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SEX AND THE SCHOOL TEACHER

Michael Willemsen*

INTRODUCTION

The laws against victimless sex crimes are the product of hypocrisy. That same hypocrisy which created the laws assures that they will receive only infrequent and sporadic enforcement; even-handed and effective enforcement would jail many in the community and result in the speedy repeal of these laws. From time to time, however, some unlucky person is arrested and prosecuted. Some of those arrested escape with a severe case of fright and embarrassment. But if the victim is a teacher, the incident is likely to result in his or her permanent expulsion from the teaching profession.

This article will explore the conflict between the reality of modern sexual practices and the California laws which govern victimless sex crimes and revocation of teaching credentials. The California Supreme Court's attempt to reconcile the conflict by holding that commission of a sexual offense, absent separate proof of unfitness to teach, cannot justify revocation of the right to teach, will be examined. Finally, the problems of constitutional dimension which remain for future resolution will be investigated.

THESIS: THE LAW

The California Penal Code makes criminal a substantial number of victimless sexual acts. Among the acts proscribed are seduction by promise of marriage,1 adulterous cohabitation,2 bigamy,3 incest,4 the “infamous crime against nature”5—a euphemism which refers to sodomy, not water pollution—anal copulation,6 and

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1. CAL. PEN. CODE § 268 (West 1970). In a sense, the person seduced is a victim, but the harm is so insubstantial that the law affords her no civil remedy in California.
2. Id. § 269a.
3. Id. § 281.
4. Id. § 285.
5. Id. § 286.
6. Id. § 288a.
lewd and indecent exposure.\textsuperscript{7} Several statutes prohibit various aspects of the business of making and distributing obscene matter.\textsuperscript{8} Other statutes ban prostitution,\textsuperscript{9} and the keeping of a "dis-orderly house"\textsuperscript{10}—another euphemism which apparently refers to an establishment which provides rooms for illicit sexual activity.

The punishments prescribed for violation of these provisions are startling in their severity. The maximum punishment of life imprisonment for a second conviction for indecent exposure was recently held unconstitutional by the California Supreme Court in \textit{In re Lynch}.\textsuperscript{11} Since imprisonment, unlike death or banishment, is not deemed an intrinsically cruel or unusual punishment,\textsuperscript{12} the \textit{Lynch} decision marks the first case in California striking down a punishment for its sheer disproportionality to the gravity of the offense.\textsuperscript{13} Equally Draconian is the maximum penalty of life imprisonment for a first offense of sodomy.\textsuperscript{14} A maximum of fifty years imprisonment for incest\textsuperscript{15} and fifteen years for oral copulation between consenting adults,\textsuperscript{16} is hardly less astonishing.

The misdemeanor statutes regulating disorderly conduct also encompass some forms of victimless sexual activity. Penal Code section 647, subdivision (a),\textsuperscript{17} proscribes lewd or dissolute conduct in “any public place, and place open to the public, or exposed to public view”; subdivision (d)\textsuperscript{18} prohibits loitering in the vicinity of a public toilet to engage in or solicit lewd conduct. Section 650.5,\textsuperscript{19} which prohibits “outraging public decency”, has also been applied to victimless sexual behavior, but that enactment was held unconstitutional for vagueness.\textsuperscript{20}

Persons convicted of committing most victimless sex crimes are, along with the perpetrators of sexual assaults, required by

\begin{itemize}
\item \textsuperscript{7} \textit{Id.} \textsuperscript{§} 314.
\item \textsuperscript{8} \textit{Id.} \textsuperscript{§§} 311, 311.2, 311.4, 311.5, 311.6 (West Supp. 1974).
\item \textsuperscript{9} \textit{Id.} \textsuperscript{§§} 266-67, 315, 318 (West 1970).
\item \textsuperscript{10} \textit{Id.} \textsuperscript{§} 316.
\item \textsuperscript{11} 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).
\item \textsuperscript{12} \textit{See, e.g., People v. Wade, 266 Cal. App. 2d 918, 927-29, 72 Cal. Rptr. 538, 544-45 (1968), which rejected the contention that an indeterminate prison sentence constitutes cruel and unusual punishment.}
\item \textsuperscript{13} \textit{Id.} at 420, 503 P.2d at 927, 105 Cal. Rptr. at 223.
\item \textsuperscript{14} \textit{CAL. PEN. CODE \textsuperscript{§} 286 (West 1970) provides a punishment of “not less than one year.” Under Penal Code section 671:}
\begin{quote}
Whenever a person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specific number of years, and no limit to the duration of such imprisonment is declared, punishment of such offender shall be imprisonment during his natural life.
\end{quote}
\item \textsuperscript{15} \textit{See CAL. PEN. CODE \textsuperscript{§} 285 (West 1970).}
\item \textsuperscript{16} \textit{Id.} \textsuperscript{§} 288a.
\item \textsuperscript{17} \textit{See CAL. PEN. CODE \textsuperscript{§} 647(a) (West Supp. 1974).}
\item \textsuperscript{18} \textit{Id.} \textsuperscript{§} 647(d).
\item \textsuperscript{19} \textit{Id.} \textsuperscript{§} 650.5 (West 1970).
\item \textsuperscript{20} \textit{In re} Davis, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702 (1966).
\end{itemize}
Penal Code, section 290 to register as sexual offenders. The purpose of this registration law presumably is to provide the police with a ready list of suspects to interrogate whenever a rape or molestation occurs. But the law sweeps so broadly that this purpose is submerged in absurdity. For example, it is conceivable that actors and actresses in sexually explicit movies, whether their role involves sexual activity or not, could be required to register. The law’s dragnet effect may also reach the cameraman, the director, the producer and, perhaps, anyone who invested in the movie. In fact, it seems legally possible for a corporation to find itself compelled to register, although such a “person” is not likely to be a neighborhood molester.

Penal Code section 291 places a special duty on the police to notify a school district whenever a school employee is arrested for a crime which would require registration. This unique statute—no other profession is so treated—suggests an extraordinary

21. CAL. PEN. CODE § 290 (West Supp. 1974) requires registration of any person convicted of assault with intent to commit rape or sodomy, or of any offense defined in Sections 266, 267, 268, 285, 286, 288, 288a, subdivision 1 of section 647a, subdivision 2 or 3 of section 261, subdivision (a) or (d) of section 647, or subdivision 1 or 2 of section 314, or of any offense involving lewd and lascivious conduct under Section 272.

22. The California Supreme Court in Barrows v. Municipal Court, 1 Cal. 3d 821, 825-26, 464 P.2d 483, 486, 83 Cal. Rptr. 819, 822 (1970), said that:

The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future.

23. Subdivision 2 of section 314 of the Penal Code prohibits procuring any person to expose himself. This statute has been applied to “bottomless” dancing, People v. Newton, 9 Cal. App. 3d Supp. 24, 88 Cal. Rptr. 343 (1970). Arguably, a corporation which employs a “bottomless” dancer violates subdivision 2 of section 314, and must register under CAL. PEN. CODE section 290. Likewise, a corporation which employed actors to commit sodomy or oral copulation might be criminally liable as a principal, and be required to register under section 290.

24. CAL. PEN. CODE § 291 (West Supp. 1974) provides:

Every sheriff or chief of police, upon the arrest for any of the offenses enumerated in Section 290 or in subdivision 1 of Section 261 of any school employee, shall do either of the following:

1. If such school employee is a teacher in any of the public schools of this state, he shall immediately notify by telephone the superintendent of schools of the school district employing such teacher and shall immediately give written notice of the arrest to the Commission for Teacher Preparation and Licensing and to the superintendent of schools in the county wherein such person is employed. Upon receipt of such notice, the county superintendent of schools shall immediately notify the governing board of the school district employing such person.

2. If such school employee is a nonteacher in any of the public schools of this state, he shall immediately notify by telephone the superintendent of schools of the school district employing such nonteacher and shall immediately give written notice of the arrest to the governing board of the school district employing such person.
legislative concern with the danger that might arise solely from the possibility that a teacher has at some time been guilty of sexual misconduct. This legislative obsession becomes apparent by pursuing the Education Code, which contains an array of overlapping or duplicative statutes, designed to ensure that persons convicted of sex crimes neither acquire nor hold any kind of teaching credential nor teach at any level.

First, Education Code section 12912 defines the term "sex offense" to include rape, molestation, sodomy, oral copulation, indecent exposure, and lewd conduct in a public place.\(^{25}\) Conviction of any of these crimes requires: (1) denial of any application for a teaching credential,\(^{26}\) (2) revocation of any existing credential by the state\(^{27}\) and county board,\(^{28}\) and (3) immediate termination of employment.\(^{29}\) Section 13718.1 of the Education Code requires that these measures be applied to school districts with a merit system,\(^{30}\) and section 12910\(^{31}\) provides that

\(^{25}\) CAL. EDUC. CODE § 12912 (West 1970) defines "sex offense" to include:

(a) Any offense defined in Sections 266, 267, 285, 286, 288, 647a, subdivision 3 or 4 of Section 261, or subdivision (a) or (d) of Section 647 of the Penal Code.

(b) Any offense defined in former subdivision 5 of former Section 647 of the Penal Code repealed by Chapter 560 of the Statutes of 1961, or any offense defined in former subdivision 2 of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961 if the offense defined in such sections was committed prior to September 15, 1961, to the same extent that such an offense committed prior to such date was a sex offense for the purposes of this section prior to September 15, 1961.

(c) Any offense defined in Section 314 of the Penal Code committed on or after September 15, 1961.

(d) Any offense defined in former subdivision 1 of former Section 311 of the Penal Code repealed by Chapter 2147 of the Statutes of 1961 committed on or after September 7, 1955, and prior to September 15, 1961.

(e) Any offense involving lewd and lascivious conduct under Section 272 of the Penal Code committed on or after September 15, 1961.

(f) Any offense involving lewd and lascivious conduct under former Section 702 of the Welfare and Institutions Code repealed by Chapter 1616 of the Statutes of 1961 if such an offense was committed prior to September 15, 1961, to the same extent that such an offense committed prior to such date was a sex offense for the purposes of this section prior to September 15, 1961.

(g) Any attempt to commit any of the above-mentioned offenses.

(h) Any offense committed or attempted in any other state which, if committed or attempted in this state, would have been punishable as one or more of the above-mentioned offenses.

\(^{26}\) Id. § 13130 (West Supp. 1974).

\(^{27}\) Id. § 13207.

\(^{28}\) Id. § 13218 (West 1969).

\(^{29}\) Id. §§ 13409, 13586 (West Supp. 1974).

\(^{30}\) Id. § 13718.1 (West 1969).  CAL. EDUC. CODE § 13596 (West 1969) parenthetically defines the merit system as a civil service system. The system provides for the appointment of people to positions not requiring certification qualifications to be based on individual qualifications, competitive exams and eligibility lists. See CAL. EDUC. CODE §§ 13581, 13723-13723.6.

\(^{31}\) CAL. EDUC. CODE § 12910 (West Supp. 1974).
nullification of a conviction pursuant to Penal Code section 1203.4\textsuperscript{32} will not relieve the defendant teacher of these consequences.\textsuperscript{33} Rather redundantly, section 13206 of the Education Code\textsuperscript{34} provides for revocation of the teaching credentials of persons convicted of rape, molestation, sodomy and oral copulation, although conviction of such crimes is already ground for revocation under section 13207 and 13218.\textsuperscript{35}

All of these provisions, however, apply to cases in which the teacher is convicted of a sex offense.\textsuperscript{36} That ubiquitous institution, the plea bargain, assures that few will suffer conviction. Instead, persons charged with sex crimes will often enter a guilty plea to disturbing the peace, outraging public decency or other related offenses not listed as specific grounds for revocation in the Education Code. Consequently, state and local school boards, in actions to discharge or revoke credentials of teachers, frequently must rely upon the statutory provisions which refer not to convictions but to the underlying conduct.

The most important of these provisions is Education Code section 13202, which requires the State Board of Education to revoke or suspend a teaching credential "for immoral or unprofessional conduct . . . or for evident unfitness for service."\textsuperscript{37}

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\textsuperscript{32} CAL. PEN. CODE § 1203.4 (West Supp. 1974).

\textsuperscript{33} Section 1203.4 of the Education Code provides that when a defendant has fulfilled all conditions of probation, the court, in its discretion, may dismiss the charges against the defendant, who "shall thereafter be released from all penalties and disabilities resulting from the offense of which he has been convicted."

\textsuperscript{34} Section 13206 states that:

Upon the becoming final of the conviction of the holder of any credential issued by the State Board of Education or the Commission for Teaching Preparation and Licensing of a violation, or attempted violation, of any one or more of Penal Code Sections 187 to 191, 192 insofar as said sections relate to voluntary manslaughter, 193, 194 to 232, both inclusive, 244, 245, 261 to 267, both inclusive, 273a, 273f, 273g, 278, 285 to 288a, both inclusive insofar as said sections relate to felony convictions, 503 and 504, or of Penal Code Section 272, the commission shall forthwith revoke the credential.

\textsuperscript{35} See CAL. EDUC. CODE §§ 13207, 13218 (West Supp. 1974).

\textsuperscript{36} CAL. EDUC. CODE § 12911 (West Supp. 1974) provides:

A plea or verdict of guilty or a finding of guilt by a court in a trial without a jury is deemed to be a conviction within the meaning of Sections 13175, 13207, 13218, 13255, and 13386 of this code, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code allowing the withdrawal of the plea of guilty and entering a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusations or information. The record of such conviction of a sex offense as defined in Section 12912 or of a narcotics offense defined in Section 12912.5 shall be sufficient proof of conviction of a crime involving moral turpitude for the purposes of Sections 13313, 13327 and 13338, and Sections 13403 to 13441, inclusive, of this code, relating to the dismissal of permanent employees.

\textsuperscript{37} Id. § 13202 provides:

The Commission for Teacher Preparation and Licensing shall revoke or suspend for immoral or unprofessional conduct, or for persistent defiance of, and refusal to obey, the laws regulating the duties of persons serving
statute, however, does not define "immoral or unprofessional conduct" or "unfitness for service". Undaunted, the State Board of Education has consistently proceeded upon the premise that unorthodox sexual conduct, whether criminal or not, constitutes "immoral conduct."

**ANTITHESIS: THE FACTS**

Most teachers are sexually mature adults; consequently, most teachers must be sex criminals. A study of the incidence of victimless sex crimes will verify this assertion.38

Oral intercourse, the most common of the sex crimes, is increasing in popularity.39 Approximately sixty percent of all mature adults engage with some regularity in heterosexual oral copulation.40 For married adults in the eighteen to thirty-five year old age range estimates increase to eighty percent.41 College graduates, a group which includes most teachers, are even more likely than average adults to engage in oral copulation.42 Heterosexual anal intercourse is also on the increase. Kinsey found this act so rare prior to 1948, that he recorded no statistical measure for it.43 But a current survey suggests that twenty-five percent of married adults under 35 have engaged in heterosexual sodomy.44

Statistics on homosexual oral and anal sex are less certain. The Kinsey report stated that thirty-seven percent of males and nineteen percent of females have engaged in at least one homosexual act; that ten percent of males and two to six percent of females are predominantly homosexual.45 The Kinsey reports do not discuss the nature of the homosexual acts, but a later study asserts that ninety-nine percent of male homosexuals and ninety-

in the Public School System, or for any cause which would have warranted the denial of an application for a credential or the renewal thereof, or for evident unfitness for service.


40. Id. at 34, 198.
41. Id. at 199.
43. Id. at 392.
44. Hunt, supra note 38, at 36.
eight percent of lesbians have engaged in oral-genital contact and ninety-three percent of the males in anal intercourse. This same report stated that one third of the male homosexuals, but only four percent of the females, had been arrested for conduct related to their sexual orientation. Most of these arrests involved either solicitation or actual sexual conduct in a public place, both of which are proscribed by Penal Code section 647, subdivision (a).

Premarital intercourse has become both acceptable and widespread. Extra-marital intercourse is also on the increase, although less dramatically. Neither of these practices is necessarily criminal in California, which proscribes only adulterous cohabitation.

One consequence of the increase in non-marital "amateur" sex is the marked decline in the number of men who visit prostitutes. The 1948 Kinsey report found that sixty-nine percent of the adult males had visited prostitutes, but a more recent survey shows that far fewer men currently do so.

Other consensual sex crimes are much rarer. Kinsey reported that seventeen percent of rural males interviewed had had some sexual experience with animals. No figures are currently available on incest, which is probably rare, nor on bigamy, which is rarer still.

By integrating this data, it becomes apparent that a majority of adults presently engage in criminal sexual behavior. Kinsey estimated that ninety-five percent of adult American men have experienced orgasm in an illegal manner. This percentage figure, however, is not applicable to California since the figure assumes that adultery without cohabitation is criminal. Nevertheless, starting with an estimate that sixty percent of adult males and females engage in heterosexual oral copulation, it may be assumed that roughly seventy percent of the adult population have committed either that act or some other victimless sex crime.

47. Id. at 165, 308.
48. Id. at 165-67.
49. See HUNT, supra note 38, at 142-55.
50. Id. at 254.
51. CAL. PEN. CODE §§ 269(a), 269(b) (West 1970).
52. A. KINSEY, W. POMEROY & C. MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 597.
53. HUNT, supra note 38, at 144.
55. Id. at 392.
56. See CAL. PEN. CODE §§ 269(a), 269(b) (West 1970).
There is no reason to believe that teachers are less prone to commit such offenses than the average adult. To the contrary, adults holding college degrees, a class which includes almost all teachers, have been found to be more likely to engage in sexual experimentation and, therefore, are more likely to have committed most of the listed offenses than adults of lesser educational achievement.

**THE Morrison SYNTHESIS**

The problem now becomes clear: about seventy percent of California's teachers commit criminal sexual acts which, if discovered and prosecuted to conviction, would compel revocation of their teaching credentials. Further, Education Code section 13202 permits revocation for conduct which, although legal, is "immoral". Many people believe adultery, with or without cohabitation, to be immoral; some believe all non-marital fornication immoral; others believe the practice of any form of contraception immoral. Depending upon whose definition of immorality one reads into section 13202, at least seventy percent of California's teachers face banishment from their profession.

Practicality now interrupts this statistical exercise. Even if the state could identify the immoral seventy percent, it could not realistically contemplate such a mass credential revocation. The consequence would be educational catastrophe. But how can the state enforce its revocation statutes without producing disaster? That same hypocrisy which leads persons to denounce and ban acts which they themselves commit yields the answer: because the police put relatively little effort into enforcing the laws against victimless sex, few teachers are caught; the school boards and courts then denounce the immorality of the few unfortunates who are caught, yet ignore the fact that other teachers and most adults in general—including perhaps a large number of policemen, district attorneys and judges—commit similar acts.

The alternative to such hypocrisy is to construe the revocation laws to limit their reach to conduct bearing directly on fitness to teach. By a 4-3 vote, the California Supreme Court in *Morrison v. State Board of Education* selected this alternative.

The defendant in this case, Mark Morrison, had engaged in a brief homosexual relationship with another teacher. The specific sexual acts involved—apparently several incidents of mutual masturbation—violate no law when done in private, and Morri-

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57. See notes 39-42 and accompanying text supra.
son was neither charged with, nor convicted of, any crime. Proceeding, however, under the broad language of section 13202, the State Board of Education found that Morrison's act constituted "immoral conduct," "unprofessional conduct" and "moral turpitude," necessitating revocation of his teaching credential. Morrison appealed to the California Supreme Court, contending that section 13202 was void for vagueness. Applying the principle that a statute should be construed to avoid unconstitutionality, the majority of the California Supreme Court limited the proscription of section 13202 to "immoral or unprofessional conduct or moral turpitude of the teacher which indicates unfitness to teach."61 Restating this holding in stronger language, the majority opinion by Justice Tobriner indicated that an individual can be removed from the teaching profession only upon a showing that his retention in the profession "poses a significant danger of harm to either students, school employees or others who might be affected by his actions as a teacher."62 Presenting no testimony relating Morrison's conduct to his fitness to teach, the Board argued that proof of private consensual homosexual activity in itself demonstrated unfitness to teach—an argument which implies that homosexuals are per se unfit and should be excluded from the teaching profession. The majority squarely rejected this argument. The court stated:

Before the Board can conclude that a teacher's continued retention in the profession presents a significant danger of harm to students or fellow teachers, essential factual premises in its reasoning should be supported by evidence or official notice. In this case, despite the quantity and quality of information available about human sexual behavior, the record contains no such evidence as to the significance and implications of the . . . incident. Neither this court nor the superior court is authorized to rectify this failure by uninformed speculation or conjecture as to petitioner's future conduct.63 Concluding that no competent, credible evidence supported any inference of Morrison's unfitness to teach, the court reversed the judgment of the superior court.

Justices Sullivan, McComb and Burke dissented. The principle dissent, authored by Justice Sullivan, relied upon Sarac v.

60. For an analysis of the arguments which have been raised to justify dismissal of teachers who engage in disapproved sexual conduct, see Comment, Unfitness to Teach: Credential Revocation & Dismissal For Sexual Conduct, 61 Cal. L. Rev. 1442 (1973).
61. 1 Cal. 3d at 225, 461 P.2d at 832, 82 Cal. Rptr. at 182 (emphasis added).
62. Id. at 235, 461 P.2d at 391, 82 Cal. Rptr. at 191.
63. Id. at 237, 461 P.2d at 392, 82 Cal. Rptr. at 192.
Board of Education, an earlier appellate court decision which upheld the revocation of the credential of a teacher convicted of disorderly conduct following a homosexual encounter on a public beach. Quoting Sarac, Justice Sullivan argued that homosexual acts, whether or not illegal, were abhorrent to public policy and justified revocation of a teaching credential.

THE FAILURE OF THE Morrison SYNTHESIS

Courts of last resort will sometimes render decisions which offend the cherished values of some of the judges sitting on lower courts. In such instances the justices of the high court, if they wish their opinion actually to alter the outcome of future cases, cannot simply file their opinion and depend upon stare decisis. They must enforce their views. The school desegregation decision, Brown v. Board of Education, is the clearest example. Within a short time after that decision, some lower court judges, strongly asserting their belief in segregation as a constitutional and beneficent institution, decided that Brown did not apply to segregation in non-educational matters, or that Brown was itself an unconstitutional attempt by a federal agency to interfere with state school systems. Had the Supreme Court entrusted the enforcement of Brown v. Board of Education solely to the discretion

64. 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (1967).
65. In Sarac the court declared that
   Homosexual behavior has long been contrary and abhorrent to the
   social mores and moral standards of the people of California as it has
   been since antiquity to those of many other peoples.
   Id. at 63, 57 Cal. Rptr. at 72. I wonder how the Sarac court ascertained the “so-

   "I believe mores of the people of California”? It is doubtful that the record in Sarac
   contained evidence on this subject, yet in the absence of evidence such language
   may represent only the personal views of the judges. Judges, however, are not
   representative of the general population; women, racial minorities, aliens, the
   young, persons without college education, and many other groups (such as homo-
   sexuals) are underrepresented in the judiciary. A judge who assumes his moral
   beliefs equal the social norms of California is on doubtful ground.

   I predict that 50 years from now the language of Sarac will be treated as
   a distasteful historical curiosity, the way California courts now treat the anti-Ori-
   ental dicta of some nineteenth century opinions.
   Cal. Rptr. 175, 197. The separate dissenting opinion of Justice Burke questioned
   the majority’s view on the standard of judicial review of administrative decisions,
   a question which still troubles the courts but which is only tangential to the scope
   of this article. See, e.g., Bixby v. Pierno, 4 Cal. 3d 130, 481 P.2d 242, 93 Cal.
   Rptr. 234 (1971) and Strumsky v. San Diego County Employees Retirement
   Ass’n, 11 Cal. 3d 28, modified 11 Cal. 3d 312b, 520 P.2d 29, 112 Cal. Rptr. 805
   (1974). Justice Burke dissented in both cases.
68. See, e.g., Handley v. City of Hope, Arkansas, 137 F. Supp. 442 (W.D.
   Ark. 1956) (public swimming pools); Flemming v. South Carolina Elec. & Gas
of such lower court judges, inferior court decisions permitting segre-
gation might have remained the law and segregation would or
would not have continued according to the whims of the local judi-
 ciary. But the Supreme Court, by a regular process of reversing
lower court decisions which defied the spirit underlying the Brown
precedent,70 gradually made this landmark decision an effective
tool for reducing segregation.

The Morrison decision also challenged deeply-held religious
and moral views. Morrison, however, has not been judicially en-
forced. Two months after the decision was rendered, Chief Justice
Traynor retired and the philosophy expressed in Morrison no
longer represented the views of a majority of the Court. The
predictable result has been an unpredictable assortment of lower
court decisions; some judges have read Morrison broadly while
others have limited and distinguished its holding.71

The critical problem in enforcing Morrison is the application
of that decision to cases in which a teacher's conduct has violated
some criminal statute. Although Morrison declared unequivocally
that "in determining whether discipline is authorized and reason-
able a criminal conviction has no talismanic significance,"72 the
majority opinion nevertheless noted that Morrison himself had
violated no law.73 Morrison disapproved Sarac v. State Board of
Education,74 but only to the extent that Sarac included "unneces-
sarily broad language suggesting that all homosexual conduct, even
though not shown to relate to fitness to teach, warrants discipli-

71. The first sign of trouble appeared in Alford v. Department of Educ., 13 Cal. App. 3d 884, 91 Cal. Rptr. 843 (1970). In support of its decision revoking Alford's credential, the state board presented psychiatric testimony to show that, by reason of mental illness, Alford was unfit to teach. The court of appeal correctly held that such evidence was sufficient under Morrison, to support revocation, but went on to give Morrison an extremely narrow and limited reading: Morrison . . . seems to be a narrow decision, limited to its facts, and one decided primarily upon a disinclination of the majority of the court to permit judicial notice by the administrative agency or the trial court of the possibility that a man who had engaged in the conduct of the petition in that case might repeat it so as to render him unfit to teach. 13 Cal. App. 3d at 889, 91 Cal. Rptr. at 846. See discussion in Comment, The Good Moral Character of California Administrative Agencies—A Study of the Good Moral Character Requirement, 5 U.C.D.L. Rev. 84, 99 (1972). It strikes me as improbable that the majority in Morrison was primarily concerned with the pedantic niceties of judicial notice. I suggest that the Morrison majority was unwilling to permit judicial notice of the "fact" that isolated, or repeated, homosexual acts renders one unfit to teach for the simple reason that the alleged "fact" is probably untrue.
72. 1 Cal. 3d at 219 n.4, 461 P.2d at 378 n.4, 82 Cal. Rptr. at 178 n.4.
73. Id. at 238, 461 P.2d at 393, 82 Cal. Rptr. at 193.
74. 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (1967); see text accompanying notes 64-66 supra.
nary action. The holding of Sarac, that on the facts of the case revocation was justified without direct evidence of unfitness to teach, was not expressly disapproved.

In Amundsen v. State Board of Education, the court of appeal decided that the result and not just the dicta in Sarac was inconsistent with Morrison. Concluding that Sarac had been overruled by implication, Amundsen held that the Board could not revoke the credentials of a teacher convicted of a crime based on a homosexual encounter without evidence relating that act to fitness to teach. But because Amundsen was not a published opinion and therefore carried no precedential value the issue arose again in Moser v. State Board of Education.

Moser was accused of soliciting an undercover police officer in a public restroom to commit a homosexual act and was charged with a violation of Penal Code section 647. Conviction of this charge would have resulted in automatic revocation of Moser's teaching credential. The prosecutor, however, reduced the charge to disturbing the peace, and Moser was convicted of the lesser offense. The State Board of Education initiated revocation proceedings under section 13206 of the Education Code, but in support of revocation the Board presented only the testimony of the arresting officer. A psychiatrist testified that Moser did not possess the psychological traits that would make him unfit for teaching. Moser's personality, in fact, was such that it would be unlikely for him to have conducted himself as the police officer had described. Assuming that Moser did commit the act charged, however, the psychiatrist concluded that the incident was one not likely to be repeated.

Although Moser had committed an act involving unprofessional and immoral conduct, the record did not establish that he

75. Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 238, 461 P.2d 375, 393, 82 Cal. Rptr. 175, 193.
77. Id.
79. CAL. PEN. CODE § 647(a) (West Supp. 1974) proscribes solicitation to engage in lewd conduct and section 647(d) makes it a misdemeanor to loiter in a public toilet to solicit an unlawful act.
80. CAL. EDUC. CODE § 13206 (West Supp. 1974) provides:

Upon the becoming final of the conviction of the holder of any credential issued by the State Board of Education or the Commission for Teacher Preparation and Licensing of a violation, or attempted violation, of any one or more of Penal Code Sections 187 to 191, 192 insofar as said section relates to voluntary manslaughter, 193, 194 to 232, both inclusive, 244, 245, 261 to 267, both inclusive, 273a, 273f, 273g, 278, 285 to 288a, both inclusive, 424, 425, 484 to 488, both inclusive, insofar as said sections relate to felony convictions, 503 and 504, or of Penal Code Section 272 the commission shall forthwith revoke the credential.
was unfit to teach. The Board, however, without taking further evidence, revoked Moser's teaching credential.\(^8\)

Moser's case raised essentially the same issue as that in Morrison, namely, whether proof of a homosexual act, without more, is sufficient to show unfitness to teach. But Moser's act, unlike Morrison's, violated a penal statute. Citing the holding in Sarac v. State Board of Education\(^2\) the court held that the Board could infer unfitness from the crime itself without need of evidence to show a direct relationship between the criminal act and Moser's conduct as a teacher.\(^8\)

While Moser was pending before the Court of Appeal for the Second District, the First District was also considering two cases involving the application of Morrison to teachers convicted of possession of marijuana. In a combined opinion, entitled Comings v. State Board of Education,\(^4\) the First District held that conviction of a crime, absent other determinative faults, is insufficient evidence of unfitness to teach. In the companion case, Jones v. Jefferson Union High School District,\(^5\) the court upheld a teacher's discharge from a tenured position,\(^6\) relying upon the opinion testimony of the vice-principal that the teacher's marijuana conviction resulted in unfavorable notoriety for the school.\(^7\)

Despite this obvious conflict between the First and Second District Courts of Appeal, the California Supreme Court denied hearings in Moser, Comings, and Jones.\(^8\) The three remaining members of the Morrison majority voted to grant a hearing in Moser.\(^9\)

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81. 22 Cal. App. 3d at 989, 101 Cal. Rptr. at 87.
82. 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (1967).
84. 23 Cal. App. 3d 94, 100 Cal. Rptr. 73 (1972).
85. Id.
86. In evaluating fitness to teach, courts have employed the same standard in cases involving termination of tenured employment by a local school district as in revocation of a state credential. Comings v. State Bd. of Educ., 23 Cal. App. 3d 94, 103-04, 100 Cal. Rptr. 73, 80 (1972); Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 826, 94 Cal. Rptr. 318, 320 (1971). But a distinction seems warranted. Revocation of a state credential should require a far stronger showing of unfitness. Moreover, even if local notoriety impaired a teacher's ability to teach at his present locale, as in Jones v. Jefferson Union High School Dist. (the companion case to Comings v. State Bd. of Educ.), such a teacher could not reasonably be barred from obtaining a new job in a different community.
87. Most of the publicity in Jones v. Jefferson Union High School Dist. was generated by the act of the school district in suspending Jones. Arguably the district should be estopped to rest a finding of unfitness upon notoriety arising from the district's own acts.
88. Hearings in Comings and Jones were denied on Mar. 30, 1972, and in Moser on Apr. 12, 1972.
89. Those voting to grant the hearing were Justices Tobriner, Peters and Mosk.
Pettit v. State Board of Education: WHICH DISTINCTION MAKES THE DIFFERENCE?

Pettit v. State Board of Education,90 decided in 1973, is the only case involving revocation of a teaching credential decided by the California Supreme Court since Morrison.91 Pettit, a teacher of mentally retarded elementary school children, attended a "swingers' party" with her husband and engaged in oral copulation with three men at the party. These acts were viewed by an undercover police agent.92 Pettit was charged with a violation of Penal Code section 288a93 but pleaded guilty to the lesser offense of outraging public decency,94 even though the statute proscribing that offense had already been declared unconstitutional.95 Since the charge to which Pettit pleaded guilty is not among the specific sex crimes enumerated in the Education Code96 as constituting grounds for credential revocation, the Board brought revocation proceedings under Education Code section 13202.97 Finding Pettit unfit to teach, the Board revoked her teaching credential, and the California Supreme Court, by a five to two vote, upheld the revocation.98 Justice Burke, writing the majority opinion, distinguished Morrison on three grounds: first, Pettit's acts of oral copulation were criminal; second, they had occurred in a semi-public setting; and third, expert witnesses had testified that

91. Lindros v. Governing Bd. of the Torrance Unified School Dist., 9 Cal. 3d 524, 510 P.2d 361, 108 Cal. Rptr. 185 (1973), involved a refusal to reemploy a probationary teacher; Board of Trustees v. Metzger, 8 Cal. 3d 206, 501 P.2d 1172, 104 Cal. Rptr. 452 (1972), concerned discharge of a permanent teacher. Both cases involved a teacher's use in the classroom of a literary work, authored by the teacher, which contained an obscenity. In such cases there is no problem showing that the teacher's act relates to his teaching and affects his students; issues on appeal concerned whether the teacher's act "adversely" affected the students, whether it fell within the teacher's discretion—or perhaps his right of "academic freedom"—in selection of course materials, and the scope of trial court review of the findings of the school board. (For a similar case before the court of appeal, see Oakland Unified School Dist. v. Olicker, 25 Cal. App. 3d 1098, 102 Cal. Rptr. 421 (1972).)
92. 10 Cal. 3d at 31, 513 P.2d at 890, 109 Cal. Rptr. at 666. One may conjure up an image of the agent standing fully clothed, clipboard in hand, taking notes in the midst of an orgy.
93. CAL. PEN. CODE § 288a (West 1970) provides, in relevant part:

   Any person participating in the act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding fifteen years, or by imprisonment in the county jail not to exceed one year, . . .
94. See CAL. PEN. CODE § 650.5 (West 1970).
97. Id. § 13202 (West 1969).
98. 10 Cal. 3d at 36, 513 P.2d at 894, 109 Cal. Rptr. at 670. The two remaining members of the Morrison majority, Justices Tobriner and Mosk, dissented.
she was unfit to teach.99

From a realistic viewpoint, however, the Pettit decision cannot be distinguished from Morrison on the basis of the factual differences advanced by the majority. Rather, the change in judicial attitudes is attributable to a change in the supreme court's personnel to a majority whose members are uneasy with the attitude of tolerance toward unconventional sexual behavior that underlies Morrison, but are unwilling, in part through respect for principles of stare decisis, to overrule that decision.

Turning to the first distinction advanced, Pettit's acts were unquestionably criminal in that they violated Penal Code section 288a, which proscribes oral copulation;100 Morrison's homosexual conduct violated no statute. But although Morrison himself engaged in noncriminal conduct, ninety-nine percent of homosexuals—and a majority of heterosexuals—perform acts which are proscribed by the criminal law.101 Thus, to limit the holding in Morrison as directed solely to noncriminal sexual conduct in practical effect destroys the utility of that decision, and resurrects the absurdity of labeling the majority of teachers immoral and unfit.

Pettit contended, moreover, that Penal Code section 288a was unconstitutional and thus that her acts were not criminal.102 The majority refused to resolve that issue, asserting that the validity of section 288a was irrelevant to the question whether the record contained sufficient evidence to support the trial court's finding that her conduct rendered her unfit to teach.103 The majority also failed to resolve the conflict between Moser and Comings respecting whether a criminal conviction alone constitutes sufficient evidence of unfitness. The logical inference to be drawn from the court's refusal to resolve these issues is that the majority believe that it is immaterial to the question of teaching fitness whether the teacher's conduct violates a valid penal statute or results in a conviction. But under this reasoning, neither Pettit's ostensibly criminal act nor her conviction can serve as a ground for distinguishing Morrison.

The second distinction between Pettit and Morrison is that Pettit's act, unlike Morrison's, occurred in a "semi-public atmosphere."104 This phrase obscures the fact that Pettit's conduct

100. See note 93 supra.
101. See text accompanying note 46 supra.
102. 10 Cal. 3d at 33 n.4, 513 P.2d at 892 n.4, 109 Cal. Rptr. at 668 n.4.
103. Id.
was neither public nor notorious. As the dissenting opinion points out, her acts occurred in the bedroom of a private home, viewed only by persons who expressly stated their willingness to view or participate. The record, moreover, shows that neither her students, their parents, nor her fellow teachers were aware of her conduct at the swingers' party. What "semi-public atmosphere" apparently means is that Pettit engaged in sexual conduct in the presence of willing viewers, a fact which the majority asserts is demonstrative of her lack of concern for privacy, decorum and dignity.

Yet the appropriateness of behavior is relative to its setting; a display of concern for privacy, decorum and dignity at a swingers' party would seem as inappropriate as levity and enthusiasm at a funeral. In assuming that one can reason from specific behavior in one setting to a hypothetical psychological trait, and from that trait to specific behavior in an entirely different setting, the majority opinion employs psychological reasoning of questionable validity. Such reasoning cannot be taken on faith, but must be tested empirically. If Pettit in fact exhibited a lack of concern for privacy, decorum and dignity in everything she did, then it is likely she would have displayed such characteristics during her thirteen years of classroom teaching. Yet, as I read the majority opinion in Pettit, the school board is authorized to pursue this reductio ad absurdum from hypothetical psychological traits without seeking either expert or empirical verification.

105. 10 Cal. 3d at 41, 513 P.2d at 897, 109 Cal. Rptr. at 673.
106. The majority stated: Plaintiff's indiscretions involved three different "partners", were witnessed by several strangers, and took place in the semi-public atmosphere of a club party. Plaintiff's performance certainly reflected a total lack of concern for privacy, decorum or preservation of her dignity and reputation.
107. The majority opinion states that Pettit's appearance on a television show, where she and her husband discussed "non-conventional sexual life styles" and "wife swapping," gave further indication that she lacked that minimum degree of discretion and regard for propriety expected of a public school teacher. 10 Cal. 3d at 35, 513 P.2d at 893, 109 Cal. Rptr. at 669. This language intrudes into first amendment considerations. Unconventional sexual practices are matters of public interest, and a discussion of such topics on a television panel show is unquestionably protected by the first amendment. In Bekiaris v. State Board of Educ., 6 Cal. 3d 575, 493 P.2d 480, 100 Cal. Rptr. 16 (1972), the California Supreme Court stated that a teacher could not be dismissed for the exercise of constitutional rights absent a showing that the restraints imposed on such rights are justified by a compelling state interest. Id. at 585-86, 493 P.2d at 485, 100 Cal. Rptr. at 21; see Board of Trustees v. Owen, 206 Cal. App. 2d 147, 23 Cal. Rptr. 710 (1962); cf. Bagley v. Washington Township Hosp. Dist., 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966). The Pettit opinion demonstrated no attempt to apply a compelling state interest test.

A similar first amendment issue was raised in Governing Bd. v. Brennan, 18 Cal. App. 3d 396, 95 Cal. Rptr. 712 (1971). One Melkonian, charged with dis-
The third distinction between this case and *Morrison* is that the Board presented expert testimony that Pettit was unfit to teach. Valid though this distinction might be, the expert testimony was not convincing. Although the witnesses were qualified as experts on fitness for teaching, they testified *not* as educators but as moralists. Rather than examining Pettit's actual teaching performance, each expert asserted his personal standards respecting sexual morality and found that under such standards Pettit's conduct was immoral. To bridge the logical gap between off-duty immoral behavior and professional unfitness, both the witnesses and the majority referred to the teacher's statutory duty to "endeavor to impress upon the minds of the pupils the principles of morality" and to the legal dictum that a teacher must serve as a moral exemplar for his pupils.  

It is, however, by no means obvious that one who commits an "immoral" act not involving teaching is unable to teach morality. Each of us knows men and women who, despite their private transgressions, preserve a proper and upright public image. Indeed, the best qualified teacher of morality traditionally has been the reformed sinner, St. Augustine being a particularly noteworthy example. Secondly, this line of reasoning requires a definition of morality. Without such a definition, there is no way to determine whether Pettit's conduct was immoral, whether such conduct in any way affects the teaching of moral principles,
or whether it affects her suitability as a moral exemplar.112

The experts who testified in *Pettit* presented their own idiosyncratic definitions of morality, but surely those definitions are not binding on the court. Indeed, obvious constitutional problems would arise if the term “morality” as used in Education Code section 13202 turned upon the personal views of the experts testifying in each case. But a uniform and popularly acceptable definition of morality, if required, is a task to challenge a Socrates. The majority does not attempt to formulate such a definition, but their failure to do so leaves a logical fallacy in their analysis.

The net effect of the *Pettit* decision is to repose all power in the trial courts. If the teacher's act is criminal, or if some educator or the court itself deems the act immoral, the conclusion is sufficient to revoke a credential. By the same token, testimony or judicial notice that an act was not immoral or did not relate to unfitness for teaching would suffice to prevent revocation. Since views on sexual morality range from a libertarian acceptance of all consensual acts to a Puritanical condemnation of everything except procreative intercourse between lawfully married couples (and some would define “lawful marriage” to exclude many marriages), an “expert” can be found to approve or denounce a teacher’s conduct in virtually all cases likely to come before the courts. Thus, regardless of which way a trial court decides the case, substantial evidence will appear to support the decision. But a rule which has the practical effect of treating the trial court’s moral stance as if it were a question of fact, turning on the credibility of witnesses, will necessarily result in inconsistent decisions. Eventually, in order to resolve conflicts in lower court adjudications arising from the different moral views of trial judges, appellate courts will be forced to one of two alternatives—either to follow *Morrison*, and thereby avoid the philosophical problem of defining “morality” and “immorality” by insisting on evidence directly bearing on teaching performance, or to reject *Morrison* and confront the problem of defining these terms directly.

**Unsettled Constitutional Questions**

In the final analysis, many of the issues previously discussed concerning revocation of teaching credentials may turn on points of constitutional law. For example, revocation is often justified by reference to the criminal character of the teacher’s act. Yet, the criminal statutes most often applicable, section 28611 (sod-

112. The *Morrison* definition of “morality” in terms of teaching fitness is inappropriate in this context. See text accompanying notes 61-63 supra.
113. CAL. PEN. CODE § 286 (West 1970).
omy), section 288a (oral copulation), and section 647 (lewd conduct), are of questionable constitutionality.

Sections 286 and 288a prohibit sodomy and oral intercourse, whether done in public or in private. Such broad proscriptions would appear to bring the statutes into direct conflict with the constitutional right of privacy recognized by the Supreme Court in Griswold v. Connecticut, which struck down a Connecticut statute prohibiting the use of contraceptives. Courts and scholars have debated the parameters of this penumbral right of privacy, but for purposes of analyzing sections 286 and 288a the outer limits of that right need not be explored. The arguments attacking the constitutionality of those Penal Code sections fall squarely within the language and reasoning of Griswold. Griswold's concern that enforcement of the statute in question would require searches within the marital bedroom applies equally to sections 286 and 288a; the Court's attack upon the overbreadth of an enactment which, although designed to enforce sexual morality, authorizes intrusions into protected zones of privacy strikes implicitly at the California statutes.

The California courts of appeal have consistently upheld Penal Code sections 286 and 288a against constitutional attack. Most published decisions, however, involve acts which do not involve the right of privacy. The application of section 288a to

114. Id. § 288a.
115. Id. § 647.
118. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship." 381 U.S. at 485-86.
119. [It is clear that the state interest in safe-guarding marital fidelity can be served by a more discriminatingly tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples.

W. Barrent, Sexual Freedom & the Constitution (1973), presents the arguments as to why the sodomy statute may be unconstitutional. Most of the arguments presented apply equally to support an attack upon the statutory proscription against oral copulation. See also Comment, Oral Copulation: A Constitutional Curtain Must Be Drawn, 11 San Diego L. Rev. 523 (1974).
private acts was challenged in *Pettit*, and the application of sections 286 and 288a to private actions was challenged subsequently in *Slater v. Pitchess*. In each case the court found it unnecessary to resolve the constitutional issues. Thus, a definitive decision of the constitutionality of these sections’ proscription against private sexual behavior must await a future case.

If these questionable penal statutes are held unconstitutional in a private context, several arguments could be raised to suggest their unconstitutionality as applied to public acts. First, it may be argued that the statutes’ proscription of private and public acts is not severable. Since the overwhelming majority of proscribed sexual acts occur in private, it is unlikely that the Legislature intended these provisions to impose criminal sanctions only upon public sexual activity. This conclusion is all the more reasonable when we consider that public sexual misconduct is already covered under Penal Code section 647, subdivision (a). Second, it may be argued that the right of privacy is a “fundamental constitutional right” and that doctrines of “overbreadth” and “chilling effect,” usually invoked in a first amendment context, can be raised to safeguard this fundamental right. Under this analysis, sections 286 and 288a must be struck down in their entirety; otherwise, their overbroad language will inhibit persons from engaging in constitutionally protected acts. The language of *Griswold*, quoted earlier, strongly implies that the doctrine of over-

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the constitutionality of sections 286 and 288a in a case involving incest between the defendant and his minor daughter, acts which cannot claim the protection of *Griswold*, even though conducted in private. One decision, *People v. Parker*, 33 Cal. App. 3d 842, 109 Cal. Rptr. 354 (1973), upheld a conviction for oral copulation in private between consenting adults, but the defendants were engaged in filming a pornographic movie intended for public distribution.

122. *Slater v. Pitchess* was a declaratory relief action seeking a determination that both sections 286 and 288a of the Penal Code were unconstitutional; the court of appeal denied relief saying that the constitutional issues could be raised in defense of a criminal prosecution. The opinion, originally published at 33 Cal. App. 3d 720 (1973), was ordered unpublished by the California Supreme Court pursuant to CAL. CIV. AND CRIM. COURT RULES, Rule 976(e) (West Supp. 1974).

123. Doubts respecting the power of the state to prohibit private adult consensual sexual acts have appeared in several judicial opinions. Justice Marshall, dissenting in California v. *LaRue*, 409 U.S. 109, 132 n.10 (1972), stated: “I have serious doubts whether the State may constitutionally assert an interest in regulating any sexual act between consenting adults.” Justice Tobriner, dissenting in *Crownover v. Musick*, 9 Cal. 3d 405, 441, 509 P.2d 492, 522, 407 Cal. Rptr. 681, 706 (1973), noted that the “assumption that the state has the power to ban consensual adult behavior, harmful neither to participants nor bystanders, on the ground that some nonparticipants deem that behavior immoral, is certainly open to dispute.” In *Silva v. Municipal Court*, 40 Cal. App. 3d 733, 742, 115 Cal. Rptr. 479, 484 (1974), Justice Sims, in his concurring opinion, expressly reserved the question whether sexual conduct “when conducted in private between consenting adults may properly be prohibited by the state.”


125. See note 119 *supra.*
breadth does apply to protect the right of privacy. Finally, if the only interest of the state is to protect against acts which offend bystanders when performed in public view, then the punishment imposed by these sections is plainly excessive when compared to the treatment of other acts of public lewdness as misdemeanors.

The remaining criminal statute which plays an important part in revocation cases is Penal Code section 647, subdivision (a), which prohibits solicitation to engage in "lewd or dissolute conduct in any public place . . . ." Although the statutory language is ambiguous, court of appeal decisions have interpreted it to prohibit solicitation in a public place to commit a lewd act in a private place. Since no law bans the private commission of lewd acts, the statute as construed may prohibit speech urging the commission of lawful acts. Consequently, constitutional inquiry into section 647, subdivision (a), must consider not only the vagueness of the statutory language but also the statutory restriction of free speech. In a recent decision, Silva v. Municipal Court, the court of appeal struggled with both issues but emerged the loser.

Earlier cases defining "lewd and dissolute conduct" read like a thesaurus: "lewd" equals "dissolute" equals "wanton" equals "debauched" equals "lewd" and so forth. The court of appeal in Silva added another synonym—"obscene"—and noted that numerous cases have held statutes proscribing obscenity not void for vagueness. The judicial gloss which adds specificity to obscenity statutes, however, does not speak to a case involving non-communicative conduct; without an audience, there is no one to arouse pruriently or redeem socially. Thus the court of appeal

126. In San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973), the Supreme Court warned against judicial creation of new substantive constitutional rights. Under Justice Goldberg's view in Griswold the right of privacy is not a new judicial creation, but a natural right antedating the Constitution which received implied recognition by the ninth amendment. Griswold v. Connecticut, 381 U.S. 479, 495-96 (1965). It is questionable whether the current Supreme Court so views this right.


129. 40 Cal. App. 3d 733, 115 Cal. Rptr. 479 (1974); see note 123 supra.

reopened the thesaurus, and defined obscene conduct under section 647, subdivision (a), as

that sort of sexual conduct which is "grossly repugnant" and "patently offensive" to "generally accepted notions of what is appropriate" and decent according to statewide contemporary community standards. It will ordinarily include conduct found "disgusting, repulsive, filthy, foul, abominable [or] loathsome" under those standards.131

Even with this list of twelve synonyms for "lewd," the statute remains so vague that it is impossible to determine whether solicitation to commit the most common sexual acts is or is not illegal. Is public solicitation to engage in private marital intercourse unlawful? What about premarital intercourse, or adultery? Do contemporary statewide standards consider oral copulation a disgusting and abominable practice? Neither the statute nor the court of appeal opinion provides any answers, and there is no reason to believe that juries, instructed according to the Silva test, would reach consistent verdicts.

Utilizing its definition of "lewd" as "obscene," the Silva court grappled next with the free speech issue. Noting that the first amendment does not protect obscene speech, the court asserted that a solicitation to engage in obscene conduct must include a description of the proposed conduct and is therefore beyond first amendment protection.132

Implicit in this reasoning is the assumption that a description of obscene conduct is itself obscene. This assumption is certainly wrong. As any reader of Masters and Johnson133 knows, it is possible to describe sexual acts in such dull and clinical prose as to lull anyone's prurient interest.134 And Cole Porter fans might add that graphic description is unnecessary to a solicitation; in the right context, "Let's Do It" is sufficient.

The concurring opinion by Justice Sims in Silva suggests a more limited, and far more precise, interpretation of section 647, subdivision (a). Justice Sims proposes limiting that section to solicitation to engage either in public conduct or in private conduct which is prohibited by a specific penal statute.135 Since solicitation to commit a crime cannot claim first amendment protection, this limited construction avoids the free speech problems apparent in the majority opinion.

131. 40 Cal. App. 3d at 741, 115 Cal. Rptr. at 484.
132. Id. at 737, 115 Cal. Rptr. at 481.
134. The assertion that a description of obscene conduct is itself obscene would attach the label of obscenity to numerous medical and legal works, including this article.
135. 40 Cal. App. 3d at 742, 115 Cal. Rptr. at 484.
Turning to the provisions of the Education Code, it may be recalled that three different but redundant provisions of the Code require credential revocations for convictions under Penal Code sections 286 and 288a. \(^{136}\) Section 13202 of the Education Code requires revocation for convictions under Penal Code section 647, subdivision (a). To the extent that the Penal Code provisions are unconstitutional, the Education Code provisions are *pro tanto* invalid. But even if the Penal Code provisions withstand attack, I suggest that the Education Code sections making conviction under the criminal statutes automatic grounds for revocation may be unconstitutional. \(^{137}\)

The right to practice one's chosen profession is one of the few unenumerated rights which the courts have consistently protected as an element of substantive due process. \(^{138}\) A crucial bulwark of this right is the principle that a person cannot be excluded or ejected from a profession on grounds which bear no rational relationship to the practice of that profession. \(^{139}\) Thus, a statute which asserts that proof of fact "x" is automatic grounds for exclusion from the teaching profession is constitutional only if fact "x", in virtually all instances, implies unfitness to teach.

If no person can be expelled from a profession on grounds unrelated to his *individual* fitness to practice that profession, the Education Code provisions in question cannot be sustained merely on the ground that many persons who commit the enumerated crimes are unfit to teach. Instead, such statutes must be analyzed as if they enacted a conclusive evidentiary presumption of unfitness. \(^{140}\) The presumption and the statute itself would be invalid if that factual relationship "is not necessarily or universally true in fact, and . . . the State has reasonable alternative means of making the crucial determination." \(^{141}\)
When the United States Supreme Court struck down school board regulations which required teachers to take compulsory maternity leave in the sixth month of pregnancy, the Court treated such regulations as implying a conclusive presumption that teachers more than five months pregnant are not physically able to perform their teaching duties. Observing that physical fitness is an individual matter which varies from teacher to teacher, the Court concluded that such a presumption was neither necessarily nor universally true and that the regulation was thus unconstitutional. This same analysis can be applied to the Education Code provisions here in question. It seems obvious from the statistics set out earlier that proof that a person violated sections 286, 288a, or 647 does not necessarily demonstrate unfitness to teach. It is absurd to declare on the basis of extracurricular sexual conduct that seventy to eighty percent of present teachers, including many of unquestioned competence, are unfit for their profession. Proof of a public violation would present a closer case, but public performance is not an element of the offense under sections 286 or 288a, nor under section 647 as judicially construed. Moreover, the automatic revocation statutes provide for no hearing for the teacher to explain that his acts occurred in private.

Even for those crimes in which commission in a public place or public view is an element of the offense, a conclusive presumption of unfitness for teaching is improper. The common assumption that persons who violate these sections are dangerous to children is neither an a priori truth nor a proper subject of judicial notice. If the matter were put to the test of statistical evidence and expert opinion, I would predict that the evidence of a relationship between such an offense and significant danger of harm to the students is not sufficient to support a conclusive presumption. In other words, these statutes imply factual relationships which are neither necessarily nor universally true and the state has an alternative and less restrictive means—an administrative hearing at which expert and statistical evidence is presented on the issue—by which to make a determination of teaching fitness. It therefore follows that these statutes are unconstitutional.

Moreover, each of the Education Code provisions in ques-

143. Id. at 645-46.
144. See note 57 and accompanying text supra.
tion^146 rest their presumptions not on the commission of one of the enumerated offenses but upon conviction of the offense. Thus, the teacher who in fact violated an enumerated section but pleaded guilty to a lesser charge not included within the coverage of the Education Code provisions has a right to a hearing and an opportunity to convince the Board and a reviewing court that, despite his commission of the offense, he is fit to teach. One who is convicted of the enumerated crime has no such right. I do not know what characteristics distinguish those who plead or are convicted of the enumerated offenses from those who bargain to plead to lesser crimes, but I suspect the distinction turns on competency of defense counsel, a factor which is hardly related to a client’s fitness to teach.

Finally, Education Code section 13202, the revocation statute at issue in *Morrison, Pettit* and the other cases discussed in this article, remains vulnerable to constitutional attack. In permitting revocation for immoral conduct without defining such conduct, this section is open to charges of vagueness. Moreover, if the pre-*Morrison* definition^148 of immoral conduct is used, the section erects a standard which bears no reasonable relation to teaching fitness. The *Morrison* court avoided those arguments by construing immoral conduct to mean unfitness to teach. But if this construction is only given lip service while teaching credentials are revoked as a result of arbitrary moral judgments by the State Board of Education, the constitutional issues avoided by the *Morrison* court will reappear.

In this pluralistic society, no single creed of sexual morality commands majority assent. Just as there are parents who teach their children a Victorian code of morality, there are parents who teach a libertarian or situational ethic; just as there are those who teach abhorrence of homosexuality, there are those who teach acceptance and toleration. As a lawyer and parent, I object to laws and decisions which declare that a teacher who does not exemplify Victorian morality in his private life and who does not inculcate such attitudes in his students is “immoral” and “unfit.” No majority, and certainly no minority, should be entitled to use the public schools as an exclusive forum for teaching its moral principles. Absent a “significant danger of harm to students”^150

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148. See note 75 and accompanying text supra.
149. See note 61 and accompanying text supra.
—and the decisions notwithstanding, the showing in Moser,\textsuperscript{151} Pettit,\textsuperscript{152} and most of the other cases is miles from that mark—a teacher's private life is his or her private business.

\textsuperscript{151} Moser v. State Bd. of Educ., 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972); see text accompanying notes 80-83 \textit{supra}.

\textsuperscript{152} Pettit v. State Bd. of Educ., 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665; see text accompanying notes 90-112 \textit{supra}.