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# OFF CAMPUS: SCHOOL BOARD CONTROL OVER TEACHER CONDUCT

## I. INTRODUCTION

In the 1998 session of the Oklahoma Legislature, a “law breaker data” bill was introduced in the form of Senate Bill 1416.<sup>1</sup> This bill was a direct response to a series of articles in the *Tulsa World* detailing a number of cases in which felons currently employed by Oklahoma public schools were uncovered.<sup>2</sup> The proposed bill required the District Attorney's office to notify a school district of an employee's arrest.<sup>3</sup> Despite the bill's failure to pass,<sup>4</sup> the media spotlight on the issue spurred many districts to implement new employment procedures requiring school employees to notify the district upon being arrested.<sup>5</sup> The possibility of Senate Bill 1416's passage in the 1999 legislature,<sup>6</sup> combined with numerous districts creating new guidelines that could result in adverse employment decisions based on arrests, requires a full exploration of a school district's powers, responsibilities and duties regarding employees' lives outside the workplace.

Opinions regarding the effect the bill might have upon schools vary widely. Some parties have expressed concern that the bill “prematurely labels” school employees who are arrested.<sup>7</sup> In order to prevent abuse in the form of arbitrary dismissals, there must be a clear and definite understanding of exactly what types of behaviors are relevant to school employers when making personnel decisions. The

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1. See S.B. 1416, 46<sup>th</sup> Leg., 2nd Reg. Sess. (Okla. 1998).

2. See Ginnie Netherton et al., *Bad Apples: School Safeguards Put to Test.*, TULSA WORLD, Jan. 25, 1998, at 10 (discussing loopholes in Oklahoma State Bureau of Investigation background checks performed on teacher applications); David Fallis et al., *Bad Apples: Charges Bring Silence: "I Didn't Tell Anybody."*, TULSA WORLD, Jan. 26, 1998, at 11 (discussing school employees' failure to inform districts of arrests, possibly due to the advice of the Oklahoma Educational Association); David Fallis et al., *Bad Apples: Don't Ask, Don't Tell School Employees Remain Silent*, TULSA WORLD, Jan. 26, 1998, at 1 (reporting that “[Tulsa] Area districts were in the dark about the majority of more than 200 arrests and subsequent court actions of school employees in the past two years.”).

3. See Ginnie Netherton & David Fallis, *Bad Apples: School Bill Adds DA Duties*, TULSA WORLD, Feb. 13, 1998, at 1.

4. See Scott Cooper, *Bad Apples: Clock Is Ticking For Law-breaker Data Bill*, TULSA WORLD, May 25, 1998, at 1.

5. See Derek Wilson, *Bad Apples: School Board Approves New Measures to Check for Crooks*, TULSA WORLD, Apr. 29, 1998, at 1 (discussing the Broken Arrow Public School District's new requirement that all BAPS employees complete an annual criminal background questionnaire, and a random ten percent of all employees undergo a criminal background check similar to the one conducted prior to employment).

6. See Cooper, *supra* note 4, at 1 (quoting Oklahoma State Representative Scott Adkins: “I plan to put together an interim study during the break ... We can possibly bring something up early next session.”).

7. Scott Cooper, *Bad Apples: Bill May Not Make the Grade*, TULSA WORLD, May 3, 1998, at 17 (discussing the Oklahoma Education Association's opposition); See also David Fallis et al., *Where Do We Go From Here? School Districts Have Ideas, but Bottom Line is Funding*, TULSA WORLD, Jan. 27, 1998, at 1.; Ginnie Netherton et al., *School District to Bolster Background Checks*, TULSA WORLD, Feb. 1, 1998, at 1 (discussing opposition from President of Tulsa Classroom Teachers Association, Beth Gooch. Gooch claims there “doesn't seem to be a “problem,” there is no need to reform the law and the constant red tape would take away resources for the children.”).

danger of wrongful termination exists for all teachers whose conduct may be viewed with disfavor by school boards, not just those arrested for potential criminal violations. This article will not explore the merits of the proposed legislation itself; but rather, the extent and limitations of a school board's authority upon learning of questionable conduct committed outside school hours and the impact the exercise of these powers have upon the field of education as a whole.

## II. TEACHERS AS ROLE MODELS

The question "Who shall teach our children" has been asked "from the trial of Socrates for corrupting the youth of ancient Athens to today."<sup>8</sup> The destiny of a nation may depend on the answer. American society places great importance in an individual's character.<sup>9</sup> During the 1990's, the political class expended tremendous energy arguing the importance of presidential character. Robert Wilson published a collection of essays regarding twentieth century presidents entitled Character Above All.<sup>10</sup> Many commentators muse on whether the president should be considered a role model to the children of America.<sup>11</sup> Others concern themselves more with the example set by sports heroes, entertainment figures and prominent musicians.<sup>12</sup>

While reasonable people may disagree on the influence such national figures possess upon the character development of America's youth, little disagreement exists regarding the influence of individuals, such as teachers, who come into daily contact with young people. The conduct of teachers has long been a matter of public concern.<sup>13</sup> The importance of a teacher's ability to convey an academic curriculum to students is obvious. Less obvious, perhaps, is a teacher's influence through *conduct*, both in and out of the classroom. A duality exists in the role of a teacher with regards to his relationship with students. Teachers "are in a position of special public trust."<sup>14</sup> They cannot expect to simply present academic lessons to students while ignoring the "moral" lessons they present. Part of a teacher's responsibility is to model behavior, not just to impart wisdom.<sup>15</sup> "There is considerable agreement between teachers and parents that teachers serve as role models in the classroom."<sup>16</sup> In Justice Powell's opinion:

A teacher serves as a role model for his students, exerting a subtle but important

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8. Todd A. DeMitchell, *Private Lives: Community Control v. Professional Autonomy*, 78 EDUC. L. REP. 187.

9. See David McCullough, TRUMAN (1992).

10. See Robert Wilson, CHARACTER ABOVE ALL (1997).

11. See Marc Silver & Anna Mulrine, *How to Talk to Your Kids about Clinton and You Know What*, U.S. NEWS AND WORLD REPORT, Sept. 21, 1998, at 24.

12. See David Gelman ET AL., *I'm Not a Role Model*, NEWSWEEK, June 28, 1993, at 56.

13. DeMitchell, *supra* note 8, at 187.

14. Dupree v. School Committee of Boston, 15 Mass.App. 535, 446 N.E. 2d 1099(1983).

15. Mary Jane Smetanka, *Teachers Justly Face High Standards, Experts Say*, MPLS.-ST. PAUL STARTRIBUNE, Mar. 15, 1998 at 17A.

16. Clifford P. Hooker, *Terminating Teachers and Revoking Their Licensure For Conduct Beyond the Schoolhouse Gate*, 96 EDUC. L. REP. 1 (1995).

influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.<sup>17</sup>

However, the question is then raised as to what role a teacher fills outside the classroom. Does a teacher sacrifice his private life outside the "schoolhouse gate?"<sup>18</sup> As late as the 1960's, many teachers hesitated before having a drink in a bar. Female teachers vanished from the classroom the moment a pregnancy was evident.<sup>19</sup> This may no longer be the case, but the question remains: what types of controls can parents, principals, and school boards expect to exert over the lives of teachers outside their employment?

### III. AN ANALYSIS OF SCHOOL BOARD AUTHORITY

#### A. *The History*

In the early nineteenth century, education emerged from dependence upon family members, the church or some sort of apprenticeship into "more public, official arrangements."<sup>20</sup> Before 1815, a comprehensive school system could be found nowhere in America.<sup>21</sup> Around 1815, in New York and other urban regions, "public" systems began in the form of "charity schools for the poor."<sup>22</sup> Outside of the cities, however, conditions were different. Rural schools were under the control of the local communities with little, if any, support from local taxes.<sup>23</sup> Instead of taxes on the community at large, parents were assessed an amount based upon how many of their children were enrolled in school.<sup>24</sup> Most districts did not have a "schoolhouse" and few paid salaries adequate to bring quality individuals to the profession.<sup>25</sup> Furthermore, most teachers had no sense that they might belong to a professional community.<sup>26</sup> Under these conditions, no movement could exist to advocate for the rights of teachers as a class of individuals. There were no professional organizations or unions to counterbalance the power of the local community over the personal lives of the local school teachers.

The practice of local families taking turns boarding teachers in their homes

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17. *Ambach v. Norwick*, 441 U.S. 68, 77(1979), *quoted in* Hooker, *supra* note 16, at 3.

18. *Id.* at 1.

19. *See* Smetanka, *supra* note 15, at 17A.

20. JAMES MACGREGOR BURNS, *THE VINEYARD OF LIBERTY* 504 (1983).

21. *See id.*

22. *Id.*

23. *See id.*

24. *See id.*

25. *Id.* "As one school board member wrote in 1847 of a teacher: 'he thinks of turning peddler, or of working at shoemaking. But the one will expose him to storms, the other he fears will injure his chest. ...He will nevertheless teach school for a meagre [sic] compensation.'"

26. *See* DeMitchell, *supra* note 8, at 193.

allowed the community to monitor the private life of the teachers.<sup>27</sup> "Because of a teacher's close relationship with children, teachers were considered mandatory role models .... Parents who smoked, drank, gambled, lied, and committed adultery demanded a teacher's conduct be above their own."<sup>28</sup> Indeed, despite the overall lack of direct training<sup>29</sup> for teachers in the classroom, "evidence abounds that townspeople kept a vigilant eye on the out-of-class behavior of educators, and that the moral 'lapses' resulted in firings more often than did incompetence in the classroom."<sup>30</sup>

Today, the teaching profession is quite different. The community can no longer expect to be the sole source of control over local schools.<sup>31</sup> An increasing professionalism in the teaching community has led to more bureaucratization in schools and less direct control from the community.<sup>32</sup> Furthermore, the United States began to place more importance upon individual rights and freedoms. All Americans, teachers included, began to expect greater latitude in their freedoms of both action and speech.<sup>33</sup> Teachers began to assert that their personal actions off school grounds were their private business, and not their employer's concern.<sup>34</sup> At the same time, administrators continued to claim that teachers serve as role models for their students and must conform to local community mores.<sup>35</sup>

### B. Modern Case Law

In most states today, statutes grant school boards the authority to dismiss teachers for causes unrelated to performance in the classroom.<sup>36</sup> Such statutes often list immorality, conduct unbecoming a teacher, moral turpitude, and felony convictions as disqualifying an individual from careers in the classroom.<sup>37</sup> Violating these statutes may result not only in dismissal but also in revocation of professional teaching licenses.<sup>38</sup> The relevant Oklahoma statute reads:

Grounds for dismissal or nonreemployment:

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27. See *id.* at 190.

28. *Id.*

29. BURNS, *supra* note 20, at 504 (discussing the inadequacy of teacher education and performance in the nineteenth century).

30. David B. Tyack & Elisabeth Hansot, *MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820-1980* (1982), *quoted in* DeMitchell, *supra* note 8 at 190.

31. See *id.* at 193.

32. See *id.*

33. See *id.*

34. LOUIS FISCHER ET AL., *TEACHERS AND THE LAW* 335 (1991) (discussing the tensions between teacher freedom and community control).

35. See *id.*

36. See Bruce Beezer, *Teacher Dismissal: Indictment or Conviction for Nonsexual-Related Behavior*, 58 EDUC. L. REP. 1085 (listing as examples FL. STAT. ANN. § 231.28 (West 1989); GA. CODE ANN. § 20-2-940 (1987); MINN. STAT. ANN. § 125.129(6) (West Supp. 1989); N.C. GEN. STAT. § 115C-325 (1987); and W. VA. CODE § 18A-2-8 (1988)).

37. See *id.*; See also OKLA. STAT. ANN. tit. 70, §6-101.22 (West 1997).

38. See Jeanne La Borde Scholz, Comment, *Out of the Closet, Out of a Job: Due Process in Teacher Disqualification*, 6 HASTINGS CONST. L.Q. 637, 691-92 (1979).

A. Subject to the provisions of the Teacher Due Process Act of 1990, a career teacher may be dismissed or not reemployed for:

- 1) Willful neglect of duty;
- 2) Repeated negligence in performance of duty;
- 3) Mental or physical abuse to a child;
- 4) Incompetency;
- 5) Instructional ineffectiveness;
- 6) Unsatisfactory teaching performance; or
- 7) Any reason involving moral turpitude.<sup>39</sup>

Two constitutional issues are raised by such statutes: property rights and privacy rights. The Fifth and Fourteenth Amendments require that no person be deprived of "life, liberty, or property, without due process of law."<sup>40</sup> The definition of property is no longer limited to the classical definition of real and personal property.<sup>41</sup> The term "Property" now encompasses licenses and public employment.<sup>42</sup> While professional licenses and public employment may be characterized as mere "privileges," they are in fact protected by the Fifth and Fourteenth Amendments.<sup>43</sup> In *Board of Regents v. Roth*,<sup>44</sup> a teacher had a one year non-tenured contract.<sup>45</sup> His contract was not renewed.<sup>46</sup> He claimed the reason for his non-renewal was his criticism of university administration.<sup>47</sup> The court held that while the Fourteenth Amendment does not generally protect a non-tenured teacher,<sup>48</sup> Roth would have had a claim if he had succeeded in demonstrating that the school had deprived him of a liberty or property interest.<sup>49</sup> The Court explained its meaning of liberty as:

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 useful knowledge, to marry, establish a home, bring up children, to worship God according to the dictates of his own conscience, and generally to

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39. OKLA. STAT. ANN. tit. 70, § 6-101.22 (West 1997).

40. U.S. Const. amend. V; amend. XIV §1.

41. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.5 at 537 (5<sup>th</sup> ed.1995) (discussing the end of the right-privilege distinction in property law and the requirement that due process protect even mere 'privileges').

42. See *id.*

43. See *id.*

44. Board of Regents v. Roth, 408 U.S. 564, 566 (1972).

45. See *id.*

46. See *id.*

47. See *id.* at 568.

48. See *id.* at 578.

49. Board of Regents v. Roth, 408 U.S. at 572-578.

enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men<sup>50</sup>

The Court ultimately found Roth did not meet the standard of having either a liberty or property interest violated. However, in a case decided the same day as *Roth*, an educator did meet the standard.

The facts of *Perry v. Sindermann*<sup>51</sup> were nearly identical to *Roth*. Again, the teacher claimed his criticisms of the administration led to the non-renewal of his contract. Here, however, the teacher was employed by four one-year contracts.<sup>52</sup> The court found Perry to have a property interest in continued employment due to the school's de facto tenure program.<sup>53</sup> *Roth* and *Sindermann* demonstrate that teachers can, and often do, have a property interest in their jobs; consequently these jobs may not be taken away without due process. However, noted constitutional scholar, Professor Rotunda stresses that even those employees who lack entitlement to continued employment cannot be discharged for reasons which in themselves violate the Constitution.<sup>54</sup>

A recurring controversy involving statutes citing immorality or moral turpitude as cause for dismissal of teachers is "the right to privacy."<sup>55</sup> The Constitution makes no direct reference to the existence of a right to privacy. However, the Supreme Court has declared privacy to not only be implicit in the Constitution but a "fundamental" right.<sup>56</sup> Commentators generally credit Samuel Warren and Louis Brandeis as the first to vocalize the existence of a right to privacy.<sup>57</sup> This right has evolved over the course of the twentieth century through a series of Supreme Court decisions.<sup>58</sup> However, the scope and limits of the "newly evolving constitutional right to privacy" are unclear.<sup>59</sup>

50. *Id.* at 572.

51. *Perry v. Sindermann*, 408 U.S. 593 (1972).

52. *See id.* at 595.

53. *See id.*

54. *See* Rotunda, *supra* note 41, § 13.5, at 543 ("It should be noted in closing that even those employees who lack any entitlement to continued employment cannot be discharged for reasons which in themselves violate the Constitution").

55. *See generally* Donald M. Sacken, *The Limits to a Teacher's Privacy Rights: Ponton v. Newport News School Board*, 42 EDUC L. REP. 19 (1988).

56. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("For also fundamental is the right to be free ... from unwanted governmental intrusion's into one's privacy.").

57. Rotunda, *supra* note 41, § 14.26, at 796 (explaining Brandeis's role: "This general constitutional right to privacy may have had its inception in an article written in 1890 by Samuel Warren and Lois Brandeis. The article attacked intrusions by newspapers into the private affairs of individuals and advocated the protection of the "inviolate personality" of each person. In contemporary terms Warren and Brandeis were advocating protection, under the law of torts, for dissemination or use of facts relating to an individual's private life. They did not consider the problem of government intrusion into the "inviolate personality" of each individual, but they did help to establish recognition in American legal thought that each person had a cognizable legal interest in a private life, both physical and emotional. Later, as a Justice of the Supreme Court, Brandeis would advocate a wide reading of the Fourth Amendment in order to insure that government did not intrude into the "privacy of the individual." While Justice Brandeis did not foresee the issue of government restrictions or decision-making in private matters, he laid the basis for the modern right to protection of one's private life from government intrusion or "the right to be left alone - the most comprehensive of rights and the right most valued by civilized man.").

58. *See generally id.* at 795.

59. *Sullivan v. Meade Indep. Sch. Dist.*, 530 F.2d 799 (8th Cir. 1976), *quoted in* FISCHER ET AL., *supra* note 34, at 253.

While most state statutes state that teachers may be dismissed for immorality or moral turpitude,<sup>60</sup> modern courts refuse to allow arbitrary termination upon an accusation of immorality. Courts recognize that 'immorality' is not precisely defined.<sup>61</sup> It is a word with differing meanings from community to community and time to time. For example, while one court may find adultery insufficient to make one unfit to teach,<sup>62</sup> another court might declare "shaking dice and showing customers how to operate a pinball machine"<sup>63</sup> sufficient to remove a teacher from the profession.<sup>64</sup> Clearly these vague terms are subject to shifting social attitudes.<sup>65</sup> One Florida Court defined immorality as "conduct that is inconsistent with the standards of public conscience and good morals."<sup>66</sup> It is not confined to sexual matters but could also encompass corruption,<sup>67</sup> drug use,<sup>68</sup> abusive language,<sup>69</sup> lying<sup>70</sup> and a number of other issues.

#### IV. GUIDELINES FOR ESTABLISHING THE NEXUS

Due to the vague nature of terms such as immorality and moral turpitude, courts began to develop guidelines to protect teachers from arbitrary dismissals. The leading case in this area is *Morrison v. State Board of Education*<sup>71</sup> Marc Morrison engaged in a limited, non criminal physical relationship described as a homosexual relationship with another teacher.<sup>72</sup> Morrison had never been accused or convicted of any criminal activity.<sup>73</sup> The relationship lasted around one week.<sup>74</sup> Approximately one year later, the other teacher informed the school district of the relationship.<sup>75</sup> Months

60. See Beezer, *supra* note 36, at 1085.

61. M. Chester Nolte, *Establishing the Nexus: A School Board Primer*, 38 EDUC. L. REP. 1, 3 (1987)(discussing the hurdles involved in considering legal action against teachers accused of committing immoral acts).

62. Erb v. Iowa State Board of Public Instruction, 216 N.W.2d 339 (Iowa 1974), *cited in* Nolte, *supra* note 61, at 3. ("witnesses for the teacher ... testified that the community had forgiven the teacher and that he still maintained the respect of the community").

63. Horosko v. Mt. Pleasant Township School District, 4 A.2d 601 (Pa. 1939) *cited in* Nolte, *supra* note 61, at 3.

64. *Id.*

65. See Fiscus v. Bd. of Sch. Trustees, 509 N.E. 2d 1137 (Ind. Ct. App. 1987).

66. Clark v Sch. Bd. of Lake County, 596 So.2d 735, 738 (Fla. Dist. Ct. App. 1992) ("It is conduct sufficiently notorious to bring the individual concerned or the education profession in to public disgrace or disrespect and impair the individual's service in the community").

67. See Kenai Peninsula Borough Bd. of Educ. v Brown, 691 P.2d 1034 (Alaska 1984) (describing a teacher who diverted power from the electric company to his home as having committed an immoral act).

68. See Chicago Bd. of Educ. v Payne, 430 N.E.2d 310 (Ill. App. Ct. 1981) (school officials discovered teacher's drug use through newspaper report).

69. See Ware v. Morgan County Sch. District, 748 P.2d 1295 (Colo. 1988), *discussed in* Fischer ET AL., *supra* note 34, at 242.

70. Bd. of Educ. of Laurel County v. McCollum, 721 SW.2d 703 (Ky. 1986) (discussing a teacher lying about his use of sick leave) *construed in* Fischer ET AL., *supra* note 34, at 246. But see Fontana Unified School District v. Burman, 753 P.2d 689 (Cal. 1988) (noting that teacher's "previously unblemished record" made dismissal an excessive punishment) *quoted in* Fischer ET AL., *supra* note 34, at 246.

71. Morrison v. State Bd. of Educ., 461 P.2d 375, (Cal.1969).

72. See *id.* at 377-78.

73. See *id.* at 378.

74. See *id.* at 377.

75. See *id.* at 378.



later, the board held a hearing and revoked Morrison's teaching license.<sup>76</sup> The board argued that the incident constituted immoral and unprofessional conduct, and an act involving moral turpitude, warranting revocation of a teaching certificate.<sup>77</sup> The court determined that these terms needed more precise definition and should not be interpreted broadly.<sup>78</sup> The court cautions against broad interpretations that could lead to discipline for every teacher in the state.<sup>79</sup>

Rather than allow dangerously loose interpretations, the court formulated a set of factors which must be considered in determining if a teacher's alleged wrongdoing constituted grounds for dismissal:

- 1) The likelihood that conduct may have adversely affected students or fellow teachers;
- 2) The degree of such adversity anticipated;
- 3) The proximity or remoteness in time of the conduct;
- 4) The type of teaching certificate held by the party involved;
- 5) The extenuating or aggravating circumstances, if any, surrounding the conduct,
- 6) The praiseworthiness or blameworthiness of the motives resulting in the conduct,
- 7) The likelihood of the recurrence of the questioned conduct, and
- 8) 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.<sup>80</sup>

The California Supreme Court found no evidence presented by the school board that Morrison's conduct had any effect on his performance in the classroom.<sup>81</sup> The board failed to show, by utilizing the above factors, that there was a proper "nexus" between the teacher's impact on the students and the educational environment.<sup>82</sup> In this context, a "nexus" is a "connecting link" between the employee's act and that

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76. *See id.*

77. *Morrison v. State Bd. of Educ.*, 461 P.2d 375, (Cal. 1969).

78. *See id.* at 381-82.

79. *See id.* at 382-83 ("Without such a reasonable interpretation the terms would be susceptible to so broad an application as possibly to subject discipline virtually every teacher in the state. In the opinion of many people laziness, gluttony, vanity, selfishness, avarice, and cowardice constitute immoral conduct")

80. *Id.* at 386.

81. *See id.*

82. *Id.* at 392. ("This lack of evidence is particularly significant because the board failed to show that petitioner's conduct in any manner affected his performance as a teacher. There was not the slightest suggestion that petitioner had ever attempted, sought, or even considered any form of physical or otherwise improper relationship with any student... There is no reason to believe that the ... incident affected petitioner's apparently satisfactory relationship with his coworkers.").

teacher's ability to perform the job assigned to him/her by the board of education.<sup>83</sup>

## V. APPLICATION OF THE NEXUS

The *Morrison* case began a dramatic shift in teacher dismissal cases. No longer could a teacher be summarily dismissed simply for engaging in behavior considered by the community to be immoral.<sup>84</sup> After *Morrison*, courts required a demonstration that the conduct was somehow related to classroom performance.<sup>85</sup> School boards now possessed the burden of demonstrating a "rational nexus" between the conduct and the duties of a teacher.<sup>86</sup> Teachers could expect at least a portion of their lives to remain private without fear that every action could potentially have serious ramifications on their continued employment in the public schools.

The requirement of a "nexus" between conduct and a teacher's performance also prevents "the exercise of personal moral judgments by board members"<sup>87</sup> from leading to arbitrary terminations.<sup>88</sup> However, there are cases where the reaction of the community was sufficient to lead to dismissal despite the failure to demonstrate unfitness.<sup>89</sup> For example, a teacher who has a sex change operation may be dismissed, not because of an inability to teach, but because of the effect of the sex - change on the students.<sup>90</sup> The same logic can be found in some cases where an individual's homosexuality became well publicized.<sup>91</sup>

Two factors which sometimes arise in these types of cases are the amount of publicity received and the constitutional implications. Obviously, a large amount of media attention alerting the public to the existence of "immoral" conduct may diminish the effectiveness of a teacher in the classroom. If a teacher's "conduct has become the subject of such public notoriety as significantly and reasonably to impair the capability of the particular teacher to discharge the responsibilities of his position, *dismissal* may be justified."<sup>92</sup> However, where the crime is "at a time and place separate from employment, the Board must demonstrate a 'rational nexus' between the conduct performed outside the job and the duties the employee is to perform."<sup>93</sup> In fact, in at least one state, this requirement is mandated by statute.<sup>94</sup>

What if the conduct is "unduly publicized?"<sup>95</sup> The majority rule seems to be

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83. Nolte, *supra* note 61, at 5 (discussing the various meanings of "nexus" as defined by both dictionaries and courts).

84. Fischer et al., *supra* note 34, at 236.

85. *See id.*

86. Nolte, *supra* note 61, at 8.

87. *See* Weissman v. Bd. of Educ., 547 P.2d 1267, 1273 (Colo. 1976).

88. *Id.*

89. *See* In re Grossman, 316 A.2d 39 (N.J. Super. Ct. App. Div. 1974) (discussing the dismissal of a teacher who had a sex change operation).

90. *Id.* at 42.

91. *See, e.g.* Gaylord v. Tacoma Sch. District, 559 P.2d 1340 (Wash. 2d 1977) (citing fear, confusion, suspicion, and parental concern as justification of dismissal).

92. Jerry v. Bd. of Educ., 324 N.E.2d 106, 111 (N.Y. 1974).

93. Golden v. Bd. of Educ., 285 S.E.2d 665, 668 (W. Va. 1981).

94. *See* Matter of Shelton, 408 N.W.2d 594 (Minn. Ct. App. 1987).

95. *See* Nolte, *supra* note 61, at 8.

that if the school board is responsible, even unintentionally, for "undue notoriety" then the teacher will usually be reinstated.<sup>96</sup> In one case, even when the facts revealed an indirect impact on a teacher's effectiveness, the fact that the board was partially responsible for the teacher's notoriety led to the teacher's reinstatement.<sup>97</sup> However, this rule will presumably only apply when there is no demonstration of an adverse impact on classroom performance other than that created by the publicity.<sup>98</sup> School boards "cannot infer wrongdoing, [they] must prove wrongdoing before a teacher must be dismissed."<sup>99</sup> The fact that a teacher becomes the focus of a well publicized community controversy does not mean that the teacher may automatically be dismissed without a showing of harm to the effectiveness of the teacher in the classroom.<sup>100</sup>

## VI. SCENARIOS

### A. Divorce

Constitutional protections for conduct also must be considered.<sup>101</sup> Clearly the Bill of Rights and the privacy doctrine protect fundamental freedoms from abridgment by school boards,<sup>102</sup> although these rights are not absolute.<sup>103</sup> In *Littlejohn v. Rose*,<sup>104</sup> the court disagreed with parents who wanted a teacher dismissed because she was undergoing a divorce. The parents asserted that there were already too many divorced teachers teaching in the school. The court cited the "constitutional right to privacy"<sup>105</sup> which includes "matters relating to marriage and family relationships"<sup>106</sup> in forbidding the dismissal of the teacher for making a "constitutionally protected decision to seek divorce."<sup>107</sup>

### B. Pregnancy

Pregnancy cases also raise constitutional concerns. In *Ponton v. Newport News Schools*,<sup>108</sup> an unmarried pregnant teacher was offered a 'parental leave' with no

96. *See id.* ("The general rule is that undue notoriety accompanying the case, especially if the notoriety is board-induced, provides the grounds for recovery by the employee.")

97. *See* *Jefferson Union High Sch. District v. Jones*, 23 Cal. App.3d 94 (1972), *quoted in* *Nolte supra* note 61, at 8.

98. *See* *Rogliano v. Fayette Bd. of Educ.*, 347 S.E.2d 220 (W.Va. 1986), *discussed in* *Nolte, supra* note 61, at 8.

99. *DeMitchell, supra* note 8, at 195.

100. *Id.*

101. *See* *Nolte, supra* note 61, at 8.

102. *See id.* (discussing the Bill of Rights).

103. *Connick v. Myers*, 461 U.S. 138. ("speech critical of the public employee's employer is protected under the First Amendment only if it is related to a matter of public concern"), *quoted in* *Nolte supra* note 61, at 8.

104. *See* *Littlejohn v. Rose*, 768 F.2d 765 (6<sup>th</sup> Cir.1985).

105. *Id.* at 768.

106. *Id.*

107. *Id.* at 768, 771.

108. *Ponton v. Newport News School Bd.*, 632 F. Supp. 1056 (E.D. Va. 1986), *discussed in* *Sacken, supra* note 55, at 20.

guarantee that she would get her old position back.<sup>109</sup> The judge claimed “it is clear that the right to bear a child out of wedlock is [constitutionally protected]”<sup>110</sup> and that Ponton’s right to privacy outweighed the school’s interest in a coerced leave of absence.<sup>111</sup>

There is a wide spectrum of behavior by teachers in and out of the classroom which might raise the eyebrow of the reasonable person in the community. Some areas of inappropriate behavior have usually been found sufficient to meet the needed “nexus” to warrant dismissal, others have not.

### C. Sexual Activity

The most likely fact pattern to meet the “nexus” requirement would be immorality involving students. While many courts may find the connection between sexual behavior with other adults and classroom performance to be too tenuous, most courts are very strict when it comes to the area of sexual relations with students. If sexual relations are non-consensual, grounds for dismissal clearly exist.<sup>112</sup> Even if the relationship was volitional on the part of the student, dismissal or discipline is usually justified. For example, in *Denton v. South Kitsap School District*,<sup>113</sup> a teacher was dismissed on the grounds that teacher - student relationships in a school district were severely impacted when the teacher, even with parental permission, dated a student who later became pregnant.<sup>114</sup> Denton’s protestations that the girl was not a student at his school were not persuasive to the court.<sup>115</sup> Another teacher was released after he began a love affair with a student during the last semester of her senior year which lasted until well after she graduated.<sup>116</sup> In response to a teacher who argued his defense on the grounds that his out- of- school behavior was his business alone, a California court responded “the integrity of the educational system under which teachers wield considerable power ... is clearly threatened when teachers become involved in relationships with students.”<sup>117</sup> Relationships between teachers and students are to be judged with “special scrutiny.”<sup>118</sup> Educators “occupy an important place and may be dismissed for ‘exploiting students for his private advantage.’”<sup>119</sup>

Sexual relationships of a teacher with another adult present more difficulties for courts than teacher/student relationships. For example, jurisdictions are split as to

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109. See *Ponton* at 1056.

110. *Id.* at 1061.

111. *Id.* at 1062.

112. See *Ulrich v. Sate*, 555 N.E.2d 172 (Ind. Ct. App. 1990) ( discussing the revocation of a teacher certificate for raping a student); *Strain v. Rapid City Sch. Bd.*, 447 N.W.2d. 332 (S.D. 1989) (teacher dismissed for forcible intercourse).

113. *Denton v. South Kitsap Sch. District*, 516 P.2d 1080 (Wash. 1973).

114. See *id.* at 1081.

115. See *id.* at 1082.

116. See *Sertick v. Sch. District of Pittsburgh*, 584 A.2d 390 (Pa. Commw. Ct. 1990).

117. See *Bd. of Trustees of Compton Junior College District v. Stubblefield*, 94 Cal. Rptr. 318, 323 (Ct. App. 1971) discussed in *FISCHER ET AL.*, *supra* note 34, at 239.

118. *Korf v. Ball State Univ.*, 726 F.2d 1222, 1227 (7th Cir. 1984).

119. *Id.*

whether a teacher cohabitating with a member of the opposite sex while remaining unmarried may be dismissed.<sup>120</sup> It appears that the particular circumstances involved may be more determinative in the outcome of a suit than any broad general legal principle. In *Sullivan v. Meade Independent School District*,<sup>121</sup> the teacher cohabited with a male friend in a small town.<sup>122</sup> Sullivan was fired for violating the social mores of the community.<sup>123</sup> The court upheld her dismissal by stating that even if the right to privacy was relevant, the court still needed "to balance the privacy interest against the legitimate interest of the board in promoting the education of its students."<sup>124</sup> In *Sherburne v. School Board Of Suwanee County*,<sup>125</sup> the facts were similar except the community was larger.<sup>126</sup> The court found that Scherburne's failure to "conform to the moral standards"<sup>127</sup> of the community was irrelevant unless there was evidence that the cohabitation in fact had an adverse effect on her ability to teach.<sup>128</sup> Unlike *Sullivan*, the living arrangements were not known to the public until the board publicized them.<sup>129</sup> A comparison of the two cases suggests that a school board may indeed be able to exert some degree of control over the living arrangements of individuals in smaller communities where there is less likelihood of privacy in the first place. In larger communities, the chances of a court finding a 'nexus' between the living arrangements of a teacher and their ability to perform well in the classroom are lessened.

Cases concerning homosexual behavior are even more diverse. The Supreme Court has upheld the validity of state anti-sodomy statutes.<sup>130</sup> This makes the issue of homosexual teachers problematic. If sodomy is illegal, opponents of homosexuality can point to antisodomy statutes as evidence per se of moral turpitude or immorality.<sup>131</sup> However, the majority view seems to be homosexuality alone will not justify dismissal or discipline.<sup>132</sup> In *Board of Education v Jack M.*,<sup>133</sup> a teacher was accused of public solicitation in a public restroom.<sup>134</sup> The court stressed that the students were unaware of the incident and therefore could not imitate the behavior: "the fear that students will emulate illegal or immoral conduct of their teachers becomes realistic only when students know or are likely to know of it."<sup>135</sup>

120. See *Sullivan v. Meade Ind. Sch. Dist.*, 530 F.2d 799 (8th Cir. 1976), discussed in FISCHER ET AL., *supra* note 34, at 253, *But see* *Sherburne v. Sch. Bd. of Suwanee County*, 455 So. 2d 1057 (Fla. Dist. Ct. App. 1984) discussed in FISCHER ET AL., *supra* note 34, at 253.

121. *Sullivan v. Meade Indep. Sch. Dist.*, 530 F.2d 799 (8<sup>th</sup> Cir. 1976)

122. *See id.*

123. *See id.*

124. *Id.*

125. *Sherburne v. Sch. Bd. Of Suwanee County*, 455 So. 2d 1057 (Fla. Dist. Ct. App. 1984).

126. *Id.*

127. *Id.*

128. *See id.*

129. *See id.*

130. See *Bowers v. Hardwick*, 478 U. S. 186 (1986), *rehearing denied* 478 U. S. 1039 (1986) (5-4 decision upholding Georgia criminal statute prohibiting sodomy).

131. See Walden & Culverhouse, *Homosexuality and Public Education*, 55 EDUC. L. REP. 7 (1989).

132. See *Bd. Of Educ. v. Jack M.*, 566 P.2d 602 (Cal. 1977) (homosexual conduct not sufficient to justify dismissal).

133. *Id.*

134. *See id.*

135. *Id.*

However, as mentioned above, a teacher's homosexuality may become so publicized and so notorious that a court may conclude the teacher is no longer capable of performing his or her duties.<sup>136</sup> In *Ross v Springfield*,<sup>137</sup> a police officer observed a teacher engaging in homosexual behavior in the back of an adult bookstore.<sup>138</sup> The court found sexual activity in a public place to be immoral.<sup>139</sup> The combination of the immoral behavior and resulting public notoriety led the court to decide the teacher could not continue in his position.<sup>140</sup> Some commentators have stressed that homosexual conduct alone can be of such a nature as to jeopardize a teacher's job as well.<sup>141</sup>

#### D. Miscellaneous

Sexual misconduct off school grounds is not the only area in which teachers have been found guilty of immoral conduct or moral turpitude. Criminal activity also constitutes a large portion of teacher dismissal cases. Crimes involving dishonesty, drugs and immoral conduct are among the most common types of fact patterns involving teachers and violations of state and federal statutes. Dishonesty involves a lack of integrity, lying, cheating, deceiving, a lack of fairness and straightforwardness or a disposition to defraud.<sup>142</sup> Some cases of dishonesty as grounds for dismissal arise out of attempts to cover up other wrongdoing.<sup>143</sup>

Felony convictions often result in the dismissal of teachers. Most of the time, these convictions will be upheld.<sup>144</sup> However, once again, this is not a universal rule; all factors must be considered. In Delaware, a court upheld a teacher's dismissal after he pled guilty to theft and aggravated assault with a gun.<sup>145</sup> The teacher had no prior history of criminal behavior and was unlikely to ever perform an act like this again.<sup>146</sup>

Nevertheless, the court concluded that the massive amount of press given his case would undoubtedly affect his teaching ability.<sup>147</sup> Furthermore, his crime was very serious and "unquestionably immoral."<sup>148</sup>

In *Hoagland v. Mt Vernon School District*,<sup>149</sup> the court reasoned that not all felonies necessarily involve immoral behavior.<sup>150</sup> In that case, a teacher was

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136. See Gaylord, *supra* note 91.

137. See *Ross v. Springfield*, 691 P.2d 509 (Ore. App. 1984).

138. See *id.*

139. See *id.*

140. See *id.*

141. See Walden, *supra* note 31, at 19.

142. BLACK'S LAW DICTIONARY 468 (6<sup>th</sup> ed. 1990).

143. See *Golden v. Board of Educ.*, 285 S.E.2d 665 (W. Va. 1982).

144. See FISCHER ET. AL., *supra* note 34, at 247.

145. See *Skripchuck v. Austin*, 379 A.2d 1142 (Del. 1977).

146. See *id.*

147. See *id.*

148. *Id.*

149. *Hoagland v. Mount Vernon Sch. District*, 623 P.2d 1156 (Wash. 1981)(grand larceny conviction not a per se ground for dismissal, without hearing and proof of its effect on teacher fitness). See also *Lindgren v. Bd. of Trustees*, 558 P.2d 468 (Mont. 1976) (Conviction of drunken driving, without a license held not a per se ground for dismissal as a matter of law).

150. See *id.*

convicted of buying a stolen motorcycle.<sup>151</sup> The court ruled that, unless a teacher's criminal conduct "materially and substantially"<sup>152</sup> affected classroom performance, a school board could not dismiss a teacher.<sup>153</sup> According to the court, "simply labeling an instructor as a convicted felon will not justify a discharge."<sup>154</sup>

Therefore, the fact that particular conduct is considered to be a crime does not per se constitute grounds for dismissal based on immorality. Nor is its classification as a felony or a misdemeanor always determinative.<sup>155</sup> Some misdemeanors have been grounds for discharge, on immorality grounds, while others have not.<sup>156</sup>

### *E. Drugs*

Drug possession, use, and sale by teachers also suggest possible immoral conduct. Case law varies greatly in this area. While drugs are a very serious issue, it appears that, if a minor offense gains little notoriety, dismissal may be considered too harsh a penalty. For example, in *Rogliano v. Fayette County Board Of Education*,<sup>157</sup> a teacher was arrested for misdemeanor possession of a small amount of marijuana.<sup>158</sup> The court found that his ability to function as a teacher was *not* impaired by his conduct.<sup>159</sup> In reaching this conclusion, the court considered factors such as his reputation as an above average teacher,<sup>160</sup> the fact that the misconduct occurred in private and did not involve students,<sup>161</sup> and the school board's contribution to his 'notoriety' by unnecessarily protracting the proceedings.<sup>162</sup>

In contrast, in *Jefferson Union High School v. Jones*,<sup>163</sup> authorities fined a teacher for possessing marijuana while on a trip to Hawaii.<sup>164</sup> School officials read about the incident in a San Francisco newspaper.<sup>165</sup> The court upheld the teacher's dismissal, finding "substantial evidence" indicating that he was unfit to teach.<sup>166</sup> Also contrasting with *Rogliano*, in *Ambus v. Granite Bd. of Educ.*,<sup>167</sup> the court found the immediate suspension of a teacher, without pay, to be justified due to his arrest for drug sales.<sup>168</sup>

Congress, as part of its efforts to curb unlawful drug use, enacted the Drug Free

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151. *See id.*

152. *Id.*

153. *See id.*

154. *See id.*

155. *Hoagland v. Mount Vernon Sch. Dist.*, 623 P.2d 1156 (Wash. 1981).

156. *See Turk v. Franklin Special Sch. Dist.*, 640 S.W.2d 218 (Tenn. 1982) (teacher with good long record, who was arrested for drunk driving, held not dischargeable for conduct unbecoming a teacher).

157. *Rogliano v. Fayette County Bd. of Educ.*, 347 S.E.2d 220 (W. Va. 1986).

158. *Id.*

159. *Id.*

160. *See id.*

161. *See id.*

162. *See id.*

163. *Jefferson Union High Sch. v. Jones*, 100 Cal. Rptr. 712 (Cal. App. 1971).

164. *See id.*

165. *See id.*

166. *See id.*

167. 975 F.2d 1555 (Utah Ct. App. 1992).

168. *See id.*

Workplace Act of 1988.<sup>169</sup> This statute requires all grantees receiving grants from any federal agency to take certain actions prescribed by the Act.<sup>170</sup> This legislation has aided schools in their efforts to discipline or dismiss employees for drug use. Administrators can point to the legislation and argue that their actions are supported by public policy. Administrators are aware that failing to make a good faith effort to comply may result in sanctions, including the suspension of grant payments.<sup>171</sup> However, despite the policy behind the act, the significant factors still seem to be the degree of notoriety achieved and the establishment of a nexus between an employee's conduct and his or her duties or responsibilities.<sup>172</sup>

#### F. Alcohol

In the area of alcohol use, the case law is split as well. In California, a teacher was denied a teaching certificate on the grounds that his six convictions involving alcohol use constituted immorality.<sup>173</sup> While no proof was presented to demonstrate his teaching was affected, the court ruled that his conduct was a poor example for students.<sup>174</sup> The judge stated "I don't know what better evidence there could be of immorality than a series of criminal convictions."<sup>175</sup>

169. Drug Free Workplace Act, Pub. L. No. 100-690, Title V, Subtitle D, 102 Stat. 4304 (1988).

170. See 34 C.F.R. Part 85, Appendix C (form of certification): a grantee states that it will provide a drug free workplace by:

- Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying actions that will be taken against employees for violation of the prohibition.
- Establishing a drug-free awareness program to inform employees about —
  - (1) The dangers of drug abuse in the workplace;
  - (2) The grantee's policy of maintaining a drug free workplace;
  - (3) Any available drug counseling, rehabilitation, and employee assistance programs; and
  - (4) The penalties that may be imposed upon employee's for drug use violations occurring in the workplace.
- Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the grantee's published employee's notice.
- Notifying employees that, as a condition of employment under a grant, the employee will —
  - (1) Abide by the terms of the statement; and
  - (2) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days under such conviction.
- Notifying the granting agency within ten days after receding notice of an employee's conviction under a criminal drug statute.
- Taking one of the following actions within thirty days of receiving notice of an employee's conviction under a criminal drug statute:
  - (1) Taking appropriate personnel action against the employee, up to and including termination; or
  - (2) Requiring the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved by that purpose by a federal, state, or local health, law enforcement, or other appropriate agency.
- Making a good faith effort to continue to maintain a drug free workplace through implementation of these requirements.

171. See 34 C.F.R. §85.620(a) (1999).

172. See *Chicago Bd. of Educ. v. Payne*, 430 N.E.2d 310 (Ill. App. 3d 1981) (affirming dismissal when newspaper article informed school board of teacher's guilty plea for possession of marijuana); *Rogliano v. Fayette County Bd. of Educ.*, 347 S.E.2d 220 (W.Va. 1986) (holding that nexus was not established when teacher arrested for marijuana possession and the charges were dismissed with little notoriety).

173. See *Watson v. State Bd. of Educ.*, 99 Cal. Rptr. 468 (Cal. App. 1971).

174. See *id.*

175. *Id.*



A Montana court reached the opposite result.<sup>176</sup> A teacher was dismissed after his third conviction for Driving under the Influence.<sup>177</sup> According to the court, "violations for driving under the influence of intoxicating liquor" are not automatically "tantamount to immorality."<sup>178</sup> The Montana court insisted that the nexus between job performance and the convictions be established.<sup>179</sup>

## VII. CURRENT OVERSIGHT OF TEACHERS IN OKLAHOMA

How do school administrators discover criminal activity committed by its employees? In Oklahoma, school districts are not required to conduct criminal background checks, but have the authority to do so.<sup>180</sup> Districts can request the Oklahoma State Bureau of Investigations (OSBI) to check out-of-state records, via the Federal Bureau of Investigations criminal database.<sup>181</sup> However, districts find the cost prohibitive because record searches cost fifty dollars each and take weeks to complete.<sup>182</sup> The standard OSBI checks, which cost only fifteen dollars, are often incomplete in that as many as eight to ten percent of arrests are omitted annually.<sup>183</sup> Also, some deferrals and expungements common in sex crimes are excluded by state law.<sup>184</sup> Illustrating the weaknesses of the system, a former teacher's assistant arrested on a complaint of second degree rape and convicted of contribution to the delinquency of a minor had no record of either on his OSBI background check.<sup>185</sup> Furthermore, because OSBI records do not encompass federal arrests and prosecutions, applicants often escape scrutiny for federal crimes.<sup>186</sup> As evidence of the weaknesses of the current system, the *Tulsa World* found "more than 200 public school employees -including administrators, teachers, assistants, and custodians - who have been jailed in Tulsa county since January 1, 1996."<sup>187</sup>

In addition to no requirement for pre-hiring criminal background checks, few school districts conduct post-employment checks.<sup>188</sup> However, in response to emphasis placed upon the issue by the *Tulsa World*, many schools began requiring

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176. *Lindgren v. Bd. of Trustees*, 558 P.2d 468 (Mont. 1976).

177. *Id.*

178. *Id.*

179. *See id.*

180. *See* OKLA. STAT. ANN. tit. 70, §5-412 (West 1997).

181. *See* Ginnie Netherton & Scott Cooper, *Where Do We Go From Here? School Districts Have Ideas, But the Bottom Line is Funding*, TULSA WORLD, Jan. 27, 1998 at 1.

182. *See id.*

183. *See* Ginnie Netherton & David Fallis, *OSBI Records Contain Loopholes: Omissions in Records Sometimes Allow Felons Into Classrooms*, TULSA WORLD, Jan. 25, 1998 at 10.

184. *See* Netherton & Cooper, *supra* note 181, at 1.

185. *See* Netherton & Fallis, *supra* note 183, at 10.

186. *See id.*

187. David Fallis, et al., *Slipping Through the Cracks: Felons Found Employed in Schools*, TULSA WORLD, Jan. 25, 1998 at 1.

188. *See* David Fallis et al., *License to Teach: Teachers' Crimes Not Always Reported to State*, TULSA WORLD, Jan. 27, 1998 at 3.

disclosure of criminal activity during contract renewals.<sup>189</sup> The weaknesses of the current criminal background check systems would seem to make the informal process of reference checking all the more important. However, public schools fear reporting a former employee's criminal activities to the State Department of Education and other districts seeking references because of the threat of litigation.<sup>190</sup> "There are some things we try to be careful on' Broken Arrow Superintendent Jerry Hill said ... 'We would tell [inquiring school districts] if [former employees] are eligible to work in this district again, which is a real key to indicate there is a problem. But, we have been advised not to go into specifics.'"<sup>191</sup>

Furthermore, other factors deter administrators from fully exploring the backgrounds of potential employees. Some interview questions, while legal in the past, now border on discriminatory employment practices.<sup>192</sup> Educators need to be sensitive to questions which could "have an adverse impact on any of the protected class identified in Title VII,<sup>193</sup> and related employment law...."<sup>194</sup> "Facially neutral job requirements may exclude certain protected classes from work...."<sup>195</sup> Even if there is

189. See Ginnie Netherton et al., *School District to Bolster Background Checks: Plans Formulated to Ensure Children's Safety*, TULSA WORLD Feb. 1, 1998 at 1; See also BROKEN ARROW, OK., SCH. BD. POLICY 11.19 (1988):

EMPLOYEE YEARLY CRIMINAL BACKGROUND QUESTIONNAIRE

Student safety is of paramount concern to the Board of Education. Employees who have committed criminal offenses could be a threat to the safety of these students. The Board of Education commits itself to make the best possible effort to maintain a workplace safe for all students and employees.

All employees of Broken Arrow Public Schools who are employed on September 1 of each year shall truthfully answer the following questions:

HAVE YOU WITHIN THE PAST 365 DAYS;

Entered a plea of guilty or nolo contendere to a state (FROM ANY STATE) or federal felony charge:

Been convicted of a state (FROM ANY STATE) or federal offense:

Been charged with a state (FROM ANY STATE) or felony offense which was reduced to a misdemeanor offense to which you entered a plea of guilty or nolo contendere?

Entered a plea of guilty or nolo contendere to, or been convicted of, a state (FROM ANY STATE) or federal misdemeanor charge involving illegal chemical substances or illegal sexual activity?

Refusal by the employee to sign and return this form or giving false information on this form will constitute insubordination or willful neglect of duty and may be the basis for termination of employment.

Each year ten percent (10%) of the total staff (certified, support, and administrative) will be randomly selected for a complete background check to be conducted in the same manner as preemployment background checks for all employees. You will be notified if your name has been randomly selected.

190. See Fallis, et al, *supra* note 188, at 3.

191. *Id.*

192. See Susan G. Clarke, *Interviewing Job Applicants: Asking the Right Questions*, 128 EDUC. L. REP. 939 (Supp. Oct. 1998).

193. See *id.* at 939 n.1 (1998): ("Title VII of the Civil Rights Act of 1964, amended by the Civil Rights Act of 1991 is codified at 42 U.S.C. §§2000e *et seq.* (1994) and prohibits employers of fifteen or more from discriminating against individuals on the basis of race, color, religion, sex, or national origin and covers hiring, firing, promotion, compensation, and other terms and conditions of employment.").

194. *Id.* at 939 n.2 (1998): ("Plaintiffs alleging employment discrimination may also bring suit under the Fourteenth Amendment; title IX, 20 U.S.C. §1681(a) (1990 & Supp. 1995); the Rehabilitation Act of 1973, 29 U.S.C. § 504 (1985 & Supp. 1995); the Civil Rights Act of 1866 amended by the Civil Rights Act of 1991 and codified at 42 U.S.C. §1981a; 42 U.S.C. § 1983 (1994); the Equal Pay Act, 29 U.S.C. § 206(d) (1978 & Supp. 1995); the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (1994); the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.* (1995), and the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-2000bb-4 (1994).").

195. Clarke, *supra* note 192, at 939.

no intent to discriminate on the part of an administrator, asking the wrong questions may open the school to unneeded litigation.<sup>196</sup> To prevent unwanted litigation, questions concerning applicants' arrest records must be phrased very carefully.<sup>197</sup> Rather than inquiry into arrest records, the safer course is to inquire only as to actual convictions:<sup>198</sup> "Studies have shown that a disproportionately high number of minorities are arrested compared to the majority race; hence, arrest questions, which may be important for any candidate as to abuse or crimes against children, may create potential liability for a claim of race discrimination if the candidate is not hired."<sup>199</sup>

When school administrators face the responsibility or duty of initiating disciplinary or dismissal actions against an employee, there should be "adherence to the following overriding practical guidelines: a recognition and preservation of the dignity of the individual, treating the accused in a manner in which the investigator would expect to be treated if he or she were the subject of the investigation, and presuming innocence until the investigation is complete."<sup>200</sup> With this approach, the administrator "will not only have a greater likelihood of discovering the facts but will also significantly help assure that the decision made at the conclusion of the investigation will be upheld."<sup>201</sup>

Schools usually have wide discretion in their employment decisions; the Supreme Court has stated "That the school authorities have the right and the 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."<sup>202</sup> However, the penalty imposed by schools in some cases "is so disproportionate to the offense as to be shocking to one's sense of fairness."<sup>203</sup> Therefore, dismissals may be reversed by an appellate board or a court if the board "is not persuaded, in the exercise of its discretion, that an offense is serious enough to warrant that step."<sup>204</sup>

An employee may choose to resign rather than have his resume blemished and his career threatened by an impending dismissal.<sup>205</sup> "Resignation in lieu of a dismissal" is a face saving tactic which spares the employee the stigma associated with being fired.<sup>206</sup>

However, two potential dangers arise in resignation in lieu of dismissal scenarios. First, a school board may abuse its power by threatening dismissal in

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196. *See id.* at 940.

197. *See id.* at 941.

198. *See id.*

199. *Id.* at 941, n.12.

200. Bump & Frels, *Investigating Alleged Wrongdoing by Employees in the School Setting*, in *SCHOOL LAW IN REVIEW* 4, 7 (NSBA, 1990).

201. *Id.*

202. *Adler v. Bd. of Educ.*, 342 U.S. 485, 493 (1952).

203. *Ross v. Oxford Academy & Cent. Sch. Dist.*, 590 N.Y.S.2d 552 (App. Div. 1992).

204. *Fontana Unified Sch. Dist. v. Burman*, 753 P.2d 689, 699 (Cal. 1988).

205. *See Hankins v. Dallas Indep. Sch. Dist.*, 698 F.Supp. 1323 (N.D.Tex. 1988) (contract terminated by resignation).

206. *Giglio v. Dunn*, 732 F.2d 1133, 1136 (2<sup>nd</sup> Cir. 1984).

order to induce a resignation.<sup>207</sup> Second, if an employee has done something wrong, he is able to move to another district, a district which may be unaware of his unacceptable actions.<sup>208</sup>

#### VIII. TEACHER OVERSIGHT IN OTHER STATES

In order to determine how better to insure that both teachers' rights and student safety receive adequate protection, the practices of other states should be considered. For example, contrasting with Oklahoma's optional system,<sup>209</sup> in Arkansas, all districts must complete a state *and* an FBI background check on all teachers new to a district.<sup>210</sup> Furthermore, twenty nine specific offenses mandate denial or revocation of teaching licenses, including murder, public sexual indecency and endangering the health of a minor.<sup>211</sup> Arkansas superintendents are required to follow any criminal case involving a former employee for at least two years and report the court findings to the state if the person is found guilty, pleads guilty or pleads no contest.<sup>212</sup> This reduces the opportunity for criminals to move from one district to another unbeknownst to any school authority. The Arkansas State Department of Education may then revoke the teaching credentials for criminal problems after the courts have taken action.<sup>213</sup>

In Missouri, state officials, rather than local districts, compare the certified teacher list to police criminal conviction list.<sup>214</sup> The Governor of Missouri provides the State Education Department with special funding to enforce state law prohibiting school employees with felony conviction or questionable moral turpitude from working in the public schools.<sup>215</sup>

Kansas appears to have the most lax requirements of all states in the Mid West. There is no law requiring background checks or addressing the issue of criminal violations and school employment.<sup>216</sup> In fact, only a small number of Kansas schools conduct any sort of background check at all.<sup>217</sup>

Texas, like Oklahoma, gives districts the option of conducting background checks.<sup>218</sup> However, unlike Oklahoma, Texas college graduates applying for certification are subject to a state criminal background check by the state public

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207. See *Patterson v. Portch*, 853 F.2d 1399 (7<sup>th</sup> Cir. 1988).

208. See David Fallis et al., *License to Teach: Teacher Crimes Not Always Reported To State*, TULSA WORLD, Jan 27, 1998, at 3 (quoting Tulsa School Superintendent John Thompson: "When you resign from Tulsa Public Schools, we don't have anything to do with that from there).

209. See OKLA. STAT. ANN. tit. 70, §5-142 (West 1998).

210. See David Fallis et al., *School Safeguards Put to the Test: How Oklahoma Compares*, TULSA WORLD, Jan. 27, 1998, at 3.

211. See *id.*

212. See *id.*

213. See *id.*

214. See *id.*

215. See *id.*

216. See Fallis et. al., *supra* note 210, at 3.

217. See *id.*

218. See *id.*

safety department.<sup>219</sup> If an applicant is from out of the state of Texas, the State calls the state education departments of other states to inquire about any sanctions the applicant may have received.<sup>220</sup> Also, similar to what Tulsa area schools have begun, Texas Districts have the authority conduct random background checks on current employees.<sup>221</sup>

Minnesota has set up a system by which “[i]f a [teacher] does a bad thing, they can’t cross over into North Dakota and do the same thing all over again.”<sup>222</sup> Minnesota has created a state Teaching Board which investigates complaints originating from school districts, parents and even students.<sup>223</sup> The state Teaching Board “consists of six classroom teachers, two current or former school board members, one school administrator, one teaching educator and one public member. Members are appointed by the governor.”<sup>224</sup> These complaints may range from accusations of “hitting to name-calling.”<sup>225</sup> Districts have no discretion as to the seriousness of a complaint; districts are required to report *all* complaints to the board, and all are investigated.<sup>226</sup> These investigations are conducted by the Minnesota Attorney General’s office and may take more than a year.<sup>227</sup> In addition to reporting the accusations to the state Teaching Board, districts also are required to conduct their own investigations.<sup>228</sup>

After an investigation, actions taken vary depending upon the nature of the case. Some complaints result in a reprimand from either the Teaching Board or from the individual school district.<sup>229</sup> If the complaint is an especially serious one, the teacher is often fired shortly after the allegations surface.<sup>230</sup> Two members of the state Teaching Board, usually teachers themselves, recommend to the full board what action is merited by the case: “case dismissal, reprimand, license suspension or revocation. Revocation often lasts five years or more; suspensions are usually shorter.”<sup>231</sup>

If a license is revoked, teachers must wait a specified number of years, chosen by the Teaching Board, to reapply.<sup>232</sup> During their reapplication, teachers must find three psychiatrists who are willing to certify their fitness to teach.<sup>233</sup> Also, if a teacher is negligent in paying taxes, the teacher can be suspended until the taxes are

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219. *See id.*

220. *See id.*

221. *See id.*

222. Maureen M. Smith, *How Minnesota Disciplines Educators*, MINNEAPOLIS STAR-TRIBUNE, Mar 15, 1998, at 17A.

223. *See id.*

224. *Id.*

225. *Id.*

226. *See id.*

227. *See id.*

228. *See Smith, supra* note 222, at 17A.

229. *See id.*

230. *See id.*

231. *Id.*

232. *See id.*

233. *See id.*

paid to the state.<sup>234</sup>

Under this system, every year in Minnesota “about two dozen Minnesota teachers lose their licenses for misconduct.”<sup>235</sup> Since 1991, one hundred and fifty licenses have been revoked due to “crimes or misbehavior [such] as assaulting or harassing students, selling drugs, lying about credentials or not paying taxes.”<sup>236</sup> One third of these caused or were caused by criminal charges being brought against the teacher.<sup>237</sup> One half of the revocations involved sexual relationships or inappropriate contact with students.<sup>238</sup>

## IX. CONCLUSION

The current need for reform of the methods employed in Oklahoma to insure that school employees pose no danger to schoolchildren is clear. The current system provides for no consistency on a state wide basis. Some districts may exercise the option to conduct background checks. However, this is not a universal practice. While one district may be vigilant in monitoring its employees, making every effort to eliminate undesirable risks, another will not, either because of a conscience decision or possibly an innocent lack of know-how. The *Tulsa World's* findings of numerous felons employed in the Tulsa Public Schools reveal the current state of affairs to be woefully inadequate.

The proposed cure, the “lawbreaker data bill,” which requires Oklahoma District Attorneys to notify a school district if an employee is arrested, has problems as well. First, as it deals with arrests and not convictions, it could have an unintended disparate effect on minority groups who are more likely than the general population to face wrongful arrests. Furthermore, school boards vary in their abilities to deal with such information in a fair and judicious manner. Many school administrators will be unable or unwilling to recognize that not all arrests are equal in terms of job performance. Thus, teachers will face disparate conditions across the state regarding their right to privacy off school grounds.

A superior system would be one similar to that of Minnesota. Oklahoma should create a state teaching board charged with the duty to investigate allegations, criminal and non-criminal, involving school employees. Such a board would bring consistency and predictability as the members would have considerably more experience than individual local administrators in dealing with the myriad of scenarios which can arise. A state teaching board would professionally evaluate conduct and determine if a nexus between the conduct and classroom behavior exists. Although critics might complain about the erosion of local control, the predictability and clarity such a board would bring would be a tremendous improvement over the status quo.

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234. See Smith, *supra* note 222, at 17A.

235. *Id.*

236. *Id.*

237. See *id.*

238. See *id.*

