

THE RIGHTS OF HOMOSEXUAL TEACHERS IN THE AMERICAN PUBLIC SCHOOL SYSTEM

This discussion begins with the premise that a homosexual has as much right to a position as a teacher in the public school system of this country as does any other citizen, whether heterosexual or not. Having said this, however, one has not proceeded very far in considering the subject, because no discussion of the rights of teachers who happen to be homosexually oriented can be meaningful without an understanding of the rights -- and the ancillary obligations -- of all teachers, qua teachers. Here it is necessary to understand that, when a person assumes a position as a teacher, he or she ^{also} assumes the obligations and responsibilities which inhere to that position. The situation is essentially no different from any other position of employment. That is, it carries with it certain obligations and duties which go with the job. For example, an employee of a paint manufacturer may properly be dismissed by his employer if he were discovered telling customers that the paint was of poor quality. One obvious element of the employment relationship is the employee's duty not to disparage his employer's product, even though, in fact, the product is very inferior. The employee of the paint manufacturer does not lose his right of free speech by accepting employment, and no criminal sanctions will attach if he chooses to exercise it, but, if he does so in this instance, he may justifiably be fired by his employer for having spoken out about the paint. (The possibility of a libel action if the employee's assertions are not true is not considered.) In short, there are circumstances when the full exercise of one's legal rights are incompatible with one's employment obligations.

A position as teacher is no exception to the general principle that employment relationships carry with them certain duties which not infrequently limit the freedom of the employee involved. Although the employee's constitutional rights are not affected, if he chooses to exercise them under circumstances where he violates his duty to his

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employer, he may be fired. It goes without saying that the duties of a teacher are quite different from those of an employee of a paint manufacturer, but the principles involved are the same. In the case of a teacher, one of the central obligations of his profession is a recognition that certain matters must remain personal to the teacher himself, and are not appropriate for classroom discussion. Obviously the obligations of employees differ from one position to another. For example, if the employee of the paint manufacturer were to inform a fellow-employee that he belonged to a particular religious sect, and that all those who did not belong to that sect were destined for hell, that would be a perfectly legitimate exercise of the employee's right of free expression and one which was in no way in conflict with his duties as an employee. His remarks could certainly not be made a reason for dismissing him. Yet the very same remarks made by a teacher to a student may well constitute grounds for a reprimand or dismissal. Not only would this violate the secular character of the American public school system, but it violates one of the central canons of the teaching profession.

Let us examine this further. It is an unwritten postulate of the teacher-student relationship that a teacher's private life is, except in the most exceptional of circumstances, not an appropriate subject for discussion with students. A teacher's religious persuasion, marital status, family life, economic station, or sexual orientation are entirely private matters which are of no relevance in the process of teaching. Teachers who insist on using personal ad hominem examples for purposes of instruction do not understand the basic fundamentals of the educational process. They do not understand that the core of the student-teacher relationship rests on mutual respect, and that, in the case of a teacher, that respect is nurtured by maintaining an appropriate distance. Familiarity always breeds contempt, and, in the case of teachers vis-à-vis students, it is subversive of the entire teaching process. The facts of a teacher's personal life have no place in the classroom, and for these to be used for purposes of instruction defeats the educational process.

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This does not mean that the use of personal anecdotes or personal experiences is proscribed. A good teacher can make very effective use of these for didactic purposes. What is totally unacceptable is the notion that, because a teacher is friendly with a student or students, this legitimizes a discussion of the teacher's private life. Nor does it follow that, because students frequently discuss their own private lives with their teachers, the converse is permissible. Doctors, lawyers, ministers and teachers -- to name a few -- are constantly in receipt of information concerning the most private aspects of the lives of those whom they professionally serve, but this provides no warrant for their discussing their own private lives with those to whom they minister.

We come now directly to the teacher who is homosexual. It should be obvious from the foregoing that, for such a teacher to disclose -- much less discuss -- his homosexuality to his class or to any of his students would be a gross violation of his professional obligations as a teacher. In truth, if one pauses for a moment to consider, it will be seen that fear of this very kind of disclosure lies at the root of much of the public's hostility to homosexuals as teachers. Whether this fear be justified or not is beside the point; the fact remains that the public is terrified at the thought that a homosexual teacher will reveal his or her sexual orientation. In the misinformed view of many parents, this may influence the teacher's students to embrace homosexuality as a way of life. It makes no difference that one does not become homosexual by having a teacher who is openly gay. (It is now well established that sexual orientation is fixed long before the age at which one begins school.) What is important is that the public perceives the situation in this light, and its fears must be respected, if only because a teacher's disclosure to students of his or her homosexuality constitutes a violation of one of the basic tenets of his calling. (We are not considering here the adventitious discovery by school authorities that a teacher is homosexual.) What would one think of a public-school teacher who belonged to the Jesuit order, and who discussed his membership openly in class?

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Whether justified or not, would there not be concern on the part of some parents about religious proselytizing?

However, to speak of teachers as if their responsibilities were all identical is to divorce oneself from reality. There are elementary school teachers, high school teachers, and university teachers. What is appropriate for one group is not necessarily fitting for the others. For pupils up to a certain age, schools stand in loco parentis. In those situations, teachers must be careful not to usurp the role of their pupils' real parents. Later on, when students become older, schools are concerned solely with their educative role. Clearly, the principles we have been discussing apply with greater force when students are young, because to violate them under those circumstances trespasses upon the rights of parents to direct their children in such matters as religious belief, political viewpoint, and general life style. But even at the level of higher education, these teaching canons never disappear entirely.

Up to this point we have been considering the teacher's duties in the classroom and school. However, a teacher's conduct outside of school also falls within the concern of those who employ him simply because a teacher's outside activities are not infrequently related to his professional duties as a teacher. It is in this respect that the employment relationship of a teacher differs most substantially from that of the paint manufacturer's employee, whose conduct outside of his job rarely affects his employment. Teachers clearly have as much legal right as all other persons to participate in political movements, to engage in religious activities, and to assume a lifestyle of their own choosing. But a teacher's exercise of these rights may sometimes be in conflict with another one of his obligations as a teacher, namely his objectivity. The requirement of objectivity is central to a person's legitimacy as a teacher. A want of it turns a teacher into a partisan. This is not to suggest that partisanship is a negative characteristic. At the appropriate time and place it can reflect some of the noblest of human sentiments. Under most circumstances.

outside partisanship does not compromise a teacher's classroom objectivity. But there are occasions when it can and does. When that occurs, a teacher's superiors have a right to insist that he give up those outside activities which affect his professional objectivity, or forfeit his teaching position.

At this juncture it should be apparent that the nature of the teaching profession is such that it is almost impossible to draft a hard-and-fast code of professional conduct. Many aspects of teaching are determined by custom or unwritten convention. This is why the disciplining of teachers has, at least in theory, been left to their peers -- a practice prevailing in many other professions. Discipline by peers remains substantially the case with university teachers, but, as one proceeds down the educational ladder to high schools, and especially to elementary schools, professional discipline is enforced either by the school administration or by the local school board, with appeals to the state educational hierarchy and, ultimately, to the courts. Since local school boards and school administrators are frequently exposed to political pressures, it is at this level that the most egregious violations of due process occur. The system is such that there is ample room for those in authority to discriminate against teachers who are homosexual in the course of reaching their administrative decisions.

Where such cases reach the courts, lawyers handling them should have a full understanding of the constitutional standards which are applicable. These standards apply with equal force to all teachers, whether or not homosexuality is involved. Attorneys representing teachers must remember that the personal rights of their clients are qualified by their clients' professional obligations as teachers. This means that, in reviewing the constitutionality of disciplinary or other proceedings taken against homosexual teachers in our public school system, courts will be persuaded less by abstract first-amendment or privacy arguments than by due process arguments, particularly those involving equal protection. Constitutional issues in homosexual-teacher employment cases would appear to arise principally where the administrative action or procedures taken would not have been the same had

the teacher involved not been homosexual or the subject-matter at issue not been homosexuality.

It follows that lawyers handling cases involving a claim of discrimination for reasons of homosexuality must come into court with a thorough knowledge of the practice of school boards and educational authorities in their jurisdictions in cases similarly-circumstanced to their own except for the element of homosexuality. Litigation in such cases will not be won by arguments expounding broad theories of individual rights. This is because these rights are subject to certain professional limitations when a person becomes a public school teacher. The purpose of judicial scrutiny of allegations of discrimination for reasons of sexual orientation will be to find invidious differences in the treatment of the homosexual teacher and/or the subject of homosexuality as compared with the treatment of their heterosexual equivalents. Lawyers in these cases must move their focus away from first amendment and privacy arguments, and should concentrate far more than they have in the past on the ramifications of equal protection. Their legal horizons must be broadened so as to include as well a consideration of the discriminatory and arbitrary consequences which follow from a want of equal protection.

In this connection it is noteworthy that few of the important cases which have been won in the general field of homosexual civil liberties have rested on equal protection grounds. Only one of the successful challenges to old-style state sodomy statutes had equal protection as its rationale. (Commonwealth v. Bonadio, 490 Pa. 91; 415 A.2d 47 [1980].) The fault has not been the unwillingness of judges to accept equal protection arguments, but the failure of attorneys to make them, or, when they do, to develop them fully. The sooner the civil liberties bar gets rid of its "Griswold" syndrome in cases involving not only the rights of homosexual teachers, but the constitutionality of state sodomy and homosexual solicitation laws, the sooner its energies can be employed in developing the several other arguments -- not only equal protection -- which need to be raised in cases

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net involving teachers. No doubt, in the best of legal worlds, it would be expected that the primary arguments in many such cases would rest on first-amendment or privacy grounds, but, in the real world of the current U. S. Supreme Court, there is little chance that the federal judiciary will be permitted to extend the logic of Griswold to situations outside of marriage for years to come.

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