fact that Jack M. was arrested, he was never charged. He did, however, inform his principal of his arrest. The Board of Education requested a hearing on the merits in an effort to dismiss Jack M. from employment. The Court in Jack M. found that the restroom incident was isolated and unlikely to occur again. The Court held that Jack M.’s conduct did not constitute an unfitness to teach. The Court in Jack M. noted the following regarding the fitness to teach issue:

Defendant’s conduct did not come to the attention of the public, students, parents, fellow teachers, and other staff members other than to defendant’s immediate superior to whom he reported the incident. **Defendant’s conduct was an isolated act precipitated by an unusual accumulation of pressure and stress. There is no danger
that the defendant will repeat the conduct. **Defendant does not present a threat to students or fellow teachers. **Defendant’s conduct does not demonstrate an unfitness to teach. (Jack M., 1977, p. 605)

The Court in Jack M. concluded that the teacher had an otherwise good teaching record and that the incident in the restroom was not sufficient to justify his dismissal on the ground of unfitness to teach.

The Supreme Court of Washington took a contrary view regarding the homosexual issue in Gaylord v. Tacoma School District No. 10, 559 P.2d 1340 (1977). Gaylord, a high school teacher, counseled a student about the student’s homosexual problem. Approximately 1 1/2 years later, the student told the assistant principal about his conversations with Gaylord. The assistant principal confronted Gaylord, who then admitted that he is a homosexual. The school board then dismissed Gaylord for immorality on the ground that Gaylord’s disclosure as to his homosexuality impaired his fitness as a teacher.

The Supreme Court of Washington held that Gaylord’s efficiency as a teacher was impaired by public knowledge of his
homosexuality. Once it became widely known that he was a homosexual, the Court indicated that injury would have been inflicted upon the school if Gaylord had not been discharged.

The Court in Gaylord held that the teacher’s employment termination was proper and stated the following in support of its holding:

It is important to remember that Gaylord’s homosexual conduct must be considered in the context of his position of teaching high school students. Such students could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality. It would be unreasonable to assume as a matter of law a teacher’s ability to perform as a teacher required to teach principles of morality *** is not impaired and creates no danger of encouraging expression of approval and of imitation. (Gaylord, 1977, p. 1347)

The case of Acanfora v. Board of Education of Montgomery County, 491 F.2d 498 (1974), raised a number of significant legal issues regarding the rights and liabilities of homosexual teachers. Joseph Acanfora, an eighth grade earth science teacher in Montgomery County, Maryland, was transferred to a nonteaching position after school officials learned that he was a homosexual.
While in college at Penn State, Acanfora became involved in a homosexual activist group known as the Homophiles of Penn State. He eventually served as the treasurer of the group and became very visible and outspoken regarding his homosexuality. This involvement with homosexual issues ultimately led to his suspension from student teaching; however, he instituted legal action and was reinstated. When he applied for a teaching certificate, there was some dispute at the State Board of Education as to whether he should be granted certification.

While the certification controversy was being resolved, Acanfora was offered a teaching job by the Montgomery County Schools. The school officials in Montgomery County did not know, however, that Acanfora was a homosexual. On his application for employment, Acanfora intentionally failed to disclose his homosexuality. The school district learned of his homosexual status through news reports about a controversial decision by the Pennsylvania State Board of Education granting certification to Acanfora.
After being transferred to a nonteaching position, Acanfora participated in several interviews by the news media, creating even more controversy over his hiring. The school district thereafter refused to reinstate Acanfora to his teaching position or renew his contract. Acanfora instituted legal proceedings challenging the school district's action on First Amendment, freedom of speech, grounds.

The Court in Acanfora held that he was not entitled to reinstatement of his teaching position because of his failure to disclose his homosexuality on his employment application. Specifically, Acanfora had not listed his membership in the Homophiles of Penn State in that portion of the employment application requesting information about his extracurricular activities. The Court stated the following regarding Acanfora's failure to disclose information:

Not every omission of information in an employment application will preclude an employee from attacking the constitutionality of action taken by the governing body that employs him. But here Acanfora wrongfully certified that his application was accurate to the best of his knowledge when he knew that it contained a significant omission. His intentional withholding of facts about his affiliation with the Homophiles is inextricably
linked to his attack on the constitutionality of the school system's refusal to employ homosexuals as teachers. Acanfora purposely misled the school officials so he could circumvent, not challenge, what he considers to be their unconstitutional practices. He cannot now invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid. (Acanfora, 1974, p. 504)

In Burton v. Cascade School District Union High School No. 5, 512 F.2d 850 (1975), a high school teacher, Peggy Burton, was dismissed from employment after she acknowledged that she was a homosexual. A parent complained to the principal that her child had informed her that Ms. Burton was a homosexual. Upon questioning by the administration, Burton made the admission regarding her sexual orientation. She was dismissed on the ground of immorality. Burton thereafter filed suit challenging the constitutionality of the statute allowing dismissal of teachers for immorality. Burton argued that as applied to her homosexual status, said statute was unconstitutionally vague. Burton won her constitutional argument and was awarded back pay and one-half of her teaching salary for the following teaching year. She was not, however, granted reinstatement to her teaching position. The Court in Burton reasoned that the award of salary was an adequate remedy since she was not
tenured and had no legal right to a continuing contract. The Burton holding acknowledged the unfairness of dismissing a teacher merely for the status of being a homosexual, however, it did not go very far in terms of imposing a serious remedy for correcting the improper action by the school board.

In Rowland v. Mad River Local School District, Montgomery County, Ohio, 730 F.2d 444 (1984), Marjorie Rowland, a nontenured high school guidance counselor, was suspended, then transferred, and then ultimately not rehired because of her admission that she was bisexual. Rowland made a comment to a school secretary that she was counseling two homosexual students. In that context, she also mentioned to the secretary that she was bisexual and had a female lover. Rowland also informed the assistant principal and some teachers of her bisexuality. Upon hearing about Rowland's sexual orientation, the superintendent requested that she resign. Rowland refused to resign and was subsequently suspended with pay for the remainder of the school year. Rowland obtained a court injunction blocking her suspension. She was then transferred to a position
having no student contact. Rowland’s contract was nonrenewed for the following school year.

Rowland sought legal redress in federal court, essentially alleging that her First Amendment rights of free speech were violated by punishing her for statements about being bisexual. In addition, Rowland alleged violation of the Equal Protection Clause on the ground that heterosexual teachers were treated differently by the school district.

The Court in Rowland denied both of her constitutional claims. As to the First Amendment argument, the court noted that only statements on matters of public concern are protected by the Constitution. In this regard, the Court observed the following:

...Ms. Rowland’s statements were not protected speech. It is clear that she was speaking only in her personal interest. There was absolutely no evidence of any public concern in the community or at Stebbins High with the issue of bisexuality among school personnel when she began speaking to others about her own sexual preference. Moreover, Ms. Rowland told Mrs. Monell in confidence of her love for another woman and she asked the assistant principal to keep her revelation to him of her bisexuality confidential. **Ms. Rowland’s requests for confidentiality and the context of her discussions with others indicate that she did not consider her statements
to be on matters of public concern. (Rowland, 1984, p. 449)

The Court held that it was not a constitutional violation for the school district to nonrenew Rowland because of the statements she made. As to the Equal Protection claim, the Court held that no evidence was presented to show that heterosexual employees had been or would be treated differently for discussing their sexual preferences. The Court pointed out that Rowland could have been suspended and transferred for her misconduct as a guidance counselor in disclosing to a third party that two of her students were homosexual.
CHAPTER IV

CASE LAW CREATING AND INTERPRETING THE CONSTITUTIONAL RIGHT TO PRIVACY

Introduction

The constitutional right to privacy is purely a creation of judicial reasoning expressed through judge-made law. As previously noted in Chapter II herein, the term "privacy" is not explicitly mentioned in either the United States Constitution or the Bill of Rights. The conceptual roots of privacy rights can be traced back to various liberty interests and enumerated rights contained in the Constitution, but the right to privacy itself was not officially recognized as an identifiable, fundamental constitutional right until it was decreed such by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

The primary focus of this Chapter is to review those decisions of the United States Supreme Court, relevant to this study, that led up to and beyond the landmark decision in *Griswold*. In addition to
examining the Supreme Court cases that created and defined the federal right to privacy, selected lower court decisions (both federal and state) are also included to explore the outer limits of the privacy doctrine not specifically addressed by the Supreme Court to date. Application of the federal right to privacy to employment rights of school teachers and other public employees regarding off-the-job sexual behavior is addressed in Chapter V of this study. The case analysis includes a discussion of the facts of each case and a presentation of the Court’s holding, as well as the application thereof to other decisions where appropriate.

The Supreme Court cases are divided into the following categories: pre-

_Griswold_ decisions; right to contraceptives; right to marry; right to familial privacy; right to privacy in the home; right to abortion; and right to privacy and sexual autonomy. The lower court decisions address the limits of sexual autonomy under federal privacy regarding consensual, adult, heterosexual behavior outside of marriage and not impacting employment rights.
Pre-Griswold Decisions

Long before the right to privacy was proclaimed by judicial edict to be a fundamental constitutional right, several early decisions of the United States Supreme Court recognized the existence of certain liberty interests that were very similar to those of privacy. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court reviewed the legality of a Nebraska criminal statute that prohibited the teaching of any subject in any language other than English to any child that had not successfully passed the eighth grade. An instructor in a parochial school was tried and convicted under the statute for teaching reading in the German language to a ten year old child. The Nebraska Supreme Court upheld the conviction and the constitutionality of the statute as a valid function of state police power. The purpose of the statute was to ensure that the mother tongue of all Nebraskan children would be the English language.

The issue before the United States Supreme Court in *Meyer* was whether the statute violated the liberty interests guaranteed by the Fourteenth Amendment. In holding that the Nebraska statute did
infringe upon constitutionally protected rights, the Court reviewed the nature of the rights protected by the Fourteenth Amendment:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire 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. (Meyer, 1923, p. 399)

The Court acknowledged that the legislators of Nebraska may well have been motivated by a sincere desire to promote citizenship and allegiance to American ideals through such legislative action. Purity of motive, however, according to the Court, did not cure constitutionally defective legislation. In this regard, the Court stated the following:

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The
protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution - a desirable end cannot be promoted by prohibited means. (Meyer, 1923, p. 401)

In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court again struck down a state statute that attempted to limit the rights of parents to make decisions about the education of their children. Oregon passed the Compulsory Education Act that required every school age child to attend a public school in the district in which he or she resided. Citing its holding in Meyer, the Pierce Court declared the statute invalid on the ground that it unlawfully infringed upon the liberty interests protected by the Fourteenth Amendment. Specifically the Court held as follows:

...we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general
power of the state to standardize its children by forcing them to accept instruction from public teachers only. *(Pierce*, 1925, pp. 534-535)

Although neither *Meyer* nor *Pierce* mentioned the term "privacy" in their holdings, both cases clearly recognized constitutional protections against the states' unreasonable intrusion upon the personal affairs of individual citizens. The first Supreme Court case to contain a specific reference to privacy rights, albeit in a dissenting opinion, was *Olmstead v. United States*, 277 U.S. 438 (1928). Justice Brandeis, co-author of the highly acclaimed *Harvard Law Review* article, "The Right to Privacy" (Warren & Brandeis, 1890), wrote a powerful dissent in *Olmstead* which incorporated many of the concepts proposed in the aforesaid article.

The *Olmstead* case involved the review of a number of criminal convictions for conspiracy to violate the Prohibition Act. The government had obtained incriminating evidence against the defendants by use of telephone wire taps that were illegal under state law. The issue was whether the illegal tapping of private telephone conversations violated the Fourth Amendment prohibition against unreasonable search and seizure, and/or the Fifth
Amendment privilege against self incrimination, when evidence obtained thereby was used in criminal prosecutions in federal courts. The majority opinion in Olmstead held that no constitutional violations occurred since state law could not affect the rules of evidence in federal courts. The majority conceded that the evidence in question had been “unethically secured” (Olmstead, 1928, p. 468) by the government; however, no constitutional defects were found.

Justice Brandeis argued in dissent that the constitutional rights in question were broad enough to include a “right to be let alone” (Olmstead, 1928, p. 478) and should, therefore, support reversal of the criminal convictions. Brandeis observed the following regarding this issue:

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right,
every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth (Olmstead, 1928, pp. 478-479)

In *Skinner v. Oklahoma*, 316, U.S. 527 (1942), the Court rendered another significant pre-privacy decision that further expanded the scope of constitutional protection for personal liberties and freedoms. The Court in *Skinner* reviewed the constitutionality of an Oklahoma statute that required sterilization, by vasectomy or salpingectomy, of habitual criminals. Under the statute, a habitual criminal was any person convicted of two or more felonies involving moral turpitude, who was subsequently convicted and imprisoned for another such a felony in Oklahoma. The statute, however, expressly exempted certain felonies such as embezzlement from the list of crimes that warranted sterilization. The Court declared the statute unconstitutional on equal protection grounds and observed the following regarding the personal liberties involved:
We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the state conducts is to his irreparable injury. He is forever deprived of a basic liberty. (Skinner, 1942, p. 541)

In 1961, Justice Harlan issued a compelling dissenting opinion in Poe v. Ullman, 367 U.S. 497, which eventually led to the landmark decision rendered in Griswold, four years later. In Poe, Harlan argued that the prohibition against the use of contraceptive devices by married persons violated the right of marital privacy guaranteed by the Due Process Clause of the Fourteenth Amendment. Although Harlan urged the recognition of a constitutionally protected right of privacy regarding sexual matters within the confines of marriage, he was quick to point out this right was not unlimited when applied to sexual activity outside the marital relationship:

The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal inquiry,
however privately practiced. **Adultery, homosexuality and the like are sexual intimacies which the state forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the state not only must allow, but which always and in every age it has fostered and protected. It is one thing when the state exerts its power either to forbid extramarital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy. (Poe, 1961, pp. 552-553)

The aforesaid qualification expressed by Harlan regarding the limited scope of sexual privacy rights was subsequently quoted numerous times in later decisions exploring the outer boundaries of the right to privacy in sexual matters.

Right to Contraceptives

The right to privacy was first held to be an inherent constitutional right in the landmark case of Griswold v. Connecticut, 381, U.S. 479 (1965). In Griswold, the Court reviewed the convictions of the Executive Director and Medical Director of the Planned Parenthood League of Connecticut for giving married persons information and medical advice regarding contraception and prescribing contraceptive devices, all in violation of a Connecticut
statute. The Court held that the state statute was an unconstitutional violation of the right to marital privacy. Griswold involved the very same anti-contraceptive statute that the Court had upheld in the Poe decision. In Poe, both Justice Douglas and Justice Harlan had argued that the statute in question was an unconstitutional infringement of the right to privacy. In Griswold, the majority opinion written by Douglas again found the statute to be a violation of the right to privacy; however, his reasoning in arriving at that conclusion had changed since his dissent in Poe. Justice Douglas, writing for the majority in Griswold, concluded that certain fundamental rights exist even though not specifically mentioned in the Constitution or the Bill of Rights. For example, Douglas cited the following recognized First Amendment rights that are not enumerated in the Constitution:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents’ choice - whether public or private or parochial - is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights. (Griswold, 1965, p. 482)
According to Justice Douglas, specific constitutional rights are surrounded by "penumbras" that emanate from those enumerated guarantees and expand the scope of such expressly stated rights. Douglas noted that "without those peripheral rights the specific rights would be less secure" (Griswold, p. 483). The penumbras help give the enumerated rights "life and substance" (Griswold, 1965, p. 484).

In Griswold, the right to privacy specifically recognized was the right to marital privacy. The Court observed the following regarding marital privacy:

Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights - older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. (Griswold, 1965, pp. 485-486)
In 1972, the Supreme Court further expanded the scope of the right to privacy recognized in *Griswold*. In *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court struck down a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons. The Court held that the right to receive contraceptives is a protected right that must be the same for both married and unmarried persons. The majority opinion in *Eisenstadt* noted the following:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. (*Eisenstadt*, 1972, p. 453)

The decision in *Eisenstadt* was technically based on equal protection grounds rather than a right to privacy; i.e. single persons must be afforded the same protection as married persons.
Eisenstadt, however, has been widely cited as an example of a deliberate expansion of the Griswold privacy doctrine regarding sexual matters. A careful reading of Eisenstadt does not, however, support an assertion that the right to privacy created in Griswold somehow protects all private sexual activities, even those outside the confines of marriage. Eisenstadt protected procreative decisions like "whether to bear or beget a child" (p. 453), for both married and unmarried persons; it did not grant constitutional protection to private, consensual sexual conduct per se.

Another significant decision regarding the right to privacy and contraception was rendered by the Supreme Court in Carey v. Population Services International, 431 U.S. 678 (1977), wherein the right to access birth control methods was extended to minors. In Carey, the Court invalidated a New York statute that prohibited the sale of contraceptives to minors under age 16 years; that prohibited any and all advertisement or display of contraceptives; and that prohibited the sale of contraceptives to adults unless sold by a licensed pharmacist.
Population Services International (PPA), a North Carolina corporation engaged in the mail order sale and distribution of contraceptives, was charged with violating the New York statute in question. PPA advertised its contraceptive devices in New York and did not exclude sales to minors in such advertising. The Court expressed concern over the effect of the state’s efforts to restrict the sale of contraceptives:

Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions. A total prohibition against sale of contraceptives, for example, would intrude upon individual decisions in matters of procreation and contraception as harshly as a direct ban on their use. Indeed, in practice, a prohibition against all sales, since more easily and less offensively enforced, might have an even more devastating effect upon the freedom to choose contraception. (Carey, 1977, pp. 687-688)

In declaring the New York statute unconstitutional, the Court in Carey made it clear that “the right to privacy in connection with decisions affecting procreation extends to minors as well as adults” (p. 693). The Court did not, however, go so far as to acknowledge that the state is prohibited from regulating the sexual behavior of
minors. The extension of the right to privacy to protect the rights of minors to purchase contraceptives through the Carey decision did not grant to minors the right to be sexually promiscuous. A footnote to the majority opinion in Carey written by Justice Brennan illustrated this point as follows:

Appellees argue that the State’s policy to discourage sexual activity of minors is itself unconstitutional, for the reason that the right to privacy comprehends a right of minors as well as adults to engage in private consensual sexual behavior. We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statues regulating such behavior among adults. ***But whatever the answer to that question, ***in the area of sexual mores, as in other areas, the scope of permissible state regulation is broader as to minors than as to adults. In any event, it is unnecessary to pass upon this contention of appellees, and our decision proceeds on the assumption that the Constitution does not bar state regulation of the sexual behavior of minors. (Carey, 1977, footnote 17, p. 694)

The Carey decision, therefore, did not expand the right of privacy to protect sexual freedom per se, especially among unmarried persons and minors. Carey, like Griswold and Eisenstadt held that the right to privacy protected procreational choice rather
than a right to engage in consensual sexual behavior outside the marital relationship.

Right to Marry

Another liberty interest arising out of the freedoms guaranteed by the Due Process Clause of the Fourteenth Amendment is the right or freedom to marry. In Loving v. Virginia, 388 U.S. 1 (1967), a man and woman were convicted of the crime of entering into an interracial marriage. The Court examined the constitutionality of several Virginia statutes prohibiting marriages between white persons and colored persons. In Loving, a white man married a Negro woman and both were convicted under Virginia's miscegenation statutes and sentenced to one year in jail. Their sentences were suspended in exchange for their promise to leave Virginia and not to return together for 25 years. Several years after their sentences were initially imposed, the couple appealed their convictions. Virginia's highest state court upheld the convictions and certiorari was granted for review by the United States Supreme Court. At the time of the Loving decision, 16 states prohibited interracial marriages.
The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by freemen. **Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State.** *(Loving, 1967, p. 12)*

The right to marry was again addressed by the Supreme Court in *Zablocki v. Redhail*, 434 U.S. 374 (1977). In *Zablocki*, the Court examined a Wisconsin statute that prohibited marriage for certain people unless they obtained prior court approval. Any person having minor issue not in his/her custody could not get married unless (a) prior court approval was obtained, and (b) the child support order was paid and balance current; and (c) it could be shown that the child(ren) would not become public charge(s). The objective of the statute was laudable in that it was apparently intended to discourage marriage for those who already had child support obligations stemming from former marriages and/or sexual relationships.

The majority opinion in *Zablocki* rejected the State’s argument that the statute was a valid exercise of police power. The Court held
that the right to marry is part of the right to privacy created in
Griswold v. Connecticut, supra (1965). As to this issue, the Court
offered the following rationale for its holding:

It is not surprising that the decision to marry has been
placed on the same level of importance as decisions
relating to procreation, childbirth, child rearing, and
family relationships. As the facts of this case illustrate, 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. The woman
whom appellee desired to marry had a fundamental right
to seek an abortion of their expected child, ***, or to bring
the child into life to suffer the myriad social, if not
economic, disabilities that the status of illegitimacy brings
***. Surely, a decision to marry and raise the child in a
traditional family setting must receive equivalent
protection. And, if appellee’s right to procreate means
anything at all, it must imply some right to enter the only
relationship in which the State of Wisconsin allows sexual
relations to take place. (Zablocki, 1977, p. 386)

Right to Familial Privacy

Local housing ordinances that define restrictions on land use
have precipitated two significant Supreme Court decisions regarding
privacy rights of families and co-tenants. In Village of Belle Terre v.
Boraas, 416 U.S. 1 (1974), a New York village ordinance limited land
use to one-family dwellings. At issue was the definition of “family”. The ordinance defined the term in two ways: (a) those persons related by blood, adoption or marriage who live together as a single housekeeping unit; and (b) those persons (not exceeding two) not related by blood, adoption or marriage who live under a common roof. The dispute centered around six college students who decided to live together in a single family dwelling in the Village of Belle Terre. None of the six students were related by blood, adoption or marriage; therefore, they were cited for violating the zoning ordinance.

The owners of the house sought legal action seeking to have the ordinance declared unconstitutional as a violation of equal protection, the right of association, the right to travel, and the right to privacy. The District Court upheld the ordinance as constitutionally sound; however, the Court of Appeals reversed. The Supreme Court declared the ordinance valid and not an infringement of an fundamental rights of association or privacy. The majority opinion in Village of Belle Terre held that the ordinance represented a reasonable exercise of legislative regulation that was not arbitrary
and was rationally related to a legitimate and permissible governmental objective.

In Moore v. East Cleveland, 431 U.S. 494 (1977), the Court reached a different result in another controversy involving a housing ordinance. In Moore, the Cleveland ordinance limited housing occupancy to single families. According to the rather complicated definition of a "family" in the ordinance, the tenants at issue did not appear to qualify as a family even though they were related. The family unit in Moore consisted of Mrs. Inez Moore, her adult son, Dale, Jr. and John Moore, Jr. The two grandsons are not brothers, but first cousins. Mrs. Moore had been living with her son, Dale Moore, Sr. and his son, Dale Moore, Jr. before her other grandson, John Moore, Jr. came to live with them after John's mother died. The addition of John into the family circle disqualified the Moore household as a "single" family within the meaning of the ordinance. Mrs. Moore was notified by the city that John's presence in her home was a violation of the ordinance and that she must remove him. Mrs. Moore was thereafter charged with a criminal offense after she failed to remove John from her home.
On appeal to the United States Supreme Court, the city cited *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1874) in support of the ordinance. The Court in *Moore*, however, distinguished the *Belle Terre* case by noting the difference in the nature of the relationship of the household occupants. The occupants in *Belle Terre* were not related by blood, marriage or adoption but were merely joint tenants under a common roof. They did not, therefore, constitute a "family". The occupants in *Moore* on the other hand, were related to each other and could, therefore, be viewed as a family unit. The majority in *Moore* contrasted the two situations as follows:

East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here.

When a city undertakes such intrusive regulation of the family, neither *Belle* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate. (*Moore*, 1977, pp 498-499)
Having decided that the household occupants in Moore did comprise a family unit, the Court held that the constitutional protections regarding familial rights applied to the situation presented in Moore. The Court observed the following regarding this issue:

Our decisions establish 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. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. (Moore, 1977, pp. 503-504)

In striking down the ordinance as an unconstitutional infringement on the right to make personal choices on matters concerning family living arrangements, the Court cited Pierce v. Society of Sisters, 268 U.S. 510 (1925) in support of its holding in Moore:

Whether or not such a household is established because of personal tragedy, the choice of relatives in this degree of kinship to live together may not lightly be denied by the State. Pierce struck down an Oregon law requiring all children to attend the State’s public schools, holding that the Constitution “excludes any general power of the State
to standardize its children by forcing them to accept
instruction from public teachers only". 268 U.S., at 535.
By the same token the Constitution prevents *East
Cleveland* from standardizing its children—and its adults—
by forcing all to live in certain narrowly defined family
patterns. (*Moore*, 1977, pp. 505-506)

Right to Privacy in the Home

The sanctity of the home has often been associated with the
right to privacy. The scope of this aspect of the privacy right created
in *Griswold v. Connecticut*, 381 U.S. 479 (1965) was clarified by the
Supreme Court in *Stanley v Georgia*, 394 U.S. 577 (1969). At issue in
*Stanley* was the constitutionality of a Georgia statute making it a
crime to knowingly possess obscene material. The appellant in
*Stanley* was convicted of the crime of possessing obscene films in his
home. His home was searched pursuant to a search warrant issued
through an investigation of his alleged bookmaking activities. During
the search of his home, very little evidence of bookmaking was
uncovered; however, three reels of eight-millimeter film were found
and viewed by police officers. The police deemed the films to be
obscene and arrested appellant for possession of obscene materials.
The appellant argued that the statute prohibiting possession of obscene materials violated his First Amendment rights. The State of Georgia contended that the First Amendment does not protect pornography therefore does not apply to a conviction for possessing pornographic materials.

The Court in *Stanley* distinguished this case from its prior holdings regarding pornographic materials and declared the statute unconstitutional because it invaded the right of privacy of the home. The Court stated the following regarding this distinction:

> Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds. (*Stanley*, 1969, p. 565)

Later cases dealing with the issue of pornography pointed out that the holding of *Stanley* did not extend the right of privacy to pornography per se but limited such right to the privacy of the home. For example, in *Paris Adult Theater I v. Slaton*, 413 U.S. 49
(1973), the Court emphasized that the privacy right established in Stanley did not extend beyond the home. In Paris Adult Theater I, two adult movie theaters in Atlanta, Georgia, were enjoined from showing two sexually explicit films, "Magic Mirror" and "It All Comes Out in the End" on the ground that said films were pornographic. The owners of the movie theaters argued that such interference by the State of Georgia violated the First Amendment freedoms, citing Stanley v. Georgia, 394 U.S. 557 (1969). The majority in Paris Adult Theater I distinguished the holding in Stanley as being limited to the home. The Court held that the right to privacy does not extend to public places such as movie theaters:

This privacy right encompasses and protects the personal intimacies of the home, the family, marriage motherhood, procreation, and child rearing. ***Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation. (Paris Adult Theater I, 1973, pp. 65-66)
The Court stressed that a right to privacy may disappear if the activity for which protection is sought is conducted in public. The Court noted the following regarding this issue:

The idea of a “privacy” right and a place of public accommodation are, in this context, mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a “live” theater stage, any more than a “live” performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue. (Paris Adult Theater I, 1973, pp. 66-67)

Right to Abortion

As previously noted in Chapter II, the right to abortion is by far the most controversial privacy right ever recognized by the United States Supreme Court. In Roe v. Wade, 410 U.S. 113 (1973), the Court upheld the right to abortion for the first time. At issue in Roe was a Texas statute that prohibited abortion except when necessary to save the life of the mother. The appellant, the woman challenging the Texas anti-abortion statute, asserted that the statute was unconstitutional in that it violated her right to privacy by
infringing upon her decision to terminate her pregnancy. The appellant argued that her right to obtain an abortion was constitutionally protected on three grounds: (1) a personal liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment; (2) penumbral rights emanating from the Bill of Rights; and (3) a right reserved to the people by the Ninth Amendment.

Justice Blackmun, writing for the majority in *Roe*, agreed that the Texas statute was an unconstitutional infringement upon the appellant’s right to privacy and stated the following concerning the source of such protected right:

> The right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. (*Roe*, 1973, p. 153)

In holding the right to abortion to be a fundamental and constitutionally protected right, the Court focused on the right of the pregnant woman to control her own body and her future life, rather than focusing on the right, if any, of the unborn fetus to live.
According to Blackmun, prohibiting a pregnant woman from seeking an abortion could have a very negative impact on her well-being and general quality of life. In an effort to explain why abortion is a necessary option for women who do not wish to continue their pregnancies to term, Blackmun offered the following practical reasons in support of abortion rights:

The detriment that the State would impose upon the pregnant women by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation. (Roe, 1973, p. 153).

Blackmun noted that the right to have an abortion is not absolute and that some state regulation is permissible. In order to balance the competing interests involved, Blackmun devised a
“trimester” analysis for determining when the State could impose limitations upon the right to abortion. Under Blackmun’s trimester approach, the pregnancy term is divided into three trimesters of three months each. During the first trimester of the pregnancy, the decision of whether to have an abortion is left to that of a woman and her physician. During the second three month period, states may exercise some regulation over abortions, but only to the extent necessary to protect the health of the pregnant woman. During the third trimester, states have the most power to control, even prohibit, abortions except when necessary to protect the life of a pregnant woman.

The Roe decision has been widely criticized by legal scholars and commentators as previously indicated in Chapter II herein. Although the Supreme Court has had many opportunities to overrule Roe, it has not done so to date. The Court did, however, come very close to overruling Roe in Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

In Webster, the Court reviewed a Missouri statute that regulated the performance of abortions. The statute prohibited the
use of public employees and facilities to perform abortions not necessary to save the life of a pregnant woman. The statute also prohibited the use of public funds, employees, or facilities for the purpose of encouraging or counseling pregnant women to seek abortions not necessary to save their lives. The Court in *Webster* upheld these statutory prohibitions against the use of public funds, employees, or facilities for performing or encouraging abortions. The Court stated that "Nothing in the Constitution requires states to enter or remain in the business of performing abortions" (*Webster*, 1989, p. 510).

*Roe v. Wade*, 410 U.S. 113 (1973), prohibited states from placing legal obstacles in the path of a person seeking an abortion. *Webster* held that states are not required to provide funds or services to make abortions available to the public if states choose not to do so. In this sense, *Webster* did not conflict with *Roe*. It merely distinguished the holding in *Roe* as applied to a different fact pattern.

The *Webster* decision was extremely critical, however, of the trimester analysis adopted by the *Roe* decision. The *Webster* Court characterized the trimester framework as "unsound in principle and
unworkable in practice” (Webster, 1989, p. 518). In addressing the difficulties encountered by the Roe trimester framework, the Court in Webster stated the following:

In the first place, the rigid Roe framework is hardly consistent with the notion of a Constitution case in general terms, as our is, and usually speaking in general principles, as ours does. The key elements of the Roe framework—trimesters and viability are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle. Since the bounds of the inquiry are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.***

In the second place, we do not see why the State’s interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability. (Webster, 1989, pp. 518-519)

Although Roe declared the right to abortion to be a fundamental constitutional right, the Court in Webster declined to acknowledge it as a fundamental right any longer. In Webster the right to abortion was demoted to a mere “liberty interest protected
by the Due Process Clause, which we believe it to be" (Webster, 1989, p. 520).

Despite the fact that significant portions of the Roe decision were abandoned by Webster, Roe was not technically overruled as illustrated by the following passage from the Webster opinion:

Both appellants and the United States as amicus curiae here urged that we overrule our decision in Roe v. Wade. ***The facts of the present case, however, differ from those at issue in Roe. Here, Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded. In Roe, on the other hand, the Texas statute criminalized the performance of all abortions, except when the mother’s life was at stake. ***This case therefore affords us no occasion to revisit the holding of Roe, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause, ***, and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow Roe and succeeding cases. (Webster, 1989, p. 52)

Another challenge to Roe was raised in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). In Casey, a Pennsylvania abortion statute was reviewed that required the following regarding the performance of abortions:
(a) that a woman seeking an abortion give her informed consent prior to the abortion;
(b) that she be given certain required information at least 24 hours before the abortion;
(c) that she obtain the informed consent of one parent if she is a minor, or obtain permission from a court;
(d) that she must demonstrate that she has notified her husband:
(e) that a medical emergency will excuse compliance with other provisions of the statute.

In reviewing the Pennsylvania abortion statute, the Court in Casey reaffirmed the essential holding in Roe by recognizing a woman's right to choose an abortion before fetal viability. The trimester framework of Roe, however, was rejected as suggested by Webster:

We reject the trimester framework, which we do not consider to be part of the essential holding of Roe.

***Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in Roe, although those measures have been found to be
inconsistent with the rigid trimester framework announced in that case. **The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the state's interest in potential life, as recognized in Roe. (Casey, 1992, p. 2818)**

The Court in Casey adopted the "undue burden" standard for reviewing state regulations that seek to subject pre-viability abortions to some degree of state control. In explaining what was meant by undue burden, the Court stated the following:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. (Casey, 1992, p. 2820)

The Court in Casey held that all of the regulations of the Pennsylvania abortion statute, except the one requiring spousal notification, were valid under the undue burden test. Spousal notification was held to be an undue burden on a woman's right to obtain an abortion of a nonviable fetus and was therefore deemed constitutionally invalid.
The central holding of Roe was not overruled by the Court in Casey, even though Casey rejected the trimester framework and adopted the undue burden test. In giving reassurance to its continued support of Roe, the Casey Court stated:

Our adoption of the undue burden analysis does not disturb the central holding of Roe v. Wade, and we reaffirm that holding. Regardless of whether the exceptions are made for particular circumstances, a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability. (Casey, 1992, p. 2821)

Right to Privacy and Sexual Autonomy

Although the scope of the right to privacy has not yet been precisely defined by the Supreme Court regarding consensual, adult heterosexual behavior outside the bounds of marriage, much less ambiguity exists concerning privacy rights and homosexual conduct.

The Supreme Court's majority opinion in Bowers v. Hardwick, 478 U.S. 186 (1986), definitively addressed the issue of whether the right to privacy has any legitimate application to private homosexual conduct. Hardwick presented the perfect case for a definitive ruling on the constitutional status of homosexual behavior conducted in
private. Respondent Michael Hardwick was criminally charged with violating the Georgia statute prohibiting sodomy. Hardwick was arrested in his own bedroom, in his own home, while engaging in private, consensual sodomy with another adult male. The case was "perfect" in the sense that it did not involve the corruption of minors or public homosexual conduct and all of the sexual activity occurred in the privacy of Hardwick's home. Homosexual activists undoubtedly hoped that the Hardwick case would lay to rest, once and for all, the issue concerning the validity of anti-sodomy legislation by summarily declaring all such laws to be unconstitutional encroachments upon the right to privacy.

In Hardwick, the State of Georgia dismissed the criminal charges against Michael Hardwick; however, he brought suit in the Federal District Court challenging the constitutionality of Georgia's anti-sodomy statute. The District Court dismissed Hardwick's claim. The Court of Appeals, however, reversed this dismissal in reliance on the holdings in Griswold, Stanley, Eisenstadt and Roe. The Court of Appeals held that because Hardwick's homosexual conduct was private it was constitutionally protected. The Court of Appeals
thereby set the stage for a landmark Supreme Court decision expanding homosexual rights.

The Supreme Court, however, rejected all of Hardwick's major arguments and upheld the constitutionality of the Georgia anti-sodomy statute. In addressing the lower appellate court's reliance on the aforesaid prior cases regarding the right to privacy, the Court observed the following:

...we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.***

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. (Hardwick, 1986, pp. 190-191)

Although Hardwick clearly stands for the proposition that there is no federally protected constitutional right to privacy for
homosexual activity, it does not mean that the issues concerning homosexual privacy rights are resolved. States still retain the power to give protection to private homosexual acts through legislation or by the provisions of their respective state constitutions. Future battles for homosexual rights regarding privacy and employment will be fought in the halls of state legislatures and in state courts interpreting state legislative enactments.

Lower Court Decisions Regarding Privacy Rights and Heterosexual Behavior Not Impacting Employment

Although the United States Supreme Court has not yet directly addressed the issue of whether the right to privacy is broad enough to protect consensual, adult, heterosexual behavior outside the marital relationship, a number of state and federal courts have rendered decisions on this very issue based on federal constitutional law. In Post v. State, 715 P.2d. 1105 (Okl. Cr. 1986), aff'd, 717 P.2d 1151 (Okl. Cr. 1986), cert. denied, 107 S. Ct. 290 (1986), an Oklahoma criminal statute prohibiting sodomy was challenged on federal privacy grounds. The appellant, Post, met a married woman at the Red Eye Saloon in Claremore, Oklahoma and invited her to his house
to drink beer. At his home he engaged in sexual intercourse, anal sodomy and oral sodomy with the woman. After having sex, Post became angry and beat the woman, blinding her in one eye. She claimed that Post forced her to have sex and severely beat her in the process. Post was charged with rape, sodomy, and maiming. A jury acquitted Post of rape, apparently on the belief that the woman had consented to the sexual relations. On appeal, Post argued that his conviction for sodomy should be reversed on the ground that the woman had consented to the oral and anal sodomy. The sodomy statute under which Post was convicted prohibited all forms of sodomy and made no exception for consensual sodomizing. In reversing his conviction for sodomy, the Appellate Court held that the statute, as applied to adult, consensual sodomy practiced in private, violated Post's right to privacy as guaranteed by the United States Constitution. In explaining its holding, the Court in Post stated the following:

It now appears to us that the right to privacy, as formulated by the Supreme Court, includes the right to select consensual adult sex partners. Exercise of this
right cannot be proscribed by the State in the absence of a compelling justification.***

We recognize it is the opinion of many that abnormal sexual acts, even those involving consenting adults, are morally reprehensible. However, this natural repugnance does not create a compelling justification for state regulation of these activities. ***The State has failed to demonstrate that private, consensual acts between adult persons could significantly harm society so as to provide a compelling state interest in the regulation of such activities. (Post, 1986, p. 1109)

It is interesting to note that the State of Oklahoma sought a review by the United States Supreme Court of the Post decision. The Supreme Court, however, refused to hear the case and thereby let stand the State Court's finding that the prohibition against heterosexual sodomy is a violation of the right to privacy. The United States Supreme Court refused to react to heterosexual sodomy, whereas it condemned homosexual sodomy shortly thereafter in Bowers v. Hardwick, 478 U.S. 186 (1986).

The Supreme Court of Iowa rendered an opinion similar to that in Post in State v. Pilcher, 242 N.W. 2d 348 (1976). In Pilcher, another conviction under a state sodomy statute precipitated a constitutional challenge on federal privacy grounds. Defendant,
Robert Pilcher, met barmaid, Roma Waterhouse, at the Tom Tom Tap, a tavern in Ottumwa, Iowa. Both parties left the bar together and went to a farmhouse outside of town. Waterhouse claimed that Pilcher forced her to commit fellatio upon him while at the farmhouse. She admitted, however, that she would have consented to "normal" sexual intercourse that evening and in fact admitted that she had engaged in sexual intercourse with Pilcher at the farm on a previous occasion. Waterhouse said that she objected to the forced fellatio and even informed Pilcher that she had false teeth. After completing the act, the two parties cleaned up and returned to town where they had a 15 minute conversation before departing. The next day, Waterhouse complained to her husband about the incident, who apparently did not believe her. At trial, she maintained that she did not consent to the act of fellatio. Oddly enough, Pilcher denied that the act ever took place, but insisted that Waterhouse nevertheless consented to it.

Upon his conviction for sodomy, Pilcher appealed and ultimately had his conviction reversed. The Iowa Supreme Court held that given the nature of the facts, it was impossible to
determine whether the jury convicted Pilcher for lack of consent or for committing sodomy with someone of the opposite sex, other than his spouse. Faced with that dilemma, the Court reversed his conviction and declared the sodomy statute an unconstitutional infringement on Pilcher’s right to privacy “to the extent it attempts to regulate through use of criminal penalty consensual sodomitical practices performed in private by adult persons of the opposite sex” (Pilcher, 1976, p. 359). The Pilcher Court was quick to point out, however, that the holding was limited to the facts of the case:

The statute cannot be construed to render it constitutionally valid when applied to the factual situation presented by this record.***

We do not intimate any view of the constitutionality of the statute as applied in any other factual situation. (Pilcher, 1976, p. 360)

In State v. Saunders, 381 A2d. 333 (1977), the Supreme Court of New Jersey reviewed the constitutionality of a fornication statute that prohibited “all sexual relations between men and unmarried women, regardless of the circumstances under which such act occur” (Saunders, 1977, p. 337). Defendants Charles Saunders and Bernard
Busby picked up two women, who later admitted to being prostitutes, and had sexual relations with them in a parked car. After having sex, Saunders and Bernard refused to give drugs to the women as they had promised to do in exchange for sexual favors. The women became angry and demanded $10.00 each for act of sexual intercourse performed. An argument erupted that led to the removal of the women from the car. The women filed rape charges against Saunders and Bernard.

At trial, the judge instructed the jury that if they did not find the defendants guilty of rape they could consider finding them guilty on the lesser charge of fornication. Apparently the judge felt that the evidence of consent was strong enough to acquit the defendants on the rape charge. Counsel for the defendants objected to the instruction of fornication arguing that it was hardly ever enforced and no longer recognized as a legitimate criminal statute. The jury returned a verdict of not guilty on the rape charges but convicted the defendants on the fornication counts. The convictions were reversed, however, on appeal on the ground that the New Jersey sodomy statute violated the constitutional right to privacy by prohibiting
sexual relations between consenting unmarried adults. The Saunders Court held:

We conclude that the conduct statutorily defined as fornication involves, by its very nature, a fundamental personal choice. Thus, the statute infringes upon the right of privacy. Although persons may differ as to the propriety and morality of such conduct and while we certainly do not condone its particular manifestations in this case, such a decision is necessarily encompassed in the concept of personal autonomy which our Constitution seeks to safeguard.

We recognize that the conduct prohibited by this statute has never been explicitly treated by the Supreme Court as falling within the right of privacy. In fact, we note that this question has been specifically reserved by the Court. **Nevertheless, our decision today is consistent with the tenor and thrust of the Court’s more recent decisions. Surely, such a choice involves considerations which are at least as intimate and personal as those which are involved in choosing whether to use contraceptives. (Saunders, 1977, pp. 338-340)**

The Court of Appeals of Maryland reached a result similar to those in Post v. State, supra (1986), State v. Pilcher, supra (1976), and State v. Saunders, supra, (1977), but used a significantly different rationale in doing so. In Schochet v. State, 580 A.2d 176 (Md. 1990), the Maryland sodomy statute was subjected to a
constitutional challenge on privacy grounds. The defendant, Steven Schochet, was charged with eight counts of felony sex offenses, ranging from rape to sodomy. The central issue that emerged at trial was whether the sexual acts complained of were consensual or forced. The facts are summarized as follows: Schochet left a college fraternity party in College Park, Maryland, to visit a friend at a nearby apartment building. By mistake, he knocked on the door of Dovie Sullivan, who was drinking and listening to music in her apartment in celebration of her recent divorce. Ms. Sullivan lived in the apartment with her eleven year old daughter, who had gone to bed before Schochet arrived. Ms. Sullivan invited Schochet in for a drink. At this point, the parties presented two very different versions of what happened next. Ms. Sullivan testified that Schochet forced her to engage in vaginal sexual intercourse and anal intercourse and made her perform fellatio on him several times. Schochet admitted to having consensual sexual intercourse with Ms. Sullivan and admitted that he allowed her to perform consensual fellatio on him. Schochet denied, however, any attempt to have anal
intercourse with her. In any event, both agreed that he spent the night at Ms. Sullivan's apartment and left the next morning.

After returning to his own home, Schochet discovered that he had contracted "crabs" from Ms. Sullivan. He returned to her apartment in anger and demanded that she pay for medical treatment to get rid of his newly acquired crabs. Ms. Sullivan refused to give him any money or take him to a physician for medical assistance. Schochet testified that he became very angry at that point and filed a false police report that Ms. Sullivan was abusing her daughter. Shortly thereafter, Ms. Sullivan filed criminal charges against Schochet for forcing her to have sexual relations with him.

At trial Schochet was acquitted of all counts except one count of fellatio. On appeal, Schochet argued that the facts supported a finding that the fellatio was consensual, therefore not criminal. Schochet argued that the sodomy statute at issue was invalid in that it violated his constitutional right to privacy; i.e., the State had no right to criminalize consensual sexual acts. The Court of Appeals reversed his conviction, but declined to base it on any violation of
the right to privacy. The Court instead chose to follow a rule of construction that "statutes should be construed so as to avoid casting doubt upon their constitutionality" (Schochet, 1990, p. 184). The Court in Schochet simply sidestepped the privacy issue and ruled that the sodomy statute in question did not "encompass consensual, noncommercial, heterosexual activity between adults in the privacy of the home" (Schochet, 1990, p. 184).

An opposite approach was taken by the Supreme Court of Massachusetts in Commonwealth v. Stowell, 449 NE2d. 357 (1983). Defendant, Judith Stowell, was convicted of adultery under a Massachusetts statute that made adultery a criminal offense. She was observed by police officers having sexual intercourse with a man in a parked van. When approached by the police and asked if she and her partner were married, she indicated that they were, but unfortunately, not to each other. Thereupon she was arrested and charged with adultery. She was subsequently convicted of the charge and fined $50.00. Upon appeal she argued that the adultery statute was unconstitutional in that it violated her right to privacy. Specifically, Mrs. Stowell argued that her decision to commit adultery
was a protected fundamental right similar to those decisions associated with abortion and contraception.

The Court in Stowell rejected the defendant’s analysis of the scope of the federal privacy doctrine and held that the statute was a constitutionally valid exercise of state police power. The Court observed the following:

Whatever the precise definition of the right to privacy and the scope of its protection of private sexual conduct, there is no fundamental personal privacy right implicit in the concept of ordered liberty barring the prosecution of consenting adults committing adultery in private. (Stowell, 1983, p. 361)

The Court indicated that the State had a legitimate reason to regulate various aspects of the marital relationship and the power to prohibit conduct, such as adultery, that may threaten the social institution of marriage.

The protection afforded the marital relationship through the right to privacy is not unlimited, however, as illustrated by the decision rendered by United States Court of Appeals, Fourth Circuit, in Lovisi v. Slayton, 539 F.2d 349 (1976). Aldo and Margaret Lovisi,
husband and wife, living in Virginia Beach, Virginia, placed an advertisement in "Swinger's Life" magazine seeking other people interested in pursuing "erotic sexual experiences" (Lovisi, 1976, p. 350). The magazine advertisement was answered by Earl Romeo Dunn who thereafter joined the Lovisis for some sexual encounters at their home. During one occasion, Margaret performed fellatio on both Aldo and Earl and captured some of the events on film by use of Polaroid pictures. Unfortunately, Mrs. Lovisi's daughters from a previous marriage, ages 11 and 13, found the photographs and took some to school to share. School officials reported the incident to authorities and the Lovisis were subsequently charged and convicted of sodomy.

The Lovisis argued that their convictions for sodomy in their own marital bedroom were in violation of the fundamental constitutional right of marital privacy. The Court, however, took a dim view of the Lovisi's privacy claims and held that no privacy violation occurred. In explaining why the traditional rules of marital privacy protection did not apply in the Lovisi's sexual escapades with Earl Romeo Dunn, the Court stated the following:
What the federal constitution protects is the right of privacy in circumstances in which it may reasonably be expected. Once a married couple admits strangers as onlookers, federal protection of privacy dissolves. It matters not whether the audience is composed of one, fifty, or one hundred, or whether onlookers pay for their titillation. If the couple performs sexual acts for the excitation or gratification of welcome onlookers, they cannot selectively claim that the state is an intruder. They possess the freedom to follow their own inclinations in privacy, but once they accept onlookers, whether they are close friends, chance acquaintances, observed “Peeping Toms” or paying customers, they may not exclude the state as a constitutionally forbidden intruder. (Lovisi, 1976, p. 351)

The reasonable expectation of privacy was also a determinative factor in Neville v. State, 430 A.2d. 570 (1981). In Neville, defendant, Howard Kelly, was convicted of violating the Maryland perverted practices statute. Kelly and a male friend, Ronald Holden, engaged in an afternoon of heterosexual frolicking with a 16 year old female, Pat. Kelly and Holden testified that they each performed a number of two party and three party sexual acts with Pat during daylight hours at an abandoned missile site. Kelly testified that Pat performed fellatio on him in the presence of Holden and that she did so in the open air outside the old missile site buildings. Kelly
appealed his conviction and argued that his participation in consensual, private heterosexual conduct was protected by the constitutional right to privacy.

In a companion case, Gary Neville was arrested for engaging in sexual acts with a female in an open wooded area near a railroad track. A police officer observe the female perform fellatio on Neville at the aforesaid location. Neville was also convicted of violating the perverted practices statute. On appeal, he too argued that his conduct was protected by the right to privacy.

The Court in Neville held that the perverted practices statute was constitutional as applied to both defendants, Kelly and Neville. The right to privacy was not violated because there was no reasonable expectation of privacy in either situation. The Court stated the following as to this issue:

Each petitioner engaged in this intimate sexual activity during daylight hours in a place which was out of doors, which was in a well populated community, and which was equally as accessible to uninvited other persons as it was to petitioner. (Neville, 1981, p. 577)
CHAPTER V

APPLICATION OF THE RIGHT TO PRIVACY TO EMPLOYMENT RIGHTS
OF SCHOOL TEACHERS AND OTHER PUBLIC EMPLOYEES REGARDING
OFF-THE-JOB SEXUAL BEHAVIOR

Introduction

Although the United States Supreme Court created the right to
privacy and provided the conceptual framework for its application,
the decisions of the Court did little to chart the outer boundaries of
privacy with definitive authority or clarity. For example, no
Supreme Court decision on privacy explicitly defines the employment
rights of teachers regarding off-the-job acts of sexual immorality. A
number of lower court decisions, however, do provide more specific
guidance in the actual application of the amorphous right to privacy
to employment rights.

This Chapter is a review of selected lower court decisions, both
state and federal, that explore the application of the constitutional
right to privacy to issues of sexual immorality in the arena of public
employment. Since the focus of this analysis is on the application of
the privacy doctrine to employment termination actions, examination of the case law is not limited merely to cases involving school teachers. For purposes of analyzing the limits of sexual privacy rights in the public workplace, the case law review herein is expanded to include public employees rather than just public school teachers. Implications of this case law review relevant to the privacy rights of teachers are addressed in the conclusions and recommendations contained in Chapter VI of this study. The case law reviewed herein is divided into the following categories of sexual behavior or status: adultery; cohabitation; unwed pregnancy; and miscellaneous sexual practices.

**Right to Privacy Regarding Adultery**

In *Stewart v. East Baton Rouge Parish School Board*, 251 So.2d. 487 (1971), a female school bus driver, Dorothy Stewart, was fired from her job on the ground of immorality. The evidence of immorality considered by the Board consisted entirely of a judgment decree of divorce that granted a divorce against Dorothy Stewart on the ground of adultery. The Board apparently accepted the decree of divorce as conclusive proof that Stewart had committed adultery.
Stewart argued that her conduct did not in any way have a negative effect on her job performance as a bus driver. She further asserted that the absence of any connection between the alleged immorality and impact on job performance constituted an infringement of her right to privacy. Stewart also challenged the Board's conclusion that adultery constituted immorality per se.

The Court in *Stewart* ignored the privacy claim and upheld the dismissal as a valid exercise of the Board's discretion. The Court stated the following regarding its holding:

> We believe that it is within the sound of discretion of an administrative body such as the East Baton Rouge Parish School Board to determine that such gross disregard for ordinary standards of decency of the community have a great deal of effect upon and relation to the performance of Mrs. Stewart's job duties and upon public interest. (*Stewart*, 1971, p. 491)

In *Sedule v. Capital School District*, 425 F. Supp. 552 (1976), an assistant superintendent was dismissed for neglect of duty and immorality. The administrator, Joseph Sedule, became involved in a sexual relationship with Joyce Naftzinger. Both Sedule and Naftzinger were married to other persons. Sedule carried on a long-
standing affair with Naftzinger, meeting her three or four times each week during working hours. He told co-workers that he was having sexual relations with Mrs. Naftzinger on school time and even arranged to use a teacher’s apartment for daytime sexual encounters. He began to lose interest in his job, neglected his duties and had excessive absences.

Sedule’s troubles took a turn for the worse when Mrs. Naftzinger and her husband moved out of state. In an effort to induce Mrs. Naftzinger to leave her husband and return to him, Sedule threatened to send nude photographs of Mrs. Naftzinger to her husband and his business associates. Sedule did in fact send a nude photograph of Mrs. Naftzinger to her husband with the inscription “Please don’t make trouble, just go” (Sedule, 1976, p. 557).

In the appeal of his dismissal, Sedule argued that the Board’s decision to terminate him invaded his right to privacy. The Court dismissed his privacy argument on the basis of the following rationale:
...although the boundaries of the right to privacy are difficult to fix, the right to privacy has little application in this case where the dismissal is based on neglect of duty. Job performance by a public employee presents a public concern; failure to fulfill public employment duties cannot be protected by asserting generally that conduct which interferes with job performance is private. Thus, even if the Court accepts plaintiff’s contention that his affair with Mrs. Naftzinger was private, its public impact in terms of job performance took it from behind any protective shield that the right to privacy may have constructed around the underlying conduct. (Sedule, 1976, p. 558)

The case of Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328 (1977), involved an adulterous affair between a librarian and a janitor at the library where she worked. The librarian, Rebecca Hollenbaugh, was divorced and the janitor, Fred Philburn, was married when their affair began. Hollenbaugh became pregnant by Philburn and Philburn left his wife shortly thereafter and moved in with Hollenbaugh. The community was well aware of what was going on in the personal lives of the librarian and the janitor. Complaints were made to the Board of Trustees of the Carnegie Free Library. The Board asked the parties to stop living together, but they refused. Disciplinary action was then taken and both
Hollenbaugh and Philburn were fired because they were living together in open adultery.

Hollenbaugh and Philburn challenged their dismissals on the ground that their constitutional right to privacy was violated. In reviewing the privacy issue, the Court in Hollenbaugh observed the following:

Although this right of privacy has been extended to several areas that have traditionally been categorized as "immoral", these decisions make it clear that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy". Roe v. Wade, supra 410 U.S. at 152, 93 S. Ct. at 726. A review of case law indicates that this right encompasses and protects the personal intimacies of the home, the family, motherhood, procreation and child rearing. ***Nothing, however, in these decisions concerning the right of privacy, intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" for two persons, one of whom is married, to live together under the circumstances of this case. We conclude, therefore, that plaintiffs' discharges were not violative of their constitutional right of privacy (Hollenbaugh, 1977, pp. 1333-1334).

A contrasting view of adultery was expressed in the holding in Briggs v. North Muskegon Police Department, 563, F. Supp. 585
(1983). In Briggs, a part-time police officer, Richard Briggs, was dismissed from employment for cohabitating with a married woman, Cynthia Secrest, not his wife. Briggs also was married, but left his wife to live with Secrest.

Briggs appealed his dismissal from employment on the ground that his personal choice to live in an adulterous relationship was protected by constitutionally protected rights of privacy and association. Briggs further argued that his private sexual conduct and lifestyle did not negatively impact his job performance. The Court in Briggs reviewed the status of the law of privacy as it existed at that time and concluded that the right to privacy had in fact been violated by the dismissal of Briggs. The Court held as follows:

Notwithstanding cases to the contrary, this Court concludes that better logic supports the view which upholds the constitutional right of sexual privacy. Accordingly, the Court is of the opinion that the privacy and associational interests implicated here are sufficiently fundamental to warrant scrutiny of the defendants' acts on more than a minimal rationality basis. (Briggs, 1983, p. 590)
The Court went on to indicate that Briggs had been dismissed for constitutionally impermissible reasons that would not bear analysis:

The Court is of the opinion that the "real" reason for the discharge of plaintiff is that his conduct did not confirm with what the defendants perceived to have been the morals of the community. He was discharged because of what defendants anticipated the reaction of the community would be. Even if this is a relevant consideration, there is no evidence as to what, in fact, that reaction was. Constitutional rights should not depend upon popularity polls or the whims of public opinion. (Briggs, 1983, p. 592)

Privacy Rights Regarding Cohabitation

The following cases explore the issue of whether the constitutional right to privacy is broad enough to protect the decisional privacy of public employees who elect to live with a person of the opposite sex and engage in a sexually intimate relationship thereby without being married to such person. In Sullivan v. Meade Independent School District No. 101, 530 F.2d 799 (1976), Kathleen Sullivan was dismissed from her position as an elementary teacher in a small, rural community in South Dakota on
grounds of immorality and incompetence. Her dismissal resulted from her decision to live with her boyfriend in a nonmarital status in a trailer furnished by the school board. Her cohabitation with her boyfriend was widely known in the small community and offended the traditional mores of many of the people residing therein. Parents of school age children protested to school authorities that Ms. Sullivan's lifestyle was offensive to their standards of morality.

When confronted by the school administration, Ms. Sullivan maintained that her living arrangement with her boyfriend was a private matter that was not subject to regulation by the school board. Ms. Sullivan was asked at several different stages in the dismissal process to simply cease living with the man until and unless they were married. Ms. Sullivan consistently refused to alter her lifestyle and was eventually dismissed from employment.

After being fired, Ms. Sullivan filed a federal civil rights action under Section 1983, 42 United States Code, against the school district, members of the school board, and school administrators seeking monetary damages and reinstatement to her teaching position. The U.S. District Court held that the dismissal had not violated any of Ms.
Sullivan's constitutional rights. The U.S. Court of Appeals, Eighth Circuit, held that no damages could be awarded against the board even if Ms. Sullivan's privacy rights had been violated since she had been afforded substantial due process. The Court noted that it was not clear whether the right to privacy extended protection to Ms. Sullivan's decision to cohabit with an unmarried male, not her spouse. In this regard, the Court observed the following:

...the parameters of the newly evolving constitutional right to privacy are not yet clear. While the right of a couple to live together without the benefit of matrimony eventually may fall within the penumbra of the constitutional right to privacy, it had not been so held at the time the Board dismissed the appellant. Thus, it cannot be said that the members of the School Board either knew or reasonably should have known that their actions would violate a "constitutional right" of Ms. Sullivan. (Sullivan, 1976, p. 806)

Ms. Sullivan subsequently withdrew her request for reinstatement to her teaching position and moved away from South Dakota. The Court, therefore, did not reach the constitutional issue regarding her privacy claim.
The case of *Sherburne v. School Board of Suwannee County*, 455 So. 2d 1057 ( Fla. App. 1 Dist. 1984), is an interesting contrast to the decision in *Sullivan, supra* (1976). In *Sherburne*, a high school teacher, Pamela Sherburne, was terminated from employment on the ground that she lacked good moral character. The termination arose from a controversy over Ms. Sherburne’s short-term cohabitation with a male acquaintance, Bob Palmer. Ms. Sherburne apparently moved in with Mr. Palmer and lived in his house trailer for approximately three to four months while her trailer was being repaired. Although brief in duration, her cohabitation with Mr. Palmer was apparently well known within the community and generated protests by some parents. Evidence from the school administration indicated that Ms. Sherburne was an excellent teacher and that the controversy over her lifestyle had not significantly impacted her ability to teach. The board of education, however, concluded that Ms. Sherburne’s actions fell below the standards of morality within the community and that deficiency in character constituted good cause for her dismissal.
On appeal, the Court in Sherburne held that the dismissal was invalid in that Ms. Sherburne’s cohabitation did not amount to sufficiently serious misconduct to justify dismissal for immorality. Although the issue of the right to privacy was not raised by Ms. Sherburne’s counsel, and consequently was not directly addressed by the Court, the decision acknowledged the concept of privacy in its holding:

We are led to conclude from our examination of the authorities on the subject that in the absence of specific, valid, statutory directives, the appropriate standard to be applied is that private, off-campus conduct ostensibly involving a consensual sexual relationship between a teacher and an adult of the opposite sex cannot, in and of itself, provide “good cause” for a school board’s rejection of a teacher nominated for employment by the superintendent unless it is shown that such conduct adversely affects the ability to teach. (Sherburne, 1984, p. 1062)

In cohabitation cases where the right to privacy has been directly raised as an issue and considered, the results have been mixed in its application. For example, in Mindel v. United State Civil Service Commission, 312 F. Supp. 485 (1970), the removal of a postal clerk from the Civil Service eligibility list because of his cohabitation
with a woman to whom he was not married, was held to be a violation of the right to privacy. The postal clerk, Neil Mindel, was interviewed regarding his Civil Service appointment as clerk with a post office in San Francisco, California. During the interview, Mindel disclosed that he was living with a woman and that they were not married. Mindel was later notified that he was not fit to serve as a federal postal clerk because his confessed cohabitation constituted immoral conduct.

The Court in Mindel held that removing Mindel from the Civil Service eligibility list merely because of his sexual lifestyle involving heterosexual cohabitation violated his right to privacy as guaranteed by the United States Constitution. In reference to the privacy claim, the Court noted the following:

The government cannot condition employment on the waiver of a constitutional right; even in cases where it has a legitimate interest it may not invade "the sanctity of a man's home and the privacies of life". (Citations omitted.) Here, of course, the Post Office has not even shown a rational reason, much less the "compelling reason" required by Griswold, to require Mindel to live according to its special moral code. (Mindel, 1970, p. 488)
The *Minden* decision illustrates that the significance of sexually immoral conduct varies with the type of position held by the employee in question. Evidence of immorality may not significantly impact a postal clerk's ability to do his/her job since the position does not require the employee to serve as a moral exemplar or role model for the community. The situation is different, however, in those positions where the role-modeling function is an essential component of the job. In addition to public school teachers, police officers are often expected to exhibit exemplary moral character in performing their professional duties. The remaining two cases address the cohabitation/privacy issue as it applies to police officers.

In *Shawgo v. Spradlin*, 701 F.2d 470 (1983), police officers Janet Shawgo and Stanley Whisenhunt, were disciplined because of off-duty dating and alleged cohabitation in violation of departmental and city rules of the City of Amarillo, Texas. Whisenhunt also was disciplined for sharing an apartment with subordinate police officer, John Edwards. As a result of the controversy created by the disciplinary action taken against them, both Shawgo and Whisenhunt
resigned their position and then sued alleging that they were constructively discharged, i.e., that they were forced to resign. In their lawsuit against the City of Amarillo, Shawgo and Whisenhunt alleged that their privacy interests had been violated by the disciplinary action taken against them.

The Court held that their right to privacy was not violated and stated the following regarding the issue:

We agree with the district court, that in the present circumstances, the plaintiffs’ right to privacy has not been infringed by the scope of the regulation proscribing as conduct prejudicial to good order, cohabitation of two police officers, or proscribing a superior officer from sharing an apartment with one of lower rank.

The plaintiff police officers, who were found to have violated police and state rules of conduct by reason of their personal, off-duty association that led to their marriage, contend that the state may not regulate these private activities. This argument fails to take into account that the right to privacy is not unqualified, and that the state has “more interest in regulating the activities of its employees than the activities of the population at large”, Kelly v. Johnson, supra, 425 U.S. at 425, 96 S. Ct. at 1444. (Shawgo, 1983, p. 483)

The decision in Kukla v. Village of Antioch, 647 F. Supp. 799 (N.D. Ill. 1986) provided an analysis of the competing interests
involved in disputes involving the privacy rights of government employees. In Kukla, the Village of Antioch, Illinois, dismissed a police sergeant and a policy dispatcher for cohabitation in violation of the following Police Department Directive issued by Antioch Police Chief, Charles Miller:

Based upon considerations of public policy and the necessity for military-type discipline and respect, it will be misconduct justifying discharge for employees of different ranks to socialize in situations inimical to the discipline and order of the Department. (Kukla, 1986, p. 802)

The police sergeant, William Kukla, and the police dispatcher, Denise A. DeVore Kukla, began dating and then living together in violation of the aforesaid directive. After being confronted by Chief Miller about the violation, Denise DeVore did not report to work any more. Chief Miller filed charges seeking dismissal of both employees. Pending the hearing on the charges, the parties married. Subsequent to the hearing on the matter, the Chief fired both William and Denise.

In response to their dismissals, William and Denise sued the Village of Antioch and various Village officials under 42 U.S.C. Section
1983 alleging violation of their constitutional rights of freedom of association and privacy. Specifically, the Kuklas argued that no evidence was presented to show that their cohabitation had any negative impact on their job performance; therefore, the Village was not justified in infringing upon their constitutional rights.

In reviewing the issues presented by the case, the Court in *Kukla* noted that an employee of the government may be subjected to more restrictions on personal conduct than a private citizen. In explaining the rationale for this more restrictive control over public employees, the Court observed the following:

The government, as employer, has a legitimate interest in providing government services effectively. Thus when the benefit at stake is a government job, and the individual's exercise of a right interferes with the provision of government services, the government interest carries more weight in the balance against the exercise of the right. ***For example, to deny a benefit to a citizen who is asserting that the denial significantly burdens a fully protected fundamental right, a government must ordinarily show that the denial is necessary to achieve a compelling state interest.*** To justify firing an employee asserting a similarly protected right, the government need only establish a significant relationship to its needs as employer.***
The Constitution will not, however, permit a public employer to punish conduct merely because it does not approve of it. The employer must be legitimately responding to the effects of the conduct on the functioning of the agency. **If the restriction has no relation to the provisions of government services, the government’s extra interest as employer is not implicated. It has no more power to limit the employee’s conduct than it would if the employee were any other citizen.** (Kukla, 1986, p. 805)

In ruling on the privacy claims asserted by the Kuklas, the Court concluded that they were not entitled to the maximum degree of protection offered by the Constitution in other matters involving fundamental rights. The Court held that cohabitation outside of marriage is not a fundamental right invoking full constitutional protection. Although the government cannot arbitrarily restrict cohabitation without a reason, the reason does not have to be compelling. The Court stated the following regarding the Kuklas’ assertion about privacy violations:

...the degree of protection for consensual sexual conduct depends on what conduct is involved. The Supreme Court has never expressly held that sexual decisions rank among the fundamental rights. When it struck down certain restrictions on the sale of contraceptives, for example, the decision was not based on the impact of
those restrictions on sexual choice but rather on the decision "whether to bear or beget a child". Carey v. Populations Services International, ***. Indeed, a majority of the Court expressly denied that the case was about private consensual sexual behavior. ***Recently the Court made clear that not all forms of "private sexual conduct between consenting adults" are "constitutionally insulated from state prescription". Bowers v. Hardwick, ***. While we will not presume from these decisions that the Kuklas' sexual choices outside of marriage have no protection, they do not have maximum protection. (Kukla, 1986, p. 807)

Privacy Rights Regarding Unwed Pregnancies

Perhaps one of the strongest arguments for application of the constitutional right to privacy can be made in those situations where pregnant public employees are fired merely because they are unmarried. As previously noted in Chapter IV of this study, the Supreme Court has consistently recognized constitutional protection in matters regarding procreation. The Court in Eisenstadt v. Baird, 405 U.S. 438 (1972) virtually laid this issue to rest by its often cited statement about the right of privacy:

If the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so
fundamentally affecting a person as the decision whether to bear or beget a child. (Eisenstadt, 1972, p. 453)

In Drake v. Covington County Board of Education, 371 F. Supp. 974 (M.D. AL 1974), Ilena Drake, an unmarried teacher, was dismissed for immorality because she was pregnant. The initial disclosure of her pregnancy to the School Board did not come from Ms. Drake, but rather from information that the superintendent solicited from Drake’s physician. In reviewing the constitutional issues involved the Court noted that Drake’s dismissal violated her constitutional rights to privacy. The Court specifically held as follows:

The Board made no finding that Drake’s claimed immorality had affected her competency or fitness as a teacher, and no such nexus was developed in the evidence. No “compelling interest” as to the cancellation vel non of Drake’s contract of employment was established by the evidence which would justify the invasion of Drake’s constitutional right of privacy. Under the testimony that Drake was in the early months of pregnancy, she in consultation with her physician would be free to determine, without regulation by the State, whether pregnancy should be terminated. ***For the State, in the absence of any compelling interest, to base cancellation of Drake’s employment contract on evidence growing out of her consultations with her physician was,
or our opinion, an unconstitutional invasion of her right to privacy. (Drake, 1974. p. 979)

The case of Lewis v. Delaware State College, 455 F. Supp. 239 (1978), involved the nonrenewal of an employment contract of the Director of Residence Halls for Women at Delaware State College. The Director, Bessie Lewis, upon inquiry discovered that the reason for the nonrenewal was because she became pregnant while unmarried, in violation of a job requirement that she be of good moral character. The College administration feared public reaction against Ms. Lewis' unwed pregnancy could negatively impact student enrollment.

The Court in Lewis found that the dismissal indeed violated the employee's right to privacy, citing the language in Eisenstadt v. Baird, 405 U.S. 438 (1972) previously mentioned herein. The Lewis Court did point out, however, that the right to privacy in such circumstances is not unlimited:

This does not mean, however, that the defendants and other government officials may never deny public employment to a person on the ground that he or she is the parent of an illegitimate child. But the courts will carefully scrutinize such decisions. (Lewis, 1978, p. 249)
In order to uphold the dismissal of Lewis, the Delaware State College would have to establish a compelling state interest that would override the privacy interests of Bessie Lewis. In this regard, the Court noted the following:

Having already concluded that the reasons given for nonrenewal of the plaintiff's contract may be arbitrary and without any basis in fact, the Court considers it virtually a foregone conclusion that the defendants will not be able to establish a compelling state interest sufficient to justify the intrusion upon the plaintiff's right to decide to bear an illegitimate child. (Lewis, 1978, p. 249)

The case of Ponton v. Newport News School Board, 632 F. Supp. 1056 (1986) presents a valuable lesson for school districts and school district officials that violate constitutional rights of employees. In Ponton, Pamela Brown Ponton was forced to take a leave of absence from her teaching position by school officials who objected to her unwed pregnancy. Ponton filed suit alleging violation of the right to privacy under 42 U.S.C. Section 1983 and violation of the Pregnancy Discrimination Act, 42 U.S.C. Section 2000 e(K), part of Title VII of
the Civil Rights Act of 1964. She did not seek reinstatement, but instead sought monetary damages not only from the School District but from individual administrators as well.

The Court in Ponton found that Pamela Brown Ponton had a constitutional right to bear a child while unmarried. The critical issue, however, was whether Ponton’s right to do so outweighed the School District’s interest in removing her from the classroom. As to this question, the Court strongly denounced the School District’s assertion that it was necessary to protect students from exposure to Ponton’s unmarried pregnancy:

In this case, the particular state interest which has been alleged is that of protecting schoolchildren from exposure to a single, pregnant teacher. The Court has serious doubt as to whether this is in fact a legitimate interest. Even assuming that the asserted state interest is a valid one, however, the Court finds that it does not outweigh plaintiff’s interest in exercising her constitutional right to bear a child out of wedlock.

It has not been alleged that the fact that plaintiff became pregnant out of wedlock indicated some moral defect in plaintiff which made her unfit to teach. Nor has it been alleged that plaintiff intended to openly advocate the virtues of pregnancy out of wedlock. Indeed, the evidence establishes that plaintiff was both desirous and anxious to marry her child’s father. Rather, the sole
allegation is that the mere sight of an unmarried, pregnant teacher would have a sufficiently undesirable influence on schoolchildren to justify excluding the teacher from the classroom. The Court finds this allegation to be meritless, for the effect on students of the mere sight of a single, pregnant teacher would be negligible, at best. To begin with, it is unclear whether plaintiff’s students would have even been aware that plaintiff was unmarried. Moreover, even if plaintiff’s students would have known that she was single, the mere knowledge that their teacher had gotten pregnant out of wedlock would seem to have a fairly minimal impact on them. (Ponton, 1986, p. 1063)

The unlawful action of the School District through its officials had very serious consequences in Ponton. The Court held that the school officials that were responsible for forcing Ms. Ponton to take a leave of absence were liable under both the Section 1983 (constitutional tort) action and the Title VII action. The School District was not liable under Section 1983 since the administrators’ unlawful conduct was not the result of an official policy or regulation of the Board of Education. The District was, however, liable under the Title VII cause of action because school officials acted as agents of the District in violating Ponton’s constitutional rights. The Court did not indicate the amount of the judgments eventually awarded, but they were undoubtedly significant. Forcing Ms. Ponton to take a
leave of absence without regard for her constitutionally protected rights exposed the District and administrators to significant liability, in addition to costs in attorney fees.

In a similar case, **Eckmann v. Board of Education of Hawthorn School District**, 636 F. Supp. 1214 (1986), teacher, Jeanne Eckmann, was discharged for being pregnant and unmarried. Like the teacher in **Ponton**, Eckmann also sued the School District and various individuals. In **Eckmann**, the individual defendants were members of the Board of Education. The jury returned a verdict in favor of the teacher for the violation of her constitutional rights and awarded her a compensatory damage award in the amount of $2,000,000. The Court, however, found the amount of the award to be excessive and reduced it to $750,000. The jury also awarded punitive damages against six individual School Board members in the following amounts: $500,000 against Claudia Chamberlain; $500,000 against Richard Stermer; $250,000 against John O’Brien; $25,000 against Norman Schossow; $25,000 against Jim Stunz; and $10,000 against Mary Shafer. The Court felt that there may have been some confusion among jurors regarding the award of punitive damages,
since Board member, John O’Brien, was one of two Board members that voted against Eckmann’s dismissal. The fact that the jury awarded $250,000 against O’Brien raised significant questions about the jury’s understanding of the punitive damage issue. The Court granted a new trial on the issue of punitive damages at the request of the School Board.

Privacy Rights Regarding Miscellaneous Sexual Activity

The case of *Lile v. Hancock Place School District*, 701 S.W.2d 500 (1985), involved the dismissal of a fourth grade teacher, Charles Lile, for immoral conduct committed in his home. Lile was accused of sexually molesting the two minor daughters of the woman with whom he lived. The two children were 4 and 8 years of age at the time of the alleged incidents. By his own admission, Lile engaged in the following conduct regarding the minor girls:

(a) he regularly entered the bathroom in his home while the girls were in there and used the toilet in their presence;

(b) he took a photograph of the girls while they were nude and taking a bath;
(c) he had the girls sleep with him while their mother was in the hospital;
(d) he took baths with the girls; and
(e) he regularly walked around nude in the presence of the girls while at home.

In addition, one of the girls testified that Lile called her "Blackie" in reference to the color of her pubic hair.

Charges of sexual abuse were filed against Lile. The case was highly publicized. The Board of Education dismissed Lile on the ground of immorality, finding that he was unfit to teach. Lile appealed his dismissal and argued, among other things, that his right to privacy had been violated by the action of the School Board in terminating his employment. The essence of the argument was all of the conduct at issue took place within the confines of his own home; therefore, he had a legitimate expectation of privacy regarding the incidents. The Court in Lile, rejected Lile's argument and stated the following regarding the privacy issue:

Appellant's argument fails, however, because the right of privacy depends not only upon the location of the
conduct, but upon the nature of the conduct as well. The conduct which appellant seeks to protect from regulation by the Board does not implicate any of the “fundamental rights” discussed above. Appellant was not related to the girls or their mother, thus no interest in marriage or family relationships is implicated. Nor does his conduct relate to procreation, contraception or child rearing and education. We cannot agree that appellant’s interest in walking around his home naked and using his bathroom facilities in the presence of two young girls is “implicit in the concept of ordered liberty”. (Lile, 1985, p. 508)

The Court upheld Lile’s dismissal on the ground that his conduct indicated that he was unfit to teach and that his presence presented a danger to children in his class.

In *Wishart v. McDonald*, 500 F.2d 1110 (1974), D. Franklin Wishart, a tenured sixth grade teacher in Eaton, Massachusetts, was fired from his teaching position for conduct unbecoming a teacher. Mr. Wishart’s downfall was that he walked around his yard at home with a mannequin covered with his wife’s dress. Neighbors testified that he did this on a regular weekly basis and attracted considerable attention in the neighborhood. One neighbor allegedly observed Wishart lifting the mannequin’s dress and placing it between his legs. Other neighbors testified that Wishart would caress the mannequin’s breast as he carried it around the yard.
In any event, the neighbor's complained to the School Board about Wishart’s abnormal behavior and the School Board eventually terminated his continuing teaching contract. Mr. Wishart filed suit claiming that he was wrongfully discharged. At the trial on the merits of his claim, the Court found that he had a good teaching record and had been recently rated within the range of “above average” to “excellent” in his teaching evaluation. Wishart’s psychiatrist testified that he had a personality disorder; however, he stated that Wishart’s activities with the mannequin were “unrelated to his performance as a teacher and would not affect classroom conduct” (Wishart, 1974, p. 1113).

Wishart also argued that his termination of employment was an infringement of his constitutional right to privacy since all of the alleged misconduct occurred at his home and in his own yard. The Court, however, held that the right of privacy may be surrendered by public display. The Court stated: “The right to be left alone in the home extends only to the home and not to conduct displayed under the street lamp on the front lawn” (Wishart, 1974, p. 1114).
In upholding Wishart's dismissal, the Court stated that the School Board had sufficient reasons to terminate his contract on the grounds that Wishart's activities with the mannequin constituted conduct unbecoming a teacher. The Court made the following observation in upholding the School Board's decision to dismiss Wishart:

We have no doubt that the conduct would seem sufficiently bizarre and threatening so that, in the minds of many, it would destroy his ability to serve as a role model for young children. (Wishart, 1974, p. 1115)

Summary

The foregoing lower court decisions give some direction to the application of privacy principles to those fact patterns and circumstances not yet directly addressed by the United States Supreme Court regarding the scope of the right to privacy. The cases in this Chapter suggest that the right to privacy may be broader than the specific holdings in Supreme Court decisions, but certainly not unlimited, even in areas not yet ruled upon by the Nation's highest court.
CHAPTER VI

SUMMARY, GUIDELINES AND RECOMMENDATIONS
FOR FURTHER STUDY

Introduction

Chapter VI provides a summary of the findings of this study, guidelines for evaluating the legal issues and the privacy rights of teachers regarding employment termination for out-of-school sexual misconduct not involving students, and recommendations for further study of this area of the law.

Summary

Purpose of the Study

The purpose of this study was to present an analysis and summary of the relevant legal issues surrounding the dismissal of teachers for acts of sexual immorality committed outside of school and not involving students. The limitations of the study, excluding school related sexual misconduct with students, were designed to focus on teacher dismissals, arguably falling within or at least near the boundaries of the constitutional right to privacy. Four (4)
specific research questions were formulated to provide a framework for the analysis of the data reviewed through this study:

1. Under what conditions may a school board dismiss a teacher for out-of-school sexual misconduct not involving students?

2. Under what conditions may a school board not dismiss a teacher for out-of-school sexual misconduct not involving students?

3. To what extent does the right to privacy, as guaranteed by the United States Constitution, protect a public school teacher from dismissal for alleged acts of sexual immorality?

4. To what extent may a school board infringe upon a teacher's constitutional right to privacy and personal liberty outside of school in order to maintain high standards of personal morality as a condition of continuing teacher employment during the contract term?
The answers to the aforesaid questions, to the extent that such were obtained through this research, guidelines for evaluating the legal issues and the privacy rights of teachers regarding dismissals for out-of-school sexual immorality.

The procedure used for this study involved traditional legal research and analysis of case law relevant to the two basic streams of law applicable to this study, namely (a) dismissal of teachers for sexual immorality, and (b) the right to privacy.

Chapters in this study dealing with the analysis of case law were organized by grouping cases into three broad areas: (a) dismissal of teachers for sexual immorality; (b) case law creating and interpreting the constitutional right to privacy; and (c) the application of the right to privacy to employment rights of teachers and other public employees regarding off-the-job sexual behavior. The findings that emerged through Chapters III, IV and V are summarized below.

**Dismissal of Teachers for Sexual Immorality**

Chapter III reviewed and analyzed court decisions dealing with the dismissal of teachers for sexual immorality or other similar
grounds stemming from illicit sexual conduct. Twenty-six court decisions were examined and categorized by sexual conduct. The following is a summary of findings from Chapter III:

1. Adulterous conduct by a teacher may or may not be sufficient cause to justify dismissal for immorality. The overriding factor is whether the adulterous conduct adversely affected the teacher's fitness to teach or impaired job performance (Erb v. Iowa State Board of Public Instruction, 216 N.W.2d 339, 1974; Stoddard v. School District No. 1, Etc., 590 F.2d 829 (1979).

2. Cohabitation by teachers may or may not result in termination for immorality depending on the overall effect of the immorality on job performance in the classroom and the fitness to teach (Thompson v. Southwest School District, 483, F. Supp. 1170, 1980).

3. Attempts to dismiss teachers merely because they are pregnant while unmarried are not going to be successful and may expose school districts to significant liability. In order to sustain the termination of an unwed pregnant
teacher, the school district must show that the teacher would have been dismissed for other reasons even in the absence of her unwed pregnancy (Avery v. Homewood City Board of Education, 684 F.2d 337, 1982).


5. Sex-reassignment by a teacher resulting in a change of gender, although not immoral, may support dismissal on the ground that the change is so extreme as to be harmful to children who are aware that it occurred (In Re Grossman, 316 A.2d 39, 1974).
6. Status as a homosexual may be enough to support termination of a teacher, depending on the jurisdiction in which the teacher resides (Gaylord v. Tacoma School District No. 10, 559 P.2d 1340, 1977).

7. In most jurisdictions, homosexual status or private homosexual conduct will probably not result in teacher termination unless a nexus is established showing that the status or conduct negatively impacted job performance.

8. Homosexual status or conduct is not considered to constitute immorality per se by most courts in most jurisdictions (Morrison v. State Board of Education, 461 P.2d 375, 1969).

9. Homosexual conduct resulting in criminal charges may be more likely to result in the dismissal of a teacher because of the likelihood of finding unfitness to continue teaching (Moser v. State Board of Education, 101 Cal. Rptr. 86, 1972).
10. Homosexual conduct even resulting in criminal charges may not automatically lead to a dismissal if the incident is isolated, unlikely to reoccur, and the teacher has an otherwise good teaching record (Board of Education of Long Beach, Etc. v. Jack M., 566 P.2d 602, 1977).

11. Failure to disclose homosexuality on an employment application may result in teacher termination (Acanfora v. Board of Education of Montgomery County, 491 F.2d 498, 1974).

Case Law Creating and Interpreting the Constitutional Right to Privacy

Chapter IV reviewed decisions of the United States Supreme Court leading up to Griswold v. Connecticut, 381, U.S. 479 (1965), and beyond, that created and defined the federal right to privacy. In addition, selected lower court decisions addressing the federal right to privacy were also examined to explore the outer limits of the privacy doctrine not yet specifically addressed by the U.S. Supreme Court. The following is a summary of the findings of Chapter IV:
1. The right to privacy is a judicially created right not explicitly mentioned in the United States Constitution or the Bill of Rights.

2. The right to privacy as defined by the United States Supreme Court emerges from the penumbras surrounding the enumerated rights and guarantees found in the Constitution.

3. The right to privacy as defined by the United States Supreme Court has been held to apply to personal matters relating to (a) marriage, (b) family, (c) procreation, (d) contraception, (e) abortion, (f) child rearing, and (g) education.

4. The right to privacy as defined by the United States Supreme Court is not absolute and has not yet been expanded to protect sexual activity outside the sanctity of marriage, except for the limited exceptions of contraceptives and abortions being made available to both married and unmarried persons.
5. The United States Supreme Court has specifically ruled in *Bowers v. Hardwick*, 478 U.S. 186 (1986), that the right to privacy does not extend to, or offer constitutional protection for, homosexuality or homosexual conduct.

6. The United States Supreme Court has not directly addressed through its decisions whether the right to privacy extends to adult, consensual, heterosexual conduct committed in private but outside the confines of the marital relationship.

7. Lower court decisions from both state and federal jurisdictions have, however, addressed the issue of whether the constitutional right to privacy applies to private, nonmarital heterosexual conduct engaged in by consenting adults. In some cases, these decisions have appealed to the U.S. Supreme Court through a writ of certiorari seeking direction as to the outer limits of the right to privacy. The Supreme Court to date has denied certiorari in such cases and thereby has allowed lower court decisions to stand even though said decisions
expand privacy rights beyond the limits heretofore set by the Supreme Court.

8. The U.S. Supreme Court denied certiorari in *Post v. State*, 715 P.2d 1105 (OKL. Cr. 1986), that held that private heterosexual acts, including sodomy, between consenting adults are protected by the right to privacy and therefore cannot be regulated by the state without demonstration of a compelling reason to do so.

9. The New Jersey Supreme Court in *State v. Saunders*, 381 U.S. 333 (1973), held that fornication (consensual sexual relations between unmarried heterosexual adults) involves a fundamental personal choice therefore it is protected by the federal right to privacy.

10. The Supreme Court of Massachusetts in *Commonwealth v. Stowell*, 449 N.E.2d 357 (1983), held that adultery is not protected by the right to privacy.

11. Persons seeking constitutional protection under the right to privacy for particular sexual conduct must establish that they had a reasonable expectation of privacy, i.e.,
that they attempted to commit the act in private. Privacy rights may be dissolved regarding acts committed in public or in the presence of others.

12. Sexual relations between husband and wife lose privacy protection if the married couple allows a third party to watch and/or join in (Lovisi v. Slayton, 539 F.2d 349, 1976).

13. Heterosexual acts between consenting adults are not entitled to privacy protection if committed outdoors and in view of other people (Neville v. State, 430 A.2d 570, 1981).

Application of the Right to Privacy to Employment Rights of Teachers and Other Public Employees Regarding Off-the-Job Sexual Behavior

Chapter V reviewed selected lower court decisions, both state and federal, that explored the application of the constitutional right to privacy to issues of sexual immorality in the arena of public employment, including but not limited to public school teachers. Fifteen cases were examined and categorized by sexual conduct. The following is a summary of Chapter V:


3. An opposite result was reached in another federal decision that held that adultery is entitled to constitutional privacy protection because it involves a fundamental interest that deserves protection (Briggs v. North Muskegon Police Department, 563, F. Supp. 585 1983).

4. Court decisions are mixed regarding the applicability of privacy rights to cohabitation. Public employees generally have less privacy protection than ordinary citizens (Kukla v. Village of Antioch, 647 F. Supp. 799,


6. Privacy rights may not extend to unusual sexual practices. Courts may find that such conduct is not implicit in the concept of ordered liberty and therefore not a fundament interest worthy of constitutional protection (Lile v. Hancock Place School District, 701 S.W.2d 500, 1985); or that the scope of a recognized
privacy right was exceeded and thereby lost (Wishart v. McDonald, 500 F.2d 1110, 1974).

Guidelines

Based upon the finding of this study, the following guidelines are offered to assist teachers and school officials in being more aware of their rights and liabilities regarding disputes over out-of-school sexual immorality not involving students. The four specific research questions formulated for this study are used as a framework for providing said guidelines.

1. Under what conditions may a school board dismiss a teacher for out-of-school sexual conduct not involving students?

   a. The dismissal of teachers for sexual immorality not otherwise protected by a constitutional right to privacy must generally be justified on one of two grounds:

      (1) The immoral conduct impairs the teacher's ability to serve as an effective role model for students.
2. The immoral conduct demonstrates and is directly related to an unfitness to teach. This relationship is often referred to as a "nexus" or link between the misconduct and the unfitness of the teacher to perform his or her duties.

b. Immorality per se, is generally not sufficient to justify teacher dismissal. With the exception of a few decisions regarding homosexual teachers, nearly all courts will not accept a mere showing that immoral conduct has been committed. School boards must prove that the immorality impacts the job in some way, either by destroying the effectiveness of the teacher to continue to serve as a role model or by adversely affecting the teacher's fitness to teach. The *Morrison* decision cited in Chapter III sets out the factors that may be considered in determining whether the fitness to teach has been affected: (a) the likelihood that the
conduct may have adversely affected students or other teachers, (b) the degree of such adversity that is likely, (c) the proximity or remoteness in time of the conduct, (d) the extenuating or aggravating circumstances involved, (e) the motives involved, (f) the likelihood of recurrence, (g) the type of certificate held by the teacher, and (h) the impact that disciplinary action may have on the constitutional rights of the teacher involved or other teachers.

2. Under what conditions may a school board not dismiss a teacher for out-of-school sexual conduct not involving students?

a. Teachers should not be dismissed from employment merely because of being pregnant and unmarried. If an unmarried pregnant teacher warrants dismissal for something unrelated to her pregnancy, dismissal is possible but not advisable unless the separate grounds are so persuasive as to demand
dismissal even if the teacher were not pregnant. The obvious inference will be that the unwed but pregnant status had something to do with the termination; therefore, such dismissals should be avoided if possible.

b. Teachers should not be dismissed in situations where the school board does not have significant proof that the out-of-school immorality in some way negatively impacted the school or educational process. Absent demonstration of adverse effect on job performance, immorality alone will no longer support teacher dismissals.

3. To what extent does the right to privacy, as guaranteed by the United States Constitution, protect a public school teacher from dismissal for alleged acts of sexual immorality?

a. The right to privacy clearly protects a teacher regarding issues of procreation, abortion, childbirth, and marriage. Therefore, the right to privacy
would grant protection to unwed pregnant teachers. Likewise, a teacher could not be disciplined or dismissed for having an abortion or for getting married. The right to marry would of course include the right to choose one’s spouse; consequently, a school could not dismiss a teacher for choosing to marry someone of another race or creed.

b. The application of the right to privacy is not so clear when dealing with sexual matters outside the marital relationship. The Supreme Court has not ruled on whether adultery, fornication, cohabitation and other heterosexual activity between unmarried consenting adults is entitled to privacy protection. It has had the opportunity to do so, but to date has declined. The Supreme Court has held only that homosexuality and homosexual conduct are not protected by the right to privacy. Lower courts are divided as to whether privacy rights apply to
heterosexual conduct outside of marriage. School boards must examine the controlling case law in their jurisdictions regarding such issues.

4. To what extent may a school board infringe upon a teacher’s constitutional right to privacy and personal liberty outside of school in order to maintain high standards of personal morality as a condition of continuing teacher employment during the contract term?

a. Even if a particular sexual act is protected by the right to privacy, this does not necessarily mean that the school board may never take disciplinary action against a teacher for doing it. It simply means that the school board, as an agent of the state, must be able to show a compelling reason or interest that would justify regulating the teacher’s freedom to participate in that particular sexual activity. If a compelling reason can be shown, then the courts employ the so-called “balancing test” and balance
the constitutional interests involved. If the reason is compelling enough, the individual privacy right of the teacher must give way to the interest of the school or state in regulating such conduct.

As a practical matter, schools will not often be able to demonstrate a compelling need to regulate that is sufficient to justify interference with a fundamental constitutional right. An example would be the constitutional right of an unmarried teacher to become pregnant.

In those areas where there is a significant divergence of opinion among courts regarding the application of privacy rights (adultery, cohabitation, fornication, etc.) a school board would have a much better chance at prevailing in a balancing test of competing interests.
Recommendations for Further Study

1. Further study is needed to explore the constitutional right to privacy provided through constitutions of the various states. Many state constitutions contain specific references to privacy rights. State privacy rights may provide much broader protection for teachers, especially regarding homosexual conduct and heterosexual conduct between unmarried persons.

2. Further study is needed regarding statutory enactments providing protection for homosexuals in general and homosexual teachers in particular. A number of state and local legislative bodies have passed legislation prohibiting discrimination regarding sexual orientation. This could impact the way in which school boards react to homosexual issues.

3. Further study is needed regarding the personal liability of school board members and school officials for violations of federal statutory and constitutional rights.
4. Further study is needed to review the fact patterns, circumstances and/or other factors necessary to establish a compelling state interest sufficient to justify infringement of individual privacy rights.
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