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ABSTRACT

In this report, the author examines current statutory and case law to determine the present legal restrictions on teacher behavior both in and out of the classroom. The discussion focuses on statutory provisions for teacher discipline and teacher conduct resulting in (1) certificate suspension or revocation, (2) suspension or dismissal, (3) loss of salary, and (4) fines and/or imprisonment. After examining statutes and cases, the author concludes that teacher discipline has changed substantially and notes that some of these changes represent significant decreases in the restrictions on teacher conduct. He indicates that the major contributing factors were (1) legislation and the widespread adoption of collective bargaining in education, (2) court decisions on teachers' rights-especially constitutional rights, and (3) developments in the total social context. (Author/JF)

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Substantive Legal Aspects of Teacher Discipline

FLOYD G. DELON

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ERIC/CEM State-of-the-Knowledge Series, Number Twenty-three

NOLPE [redacted] MONOGRAPH SERIES ON LEGAL ASPECTS OF SCHOOL ADMINISTRATION, Number Two

FOREWORD

This monograph by Floyd G. Delon is one of a series of state-of-the-knowledge papers on the legal aspects of school administration. The papers were prepared through a cooperative arrangement between the ERIC Clearinghouse on Educational Management and the National Organization on Legal Problems of Education (NOLPE). Under this arrangement, the Clearinghouse provided the guidelines for the organization of the papers, commissioned the authors, and edited the papers for content and style. NOLPE selected the topics and authors for the papers and is publishing them as part of a monograph series.

Dr. Delon examines current statutory and case law to determine the present legal restrictions on teacher behavior both in and out of the classroom. He concludes that major changes have taken place in the legal aspects of teacher discipline, as a result of legislation, court decisions, and developments in the total social context.

Dr. Delon is associate dean of the College of Education of the University of Missouri at Columbia. He has taught school for three years and served as a principal for six years in the public schools of Indiana. He received his bachelor's degree in 1951 from Ball State Teachers College, his master's degree in 1954 from Butler University, and his doctor's degree in 1961 from the University of Arizona.

From 1967 to 1969 Dr. Delon served as senior research specialist and later as executive director of the South Central Region Educational Laboratory. In the area of school law he has directed a summer institute, conducted workshops, and made numerous presentations to professional meetings. Among his publications is a book coauthored with Lee O. Garber entitled *The Law and the Teacher in Missouri.*

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SUBSTANTIVE LEGAL ASPECTS OF TEACHER DISCIPLINE

By FLOYD G. DELON

I. INTRODUCTION

Definition and Scope

The employee-employer relationship in public education is changing rapidly, perhaps more rapidly than in any other vocation or profession. The recent enactment by state legislatures of teacher collective bargaining laws is substantial evidence of this change.[1] Throughout the country, more and more boards of education are entering into negotiated agreements, some of which include detailed grievance procedures. The increasing litigation, especially in the federal courts, resulting from disputes between teachers and administrators or school boards provides further evidence of change. The question arising from this change in the employee-employer relationship is: To what extent has change occurred in teacher discipline?

In the context of this monograph, *teacher discipline* refers to the legal rules governing teacher conduct and the punishments assessed violators of these rules. Primary consideration is given to the substantive rather than to the procedural aspects of this topic.

The major focus is placed on the identification and description of the present legal restrictions on teacher behavior both in and out of the classroom. The discussions, based on current statutory and case law, are directed to teachers, administrators, school boards, and school board attorneys.

Historical Perspectives on Public Attitudes toward Teacher Conduct

Because public attitudes and opinion so frequently influence teacher discipline, directly or indirectly, writings in this area provide needed background for a meaningful interpretation of the law.

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[1]Nolte reported that by October 1969 twenty-two states had enabling legislation for collective bargaining. *See* C. Nolte, *Status and Scope of Collective Bargaining in Public Education* 20 (1970).

Also, a historical overview permits relating changes in the mores of society to developments in the law and disciplinary practice.

Since the early history of this country, the public has been far more restrictive in its expectation for the conduct of teachers than for the conduct of the average lay citizen. This situation existed even in colonial New England where religion and education were almost inseparable. According to Elsbree, the public was especially critical of teachers during the first half of the nineteenth century when it invoked the most rigid moral and religious standards.[2] In 1841 an annual report of the board of education in Boston expressed the necessity for teachers to set examples for pupils in "deportment, dress, conversation and all personal habits."[3]

In his exhaustive study, *A History of Freedom of Teaching in American Schools*, Beale cites incidents recorded during the mid-nineteenth century in which teachers were reprimanded, dismissed, fined, imprisoned, and even subjected to mob harassment for real or imagined violations of prevailing public standards.[4] Such violations included teaching Negro children[5] and advocating abolition of slavery.[6]

By 1900, state statutes contained provisions that not only prescribed the personal attributes required for teacher certification but also, in some instances, specified what must and must not be taught. In Arkansas examiners were charged not to license "any person who is given to profanity, drunkenness, gambling, licentiousness or other demoralizing vices, or who does not believe in the existence of a Supreme Being."[7] In 1903, as a result of the temperance movement, a total of forty-seven states and territories required class instruction on the harmful effects of alcohol.[8] During the following two decades, legislators shifted their attention to forbidding the teaching of evolution. Between 1921 and 1929, thirty-seven antievolution bills were introduced into the legislatures of twenty states.[9]

In a book published in 1925, Lewis commented on the teaching profession's[10] development of codes of ethics. He observed that the

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[2]*See* W. Elsbree, *The American Teacher* 296 (1939).
[3]*Id.* at 297.
[4]*See* H. Beale, *A History of Freedom of Teaching in American Schools* 3-11 (1941).
[5]*Id.* at 131.
[6]*Id.* at 143-156.
[7]Elsbree, *op. cit. supra* note 2, at 355.
[8]*See* Beale, *op. cit. supra* note 4, at 226.
[9]*See* H. Beale, *Are American Teachers Free?* 227 (1936).
[10]*See* E. Lewis, *Personnel Problems of the Teaching Staff* 419 (1925).

purpose of these codes was widely misunderstood by the public, who viewed them as the profession's attempt to restrict admission. Lewis also wrote on the legal status of teachers, commenting that court decisions of that day were divided concerning the legality of employment contracts that provided for dismissal of teachers at the option of the board.[11]

From his 1939 study of the reported causes for teacher dismissal, Anderson concluded "that in most states teacher dismissal was on a personal rather than a professional basis."[12] The distribution of causes in the samples reviewed was: incompetency and inefficiency (34), reassignment and transfer (26), insubordination (24), marriage and childbirth (25), neglect of duty (22), abolition of position (21), abandonment of position (18), immorality and rumors of immorality (17), general unpopularity (8), unprofessional conduct (7), anticipated causes (6), and political activity (4).[13] Among the trends cited by the author were:

1. The courts' tendency to affirm dismissals of women for marriage.
2. The courts' invalidation of dismissals for "anticipated" causes.
3. The courts' consistent pattern of upholding dismissals for "immorality."
4. The school boards' use of the charge of "abandonment of position" when the teacher was actually available and willing to continue service.
5. The school boards' frequent reliance on "abolition of position" as a basis for teacher dismissal in districts operating under tenure laws.[14]

In conclusion, Anderson stated that "court decisions showed little evidence on the part of the teaching profession to set its own house in order."[15]

Elsbree hypothesized that the beginnings of a more liberal attitude toward teacher conduct accompanied a relaxation of moral standards by society in general during World War I.[16] However, Anderson's study of teacher dismissal provides little evidence of an immediate turn to permissiveness with respect to teacher behavior. In fact, Beale found rural communities still quite restrictive through the 1930s;[17] many teachers had very little freedom in their personal lives until the enactment of statewide tenure laws.

By 1950, community pressures had gradually decreased. Callo-

[11] *Id.* at 440.
[12] Anderson, *Trends in Causes of Teacher Dismissal as Shown by American Court Decisions* 8 (1939) (Abstract—Ed.D.Diss. George Peabody College for Teachers).
[13] *Id.* at 5-6.
[14] *Id.* at 9.
[15] *Id.* at 8.
[16] *See* Elsbree, *op. cit. supra* note 2, at 535.
[17] *See* Beale, *op. cit. supra* note 9, at 374-375.

way reported that 73 percent of Missouri teachers who responded to a survey felt no pressure against dancing, smoking, or card playing. Yet 58 percent responded that social drinking was "frowned on" by the community or the administration, and 20 percent said they found opposition to their participation in activities open to other citizens.[18] Story, in analyzing the results of a survey of 930 classroom teachers, concluded the evidence "seems to point to a growing change in public attitude toward teachers."[19]

Bolmeier observed in 1960 that teachers were "more restricted than most citizens in the exercise of their freedoms guaranteed by the Constitution."[20] This conclusion was based on a review of court decisions on teacher involvement in subversive, political, union, and other controversial out-of-class activities.

On the other hand, Firth, advocating self-discipline by the teaching profession, declared: "Existing legal machinery is apparently inadequate for the removal of incompetent or unethical teachers from our classrooms."[21] In this same vein, Garber expressed doubt that a teacher could be fired for "unprofessional conduct" because of his public criticism of the school system, unless such criticism can be shown to impair or disrupt discipline or the teaching process.[22] Similarly, Garber concluded in 1968 that "the right of a school board to control the dress or appearance of the teacher is limited to occasions where the matter it desires to control has an adverse effect on students and/or learning conditions of the school."[23]

A number of articles on teacher immorality were published in the late 1960s. Punke wrote, "The moral code for teachers is more rigid than for people in many vocations."[24] Through an analysis of court decisions, Koenig identified the various meanings ascribed to teacher "immorality" and "misconduct." He closed the discussion with the following recommendation:

> For the teacher who would avoid dismissal on the grounds of immorality or misconduct, . . . guidelines would include the avoidance of illicit sex-

[18]Calloway, *Are Teachers Under Community Pressure?* 37 School and Community 458 (1951).
[19]Story, *Public Attitude is Changing Toward Teacher's Personal Freedom*, 45 Nation's Schools 70 (1950).
[20]Bolmeier, *Legal Scope of Teachers Freedoms*, 24 Educational Forum 199-206 (1960).
[21]Firth, *Teachers Must Discipline Their Professional Colleagues*, 42 Phi Delta Kappan 24 (1960).
[22]Garber, *Can You Fire a Teacher for Unprofessional Conduct?* 73 Nation's Schools 90 (1964).
[23]Garber, *To Shave or Not to Shave: That is the Requirement*, 82 Nation's Schools 50 (1968).
[24]Punke, *Immorality as Ground for Teacher Dismissal*, 49 NASSP Bull. 53 (1965).

ual activity; the avoidance of actions which might cast doubt on either character or reputation; a thorough knowledge of the community in which service is being performed; and a readiness to forfeit a certain degree of personal independence and freedom of action. . . . [25]

According to Nolte, the board of education "may legally expect the teacher to exhibit exemplary behavior and to comply with local mores in dress and conduct, especially in public."[26]

In a 1967 doctoral dissertation, Williams analyzed the legal causes for dismissal of public school teachers.[27] He noted that the states' statutory causes for dismissal lacked "unity" and that the courts' interpretations displayed "a great deal of ambiguity among the causes." He recommended the adoption of a uniform tenure law by each of the fifty states.[28]

Union activity, which has increased significantly in the last ten years, has become a frequent cause of disciplinary action against teachers. In 1969, Nolte, pointing out the constitutionally guaranteed right of freedom of assembly or association, advised school boards not to penalize teachers for participation in unions.[29] However, in cases of illegal strikes, board action in withholding pay has been upheld.[30] Furthermore, an *Instructor* magazine teacher survey revealed that only 16 percent of those responding thought striking teachers should receive their regular salaries.[31]

This review of the literature closes with Stinnett's statement that today's teachers "can do just about anything that any respectable citizen can do."[32] However, the daily newspaper is a reminder that teacher conduct is still under the scrutiny of society. In a November 1971 letter to the editor of the *Kansas City Times*, the wife of a Houston, Texas, postman who delivered a former school official's mail wrote, "A man who reads *Playboy* should not have a position in the schools."[33] Again, a reflection of public attitudes toward teacher behavior appears even in the dialogue of a syndicated comic strip. In a January 1972 "Mary Worth" strip by Ernst and Saun-

[25]Koenig, *Teacher Immorality and Misconduct*, 155 American School Board J. 19 (1968).
[26]Nolte, *Teacher's Image, Conduct Important*, 154 American School Board J. 29 (1967).
[27]*See* R. Williams, *Legal Causes for Teacher Dismissal* 1 (1967) (Abstract—Ed.D.Diss. Duke University).
[28]*Id.*
[29]*See* Nolte, *How Not to Pay Damages: Don't Penalize Teachers for Unionism*, 156 American School Board J. 10 (1969).
[30]*See* Nolte, *Mass Sickness Doesn't Pay in Camden*, 155 American School Board J. 23 (1968).
[31]*When Teachers Demonstrate Should They Be Paid?* 7 Instructor 30, (1968).
[32]T. Stinnett, *Professional Problems of Teachers* 242 (1968). This conclusion was based on the results of study sponsored by the N.E.A. Committee on Tenure and Academic Freedom.
[33]Kansas City Times, Nov. 24, 1971, at 1, col. 3.

ders, the school board president expressed concern about the example a newly appointed teacher would set for the young and about the effect his appearance would have on voters in the school levy election.[34]

II. STATUTORY PROVISIONS FOR TEACHER DISCIPLINE

The statutes of each of the fifty states contain provisions regulating certain aspects of teacher behavior. The implied and sometimes expressed legislative intent of such laws is to protect the children and youth enrolled in the public schools and to safeguard the public funds allocated for the support of these schools. Most of these statutes enumerate and/or define the undesirable behavior and specify the penalties to be assessed. Of course, some of the legislation still in effect is a product of the public attitudes of the past; such provisions are rarely, if ever, enforced.

Certification

The teacher certification statutes of most states provide for revocation and suspension of certificates by the issuing authority. The usual meaning attributed to revocation and suspension is, respectively, invalidation and temporary invalidation. However, the words are used interchangeably in the statutes of some states, and in others revocation refers to both an indefinite and a term cancellation of the certificate. Regardless of the definition, revocation is a severe form of disciplinary action since the involved individual ceases to be recognized as a teacher.

Although the terminology and specific provisions differ slightly from state to state, Alabama laws contain a typical example of a revocation statute:

> The state superintendent of education shall have the authority to revoke any certificate issued under the provisions of this chapter when the holder has been guilty of immoral conduct or indecent behavior.[35]

The provisions of the Oregon statute are somewhat unique in that revocation is required for certain offenses, such as the illegal use, sale, or possession of narcotics, and is optional for other stated grounds.[36]

Alaska law includes definitions of the enumerated causes, for

[34]Kansas City Times, Jan. 1, 1972, at 23.
[35]*Code of Ala.*, Tit. 52, § 337 (1927 School Code § 353).
[36]*See O.R.S.* 342.175. Reinstatement is prohibited in cases of mandatory revocation.

example, "immorality, which is defined as the commission of an act which, under the laws of the state constitutes a crime involving moral turpitude."[37] Many state statutes do not contain specific definitions of the offending behaviors, requiring those who administer the laws to exercise considerable discretionary authority in implementing them. Frequently the courts must make the final determination whether or not a given act of a teacher corresponds to a stated ground for revocation.

Table 1 presents a tabulation of the statutory grounds for the revocation or suspension of teaching certificates in each of the fifty states. These data, representing a wide range of in-class and out-of-class behaviors, fall into twenty-six categories. The most frequently stated cause is "immorality" (30 states), followed by "incompetency" (23 states), "contract violation" (19 states), and "neglect of duty" (18 states). Although obvious overlap exists among these classifications, further classification into more discrete categories does not appear warranted.

This listing suggests the legislative intent to protect students and to safeguard public funds. Such grounds for revocation as "immorality" and "reprehensible conduct" are apparently intended to protect pupils from an unacceptable example or actual harm by a teacher, whereas the grounds of "incompetency" and "neglect of duty" are to protect pupils from inferior instruction. The purpose of the legislation against "failure to keep records" and "falsification of records" (for example, attendance and transportation records) relates to safeguarding public funds from misappropriation.[38] The Arkansas statute requiring revocation of the certificate of any teacher who "fails to repay unearned salary on a contract breached by him" is for this same purpose."[39]

The term "cause" with its qualifying adjectives is used in two distinctively different ways in the statutes. The more common usage is at the end of a series of grounds; for example, in Illinois any certificate "may be suspended by the Superintendent of Public Instruction for one year upon evidence of immorality, incompetency, unprofessional conduct . . . *or other just causes*" (emphasis added).[40] Such language tends to broaden the discretionary authority of the administering agency. In a few instances the term is used

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[37] *Alaska Stat.* § 14.20.030 (1971).
[38] *See e.g. Ark. Stat. Ann.* 80-1509 (1960); *N.R.S.* 391.340 (356:32:1956); and *Fla. Stat. Ann.* 232.14 (1969).
[39] *Ark. Stat. Ann.* 80-1331 (Supp. 7, 1969).
[40] *S.H.A.* ch. 122, § 21-23 (Supp. 1972).

Table 1

STATUTORY GROUNDS FOR REVOCATION OR SUSPENSION OF TEACHING CERTIFICATES

	Incompetency	Unfitness for Service	Negligence, Neglect of Duty	Failure to Keep Required Record	Failure to Provide Designated Instruction	Inefficiency	Insubordination	Refusal to Obey School Board Regulations	Noncompliance with School Laws	Disloyalty, Subversive Activity	Failure to Acquire U.S. Citizenship, Take Oath	Contract Violations, Cancellation, Annulment, Breach	Conviction of Specified Crimes	Immorality	Indecent Behavior, Reprehensible Conduct, Unnatural or Lascivious Acts	Untruthfulness, Dishonesty, Falsification of Application, Records	Drunkenness, Intemperance	Addiction to Drugs and/or Selling Drugs	Cruelty	Conduct Unbecoming a Teacher	Unprofessional Conduct, Misconduct in Office	Violation of Code of Ethics	Causes Preventing Initial Issuance of Certificate	Cause (Good, Just, Sufficient)	Certificate Revoked in Another State	Failure to Obey State Laws	Failure to Attend Required Institutes
Alabama												x		x						x							
Alaska	x								x					x													
Arizona									x			x															
Arkansas				x								x				x					x						
California												x	x	x			x	x			x						
Colorado	x		x				x					x		x		x											
Connecticut																											
Delaware	x		x							x				x													
Florida	x								x				x	x		x								x	x		
Georgia																								x			
Hawaii	x																										
Idaho	x		x									x	x			x						x	x		x		
Illinois	x		x	x										x							x						
Indiana	x		x											x							x						
Iowa	x		x											x			x					x					
Kansas			x									x		x				x				x					
Kentucky	x		x											x							x						
Louisiana																					x						
Maine																								x			
Maryland																											
Massachusetts																											
Michigan												x															
Minnesota			x			x						x		x		x						x					
Mississippi												x															
Missouri	x		x									x		x		x											
Montana	x											x	x	x			x	x									
Nebraska	x		x									x		x			x		x			x					
Nevada	x	x						x				x		x		x				x	x			x			
New Hampshire																				x	x				x	x	
New Jersey											x																
New Mexico	x													x								x					
New York														x										x			
North Carolina												x				x											
North Dakota	x		x									x	x	x			x	x									
Ohio	x		x											x			x										
Oklahoma	x		x							x		x		x					x								
Oregon			x			x					x			x		x	x	x									
Pennsylvania	x		x											x			x								x		
Rhode Island																											
South Carolina																								x			
South Dakota	x		x							x		x		x				x									
Tennessee														x													
Texas																											
Utah																					x	x					
Vermont														x							x		x				
Virgina																											
Washington																											
West Virginia	x											x		x			x				x				x		
Wisconsin	x													x		x	x						x				
Wyoming	x		x											x	x												

merely to introduce the series of grounds, as in the Nebraska statute: "The State Board may revoke or suspend the certificate for *just cause. Just cause* may consist of incompetence, immorality, intemperance (emphasis added).[41]

In light of recent court decisions, the constitutionality of "failure to take a loyalty oath" as a valid ground for cancelling the certificate is very questionable.[42] Other legislatively stated grounds have fallen to constitutional authority as expressed by the courts. The latest grounds to fall were statutes mandating the invalidation of the certificate for teaching theories of evolution.[43]

Another provision that merits special attention suggests a more up-to-date position on teacher discipline. The revocation of certificates for violations of the teaching profession's adopted code of ethics represents a legislated effort to foster self-discipline among teachers.[44] The Delaware statute, which ties the revocation of the certificate to dismissal for the stated grounds, provides a reasonable approach to the more efficient and equitable administration of teacher discipline.[45] The similarity of the grounds for teacher dismissal and for certificate revocation is readily discernible when the statutes are compared.

Disciplinary provisions in addition to revocation are included in the certification statutes of two states. A twenty-five dollar fine is assessed any person convicted of teaching without a certificate in the public schools of Hawaii.[46] In Tennessee, the alteration of a teaching certificate is a misdemeanor punishable by a fine as well as by the revocation of that certificate.[47]

Contracts and Tenure

The statutes considered in this section encompass the legal grounds for dismissing a teacher, that is, terminating or not renewing the teacher's employment contract. These provisions are predominantly a part of tenure legislation and apply largely to per-

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[41] *R.R.S.* 79-1234 (1966).

[42] A federal district court in California held that the requested teachers oath was indistinguishable from the one declared unconstitutional by the U.S. Supreme Court in Bagget v. Bullitt, 377 U.S. 360 (1964). *See also* note 130, *infra*, and J. Bryson, *Legality of Loyalty Oath and Non-loyalty Oath Requirements for Public School Teachers* (1963).

[43] *Ark. Stat. Ann.* 80-1628 (Supp. 7, 1969). See Epperson v. Arkansas, 393 U.S. 97 (1968).

[44] *Tenn. Code Ann.* 49-1401 (Supp. 9, 1965).

[45] *Del. Code Ann.* 14, § 1204 (Supp. 8, 1970).

[46] *Hawaii Rev. Laws* § 297-4.

[47] *Tenn. Code Ann.* 49-1233 (Supp. 9, 1965).

manent teachers. The Wisconsin statute is a characteristic example:

> No teacher who has become permanently employed shall be refused employment, dismissed, removed, or discharged except for inefficiency and immorality, willful and persistent violation of reasonable regulations . . . or for other good and just cause.[48]

The statutes of some states, however, make the grounds applicable to all teachers. In Wyoming, the board of education "may suspend or dismiss any teacher for incompetency, neglect of duty, immorality, insubordination or any other good and just cause."[49]

There are approximately twenty-five stated legal causes or grounds for the dismissal or suspension of teachers. Again, the data for the fifty states are presented in table form. Table 2 shows that the most frequently listed grounds are "immorality" (28 states), "incompetency" (28 states), "neglect of duty" (23 states), "insubordination" (19 states), and "inefficiency" (15 states). In twenty-one states, school boards are empowered to fire teachers for "cause."

Many of the comments of the preceding section could appropriately be repeated here. Again, there is overlap between categories of causes listed in the table, for example, "insubordination" and "refusal to obey school board regulations." However, Kansas, Massachusetts, and Tennessee laws do list these as separate grounds. Also it is likely some of these provisions could not stand the test of constitutionality. For example, until recently, Kansas law applicable to cities of 120,000 population listed "marriage of women instructors"[50] as a legal basis for discharge, and Missouri law indicates that a teacher who participates in "the management of the campaign for the election or defeat of members of the board of education by which he is employed" is subject to termination.[51]

The category labeled "other" includes provisions appearing in the statutes of a single state. Of the eight state statutes in this category, two are the Kansas and Missouri laws cited immediately above. In California, each city, or city and county, board of examiners may remove a teacher for "profanity."[52] Also, under the statutes of Louisiana, a teacher may be suspended for teaching "any course designated as sex education or any other course . . . dealing primarily with the human reproductive system as it pertains to the

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[48] *W.S.A.* § 118.23 (Supp. 1970).
[49] *Wyo. Stat.* § 21.1-15 (Supp. 1971).
[50] *Kans. Stat. Ann.* 72-5406 (Supp. 1971).
[51] *RS Mo.* 1969 § 168.130.
[52] *West's Ann. Educ. Code* § 13216 (Supp. 1971).

Table 2

STATUTORY GROUNDS FOR THE DISMISSAL OR SUSPENSION OF TEACHERS

	Incompetency	Unfitness for Service	Negligence, Neglect of Duty	Failure to Provide Designated Instruction	Failure to Attend Required Institutes	Inefficiency	Incapacity	Insubordination	Refusal to Obey School Board Regulations	Noncompliance with School Laws	Disloyalty, Subversive Activity	Contract Violation, Cancellation, Annulment, Breach	Conviction of Specified Crime	Immorality	Untruthfulness, Dishonesty, Falsification of Application, Records	Drunkenness, Intemperance	Addiction to Drugs and/or Selling Drugs	Cruelty	Conduct Unbecoming a Teacher, Misconduct in Office	Unprofessional Conduct	Violation of Code of Ethics	Revocation of Certificate	Cause (Good, Just, Sufficient)	Failure to Obey State Laws	Other
Alabama	x				x			x						x											
Alaska	x									x				x									x		
Arizona																									
Arkansas												x													x
California	x	x																		x					
Colorado	x		x	x				x		x			x	x	x	x					x				x
Connecticut	x					x		x				x		x								x	x		
Delaware	x		x					x			x			x								x	x		
Florida	x		x					x					x	x			x		x						
Georgia																									
Hawaii						x		x	x					x									x		
Idaho												x													x
Illinois	x		x											x				x							
Indiana	x		x					x	x					x									x		
Iowa	x		x															x							
Kansas	x					x		x	x					x									x		
Kentucky	x		x			x		x						x				x					x		x
Louisiana	x		x											x				x							
Maine															x										x
Maryland	x		x					x																	
Massachusetts						x	x	x	x		x		x	x					x						
Michigan									x										x				x		
Minnesota															x										
Mississippi	x		x			x		x		x		x	x	x					x				x		
Missouri	x		x			x		x	x	x		x		x		x		x					x		
Montana	x	x				x			x				x	x											x
Nebraska	x		x					x		x															
Nevada																								x	x
New Hampshire	x																								
New Jersey						x	x							x		x									
New Mexico																			x						
New York	x		x			x		x																	
North Carolina			x			x	x		x		x		x	x					x						
North Dakota																									
Ohio						x			x					x											
Oklahoma	x		x								x			x											
Oregon																		x							
Pennsylvania	x		x								x			x											
Rhode Island									x								x	x							x
South Carolina																						x	x		
South Dakota																									
Tennessee	x		x		x	x		x	x		x		x	x		x	x	x	x		x				
Texas																									
Utah																									
Vermont	x		x						x			x													
Virginia	x		x			x		x	x					x					x						
Washington																						x			
West Virginia	x		x					x				x		x		x	x	x							
Wisconsin						x			x					x											
Wyoming	x		x	x				x						x								x	x		

act of sexual intercourse." This penalty further applies to any instructor who "shall test, quiz, or survey students about their personal or family beliefs or practices in sex, morality or religion."[53] Finally, another section of the Louisiana code provides that a teacher who becomes a member of his employing board forfeits his teaching position.[54]

Conflict-of-Interest

Since school operation involves the expenditure of substantial sums of money, state laws have been enacted to prevent school personnel from using their positions to generate undeserved profits. These conflict-of-interest laws, applicable specifically to teachers, provide penalties of fines and/or imprisonment for their violation. The coverage of the New Mexico statute is representative of this type of legislation:

> [The teacher] may not receive any commission or profit from sale of . . . instructional materials, furniture, equipment, books, insurance, school supplies or work under contract from the school district with which he is associated.[55]

Florida law forbids any "private fee, gratuity, donation or compensation . . . for promoting the sale of any textbook [etc.]" under penalty of a fine not to exceed one hundred dollars or imprisonment not to exceed thirty days.[56] A similar law was repealed by the Virginia General Assembly with the enactment of a general conflict-of-interest law applicable to all public employees.[57]

Another type of provision that is related closely enough to be described in this section prohibits bribery and "kick back" in connection with teacher employment. It is unlawful for a teacher in Missouri "to contribute any portion of his salary to his school board or any member thereof" for the purposes of paying tuition or any other expenses of the operation of schools.[58] The violation of this law is considered a misdemeanor punishable by a fine not to exceed one thousand dollars, or by imprisonment for not more than one year, or both. A Kentucky law includes, but is not restricted to, teachers:

> No person shall use or promise to use directly or indirectly any official authority or influence whether possessed or anticipated to secure or attempt to secure for any person an appointment or advantage in appoint-

[53] *LSA-RS* 17:281 (Supp. 1972).
[54] *Id.* 17:428.
[55] *N.M. Stat. Ann.* 77-19-1 (Supp. 1971).
[56] *Fla. Stat. Ann.* § 233.45 (1969).
[57] *See Code of Va.* 22 § 213 (Supp. 1971).
[58] *RS Mo.* 1968 § 168.151.

ment to a position as teacher or employee of a district board of education, or an increase in pay or other advantage in employment. . . . [59]

The penalty for violation is imprisonment for thirty days to six months and ineligibility for employment for a period of five years.[60]

School Records and Reports

Since allocations of state funds to the public schools are commonly based on average daily attendance, pupils transported, and so forth, legislators are understandably concerned about the completeness and accuracy of the records and reports submitted by the local school districts. As previously indicated, "failure to submit records" and "falsification of records" are legal grounds for the revocation of certificates or the dismissal of teachers in certain states.[61] Lesser penalties, such as fines and salary deductions, are assessed in other states. In a few instances, the statutes provide for imprisonment.

Dating back to the time when many states maintained several small schools under the supervision of a county superintendent, the statutes of several states still require that the final payment of the teacher's salary be withheld until the registers are submitted.[62] For example, the Colorado law states, in part:

Until the registers, summaries, and abstracts have been filed, it shall be unlawful for the district to draw warrants for the last month's salary of any teacher. . . . [63]

New Jersey law, similarly worded, expressly requires each teacher to keep a register.[64]

Five states designate fines and/or imprisonment as the penalties for failure to keep records. The penalty in Wisconsin is a maximum fine of twenty-five dollars, and in Louisiana it is a maximum fine of ten dollars or ten days in jail, or both.[65] In North Carolina it is a misdemeanor not to make the required reports or to make false reports or records, and the offending teacher is subject to a fine or imprisonment at the discretion of the court.[66] Mississippi law contains comparatively severe penalties for preparing fraudulent transportation records; in addition to the forfeiture of the teaching certificate, the courts are empowered to impose a jail sentence of up to sixty days, levy a fine of not less than one hundred dollars or more

[59] *Ky. Rev. Stat.* 161.154 (1970).
[60] *Id.*
[61] *See* Table 1 *supra.*
[62] *See* text at *supra* note 38.
[63] *Colo. Rev. Stat.* 123-17-2 (1963).
[64] *N.J.S.A.* 18A:6-14 (Supp. 1971-72).
[65] *See W.S.A.* 118.18 (Supp. Sp. Pamp. 1970) and *LSA-RS* (Supp. 1972).
[66] *See Gen. Stat. of N.C.* § 115-148 (1966 Repl.).

than three hundred dollars, and require the repayment of all illegally expended funds.[67]

The Washington statute is unique in that it refers exclusively to the transfer of records, books, and papers from a school employee to his successor. Failure to perform this duty is punishable by a maximum fine of one hundred dollars.[68]

Finally, defrauding the teacher retirement system is a misdemeanor in Nebraska and a felony in Oklahoma.[69]

Pupil Protection

Laws have been enacted specifically to protect pupils from unethical and brutal teachers. An example is the Montana statute that declares:

> Any teacher who shall mistreat or abuse any pupil by administering undue or severe punishment shall be deemed guilty of a misdemeanor and upon . . . conviction shall be fined not more than one hundred dollars. . . .[70]

The Washington statute is nearly identical except that it specifies "unreasonable punishment on the head of the pupil."[71] It is a misdemeanor in Oklahoma "for any teacher to reveal any information concerning a child obtained by him in his capacity as a teacher."[72] The New Jersey code forbids corporal punishment in any form.

Arizona, Mississippi, and Ohio have laws focusing specifically on the moral transgressions of male teachers. For example, Arizona's law states:

> A superintendent, tutor or teacher in a private or public school, or instructor in music or any branch of learning, who has sexual intercourse at anytime or place with any female not his wife with her consent, while under his instruction or during his engagement as a superintendent, tutor or teacher shall be punished by imprisonment in the state prison for not less than one nor more than ten years.[73]

The penalty is somewhat less severe in Mississippi. Both participants are subject to a fine of not more than five hundred dollars, and the teacher is required to serve a prison term of three to six months.[74]

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[67] *See Miss. Code Ann.* § 6248-14 (Supp. 1971).
[68] *See R.C. W. A.* 28A.87.130 (1970).
[69] *See R.R.S.* 79-1553 (1968) and 70 *Okla. St. Ann.* § 17-110 (1966).
[70] *Rev. Codes of Mont.* 75-6109 (2d Repl. 1971).
[71] *R.C.W.A.* 28A.87.140 (1970).
[72] 70 *Okla. St. Ann.* § 6-115 (Supp. 1971-72).
[73] *A.R.S.* § 13-615 (1956).
[74] *See Miss. Code Ann.* § 1999 (1942).

Table 3

STATUTORY PROVISIONS FOR TEACHER DISCIPLINE IN CONNECTION WITH LEGISLATIVELY ASSIGNED DUTIES, RESPONSIBILITIES, AND PROHIBITIONS

STATE	OFFENSE	PENALTY
Arkansas	Failure to have physical examination[75]	Fine (not less than $25 or more than $100)
	Failure to display flag[76]	Fine (not less than $100 or more than $500) Imprisonment (not less than 30 days or more than 6 months)
	Failure to provide required instruction in American History[77]	Same as above
Delaware	Failure to return to service after leave[78]	Forfeiture of salary increments and pension credits during period of leave
Kansas	Teaching the overthrow of the government by force[79]	Fine (not more than $10,000) or imprisonment (not more than 10 years)
Louisiana	Failure to enforce school course of study and regulations[80]	Salary withheld pending compliance
	Tardiness[81]	Pay deductions based on proportions of school day
Minnesota	Failure to perform duties required by compulsory attendance law[82]	Fine ($10) or imprisonment (10 days)
Montana	Failure to attend annual meeting of state teachers association[83]	Pay deduction for meeting days
Nebraska	Wearing religious garb while teaching[84]	Fine ($100) or imprisonment (30 days) or both
Ohio	Refusal to display flag[85]	Fine (not less than $5 nor more than $25 and not less than $25 nor more than $100 for subsequent offense)
South Dakota	Failure to attend teachers institute[86]	Pay deduction ($10 per day)
Tennessee	Failure to give required notice of resignation[87]	Forfeiture of tenure status
Virginia	By malfeasance, misfeasance, or nonfeasance offend school laws[88]	Fine (not less than $5 or more than $50) if no other specific penalty is provided
Washington	Teaching criminal anarchy[89]	Fine ($5,000) or imprisonment (10 years) or both

[75] See *Ark. Stat. Ann.* 80-1213 (Supp. 1969).
[76] See *Ark. Stat. Ann.* 80-1616 (1960 Repl.).
[77] See *Id.*
[78] See *Del. Code Ann.* 14, § 1325 (Supp. 8, 1970).
[79] See *Kans. Stat. Ann.* 21-306 (Supp. 1971).
[80] See *LSA-RS* 14:417 (Supp. 1972).
[81] See *Id.* 17:1203.
[82] See *M.S.A.* § 127.17 (1960).
[83] See *Rev. Codes of Mont.* 75-6111 (2d Repl. 1971).
[84] See *R.R.S.* 79-1274 (1968).
[85] See *Page's Ohio Code Ann.* § 3313.99 (1960).
[86] *SDLC* 1967 13-44-7 (SDC Supp. 1960, § 15.902).
[87] See *Tenn. Code Ann.* 49-1408 (Cum. Supp. 9, 1965).
[88] See *Code of Va.* § 22-215 (Supp. 1971).
[89] See *R.C.W.A.* 9.05.020 (1970) and *R.C.W.A.* 9.11.040 (1970).

Duties and Responsibilities of Teachers

The statutes impose various special duties and responsibilities on teachers, as well as certain prohibitions in the performance of their regular duties and responsibilities. For ease of reference, the various offenses and penalties specified by these provisions are listed in table 3.

Sections of collective bargaining laws pertaining to teachers' duties and responsibilities are not included in the table. The most relevant current prohibitions concerning collective bargaining in education are discussed by Nolte in a state-of-the-knowledge paper published by the ERIC Clearinghouse on Educational Management.[90] Nolte lists thirteen states that, as of October 1, 1969, prohibit teacher strikes and a fourteenth that provides "injunctive relief against 'specific acts' that pose a clear and present danger."[91] Five of these states designate penalties applicable to either the organization or its officers, or the individual teachers.[92] The most common individual penalty is the withholding of wages.

In addition to prohibiting striking, picketing, and boycotting, the Montana statute, adopted since the publication of Nolte's monograph, contains other provisions classified as unfair labor practices.[93] The teachers are required to bargain in good faith and are forbidden to restrain or coerce other teachers in connection with their decision to join or not to join the employee organization. Violation of either of these provisions results in the forfeiture of pay for each day of the offense.[94]

Self-Discipline by the Teaching Profession

The self-disciplining or self-policing of its membership is widely accepted as a characteristic function of a profession. Although the desirability of the teaching profession assuming this responsibility has long been recognized, little progress in this direction occurred prior to 1960.[95] During the past decade, states began to adopt legislation referred to as "professional practices" laws, which delegate certain disciplinary authority to the profession. In

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[90] *See supra* note 1.
[91] Nolte, *op. cit. supra* note 1, at 35.
[92] *Id.*
[93] *See Rev. Code of Mont.* 75-6120 (2d Repl. 1971).
[94] *See Id.* 75-6126.
[95] *See* text at *supra* note 15. *See also* D. Darland, *The Profession's Quest for Responsibility and Accountability*, 52 Phi Delta Kappan 41 (1970).

1963, the National Education Association (NEA) developed and published a set of guidelines for such legislation.[96]

Kentucky and Florida were among the first states to enact professional practices legislation. The content of the Florida act, as expressed in its title, is typical of statutes adopted subsequently:

> An act declaring teaching a profession, with all the rights, responsibilities, and privileges: creating a professional teaching practices commission; authorizing appointment of members and adoption of a code of ethics and professional performance; providing for adoption of regulations approved by the state board of education; providing for authority to make recommendations involving suspension and revocation of certificates; providing effective date.[97]

The American Association of Colleges for Teacher Education (AACTE) recently reported on the status of professional practices legislation in the various states. Figure 1, reprinted from *AACTE ALERT*. 1 (February 1972) p. 4, shows states having practices commissions, standards boards, and combinations of both.

If these procedures operate as intended, teacher discipline ceases to be primarily an element of the employee-employer relationship. The teacher is made responsible not only to his employer but also to his profession. The profession, as represented by the professional practices commission, is a participating party in proceedings that might result in disciplinary action with serious consequences.[98]

The potential influence of professional practices commissions may be underestimated because the term "recommend" is used in describing certain of their powers and duties. In reality, the commissions are granted disciplinary authority in addition to that exercised in their advisory role. In each state having a commission, the legislature has empowered this body to establish or develop standards of professional practice. For example, the standards specified by the Iowa statute include, but are not limited to, contractual obligations, competent performance, and ethical practice.[99] Such standards provide grounds for disciplinary action against the teacher, though in some instances the standards must be approved by the state department of education[100] or the teachers of the state.[101]

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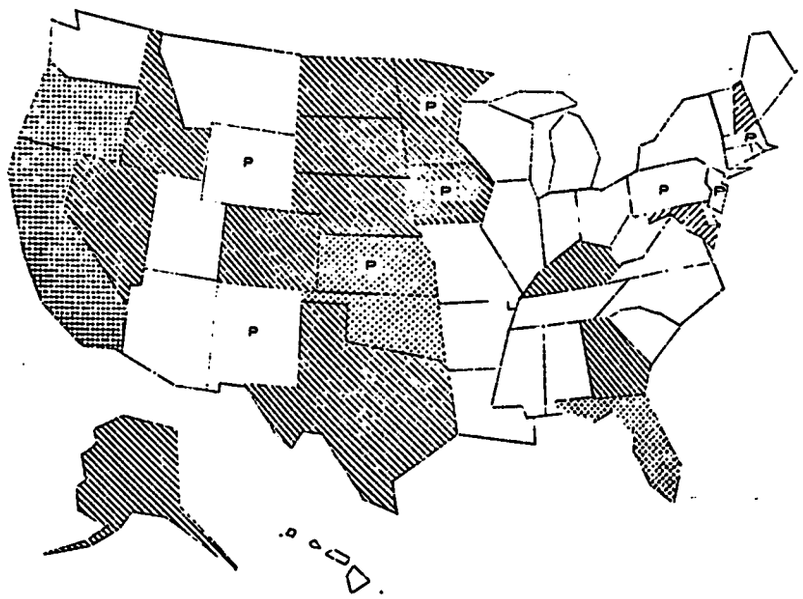
[96]See Joint Committee on Professional Practices Regulations of the National Commission on Teacher Education and Professional Standards and the Commission on Professional Rights and Responsibilities, Professional Practices Regulations (1965).
[97]*Laws of Fla.* 63-363 (1963).
[98]See *e.g. I.C.A.* 272 A.3 to 272A.6 (Supp. 1971).
[99]*Id.*
[100]See *Idaho Code* 33-1256 (Supp. 1971).
[101]See *Vernon's Ann. Civ. St.* (Educ. Code) § 13.210 (A. 1969 c.889, amend. 1971).

Figure 1

STATUS OF PROFESSIONAL PRACTICES LEGISLATION IN THE STATES*



States with practices commissions advisory to the State Board of Education

States with standards boards advisory to the State Board of Education

States with combined commissions/boards

[P] NEA pilot states for the Model Teacher Standards and Licensure Act

*American Association of Colleges for Teacher Education, AACTE ALERT, 1 (February 1972) at 4.

As indicated in the discussion of statutes pertaining to certification, some states expressly list violation of such codes or standards as sufficient ground for revocation of the teaching certificate.[102]

Professional practices commissions may investigate complaints against teachers, collect evidence, and conduct hearings. The South Dakota statute authorizes its commission to issue subpoenas, require attendance of witnesses, require production of written material and records, administer oaths, and take evidence.[103] Finally, in addition to recommending courses of action to the appropriate governing bodies, the commission may privately warn or reprimand individual teachers.[104]

III. TEACHER CONDUCT RESULTING IN CERTIFICATE SUSPENSION OR REVOCATION

Despite the voluminous legislation enabling authorized officials or agencies to revoke teaching certificates, this penalty is not imposed frequently.[105] Throughout the years, certificates were seldom revoked for teacher conduct that did not clearly fall within the grounds stated in the statutes. Consequently, the judicial challenges have not been numerous and the case law on which to base generalizations is not extensive.

Contract Violations

A compilation of statistics on actual revocation of certificates would probably show contract violations as a leading cause.[106] For example, when a teacher, without the consent of the board of education, abandons his position during the term of his contract, it is not difficult to present "satisfactory proof of . . . the annulling of a written contract."[107] Because proof of violation can be established, it is likely complaints will be filed and revocations will be issued.

A recent Nebraska case illustrates the difficulty in formulating a convincing argument for rescinding a suspension or revocation order based on a contract violation.[108] The teacher brought action to review an order by the state board of education suspending his

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[102] *Id.* § 13.211.
[103] *See SDLC* 1967 13-43-28 (Supp. 1971).
[104] *Id.*
[105] *See* Firth, *op. cit. supra* note 21.
[106] Contract violations account for nearly all of the certificate violations in Missouri.
[107] *RS Mo.* 1969 § 168.071.
[108] *See* Henderson v. School District of Scottsbluff, 84 Nebr. 858, 173 N.W. 2d 32 (1969).

certificate for one year. The suspension resulted from the local board of education's documented complaint that the teacher resigned his contract to enter business. Since the teacher obviously violated his contract, the primary question considered by the court was: Did the teacher have a "just cause" for so doing? The court answered:

> "Just cause" for a contract violation as contemplated by the statute means a legal or lawful ground for such action. The fact that the plaintiff wished to enter some other field of endeavor does not constitute a legal or lawful reason for the violation of his contract. It is therefore apparent that the plaintiff is not entitled to any relief as matter of law.[109]

The lower court's decision to dismiss the case was affirmed.

Immorality

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.

It is frequently observed that immorality, as used in the certification statutes, is not limited to sexual misconduct. An Oregon teacher was denied a five-year certificate on the ground that he failed to present evidence of good moral character.[110] Before becoming a teacher, he had been convicted of several burglaries committed while serving as a security guard and had served eighteen months of a two-year sentence. The Oregon Supreme Court upheld the state board of education's action, indicating that the judgment to deny the certificate was within the board's decretion.[111]

This decision raises the question whether the outcome would have been the same had revocation rather than denial of the certificate been the issue.[112] In *Fountain v. State Board of Education*, the court held that a California statute calling for the suspension of a certificate "for conviction of a sex offense" does not operate retroactively.[113] Likewise, the conviction for the crime, in this instance "lewd vagrancy," had occurred prior to the issuance of the initial certificate. The statutes contained no provision permitting

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[109] *Id* at 34.
[110] Similar requirements are included in the certification statutes of a number of states.
[111] Application of Bay, 378 P. 2d 558 (Ore. 1963).
[112] In general the courts tend to permit the licensing agency to exercise a greater degree of discretionary authority in initial issuance of certificates than in their revocation.
[113] See 157 Cal. App. 2d 281, 320 P. 2d 899 (1958).

revocation for grounds that would have "prevented the initial issuance of the certificate."[114]

The New York Supreme Court denied a teacher's plea for the restoration of his substitute teaching license by the board of education of the city of New York.[115] Following an incident involving some of his students, the teacher was warned that his certificate would be revoked for any recurrence. Two years later the teacher was arrested on a morals charge and his license was suspended. But it was restored after his aquittal. After another two-year interval, he was arrested on a similar charge and his license was summarily revoked. Although also acquitted on this charge the board refused to reinstate his license. Because of the legal status of his position, the nature of the certificate, and the regulations governing its issuance and revocation, the court would not require the board to follow procedures other than those stated in its bylaws. Furthermore, the court would not question the sufficiency of the reasons for the revocation.

In California a teacher brought action to compel the state board of education to restore his teaching credential.[116] The revocation by the board was in response to charges of immoral and unprofessional conduct alleging that at a public beach the teacher had "rubbed, touched and fondled the private sexual parts" of another man.[117] In his testimony the teacher acknowledged a past history of homosexual behavior. In affirming the trial court's decision supporting the action of the state board of education, the appellate court said:

> In view of the appellant's statutory duty as a teacher to "endeavor to impress on the minds of the pupils the principles of morality" and his necessarily close association with children in the discharge of his professional duties as a teacher there is in our minds an obvious rational connection between his homosexual conduct on the beach and the consequent action of the respondent in revoking his [certificate].[118]

Does homosexual behavior, then, constitute immoral conduct of sufficient ground to warrant the suspension on revocation of the

> Homosexual behavior has long been contrary and abhorrent to the social mores and moral standards of the peoples of California as it has been since antiquity to those of many other peoples. It is clearly, therefore,

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114*See* Table 1 *supra*.
115*See* Grangrande v. Board of Education of City of New York, 44 Misc. 2d 643 (Sup. Ct. 1964).
116*See* Sarac v. State Board of Education, 249 Cal. App. 2d 58, Cal. Rptr. 69 (1967).
117*Id.* at 60.
118*Id.* at 63.

certificate? The pronouncement of the court in this case seems to leave little doubt:

> immoral conduct within the meaning of the education code. . . . 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.[119]

However, subsequent decisions tend to inject a degree of uncertainty.

In 1969, in *Morrison v. State Board of Education*, the California Supreme Court reviewed a revocation action also resulting from charges of "immoral and unprofessional conduct and an act involving moral turpitude."[120] The charges arose from a "limited noncriminal physical relationship of a homosexual nature" that the plaintiff had engaged in with a fellow teacher.[121] The relationship occurred in Morrison's apartment on four separate occasions in a one-week period. Approximately one year later he reported the incidents to his superintendent and resigned his position. The revocation occurred some three years after the incident.

The court distinguished between the "public" and "private" conduct of a teacher and placed the burden of proof on the licensing agency to establish a relationship between the questioned conduct and fitness to teach. According to the opinion:

> The power of the state to regulate professions and conditions of government employment must not arbitrarily impair the right of the individual to live his private life, apart from his job as he sees fit.[122]

The court also specified guidelines for use in determining whether the teacher's allegedly immoral conduct warrants disciplinary action:

> [The] board may consider such matters as the likelihood that the conduct may adversely affect students or fellow teachers, degree of such adversity anticipated, proximity or remoteness of the time of conduct, type of teaching certificate held by the party involved, extenuating or aggravating circumstances, if any, surrounding the conduct, praiseworthiness or blameworthiness of motives resulting in the conduct, likelihood of recurrence of the questioned conduct, and the extent to which disciplinary action may inflict adverse impact or chilling effect on the constitutional rights of the teacher involved or other teachers. . . .[123]

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[119] *Id.*

[120] Morrison v. State Board of Education, 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P. 2d 375.

[121] *Id.* at 378. *i.e.*, not involving sodomy, oral copulation, public solicitation of lewd acts, loitering near public toilets, nor exhibitionism.

[122] *Id.* at 394.

[123] *Id.* at 386.

In ruling that this particular teacher's certificate must be restored, the court evidently anticipated misinterpretation of its decision. The judge explained: "We do not, of course, hold that homosexuals must be permitted to teach in the public schools of California. We require only that the board find that the individual is not fit to teach."[124]

Although the *Morrison* case seems to call for the removal of most, if not all, restrictions on the teacher's private life unless an effect on his teaching competence can be shown, a subsequent case indicates that some limits still exist.[125] In California a superior court refused to reinstate the teaching credential of a former elementary school instructor. The credential was revoked as a result of activities the teacher and her husband engaged in as members of a "wife-swapping or swingers" group. She indicated that she had had sex with two other men while her husband was present but maintained that her private life was her own business and unrelated to her fitness to teach. Judge Church said, however, that the "intimate and delicate relationship between teachers and students required that the teachers be held to standards of morality in their private lives that may not be required of others."[126]

Un-American Activities

Legislators have attempted to ensure that the schools instill the ideals of citizenship in their pupils and that teachers not use their positions to disseminate subversive beliefs. The resulting legislation takes various forms including required loyalty oaths, required instruction, prohibited organizational memberships, and prohibited instruction. Noncompliance often carries the penalty of denial or revocation of the teaching certificate.[127]

The certificates of Rita and William Mack were revoked on the

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[124]*Id.* at 394. In N. Horenstein, *Homosexuals and the Teaching Profession*, 20 Cleve. St. L. Rev. at 133, the author commented:

Although in Morrison v. State Board of Education, the court would not commit itself to the extent of requiring the school system of California to employ homosexuals, it did move towards clarifying the intent of statutes pertaining to the dismissal of teachers for homosexuality. By requiring the system to prove that an individuals' sexual inclinations produce an adverse effect on his teaching service, the court thus refused to condemn the individual by reason of such inclinations. It would seem that this was a step toward judging the homosexual for his potential as an effective teacher, and towards not punishing him for his inability to conform to the sexual mores of society.

[125]*See* 10 NOLPE Notes 1 (Oct. 1971).

[126]*Id.*

[127]*See* Mack v. State Board of Education, 224 Cal. App. 2d 370, 36 Cal. Rptr. 677 (1964). See listing of required and prohibited instruction in Table 3, page [18a], *supra*.

ground that each had sworn falsely to the loyalty oath required by California law. This oath contained the provisions:

> That within the five years immediately preceding the taking of this oath I have not been a member of any party or organization, political or otherwise, that advocates the overthrow of the government of the United States or the State of California by force or violence.[128]

At the time they took the oath they were both members of the American Communist Party. On the basis of the facts presented, it was held that the state board did not establish that the Communist Party advocated the forceful overthrow of the United States and California governments nor that the teachers knew at the time of signing the oaths what the party advocated. Therefore, the certificates were reinstated.

In 1970, a three-judge district court ruled that the California loyalty oath is an unconstitutional condition for certification.[129] The weight of evidence now indicates that membership in a political organization *per se* is not a permissible ground for disqualifying applications for the profession or for revoking their certificate or license to teach. The state probably may go no further than to require that the teacher be willing to affirm a general commitment to uphold the Constitution and to perform the duties of his position.[130]

Failure to Earn Required Graduate Credits

In a number of states the certification standards require that the teacher, to qualify for permanent certification, complete a master's degree or a specified number of graduate credit hours. A New York teacher defied such a requirement and petitioned the courts to order validation of her licenses. She challenged the reasonableness of the standards, maintaining that her excellent scholastic record and her service to the profession should be accepted in lieu of the required thirty graduate hours. The court denied the petition, noting that "due to the nature of the matter, [the court was] unable to evaluate the case on its merits."[131] In other words, the court acknowledged its inability to base a decision on the educational validity of the requirement.

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[128] *Id.* at 377.
[129] *See* Mac Kay v. Rafferty, 321 F. Supp. 1177 (N.D. Cal. 1970).
[130] *See* W. Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 Duke Law J. 841.
[131] Turetsky v. Allen, 59 Misc. 2d 895, 301 N.Y.S. 2d 890 (Sup. Ct. 1968).

IV. TEACHER CONDUCT RESULTING IN SUSPENSION OR DISMISSAL

Because of the many recent decisions involving procedural due process in connection with teacher suspension or dismissal, the concern of the courts for the actual causes of disciplinary actions may be insufficiently appreciated by school personnel. Therefore, in examining the judicial and administrative decisions, particular attention is given to the specific conduct that precipitated a suspenson or dismissal and to the extent to which this conduct represented cause sufficient to justify this action.[132]

To avoid duplicating the many existing writings on teacher dismissal, the cases reported are limited primarily to those adjudicated in the past five years. This delimitation also centers the discussion on restrictions reflecting current public attitude toward teacher behavior, as well as recent judicial concern for individual constitutional rights.

Although teacher conduct is herein categorized under the most frequently listed statutory grounds, for example, incompetency, neglect of duty, insubordination, and immorality, it should be recognized that these categories are not mutually exclusive and that the meanings ascribed to these terms by the courts are not always consistent. The decisions on what charge to make for a given infraction depend on the legal grounds for dismissal in a particular state. Also, for a given incident or series of incidents of misbehavior, the board of education may attempt to justify dismissal on several statutory grounds.

Incompetency

The inclusion of incompetency as part of a discussion of teacher discipline may be questioned because the discharge of a teacher who, through no fault of his own, is incapable of providing adequate classroom instruction can hardly be termed a disciplinary action. However, this ground is used to justify dismissal, not only for ineffective classroom performance but also for a variety of conducts not approved by the board of education.

If a board of education is to defend the dismissal of a teacher for incompetency, its chances of success are enhanced by a detailed

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[132]For a comprehensive listing of cases dealing with the substantive aspects of teacher dismissal, *See* H. Punke, *Cause and Grounds in Teacher Dismissal*, Ch. 9, *The Teacher and the Courts* (1971) and L. Peterson, R. Rossmiller, and M. Volz, *Public School Law* 410-28 (1969).

list of specific documented charges. A United States district court in New York, for example, rejected a teacher's claim that his dismissal was arbitrary, capricious, and in violation of his right to due process.[133] The teacher's dismissal resulted from a series of problems: (1) parents complained that pupils were being held after class and that one girl pupil was physically abused; (2) this girl reported to the principal that she was pushed and injured by the teacher, and another pupil corroborated her claim; (3) the principal found that the teacher's room was in total disorder when he went to discuss the matter with him; and (4) the principal, when attempting to observe the teacher's performance, found him asleep in the teachers' lounge. On the other hand, an Alabama teacher of vocational agriculture won reinstatement after he was able to present testimony that refuted each item of a long list of incompetency charges.[134]

Incompetency charges may include the nonperformance or malperformance of extracurricular duties.[135] A California teacher failed to carry out assigned duties at a football game, and to attend and carry out her duties at a nonschool festival. She was also charged with wearing "Capri pants" to another football game even though the school dress code specifically prohibited this attire. These charges were in addition to charges dealing with various deficiencies in her classroom performance, that is, leaving the classroom unsupervised, failing to report absences and tardiness of pupils, and incurring bad ratings on evaluations of her performance by the head counselor and the principal. The court held that "since the causes for not reemploying the teacher were clearly related to the welfare of the school and its pupils, the sufficiency of the cause was conclusive."[136]

The evidence supporting a dismissal for incompetency appears to carry greater weight if the teacher is given ample warning and is provided sufficient opportunity to correct the ineffective performance. For example, a decision not to reemploy a teacher because of his inefficiency and incompetency was affirmed by the New Mexico Court of Appeals, which held that substantial evidence existed to support the findings of the local board of educa-

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[133] *See* Canty v. Board of Education, City of New York, 312 F. Supp. 254 (S.D.N.Y. 1970).

[134] *See* State Tenure Commission v. Madison County Board of Education, 282 Ala. 648, 213 So.2d 823 (1968).

[135] *See* McGlone v. Mt. Diablo Unified School District, 3 Cal. App. 3d 17, 82 Cal. Rptr. 225 (1969).

[136] 3 Cal. App. 3d at 23.

tion.[137] Records introduced showed dissatisfaction with the teacher's performance in March 1967. In February 1968, he was again informed of specific deficiencies in grading practices, teaching methods, and disciplining students.

In Wisconsin, a teacher was dismissed for her unwillingness or inability to adapt her teaching methods to a team-teaching arrangement.[138] According to testimony, she failed to communicate with fellow teachers and continued to follow traditional methods of instruction. This dismissal was overturned by the courts, not on the basis of insufficient evidence, but because the school district failed to inform the teacher of the consequences of her behavior and to supply her with a statement of reasons for her dismissal.

The case of *Jergenson v. Board of Trustees* illustrates a teacher's dismissal for incompetency that was based primarily on the product of his students.[139] The product was the content of a school newspaper prepared under his supervision. The board presented other evidence: a poem, alleged to be obscene, that remained on the teacher's chalkboard for two weeks; the use of the word "rape" while teaching; and his failure to maintain discipline while a guest lecturer (a local businessman) was speaking to the class. The general charge was made that "your philosophy and practice of education is detrimental to the best interest of high school students."[140]

Although the Wyoming Supreme Court affirmed the lower court's decision supporting the dismissal, Judge Gray, in a detailed and convincing dissent, observed:

> If a teacher can be discharged for incompetency on the basis of the record before us in this case, it is quite apparent that a school board would have little difficulty in dismissing a teacher who, for flimsy reasons, had incurred the ill-will of the board.[141]
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> [The teacher] had apparently incurred the ire of the board members by flaunting before them the style of hair, a beard, and a dress of which they disapproved. . . . [In conference with them] he made known his views of legalization of marijuana and student sit-ins.[142]

Referring to the evidence, the judge noted that the principal and the superintendent were also responsible for the content of the newspaper and that the results of a student survey on the teacher's classroom effectiveness favored him.

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[137] *See* Wickersham v. New Mexico State Board of Education, 81 N.M. 188, 464 P. 2d 918 (1970).
[138] *See* Gouge v. Joint School District No. 1, 310 F. Supp. 984 (W.D. Wis. 1970).
[139] *See* 476 P. 2d 481 (Wyo. 1970).
[140] *Id.* at 482.
[141] *Id.* at 488.
[142] *Id.* at 489.

A final comment by Judge Gray appears to indicate his feeling that this decision was inconsistent with other rulings throughout the country:

> . . . today however in light of the A. P. A. and the school code and the fairly recent decisions, particularly of the federal courts, dealing with due process with academic freedom, with the right of free speech, and the Civil Rights Act, we have an entirely new "ballgame" and these problems must be approached accordingly.[143]

Judge Gray might have had a decision such as *Mullen v. Board of Education*, in mind when he made this statement.[144] In overturning the dismissal of a teacher for alleged incompetency, the court observed:

> Also of some relevance is the fact that questions concerning Mullen's ability arose only after he became the building representative for the Dubois Area Educational Association in which capacity he found it necessary to press complaints on the principal and superintendent with regard to the treatment of two fellow teachers.[145]

The teacher's performance was rated entirely satisfactory on four occasions, unsatisfactory only once, and that just four days before his dismissal. The courts, then, are suspicious of board of education charges that a teacher who was formerly considered competent has suddenly become incompetent, especially when conflict between the board and the teacher has developed on points that are unrelated to his teaching performance.

Finally, the courts have considered the legality of the use of standardized test scores as a basis for both the denial of initial employment and the nonrenewal of a probationary teacher's contract. A Mississippi case, *Armstead v. Starkeville Municipal Separate School District*, challenged two board policies that made employment dependent on the attainment of a minimum score on the Graduate Record Examination (GRE).[146] Testimony indicated the test was designed to measure the individual's capacity for advanced study at the master's and doctoral level rather than his capacity for performance as a teacher. Because this test classified applicants and inservice teachers on the basis of race (resulting in a significant decrease in black teachers in the system), the court held that the policies calling for use of the test were constitutionally invalid. Consequently, the court ordered the district to rein-

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[143] *Id.* at 488. Judge Gray is referring here to the Wyoming Administrative Procedures Act.

[144] *See* 436 Pa. 211, 359 A. 2d 877 (1969).

[145] 259 A. 2d at 279.

[146] *See* 325 F. Supp. 560 (N. D. Miss. 1971).

state the teachers discharged on the basis of their GRE scores and to reconsider the applicants denied employment for this reason.

Neglect of Duty

Neglect of duty, if the teacher is actually negligent, can usually be proved without much difficulty. This is especially true if the teacher's duties are well defined and the school maintains reasonably adequate personnel records. Under these conditions the courts are not likely to reverse the dismissal unless legally incorrect or inadequate procedures were followed.

Dismissal actions for neglect of duty have failed when the procedures were deficient and evidence was lacking. A Florida teacher won reinstatement after she established that three hearing panel members whom she deemed prejudiced failed to disqualify themselves as required by law.[147] The basis for the teacher's dismissal was neglect of duty as evidenced by one or more days' absence without leave. In another case, the employer was unable to establish that a principal neglected his regular duties while also serving as a "Head Start" director.[148] The dispute arose over the alleged dual compensation he received during the summer, but the court observed there was no evidence the principal was paid for work not performed.

Neglect of duty was also the charge against a Louisiana teacher who refused to wear a necktie as required by school board policy.[149] As its reason for adopting the policy, the board stated that the manner in which teachers dressed affected school-community relations. The board gave the teachers due notice of the new policy. When a teacher failed to comply, the board imposed on him a thirty-day suspension without pay. During his suspension the teacher brought action asking the court to enjoin the enforcement of the policy. "The essential question," said the court, "is whether the regulation is so unreasonable, or is invalid for other causes, that the courts may set it aside."[150] Denying the petition, the court stated that even in light of recent federal court decisions on individual rights, the regulation must be held valid. The teacher's reinstatement was made contingent on his compliance with the policy. However, the court permitted the thirty-day suspension,

147 *See* State *ex. rel.* Allen v. Board of Public Instruction of Boward County, 214 So.2d 7 (Fla. 1968).
148 *See* Brownsville Area School District v. Alberts, 436 Pa. 429, 260 A. 2d 765 (1970).
149 *See* Blanchet v. Vermilion Parish School Board, 220 So. 2d 534 (La. App. Ct., 3d Cir. 1969).
150 *See* 220 So. 2d at 536.

which was extended through the period of judicial review, to stand.

A 1947 decision established that a teacher may not be discharged for neglect of duty if this action deprives him of privileges secured by the laws of the United States.[151] The particular privilege questioned was federal jury duty, which, in this instance, resulted in the teacher's absence from the classroom from March 7 through April 4. The board of education dismissed the teacher on recommendation of her principal, and the New York commissioner of education affirmed this action because the state statutes permitted the summary dismissal of probationary teachers.

After noting the lack of legal precedents construing privileges secured by federal statutes, Judge Hand observed:

> We do not see how it can be questioned that to permit a person who wishes to do so to serve on a federal jury is to deny an interest which the statute means to protect. True, the plaintiff did serve upon the jury—literally, she was not "prevented" from doing so—but it would emasculate the act either to deny protection against reprisal to those whom threats did not deter, or to leave without recourse those who were later made victims of reprisal of which they had not been warned.[152]

Although the exercise of federal constitutional and statutory rights will be protected, it is apparent the courts will not ignore substantial dereliction of duty. A black principal in Georgia claimed his dismissal resulted from racial bias.[153] However, evidence presented indicated that he failed to hold fire drills, to secure buildings (which resulted in loss and damage of school property) to attend certain school meetings, to cooperate in giving achievement tests, and to follow school regulations on the use of state-adopted textbooks. Evidence also showed that he disrupted certain faculty meetings while denouncing the actions of the central administration. The courts accepted this evidence as sufficient grounds for dismissing the principal.

A similar ruling was handed down in *Robbins v. Argo Community High School District*.[154] The teacher was actively involved in community affairs and did much to relieve racial tensions in the school. Nevertheless, these commendable and constitutionally protected activities did not compensate for her failure to carry out her assigned responsibilities. According to the school record, she was

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[151] *See* Bomar v. Keyes, 162 F. 2d 136 (2d Cir. 1947).
[152] *Id.* at 139.
[153] Glover v. Daniel, 318 F. Supp. 1070 (N.D. Ga. 1969).
[154] *See* 313 F. Supp. 642 (N.D. Ill. 1970).

late 140 of 167 days and missed hall duty 50 percent of the time. She also left classes unattended and left school without signing out. Finally, the head of the English department was highly critical of her teaching methods. In the words of the opinion in the Georgia case: "The First Amendment gives the teacher the right to speak his mind but it does not give him the right to disrupt school."[155]

One final example involves a school superintendent's political activity during a school board election.[156] The dicta by Judge Palimore merits repeating:

> A school superintendent cannot be expected to confine his extra-curricular activities to birdwatching while a covetous rival is out campaigning for a school board to unseat him. So, if he remains within the confines of propriety, neither neglecting his duties nor using his powers to coerce those who are subject to his official influence, he is free to engage in political activity whether it concerns school elections or otherwise. But it is an equally harsh fact of life that if he loses, his record of performance had better be above reproach, because the winners are also human and will scrutinize his armor for an Achilles heel. Unfortunately, it is an unavoidable risk of the game, and that is what happened in this case.[157]

Evidence showed that the superintendent used funds from federal programs to influence votes and failed to hold fire drills and to correct fire hazards revealed by a fire marshal's inspection. The court ruled this evidence was sufficient to warrant discharge. This and the previous cases clearly support Judge Palimore's observation that if a teacher engages in controversial, but legally protected or sanctioned activity, it is imperative that he "keep his house in order."

Insubordination

The generic definition of insubordination is "unwillingness to submit to authority."[158] In this day of teacher militancy, it is not surprising that this ground is frequently used to remove errant teachers. Insubordination leading to suspension or dismissal ranges from the direct violation of the lawful rules of the board of education to the wearing of some personal adornment, such as a beard, which the administration or the community finds objectionable.

The board of education possesses the expressed or implied power to promulgate the rules and regulations governing the schools in its district. The teachers of that district have a statutory and/or contractual duty to obey these rules and regulations, assuming, of

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155 *See supra* note 153 at 646.
156 *See* Bell v. Board of Education of McCreary County, 450 S.W. 2d 229 (Ky. 1970).
157 *Id.* at 233.
158 *Webster's Seventh New Collegiate Dictionary* at 439.

course, they are reasonable and lawful. With few exceptions, the courts have upheld discharges for violations of such rules. Two recent cases illustrate this point.

A teacher new to an Idaho school district failed to sign and return the written contract tendered to him and to present a valid teaching credential for registration by school officials.[159] He continued to ignore this requirement even after he was advised that he could not be paid until he complied. The court recognized both the power and the duty of the board to terminate the teacher's employment.

Similarly, the Michigan Court of Appeals ruled that the discharge of a teacher was within the authority of the board of education when shown that the teacher violated school rules and regulations by being tardy, falsifying sign-in times, and being absent from duty (without reporting such absences).[160]

A teacher may not be dismissed for violation of rules and regulations that do not exist or of rules that are enacted after the alleged violation occurred. In Colorado, a superintendent accused a teacher of "physicially manhandling students" in her class "even though action of this sort is definitely against stated school board policies."[161] In testimony, the teacher admitted she occasionally used physical force in disciplining students. The Colorado Supreme Court held, however, that the discharge was improper because "there was no evidence that the school board had passed any rule or regulation regarding corporal punishment."[162]

Refusal to accept transfer appears to constitute an act of insubordination sufficient to justify dismissal. This observation is supported by the results of an administrative appeal in New York City.[163] Although a hearing officer recommended dismissal of an English teacher who allegedly led four students out of the building during a strike and participated in the distribution of an underground newspaper, the board ordered a transfer in the best interests of the school and the teacher. After the teacher refused the transfer and received formal notice of the consequences, the board dismissed him. The state commissioner of education sustained this action.

159Heine v. School District, No. 271, 95 Ida. 85, 481 P. 2d 316 (1971).
160Caldwell v. Ecorse Board of Education, 17 Mich. App. 632, 276 N.W. 2d 277 (1969).
161Nordstrom v. Hansford, 164 Colo. 398, 435 P. 2d 397 (1967).
162435 P. 2d at 397.
163Matter of Horelick, 10 Ed. Dept. Rep., N.Y. Comm. Dec. No. 8281 reported in 12 *NOLPE School Law Repr.* 15 (Sept. 1971).

The Utah Supreme Court upheld a board of education's authority to transfer teachers and to dismiss a teacher who refused transfer.[164] The teacher, transferred as a result of his refusal to attend a workshop using federally financed materials, claimed violation of his constitutional rights. In the words of the opinion:

> Surely the right of freedom of speech in a school teacher cannot prevent a school board from taking such action with respect to school personnel as in its judgment will most efficiently and properly fulfill its responsibility to the school district.
> [The teacher] was undoubtedly entitled to his freedom of thought and of speech in regard to his declared aversion to the use of federal funds in the public schools. However, his opposition and refusal to cooperate in carrying out the policies determined by those charged with the duty of administering school affairs was a factor which those officials could properly consider in fulfilling their responsibilities.[165]

Once a teacher voluntarily vacates his position, the board of education is under no obligation to reemploy him. This is the finding of the Kentucky Court of Appeals in a case involving a former junior high school teacher. After he was denied leave by the board of education, the teacher discontinued his duties and began a paid, full-time job with the American Federation of Teachers.[166]

The United States Supreme Court ruling in the now famous *Pickering* case gave great impetus to removal of unwarranted restrictions on the teacher's freedom of speech and expression.[167] The case resulted from the dismissal of a teacher who wrote a letter to the local newspaper criticizing the administration's handling of past proposals to raise school revenue and its allocation of resources between the athletic and the educational programs of the school. The court said, in effect, that the teacher's right to speak out on issues of public concern should not serve as a basis for his discharge.

Following this ruling, the court of appeals of New York reversed its earlier decision upholding a teacher's dismissal.[168] In this instance the teacher addressed a letter to the teachers and the administration of the district criticizing the school board's failure to renew the contract of a probationary teacher. This letter, written

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[164] *See* Brough v. Board of Education of Millard County School District, 23 Utah 2d 353, 463 P. 2d 567 (1969), *cert. denied*, 398 U.S. 928 (1970).
[165] 463 P. 2d at 568.
[166] Miller v. Noe, 432 S.W. 2d 818 (Ky. 1968).
[167] Pickering v. Board of Education, 88 S. Ct. 1731, 391 U.S. 563, 20 L. Ed. 2d 811 (1968).
[168] Puentes v. Board of Education, 24 N.Y. 2d 996, 302 N.Y.S. 2d 824, 250 N.E. 2d 232 (1969).

without the consent of the probationary teacher, contained some factual inaccuracies, yet the court held that the communication had no deleterious effects within the school system and was insufficient to sanction disciplinary action.

More recent cases are beginning to define the limitations on the exercise of these constitutional rights. Although a critical letter was again the source of the dispute in *Watts v. Seward School Board*, the Alaska Supreme Court affirmed the dismissal of the teachers involved.[169] The court based its decision on the following facts that, in its opinion, distinguish this case from *Pickering*: (1) the criticisms in the letter were directed toward a person (the superintendent), (2) the statements were in the nature of grievances, (3) the false statements reflected on the integrity and professional ability of the superintendent and concerned the day-to-day operation of the school, and (4) the open letter was a source of community controversy.[170]

The judicial attitudes toward oral communication appear to fall into a pattern similar to those established toward written communication. An Indiana school board charged that one of its teachers "exhibited a general attitude which discloses a refusal to cooperate with school authorities on matters related to school administration."[171] This charge stemmed from the refusal of the teacher, a member of a negotiating team, to retract a statement made at a meeting of the teachers association. The statement said, in part, that "the school administration was trying to buy the teachers off with little items at the expense of big ones."[172] Since there were no other charges, the district court held that the dismissal, based solely on such statements, was unjustified and constitutionally impermissible.

As in written communication, obvious personal attacks are viewed differently by the courts. In Connecticut, a teacher failed to win a contract renewal.[173] Dissatisfaction with his teaching assignment prompted him, in an open meeting on school problems, to label the director of secondary education a liar and to question the integrity and honesty of the entire administrative staff. His statements were expressed after the meeting's guidelines were read,

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[169] *See* 454 P. 2d 732 (Alaska 1969), *cert. denied*, 398 U.S. 928 (1970).
[170] *See* 454 P. 2d 733-739.
[171] Roberts v. Lake Central School Corporation, 317 F. Supp. at 64.
[172] *Id.* at 63.
[173] Jones v. Battles, 315 F. Supp. 601 (D. Conn. 1970).

which stipulated there should be no mention of personalities in the remarks to be made. In his opinion, Judge Clarie declared:

> The plaintiff's abusive language directed toward his superiors was of such a nature as to destroy any likelihood of a future professional relationship between him and the administrative staff.
> The plaintiff's reckless, unsupportive, and subjective accusations plant the seeds of disruptive dissention among the many. The standards of professional conduct exhibited of a public school teacher must never be lowered to the level of name-calling and abuse under the guise of protected free speech.[174]

The court found that the conduct of the teacher transgressed the protective limits afforded him under the law.

More recently, in *Ahern v. Board of Education of Grandview,* the courts rejected a Nebraska teacher's requests for injunctive relief under the Civil Rights Act.[175] The teacher's unorthodox teaching style and her outspokenness resulted in warnings by the school administration. The incident leading to her discharge occurred when she returned to duty after an absence and reacted to a report about problems between a substitute teacher and her students. The plaintiff said to her class, "That bitch! I hope that if this happens again . . . all of you walk out."[176] One of these problems, a slapping incident, was role-played in her other classes. The teacher encouraged her students to develop a proposal for a school regulation regarding corporal punishment. In regard to the teacher's statements in the classroom, the court said:

> I am persuaded that the exercising of a constitutional right was not the reason for the discharge. Although a teacher has a right to express opinions and concerns, as does any other citizen on matters of public concern, by virtue of the First and Fourteenth Amendments, . . . I doubt that she has the right to express them *during class* in deliberate violation of a superior's admonition not to do so, when the subject of her opinions and concerns is directly related to student and teacher discipline.[177]

Does First Amendment protection extend to the teacher's choice of instructional materials? As demonstrated by the cases that follow, public school teachers are asserting a constitutional right to academic freedom. The insubordination charge arises when the teacher is ordered to stop using the materials in question, but refuses to do so.

This situation arose in Massachusetts when a teacher was sus-

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174 *Id.* at 607.
175 *See* 327 F. Supp. 1391 (D. Nebr. 1971).
176 *Id.* at 1393.
177 *Id.* at 1397.

pended for assigning, after she was asked not to do so, an article in the *Atlantic Monthly* (student edition) that contained a vulgar term the board of education found offensive.[178] The court directed the reinstatement of the teacher after reviewing the article, affirming its literary merits, and noting the use of the offending word in other works in the school library.

The facts were quite similar in *Parducci v. Rutland.* In this instance, the assignment was a short story by Vonnegut entitled, "Welcome to the Monkey House."[179] The principal and the associate superintendent objected to use of the story because, in their opinion, it advocated "killing off elderly people and free sex."[180] They asked the teacher to discontinue using the story; the teacher declined and was dismissed. In considering the constitutional issues raised, Chief Judge Johnson said:

> Although academic freedom is not one of the enumerated rights of the first amendment, the Supreme Court has on numerous occasions emphasized that the right to teach, to inquire, to evaluate and study is fundamental to a democratic society. . . .
> The right to academic freedom, however, like all other constitutional rights, is not absolute and must be balanced against the competing interests of society. The court is keenly aware of the state's vital interest in protecting the impressionable minds of its young people from any form of propagandism in the classroom.[181]

In ordering reinstatement of the teacher, the court considered other factors: (1) the administrators' lack of expertise in the study of literature, (2) the absence of a written or announced policy on selection of instructional materials, and (3) the inclusion of other works with equally controversial language and philosophy on the school's English department reading list.

Rapidly changing styles of dress give rise to conflicts not only between administrators and students, but also between administrators and teachers. The latter conflicts are factors in some of the cases discussed earlier. On occasion, the insubordination charge results solely from the teacher's refusal to comply with an order to change his appearance. In *Lucia v. Duggan,* the teacher was ordered reinstated in his position after he was dismissed for ignoring an order to remove a beard he grew during a vacation period.[182] The decision was based not on his right to grow a beard, but on

[178]Keefe v. Geanakos, 418 F. 2d 359 (1st. Cir. 1969). The court referred to the word as "a slang expression for an incestuous son."
[179]See 316 F. Supp. 352 (M.D. Ala. 1970).
[180]*Id.* at 353.
[181]*Id.* at 355.
[182]See 305 F. Supp. 112 (D. Mass. 1969).

procedural grounds including the board's failure to notify him of charges or the consequences of refusing to shave and its failure to have a written and announced policy on the wearing of facial hair.

In Florida, a federal district court held that the school board's failure to reappoint the only black teacher on the school faculty because he disobeyed an order to shave his goatee was arbitrary, discriminatory, and racially motivated.[183] Therefore, the order of the board was nullified. The court cited *Finot v. Pasadena City Board of Education* in which the wearing of a beard by a teacher was held to be constitutionally protected under the due process clause of the Fourteenth Amendment.[184]

Finally, in *Ramsey v. Hopkins* the court declared a principal's rule barring mustaches was in violation of a teacher's right to due process and equal protection of the laws.[185] The court noted that "personal tastes of administrative officials is *[sic]* not a permissible base upon which to base rules for the organization of public institutions."[186]

[185]*See* 320 F. Supp. 477 (N.D. Ala. 1970).

Because the teacher's position had been filled, the court ordered that he be offered another teaching position in the system.

Immorality

Articles by Punke and Koenig stress the variety of behaviors leading to charges of immorality.[187] When used as a basis for dismissal, the term may encompass almost any conduct that is offensive to the standards of the community. Two cases considered in the preceding sections provide examples. Immorality was the charge against the teacher who wrote the critical letter in *Watts v. Seward School Board*[188] and was included among the charges against the principal accused of receiving dual compensation in *Brownsville Area School District v. Alberts.*[189] However, on the basis of recent decisions, including those just mentioned, it seems that the courts, in rejecting the charges, are moving toward a more restricted definition of the term.

In 1967, an Ohio court considered whether the vulgar language a teacher used in personal letters—to a former male student who

[183]*See* Braxton v. Board of Public Instruction of Duval County, 303 F. Supp. 477 (M.D. Fla. 1969).
[184]*Id.* at 959.
[186]*Id.* at 489.
[187]*See supra* notes 24 and 25.
[188]*See* text at note 169.
[189]*See* text at note 148.

graduated from the school—constituted sufficient grounds to justify discharge for immorality.[190] The boy's mother discovered the letters in his personal effects. She sent them to the police department, which forwarded them to the school officials. The teacher, after a brief suspension during an investigation, was reinstated. Subsequently, the local newspaper learned of the letters and made them the subject of several news stories. A community controversy erupted and the teacher was dismissed. The court held that the letters were within the protection of the First, Fourth, Ninth, and Fourteenth amendments to the Constitution and ordered the board to restore the teacher's rights under his employment contract.[191] The limits on the private behavior of a teacher are no more clearly delineated here[192] than they were in cases of certificate revocation. The courts have suggested a test or standard that appears to be the same for dismissal as for valid revocation, that is, showing a reasonable relationship between the misconduct and the individual's fitness to teach (or carry out the duties of a given position). In ordering the University of Minnesota to honor the employment contract of an admitted homosexual, the courts said:

> The plaintiff's position will not expose him to children of tender years who could conceivably be influenced or persuaded to his penchant. What he does in his private life as in other employees' should not be his employer's concern unless it can be shown to affect in some degree his efficiency in the performance of his duties. . . .[193]

This decision raises two questions: At what age does the student pass the "tender years"? and, would the courts order a school board to honor the contract of a homosexual high school librarian or teacher?

Not all out-of-class conduct, of course, can be termed private. The courts consider teacher dismissal for immoral conduct outside the classroom still, under certain conditions, a reasonable exercise of the board's authority. The Michigan Court of Appeals upheld a school board's action in suspending a teacher for indecent acts and for giving barbiturates to a person whom the board thought to be a former student. The action held even though the charge was later amended to name a person other than the former student.[194] The California Court of Appeals affirmed a junior college district board

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[190] *See* Jarvella v. Willoughby-Eastlake City School District Board of Education, 12 Ohio Misc. 288, 233, N.E. 2d 143 (1967).

[191] This is one of the few decisions in this area in which Fourth and Ninth Amendment rights were said to be involved.

[192] *See* text at note 120.

[193] McConnell v. Anderson, 316 F. Supp. at 814.

[194] *See* Mullally v. Board of Education, 13 Mich. App. 464, 164 N.W. 2d 742 (1968).

of trustees' discharge of a teacher for immorality.[105] This charge resulted from an incident in which a deputy sheriff on routine patrol discovered the teacher in a parked car with one of his female students. Both the student and the teacher were partly nude when the deputy flashed his light into the car. The teacher cursed, accelerated the car in reverse, knocked the deputy to the ground, and attempted to elude the officer in a high-speed chase. The court concluded that "the conduct of a teacher, even at the college level, excludes meretricious relationships with his students, as well as physical and verbal assaults on duly constituted authorities in the presence of his students."[106]

As might be anticipated, the courts subject the in-class conduct of teachers to more rigid standards of morality than out-of-class behavior. This is especially true of the state courts. In Florida, the District Court of Appeals upheld the action of the school board in dismissing a band instructor on charges of incompetency and immorality.[107] Specific complaints listed lack of discipline and remarks—to a mixed class—relating to sex, virginity, and premarital relations. The judge's dissatisfaction with recent federal court rulings is apparent from his comment:

> . . . It may be that topless waitresses and entertainers are in vogue in certain areas of our country and our federal courts may try to enjoin our state courts from stopping the sale of lewd and obscene literature and the showing of obscene films but we are still of the opinion that instructors in our schools should not be permitted to so risquely discuss sex problems in our teenage mixed classes as to cause embarrassment to the children or to invoke in them other feelings not indigenous to the courses of study being pursued.[108]

Other recent decisions are consistent in ruling that teachers' remarks and gestures that are normally considered obscene and that bear no reasonable relationship to the classroom instruction are not protected by the law.[109]

In Illinois, a band director lost his position because of immoral conduct.[200] The specific misbehaviors involved are described in the following testimony of a female student enrolled in one of his classes:

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[105]Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318 (1971).
[106]94 Cal. Rptr. at 321.
[107]Pyle v. Wasa County School Board, 238 So. 2d 121 (Fla. 1970).
[108]*Id.* at 123.
[109]*See* Palo Verde Unified School District v. Henscy, 9 Cal. App. 3d 967, 88 Cal. Rptr. 570 (1970).
[200]*See* Lombardo v. Board of Education of School District No. 27, 100 Ill. App. 2d 56, 241 N.E. 2d 495 (1968).

> . . . She was in the plaintiff's band class and when he taught he made her sit between his legs and put his arms around her and put his hands on her chest. She further testified that he touched her with the palms of his hands six or seven times. She thought he had done it accidentally and found when she tried to push his hands away he replaced them. She further testified . . . that he put his elbow in her lap and his hand on her chest. . . . The plaintiff kissed her on the cheek and would stick his tongue in her ear and kissed her on the cheek and on the face a lot.[201]

The same type of conduct was described in the testimony of other students. The court concluded that the evidence sufficiently justified the board's action.

Conduct Unbecoming a Teacher

This statutory ground for dismissal is the most nebulous considered thus far because there are no absolute standards of teacher conduct. While this charge is often included with other charges, conduct unbecoming a teacher is occasionally the single justification used.[202]

An aspect of academic freedom somewhat different from that considered in previous cases was raised in *Mailloux v. Kiley*.[203] This case was sparked by the dismissal of an English teacher for conduct unbecoming a teacher. The specific incident was the teacher's writing on the chalkboard, in connection with an incidental discussion of social taboos, the familiar four-letter slang word for sexual intercourse. In response to the teacher's assertion that he was deprived of his rights under the First Amendment, Judge Wyzanski noted that the question whether the Constitution gives any right to use a particular teaching method or leaves the decision to the school authorities is undecided. He based his order for the teacher's reinstatement on the absence of a school board policy prohibiting the particular teaching method used.

Six Boston teachers were dismissed for conduct unbecoming a teacher and their dismissals were affirmed by the courts.[204] The school at which the teachers taught was the focal point of a controversy concerning the extent of direct community participation, or control, that should be exercised or permitted in the schools. On the first day of school a demonstration took place in which several per-

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[201] 241 N.E. 2d at 495.

[202] *See* Tables 1 and 2, *supra*. The statutes of only one state distinguish between "conduct unbecoming a teacher" and "unprofessional conduct."

[203] *See* 323 F. Supp. 1387 (D. Mass. 1971). *See* the discussion of the case in 12 *NOLPE School Law Repr.* 1 (June 1971) and 12 *NOLPE School Law Repr.* 2 (December 1971).

[204] *See* DeCanio v. School Committee of Boston, 260 N.E. 2d 676 (Mass. 1970), *appeal dismissed* 410 U.S. 929 (1971).

sons entered the school and disrupted the classes. On the following day, after being barred from the building by the police, the demonstrators went to the playground where the children were being assembled and announced that there would be no school that day. The offense began at this point:

> The six plaintiffs without informing, consulting with, or obtaining the consent of superiors at the school accompanied the demonstrators and children to Shaw House (described as a liberation school) and conducted their classes there for the entire day.[205]

The next day the teachers were suspended and later dismissed.

Other Causes

While "cause" is a statutory ground for suspension and dismissal, it is used here as a miscellaneous category. Long ago the courts said that a board of education may not penalize a teacher for any cause the board deems sufficient. As noted in the previous sections, teachers may not be dismissed solely for the exercise of their constitutionally protected rights.

In *McLaughlin v. Tilendis,* an action brought under the Civil Rights Act of 1871, the courts said that probationary teachers may not be dismissed or denied a contract solely because of union membership or activities.[206] In the words of the opinion:

> Public school teachers have the right of free association . . . unless there is some alleged illegal intent, individual rights to form and join a union is protected by the first amendment.[207]

Even more recently, in *Lee v. Smith,* a federal district court reiterated the principle that "[a] teacher may not be denied a teaching contract because of his activities in a professional association, regardless of how vigorous they are. . . ."[208]

Although a teacher's political activities outside school appear to fall under the protection of the First Amendment, the extent to which such activities may be limited in the classroom is less clear. The New York commissioner of education ruled that a teacher had no constitutional right to wear a black armband in class.[209] After the teacher wore the armband to class on Vietnam Moratorium Day in November 1969, he was briefly suspended but permitted to resume his duties with the understanding that "he engaged in no poli-

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[205] *Id.* at 678.
[206] See 398 F. 2d 287 (7th Cir. 1968).
[207] *Id.* at 288.
[208] See —F. Supp. 2d — (E.D. Va. 1971) as quoted in 6 *NOLPE Notes* 4 (March 1971).
[209] Appeal of James, 10 Ed. Dept. Rep. — N.Y. Comm. Dec. No. 8195 as reported in 11 *NOLPE School Law Rptr.* 19 (December 1970). See the discussion of the case in the same volume at page 3.

tical activity while within the school."[210] However, the teacher wore the armband again on the next Moratorium Day in December. In upholding the dismissal, the commissioner pointed to the teacher's obligation to present the various sides of controversial issues he may introduce into the classroom.

The courts are now viewing refusal to take certain loyalty oaths as an insufficient ground for suspension or dismissal. School officials were enjoined from withholding salary checks of teachers refusing to take the loyalty oath in Washington.[211] In January 1972, the *Kansas City Star* reported that the California Supreme Court ordered the reinstatement of a college professor who was fired in 1950 for refusing to sign that state's loyalty oath.[212]

There are still comparatively uncomplicated dismissal cases. An Alabama teacher's contract was cancelled for, among other things, being in school while under the influence of intoxicants.[213] The principal and/or superintendent had warned the teacher on six separate occasions. The decision of the state tenure commission and the lower courts that the dismissal was procedurally sound and supported by the evidence was affirmed by the Alabama Supreme Court.

Most of the suspensions alluded to thus far have primarily been steps in dismissal actions. However, suspensions are imposed independent of dismissal and, while litigation is less likely to result, occasionally even these actions are challenged in the courts. For example, teachers who were suspended thirty-two months for falsely answering questions in their applications concerning past membership in the Communist Party asked that the penalty be set aside.[214] The New York Supreme Court ruled that the suspensions were reasonable. In another proceeding, the same court reduced the penalty assessed against a teacher for "neglect of duty"—that is, tardiness, failure to report for a special assignment, and so forth —from dismissal to a three-months' suspension.[215]

In closing, almost any conduct imaginable can lead to suspension or dismissal. In 1971 an Arizona teacher was suspended for claiming to be a witch and teaching witchcraft. Other charges were: causing mental stress for other teachers, discussing things not in the

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[210] *Id.*
[211] Hasket v. Washington, 294 F. Supp. 912 (D. D.C. 1968).
[212] *See* Kansas City Star, Jan. 2, 1972.
[213] *See* Autry v. Board of Education of Randolph County, 285 Ala. 617, 235 So. 2d 651 (1970).
[214] *See* Douglas v. Allen, 43 Misc. 2d 35, 249 N.Y.S. 2d 973 (Sup. Ct. 19 4).
[215] *See* Moser v. Board of Education, 17 A.D. 24 654, 230 N.Y.S. 2d 298 (1962).

curriculum, being a poor influence on students. and being insubordinate. Although the suspension was not challenged. the teacher has threatened to sue if she is discharged.[216]

V. TEACHER CONDUCT RESULTING IN LOSS OF SALARY

Statutes authorize boards of education to deduct teacher salaries for a number of offenses, as noted in chapter 2.[217] In addition to failure to submit reports and to attend institutes, these offenses include unauthorized absences and unlawful strikes. These latter two violations have been a frequent source of litigation in recent years. The salary losses can be significant, as evidenced in Stamford, Connecticut, where teachers were docked $285,665 for a four day strike.[218]

Unauthorized Absences

The most common consequence of an unauthorized absence (other than for strikes) is loss of wages for days missed. One basis for challenging the imposition of this penalty is the correctness of the classification of the absence under the statutes or leave policy of the school system. The California education code permits the use of sick leave in cases of personal emergency and contains a list of valid emergencies that includes appearing before a court as a litigant. In *Stevens v. Board of Education of San Marino* a teacher sought a court order to compel the school district to pay him for the sick leave days he used in appearing before the Los Angeles County Assessment Appeals Board.[219] The court refused to issue the order on the ground that this was not a "personal emergency" and that the plaintiff could not be termed "in court as a litigant."[220]

Although a board of education in New Jersey adopted a calendar providing for school to be in session on legal holidays, it could not penalize teachers for failure to report for duty on those days. According to a decision of the commissioner of education, withholding one day's pay from each of three teachers who absented themselves on Columbus Day was in violation of a state statute, which reads:

> No teacher shall be required to teach school on any holiday declared by law to be a public holiday, and no deductions from a teacher's salary shall be made by reason of the fact that a school day happens to be a day

216 *See* 6 NOLPE Notes 1 (January 1971).
217 *See e.g.* text at note 62.
218 *Educators Negotiating Service Newsletter* 96 (Jan. 1, 1972).
219 *See* 9 Cal. App. 3d 1017, 88 Cal. Rptr. 769 (1970).
220 9 Cal. App. 3d at 1022.

declared by law to be a public holiday. A contract made in violation of this section shall have no force or effect against a teacher.[221]

Therefore, the court ordered salary deductions restored in full to the teachers.

Provision for sabbatical leave is included among the fringe benefits of some school districts. Such provisions are intended to be of mutual benefit to the employee and the employer. Typically, the teacher receives a stipend based on a percentage of his annual salary and agrees to return to the district following the leave. In *Central School District v. Cohen*, the New York courts considered the legality of the school district's claim for repayment of the sabbatical salary paid to a teacher who did not return to his position after his leave.[222] The leave was granted on the basis of a written application in which the teacher accepted the condition requiring he return to his position for at least one year. After the leave, he first accepted the appointment and then resigned to accept an administrative position elsewhere. The courts held that he must repay the stipend with interest.

Unlawful Strike

As the phenomenon of teacher militancy became prevalent during the 1960s, unionization and the use of union tactics and procedures spread from the urban areas to the suburbs and even to some rural districts. This movement precipitated significant changes in the policies and procedures used by the National Education Association to improve the employment conditions of teachers. Many of the philosophical differences that formerly existed between the NEA and the American Federation of Teachers were thus eliminated. In all but three states, teacher strikes are either illegal or not authorized by statutes. Therefore, the use of the strike by teachers' organizations has increasingly become a cause for disciplinary action. A common penalty contained in numerous state teacher negotiation laws is the withholding of wages.

Teachers in New York are subject to provisions of the so-called Taylor Law for public employees, which specifies two days' pay deduction for each day missed because of an illegal strike. Striking teachers have often challenged the constitutionality of the law's provision for the salary deduction. In *Lawson v. Board of Education of Vestal* the members of a teachers association charged that

[221] Moldovan, *et al.* v. Board of the Township of Hamilton, Mercer County, Decision of N. J. Comm. of Educ. (1971) at 3.

[222] *See* 60 Misc. 2d 337, 302 N.Y.S. 2d 398 (1st Dist. Ct., Nassau Cty. 1968).

the Taylor Law violates due process of law because of the manner in which the violation is determined.[223] On the other hand, in *Zeluck v. Board of Education of New Rochelle* the challenge was based on the denial of equal protection of the law because the provision distinguishes between private and public employees and the penalty constitutes a bill of attainder.[224] In both cases the challenges were rejected by the courts and the assessment of the penalty was permitted to stand.

In recent years these types of deductions have also been the subject of litigation in other states. In these cases, the authority of the board of education to make deductions for the time missed for strikes was not questioned. Instead, the teachers charged that the board erred in procedures used in making the deductions. In Rhode Island, teachers who failed to report for work were not paid for six days, including Columbus Day.[225] Because this is a legal school holiday in the state, the commissioner ruled wages for that day should not have been deducted. A group of California teachers also succeeded in obtaining lesser pay deductions. They established to the court's satisfaction that the board of education used an incorrect formula, based on school days rather than calendar days, in calculating the amount their salaries should have been reduced.[226]

Another method used to penalize striking teachers is legislation prohibiting salary increases. The Minnesota "no strike" law requires that the employment of the striking employee be terminated and that, if he is reemployed, no salary increases be given for one year. In a negotiated settlement following a strike, a board of education agreed to reemploy teachers who had been on strike and to pay them for the period of the strike.[227] The district court enjoined the payment of these wages as a violation of the statute. The teachers appealed, charging the statute violated their rights under the First and Fourteenth Amendments. This claim was rejected by the Minnesota Supreme Court, which observed:

> Public employees have no common law right to strike. It is clearly established common law that a strike by public employees for any purpose is illegal. . . . The Indiana court held that public employees do not have the right to strike and can only acquire it through legislation.[228]

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[223] *See* 35 A.D. 2d 878, 315 N.Y.S. 2d 877 (1970).
[224] *See* 62 Misc. 2d 274, 307 N.Y.S. 2d 329 (Sup. Ct. 1970).
[225] *See* School Committee of City of Pawtucket v. State Board of Education, 103 R.I. 359 and 767, 237 A. 2d 713 (1968).
[226] *See* McNickels v. Richmond Unified School District, 11 Cal. App. 3d 1209, 90 Cal. Rptr. 562 (1970).
[227] Head v. Special School District No. 1, 182 N.W. 2d 887 (Minn. 1970).
[228] *Id.* at 894.

Pennsylvania's "Strike by Public Employees Act" had a similar provision that precluded salary increases for three years after a strike. A taxpayer sued to enjoin the Scranton school board from paying salary increases budgeted for teachers who had allegedly gone on strike.[229] Although the board of education joined the teachers organization in contending that the courts lacked jurisdiction, their complaints were dismissed. Subsequently, the legislature amended the law. As a result, the controversy was finally resolved when the state supreme court held that this amendment effectively ratified the board's action in granting the salary increase, though it may have been illegal at that time.[230]

VI. TEACHER CONDUCT RESULTING IN FINES AND/OR IMPRISONMENT

Fines and imprisonment are penalties ordered by the courts rather than the school districts or the state education agencies. However, the question of authority to fine did become the subject of litigation in Florida.[231] In 1968, as part of the much publicized collective action of the teachers of the state, four hundred teachers in Lee County resigned their positions. An agreement was negotiated that permitted the teachers to pay a one hundred dollar fine and to return to their previous status. A class suit brought by the individual teachers, the National Education Association, and the Florida Educational Association challenged these fines. The court held that school boards in Florida do not have the authority to impose fines and that the punishment did not meet the requirement of due process. Further, the court issued an order requiring that the money collected in fines be returned and that those teachers who refused to pay the fines be reinstated.

The teacher is subject to fines and/or imprisonment for numerous work-connected offenses.[232] Most of these offenses are listed in examples of statutory provisions presented in chapter 2.[233] In the recent cases of record, the offenses fall roughly into two categories: unlawful strikes and picketing and assault and battery.

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[229] *See* Legman v. School District of the City of Scranton, 432 Pa. 342, 247 A. 2d 566 (1968).

[230] *See* 438 Pa. 157, 263 A. 2d 370 (1970).

[231] *See* National Education Association v. Lee County Board of Public Instruction, 299 F. Supp. 834 (M.D. Fla. 1969).

[232] The assumption here is that fines and imprisonment that are not the result of a work-connected offense are outside the bounds of teacher discipline.

[233] *See* pages [14-16] *supra.*

Unlawful Strikes and Picketing

Teachers may be charged individually or collectively (as members or officers of a teachers union or association) for violating either a statute or a court injunction prohibiting strikes by teachers or all public employees. In addition to striking *per se*, the prohibited conduct may include picketing and otherwise disrupting operation of the school.

Although a teacher's conduct in protesting administrative decisions may not always violate a statute or court injunction, it can conflict with city ordinances. After being denied permission to hang a mural in the high school, a teacher stood up during an assembly program and said, "I'm leaving the building and won't return until the mural is hung."[234] He then left, accompanied by students, the number of which was disputed. Charges were later filed on the basis of a city ordinance that provided:

> Any person who by noisy or disorderly conduct disturbs or interferes with the quiet or good order of any place of assembly, public or private, including schools, churches, libraries, and reading rooms, is a disorderly person.[235]

The teacher was found guilty as charged and sentenced to the county jail for three months. This sentence was suspended and the teacher was placed on probation for one year.

The teacher was also convicted of trespass. Two days after the board of education suspended him following the assembly incident, the teacher conducted a "vigil of protest" in the school parking lot, against the board's action. The school principal ordered him to leave after which both the disorderly conduct and the trespass charges were filed. The New Jersey Superior Court affirmed the conviction for disorderly conduct but reversed that for trespass, holding that peaceful protest is a protected right of the individual.[236]

Peaceful picketing may not be permitted if it is used to promote an illegal strike. In North Dakota, three teachers were convicted of criminal contempt for violating an order enjoining picketing, work stoppages, or strikes.[237] The sheriff and his deputies testified they observed the three defendants walking back and forth carrying signs at the entrance to the Minot Air Force Base, the Minot High School, and the board of education building, respec-

[234]State v. Besson, 110 N.J. Super. 528, 226 A. 2d 175 (1970).
[235]266 A. 2d at 177.
[236]*Id.* at 181.
[237]State v. Heath, 177 N.W. 2d 751 (N.D. 1970).

tively. The teachers appealed, asserting, among other things, that the contempt statute was unconstitutional because it encroached on constitutional guarantees of freedom of speech and assembly, and because it permitted trial without a jury. These contentions were rejected by the state supreme court. The teachers were fined two hundred fifty dollars plus fifteen dollars court costs. Sentences of thirty days in jail were suspended on condition of good behavior, including no further unlawful picketing.

Teachers of Kankakee, Illinois, similarly challenged a temporary restraining order prohibiting them from striking and picketing.[238] Their claims of First and Fourteenth Amendment violations were also rejected. In the words of the opinion:

> The circuit court had authority and duty to issue without notice a temporary restraining order against the unlawful strike of the teachers already in progress and picketing by them. And the teachers' disobedience of such order merits their punishment for contempt.[239]

Picketing, according to the court, "while a mode of communicating ideas is not dogmatically equated with constitutionally protected free speech."[240]

Teacher organizations are not completely precluded from pressuring for better employment conditions. A school district sued to enjoin the National Education Association and the New York State Teachers Association from imposing sanctions on it.[241] The sanctions, termed an "urgent advisory," called on teachers not to make application or to take employment with the district until its labor situation was resolved. Noting that these provisions were not binding and threats were not made against the membership for failure to comply, the court refused to order the injunction.

On the other hand, the school board of the Huntington School District charged the New York State Teachers Association with violating the Taylor Act in "causing, instigating, encouraging, and condoning" a strike in district.[242] The association contended that since the association was not the certified representative of the teachers, it contended that the board of education could not impose

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[238] *See* Board of Education of Kankakee School District v. Kankakee Federation of Teachers, 46 Ill. 2d 439; 264 N.E. 2d 18 (1970).

[239] 264 N.E. 2d at 22.

[240] *Id.*

[241] *See* Board of Education of Union Free School District of Town of Brookhaven v. National Education Association and New York State Teachers Association, 63 Misc. 2d 338, 311 N.Y.S. 2d 370 (Sup. Ct. 1970).

[242] Teachers of Huntington v. Board of Education of District No. 3, 60 Misc. 2d 443, 303 N.Y.S. 2d 469 (Sup. Ct. 1969).

the penalty provided by for such violations. This penalty was the loss of dues check off privileges. The court ruled the imposition of this penalty in light of the associations activities was a proper exercise of the board's authority.

When a restraining order is issued and the organization is convicted of contempt, the penalty is more severe. The Lakeland Federation of Teachers was fined five thousand dollars because the evidence demonstrated that the union instigated a strike and caused strike bulletins and other communications urging support of the strike to be issued to the teachers and parents in the Lakeland district.[243] However, charges against the individual teachers were dismissed even though evidence indicated that certain teachers were absent from work and were seen in a picket line in front of the schools. The court decided this was not sufficient to establish that they willfully engaged in a strike in violation of the restraining order.

The New Jersey courts have imposed both fines and prison sentences on teachers organizations, their officers, and their members for striking in violation of restraining orders. Following an illegal strike, the Woodbridge Township Federation of Teachers was fined one thousand dollars, and its officers and members of the negotiating committee were given fines of five hundred to one thousand dollars, prison terms of one to three months, and probationary periods of one to two years.[244] The court emphasized the seriousness of the offense:

> When government undertakes itself to meet a need, it necessarily designs, the public interest requires, the service, and its employees cannot reverse or frustrate that decision by a concerted refusal to meet that need. In any event, teachers are ill-situated to profit from the distinction we have rejected since the maintenance of a free public school system is mandated by the State Constitution itself.[245]

In another New Jersey case, the court ruled that a ten thousand dollar fine against the Jersey City Education Association was not excessive.[246] Judge Carton observed:

> Unlike union officers, the union itself cannot be jailed for contempt. On the other hand, the citation of all striking members individually and the invocation of plenary proceedings as to each present an impractical alternative method of vindicating the public wrong committed by willful de-

[243] *See* Lakeland Federation of Teachers v. Board of Education, 65 Misc. 2d 397; 317 N.Y.S. 2d 902 (Sup. Ct. 1971).
[244] *See In re* Block, 50 N.J. 494; 236 A. 2d 589 (1967).
[245] 236 A. 2d at 592.
[246] In the Matter of Jersey City Education Association, 115 N.J. Super. 42; 278 A. 2d 206 (1971).

finance of the order. We observe also that the fine of $500 or $1,000 maximum fine even on a daily basis, would not, in all probability, serve as a deterrent to a large union calling a strike of public employees.[247]

Finally, the United States Supreme Court refused to hear the contempt case of the Newark Teachers Union. In addition to fines and jail sentences for rank and file members, the union itself received a forty thousand dollar fine.[248]

Assault and Battery

By definition, *assault* is "intentional unlawful offer of corporal injury to another by force, or force unlawfully directed toward the person of another," and *battery* is "any unlawful beating or other wrongful physical violence inflicted without his consent."[249] It is assumed that work-connected assault and battery can justifiably be considered a part of teacher discipline.

Although few assault and battery cases involving teachers have moved beyond the trial courts in the past five years, those that have illustrate the types of teacher conduct involved. Typically the complainant is a pupil who, after being physically punished, files charges against the teacher. Unless denied by statute or school board regulation, the teacher has the common-law right to administer reasonable corporal punishment. Therefore, the court must examine the specific actions of the teacher to determine whether or not they exceed the bounds of reasonableness.

In Arizona, a seventh-grade pupil sued his teacher for assault and battery, alleging that, during a softball game, the teacher grabbed him by the throat and slammed him against the backstop.[250] The teacher, acting as the umpire, had called the pupil out in a close play at first base. The teacher contended he had shoved and admonished the boy for using coarse language. The court noted that reasonable corporal punishment does not give rise to cause for action to attain damages. Although the testimony was conflicting, the Arizona Appellate Court affirmed the trial court's judgment for the teacher.

Governmental immunity does not free the teacher from liability for wrong-doing. The Kentucky Court of Appeals ruled that a trial court erred in granting a summary judgment for a teacher on the ground that he could not be held liable if he was acting

247278 A. 2d at 214.
248Educators Negotiating Service Newsletter 91 (Jan. 1, 1972).
249Black's Law Dictionary at 147 and 193.
250*See* La Frentz v. Gallagher, 105 Ariz. App. 176, 462 P. 2d 804 (1969).

within the scope of his authority.[251] Retrial was ordered on the facts, that is, to establish whether the teacher inflicted any corporal punishment or physical restraint on the pupil, a junior high school girl, and, if so, whether it was in excess of what appeared reasonably appropriate under the circumstances.

Under what conditions do the courts consider corporal punishment unreasonable? In its decision in one case, the Illinois Appellate Court said, "[T]he teacher may not wantonly or maliciously inflict corporal punishment, and may be guilty of battery if he does so."[252] The facts of this case centered around an incident at a high school football game. The teacher was assigned the duty of keeping the crowd away from a fence between the stands and the playing field. Shortly before half-time a player was injured, carried from the field on a stretcher, and placed near the fence. At half-time, the plaintiff, a fifteen-year-old boy, went to the fence to learn the extent of the player's injury. The teacher ordered the crowd back. As the boy started to leave, the teacher allegedly turned him around and struck him several times on the face before a campus policeman intervened. The court upheld the teacher's conviction for violating a city ordinance prohibiting fighting and assessed him a ten dollar fine.

A fitting summary for this section is provided by the findings of a 1970 study by Schlaegel and Fordyce.[253] This study, based on a survey of the judicial reports of the several jurisdictions, was made to ascertain the extent to which public school teachers may physically discipline students without incurring criminal or civil liability. In general, the decisions revealed judicial agreement that a teacher may administer only reasonable corporal punishment. On the other hand, the courts were divided on the degree of physical discipline that constitutes reasonable punishment. In this regard, specific findings were:

> North Carolina, Ohio, Alabama, Illinois and Pennsylvania have adopted the proposition . . . that a teacher is immune from criminal liability in administering corporal punishment provided that it is not inflicted with legal malice or does not produce permanent injury or disfigurement.[254] Similarly, Ohio, Illinois and Alabama have adopted the view that a teacher is not civilly liable for inflicting excessive physical force in good

[251]Carr v. Wright, 423 S.W. 2d 521 (Ky. 1968).
[252]City of McComb v. Gould, 104 Ill. App. 2d 361, 244 N.E. 2d 361 (1969).
[253]*See* Schlaegel and Fordyce, *Schools—Corporal Punishment without Civil or Criminal Liability*, 72 W. Va. Law Rev. 399 (1970).
[254]*Id.* at 400.

faith from motives of duty, unless such punishment results in permanent injury.[255]

The great majority of jurisdictions, however, hold a teacher to be both civilly and penally liable for the administration of *excessive* corporal punishment regardless of whether such punishment is inflicted from good motives or results in no serious injury.[256]

Under this latter position, the sex, age, size, and apparent physical condition of the pupil are key factors in determining whether or not the teacher himself is to be disciplined.

VII. CONCLUSION

This monograph began by questioning the extent to which teacher discipline has been affected by changing public opinion and attitudes toward teachers. On the basis of the documentation that followed, it can be concluded that major changes in the substantive aspects of teacher discipline have occurred. Some of these changes represent significant decreases in the restrictions on teacher conduct. The main factors that contributed to these changes were: (1) legislation and the widespread adoption of collective bargaining in education; (2) court decisions on teacher rights, especially constitutional rights; and (3) developments in the total social context.

Legislation

There have been few changes in the statutory provisions for teacher discipline since the adoption of statewide tenure laws. The notable exceptions, both essentially products of the past decade, are the collective bargaining and professional practices laws instituted in some states.[257] Although the future will probably see similar legislation in most of the remaining states, accompanied in many instances by the repeal of the tenure statutes, the resulting effect on teacher discipline is extremely difficult to predict.

Thus far, collective bargaining has frequently involved unlawful strikes and picketing that result in increased disciplinary action against teachers.[258] Last year, the number of teacher strikes decreased for the first time, indicating, perhaps, that teachers and boards of education are beginning to bargain in good faith and to develop some degree of competency in the bargaining process. Nev-

[255] *Id.* at 401.
[256] *Id.* at 402.
[257] *See* page [16-19], *supra.*
[258] *See* pages [44-46] and [47-50], *supra.*

ertheless, it is improbable that many state legislatures will grant teachers the right to strike in the near future: therefore, this violation will continue to be a leading cause of disciplinary action.

Professional practices laws hold the potential for revolutionizing teacher discipline by shifting the primary disciplining responsibility to the teaching profession itself. A new and effective form of regulation is needed as the old employee-employer relationships are replaced with collective bargaining arrangements. Unfortunately, the professions's past performance in this realm does not augur well for self-policing. Professional self-discipline is likely to remain an elusive goal for some time to come, even though the legal machinery for it will be provided in more and more states.

Court Decisions

The courts, reviewing the state statutes and administrative regulations restricting teacher conduct, have brought about significant changes. For the most part, these changes were effected by identifying constitutionally protected activities. No longer is it constitutionally permissible to deny or revoke a teacher's certificate or to dismiss a teacher for the following reasons: (1) failure to take a loyalty oath requiring him to foreswear activities or associations; (2) membership, *per se,* in political organizations, including the Communist party and economic organizations such as labor unions and teachers associations;[259] (3) refusal to restrict his teaching to a state-determined position on a controversial issue such as the theory of evolution;[260] or (4) expression of his views on issues of public concern when it is done outside the classroom.[261]

The fourth item was added with some hesitancy because the application of the First Amendment freedom of speech to teachers is in a state of flux. One would be bold indeed to proclaim standards and guidelines for judging the scope of protected teacher speech, since the courts, including the United States Supreme Court, have declined to do so.[262] However, the existing patterns of interpretation can be noted. Extramural expression on issues and matters of public concern apparently does fall within the domain of constitutional protection, whereas personal attacks and remarks disruptive of the school operation do not.[263] In-class speech, includ-

[259]*See* Van Alstyne, *op. cit. supra* note 130.
[260]*Id.* at 856.
[261]*See* text at note 167.
[262]*See* 391 U.S. at 569 and 88 S.Ct. at 1735. *See also,* 12 NOLPE School Law Rptr. 2 (Dec. 1971).
[263]*See* text at notes 167, 168, and 172.

ing the choice of subject matter, is much more restricted and is likely to remain so. Considered in the court decisions to date are such factors as: (1) the maturity level of the students; (2) the relatedness of the questioned speech or subject matter to the course, as well as the accessibility of the subject matter to the students from other sources such as the school library and its appropriateness for the course as viewed by authorities in the field; and (3) the extent to which only one side of a debated issue is presented.[204]

The weight of evidence also seems to indicate that the teacher's otherwise lawful political and union activity that does not interfere with the school's operation nor with the teacher's performance of his duties is protected from disciplinary reprisal by school officials. On the other hand, the courts have pointed out that the teacher has no common-law right to strike and that picketing, as such, cannot be equated with other forms of constitutionally protected assembly and expression.[205]

One of the most controversial areas of change pertains to the private moral behavior of the teacher. Although less stringent requirements are inevitable, it is doubtful there will be immediate wide-scale acceptance of the judicial standard that measures the acceptability of such behavior in terms of its effect on the teacher's fitness to perform his duties, rather than in terms of society's standards of morality.

Because of the recent successes teachers have experienced in the courts' decisions, it is likely they will increasingly seek judicial relief when disciplined for reasons that in any way tend to infringe on individual rights.[206] At the same time, the organizational support available to individual teachers will further encourage these actions.

Developments in the Total Social Context

Without doubt, there is a relationship between the changes produced by legislation and court decisions and the developments in the total social context. The modifications of restrictions on teacher conduct documented in this paper provide a fitting example of the accelerated rate of change described in a recent bestseller, *Future*

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[204] See pages [33-36], *supra*.

[205] See text at notes 228 and 240.

[206] A positive outcome of this threat could be improved personnel administration including more adequate supervision, better evaluation of performance, and the wider use of intermediate penalties such as suspension in lieu of dismissal.

Shock, by Alvin Toffler. The author's admonition in this respect was:

> To survive, to avert what we have termed *future shock*, the individual must become infinitely more adaptable and capable than ever before. He must search out totally new ways to anchor himself for all the old roots —religion, nation, community, family or profession—are now shaking under the hurricane impact of the accelerative thrust. Before he can do so, however, he must understand in greater detail how the effects of acceleration penetrate his personal life, creep into his behavior, and alter the quality of existence. He must, in other words, understand transsience.[267] (Emphasis added)

Educators, and all concerned with education, are well advised to consider seriously Toffler's warning, because the transience of the theories and practices of American education, including many of the substantive legal aspects of teacher discipline, is becoming readily apparent.

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[267] A. Toffler, *Future Shock* 35 (1970).

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