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Justice Tobriner and the Tolerance of Evolving Lifestyles: Adapting the Law to Social Change

By Michael A. Willemsen

The sixteen years of Justice Tobriner's tenure on the California Supreme Court have witnessed the rise and evolution of new, unorthodox styles of living and relating to others. Those years have seen also a gradual change in public attitudes toward acceptance of many such alternative lifestyles. In this article, I will briefly review certain of the more prominent changes in social behavior and attitudes during this period and then focus more directly on the response of Justice Tobriner and the California Supreme Court to those changes.

One principal area of change has concerned popular attitudes toward sexual relationships and behavior. The traditional marital...
stereotype of a male breadwinner and a female homemaker has faced increasing challenge from advocates of a relationship based upon new concepts of sexual equality. Many people have rejected the marriage relationship. The number of unmarried couples living together increased eightfold in the 1960's, and there are no signs that this trend will reverse itself. Consequently, the opprobrium that traditionally attached to such "illicit" relationships has diminished. At the same time certain common, yet traditionally disapproved, sexual practices have become increasingly tolerated. In 1977 only a dwindling minority still believe that heterosexual oral intercourse, anal intercourse, premarital sex, or extramarital sex ought to be punished as criminal conduct. To a lesser degree, public disapproval of homosexual conduct seems to have diminished, and attitudes toward long term homosexual relationships have broadened with the increasing visibility of the gay community.

Equally dramatic changes have occurred in public attitudes toward sexually oriented literature and other forms of expression. Accepted standards of candor in print have shifted radically. In 1961 the works of D. H. Lawrence and Henry Miller were considered questionable and were banned in many localities. Ten years later those writings and others of equal candor are generally available. A similar development has shaped the theatre and the cinema. The tide may now have turned in a surge of public reaction against the extremes of pornography, but this apparent retreat has so far erased little of the advance of the preceding decade.

Public attitudes toward drugs and particularly toward marijuana have been affected by the great increase in their use by persons of all social strata. By mid-1970 marijuana had moved a great distance toward complete social acceptability, although there had been no corresponding relaxation in attitudes toward addictive drugs.

All of these social changes have taken place against a background of laws and judicial decisions dating from an earlier era. Such laws and decisions, if applied without recognition of the changes in social attitudes and behavior, may suppress the normal and desirable evolution of society and harshly punish those who participate in that evolution. Examples are easy to find. In California in 1968, for example, laws that made it possible to punish possession of marijuana as a felony,

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that treated casual nudity as a sex crime,⁴ that threatened to jail as a felon any homosexual who expressed his sexual needs in private and with a consenting partner⁵ and to bar him from many occupations,⁶ and that almost unconsciously presumed the weakness and inferiority of women.⁷ Enforcement of such laws or decisions, which had become radically inconsistent with social attitudes, appeared a form of arbitrary injustice.

With that introduction, I come to the thesis of this article: to demonstrate how the California Supreme Court, and Justice Tobriner in particular, utilized the cases coming before the court to adapt legal principles to changing social conditions and to give expression to a philosophy of individual freedom and tolerance. A caveat is necessary here; my discussion of the work of the courts in adapting the law to social change is also a discussion of the limitations of the judicial process in achieving that end. For example, in three major areas of controversy, marijuana, unorthodox sexual practices, and discrimination against women in domestic relations law, the ultimate reconciliation of the law with social change required legislative action. Perhaps judicial decisions helped to influence that action; assessment is difficult. The principal role of judicial decisions, however, is often the more limited but still important one of minimizing what might be called "temporal injustice," that injustice which arises from the lag between social change and legislative action.

Nonmarital and Marital Relationships

The Family Law Act of 1969⁸ established no-fault divorce in California and clarified the law of community property. It failed, however, to define the rights of unmarried cohabitants and thus did not accommodate the increasing use of contract to structure property and other rights in both marital and nonmarital relationships and to respond fully to the demand for total equality between male and female partners. The California Supreme Court resolved some of the problems

⁴ See CAL. PENAL CODE § 314, and In re Smith, 7 Cal. 3d 362, 497 P.2d 807, 102 Cal. Rptr. 335 (1972) interpreting § 314.
⁷ See former CAL. CIv. CODE § 156 (West 1954) (later version at CAL. CIv. CODE § 5101) (repealed 1973); former CAL. CIv. CODE § 172 (West 1954) (current version at CAL. CIv. CODE § 5125) (West Supp. 1977); former CAL. CIv. CODE § 172a (West 1954) (current version at CAL. CIv. CODE § 5127) (West Supp. 1977).
which were not treated by the Family Law Act in Marvin v. Marvin\(^9\) and In re Marriage of Dawley.\(^{10}\)

**Unmarried Couples and Property Rights**

*Marvin v. Marvin* was the first supreme court decision to discuss the contract and property rights of unmarried consorts\(^{11}\) since *Keene v. Keene*.\(^{12}\) The case achieved public notoriety because the defendant, Lee Marvin, was at the time an actor of considerable repute and wealth. According to plaintiff Michelle Marvin, she and Lee had entered into an oral agreement in 1964 to combine their efforts and earnings and to share equally all property accumulated. They lived together until 1970. After Lee stopped supporting her in 1971, Michelle sued for half of the property acquired during the six-year period. The trial court granted judgment on the pleadings for Lee, apparently on the ground that the agreement might violate the rights of Betty Marvin, to whom Lee was legally married until 1968. The court of appeal affirmed on a much broader ground, holding that the agreement was void because it was made in contemplation of an illicit relationship.

The court of appeal, relying on the dicta of prior cases that contracts made in contemplation of an illicit relationship are unenforceable, took a punitive stance in opposition to changes in social behavior. The years since cases like *Keene v. Keene* had seen a great increase in the number of nonmarital living situations,\(^{13}\) a growing social acceptance of such relationships, and the rise of a new moral imperative, claiming equal rights for women in nonmarital as well as marital re-

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10. 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976).
11. The courts are not settled on the label for a nonmarital relationship and the members of that relationship. *Marvin* rejects the term “meretricious,” which implies prostitution, and refers to the relationship as a “nonmarital partnership.” 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). This term seems overbroad, for example, because it encompasses most law firms which are literally “nonmarital partnerships.” This writer prefers the term “nonmarital consortium,” referring to the members as “consorts.”
12. 57 Cal. 2d 657, 371 P.2d 329, 21 Cal. Rptr. 593 (1962). In *Keene*, the court held that a woman who contributed services to a farming operation during the course of a nonmarital consortium was not entitled to any interest in the ranch property which was held in the name of her consort. *Id.*
13. Justice Tobriner observed that “many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage. This trial period . . . serves as some assurance that the marriage will not subsequently end in dissolution to the harm of both parties. We are aware . . . [also] of the pervasiveness of nonmarital relationships in other situations.” 18 Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.
relationships. Viewed in the light of these developments, the moral premises of the court of appeal decision yielded an immoral result: persons who lived together without marriage and entered agreements relating to their property were denied the contract rights of married persons, with the consequence that one consort, usually the male, acquired property which was the product of mutual effort.

Justice Tobriner, writing for the supreme court majority in Marvin, rejected the court of appeal's moralistic approach, stating that "[t]he mores of society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many." His opinion began by demonstrating that the past decisions do not invalidate all contracts which contemplate a nonmarital relationship. Instead, he construed those decisions to yield a simple and more limited rule: "So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements." In other words, contracts that by their terms violate the laws against prostitution cannot be enforced, but all other agreements between unmarried consorts may be valid. This objective rule avoids the difficulty of inquiring into the subjective contemplation of the parties and serves to protect their reasonable expectation that agreements will be carried out.

Because Michelle Marvin's pleadings had alleged an express contract, the court's opinion could have stopped with its holding that such a contract could form the basis of a cause of action. The arguments of counsel, however, called the court's attention to a conflict in the court of appeal opinions concerning the property rights of unmarried couples. The Court of Appeal for the First District in In re Marriage of Caryl had interpreted the Family Law Act to require that property acquired during an "actual family relationship" be divided equally.

14. Id. at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.
15. Id. at 674, 557 P.2d at 116, 134 Cal. Rptr. at 825.
but the Third District in *Beckman v. Mayhew*¹⁹ had refused to follow that precedent. Because the resolution of conflicts between court of appeal decisions is a principal function of the supreme court, Justice Tobriner’s opinion addressed the question that *Cary* and *Beckman* had been unable to resolve consistently.

Justice Tobriner demonstrated that the holding of the *Cary* decision suffered from two defects. First, there was simply no evidence that the legislature had intended the Family Law Act to govern property of unmarried couples.²⁰ Second, many couples who live together do not marry because they do not want their relationship governed by the laws applicable to married couples. In effect *Cary* would have forced those laws upon them.²¹

The court concluded that *Cary* erred in applying the Family Law Act to unmarried couples. If it had overruled *Cary* with nothing to replace that decision, however, the court’s assurance that express contracts would be enforced would have been a giant step backwards. Virtually all consortiums without express contracts would fall under the regime of the old and inequitable precedents which gave all property to the consort in whose name title was taken. If *Cary* was to go, legal principles had to be set out to govern those situations in which the parties intend an equal division of property and act in reliance upon this tacit understanding but never put that understanding into an express agreement. Therefore the *Marvin* opinion next held that unmarried consorts can assert rights based on theories of implied contract or quantum meruit and can resort to established equitable remedies. Recognizing the changing needs of society, Justice Tobriner summarized the court’s approach:

We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed.... [T]he courts now hold that express agreements will be enforced unless they rest on an unlawful meretricious con-


21. Of course, under the reasoning of both *Cary* and *Marvin*, a valid agreement between the parties to hold their acquisitions as separate property would be controlling. In the case of nonmarital consortiums it would seem more reasonable to begin with the assumption that the parties intended their relationship to be governed by the laws applicable to unmarried persons and to place the burden on the party asserting the contrary. *Cary* would instead impose community property laws unless the objecting party proved a valid separate property agreement.
sideration. We add that in the absence of express agreement, the courts may look to a variety of other remedies in order to protect the parties’ lawful expectations.\textsuperscript{22}

As Justice Clark’s dissent pointed out, \textit{Marvin} leaves some unsettled questions.\textsuperscript{23} Two are of particular importance. \textit{Marvin} visualizes an equal, emancipated relationship between man and woman, with property rights based on express or tacit agreement. When unmarried couples instead enter into a traditional living arrangement with only one earning consort and make no agreement, express or implied, the question arises whether anything can be done to protect the expectations of the consort who stays home. The court in \textit{Marvin} deferred resolution of this complex issue to a later date because it had not been thoroughly argued.\textsuperscript{24}

The second question raised concerns the application of \textit{Marvin} to gay couples. The facts of the case and the arguments of counsel did not address the issue. The respect shown in \textit{Marvin} for the rights of individuals to choose their own way of life and to order their affairs by private contract, free from state enforcement of patterns of orthodox behavior, intimates, however, that agreements between gay couples would be enforced.

\section*{Married Couples and Contract Rights}

Shortly after hearing argument in \textit{Marvin v. Marvin}, the court granted a hearing in the case of \textit{In re Marriage of Dawley}.\textsuperscript{25} That case presented issues philosophically similar to \textit{Marvin} but involved a lawful, if temporary, marriage. Under the pressure of an unplanned pregnancy, the Dawleys decided to marry for at least fourteen months. Prior to the marriage they entered into an agreement providing that the earnings of each would remain the separate property of that spouse. When they separated eight years later, the husband sued to enforce the antenuptial agreement. Relying on a dictum from \textit{In re Marriage of Higgason},\textsuperscript{26} that an antenuptial agreement “must be made in con-

\begin{itemize}
  \item \textsuperscript{22} Marvin v. Marvin, 18 Cal. 3d 660, 684, 557 P.2d 106, 122, 134 Cal. Rptr. 815, 831 (1976).
  \item \textsuperscript{23} Id. at 685-86, 557 P.2d at 123-24, 134 Cal. Rptr. at 832-33.
  \item \textsuperscript{24} The court states, “Our opinion does not preclude evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such remedies may be determined in later cases in light of the factual setting in which they arise.” \textit{Id.} at 684 n.25, 557 P.2d at 123, 134 Cal. Rptr. at 832.
  \item \textsuperscript{25} 17 Cal. 3d 342, 551 P.2d 323, 131 Cal. Rptr. 3 (1976).
  \item \textsuperscript{26} 10 Cal. 3d 476, 485, 516 P.2d 289, 295, 110 Cal. Rptr. 897, 903 (1973).
\end{itemize}
temptation that the marriage relation will continue until the parties are separated by death,” the court of appeal refused to enforce the agreement on the ground that it contemplated a temporary marriage.

As in Marvin, the court found that the moral values barring enforcement of the agreement were inapplicable to changed social conditions and that a narrow interpretation of past decisions would be more consistent with modern practice. The opinion notes:

An increasing number of couples have executed antenuptial agreements in order to structure their relationship in a manner more suited to their needs and values. Neither the reordering of property rights to fit the needs and desires of the couple, nor realistic planning that takes account of the possibility of dissolution, offends the public policy . . . .

Only those contracts are barred by the Dawley decision that by their terms promote and encourage dissolution — a limitation comparable in its narrow scope to the contracts for prostitution held unenforceable in Marvin. The result, once again, is a victory for individuality and for the rights of couples to make and enforce their own agreements without being confined by conventional attitudes toward community property rights.

The California Supreme Court failed, however, to respond to another serious defect in the Family Law Act, the Act's perpetuation of the husband's superior rights in the management of community assets. The issue arose in Marks v. Superior Court, a petition for hearing that challenged the constitutionality of California Civil Code section 5125, which then provided that “the husband has the management and control of community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate.” Although California constitutional law holds that statutes which discriminate on the basis of gender are invalid unless supported by a compelling state interest, a hurdle that section 5125 plainly

27. 17 Cal. 3d at 358, 551 P.2d at 333, 131 Cal. Rptr. at 13.
30. Sail'er Inn v. Kirby, 5 Cal. 3d 1, 17-18, 485 P.2d 529, 539-40, 95 Cal. Rptr. 329, 339-40 (1971). When the court held in Sail'er Inn that sex discrimination required strict judicial scrutiny, it may not have fully appreciated the implications of that holding. Sail'er Inn implies the unconstitutionality of the husband's control of community property and his choice of the family abode, the preference for the mother in custody cases, school hair and grooming requirements that differentiate between sexes, job classifications and tests that bear unequally on the sexes, and many other laws and regulations. Although the court has never rejected the holding of Sail'er Inn, it has been noticeably reluctant to grant hearings in those cases which challenge
could not surmount, the court denied a hearing. The following year the legislature amended the Family Law Act to abolish the husband's priority in management of community property, thus rectifying this atavism.

In sum, the court, largely through the opinions of Justice Tobriner, and the legislature have transformed California law respecting the property rights of married and unmarried couples. The law now rests on two principles: the equality of the partners, regardless of sex, and the right of the partnership to order its own economic affairs.

Adult Sexual Behavior and the Law

An enormous gulf existed between human sexual practices and the laws relating to victimless sex crimes as they existed before 1976. Studies have indicated that the majority of adults have engaged in oral copulation and that a substantial minority have practiced sodomy. Yet until recently, the law imposed a maximum term of fifteen years for the former offense and life for the latter. These laws refused to recognize the reality of the homosexual community.

Retroactive Application of Legislative Reform

The ugly spectre of laws designed to impose a narrow and obsolete view of sexual behavior upon a nonconforming majority, with calami-
tous effect upon the occasional person who was caught, disappeared as a result of legislative action in 1975.\textsuperscript{37} Once this action was taken, the court was able to provide a postscript to the legislative reform with its decision in \textit{People v. Rossi}.\textsuperscript{38} Mrs. Rossi had engaged in oral copulation during the filming of movies intended for public distribution but never distributed. She was convicted in 1973 of violating former section 288a of the Penal Code.\textsuperscript{39} The trial judge then ordered her committed for a ninety day psychological observation, an astonishing use of judicial power because there was no reason to believe her conduct was symptomatic of mental illness. The supreme court, however, denied her petition for habeas corpus.\textsuperscript{40} Her direct appeal fared better, however, because the new legislation took effect while her case was pending before the court of appeal.

In affirming the conviction, the court of appeal reasoned that because the legislature had expressly provided that the new legislation would not be retroactive for purposes of avoiding the effect of certain education code provisions, it was not retroactive at all. The supreme court rejected this non sequitur and reversed the conviction. The opinion by Justice Tobriner relied heavily upon the precedent of \textit{In re Estrada},\textsuperscript{41} which held that a statute that reduced punishment benefitted all defendants whose cases were pending on appeal.\textsuperscript{42}

\textit{Rossi} illustrates the conceptual problems that can sometimes stand in the way of a just and sensible result. \textit{Estrada}, the leading precedent, differed from \textit{Rossi} in that it involved a statute that mitigated punishment instead of repealing the substantive offense. Justice Peters' opinion in \textit{Estrada} stated that when the prohibition against ex post facto laws is not applicable and the court is faced with a choice between a greater or a lesser punishment, it could choose the lesser, but the opinion implied that the court could not totally prevent the punishment of an offender convicted under a prior law. Justice Tobriner's opinion pointed out that this distinction would yield the absurd result that had the legislature reduced Rossi's crime to an infraction subject to a ten dollar fine, she could avail herself of the new law, but because it made her conduct legal, she was subject to fifteen years imprisonment. Rejecting this absurdity, the court held that the miti-

\textsuperscript{38} 18 Cal. 3d 295, 555 P.2d 1313, 134 Cal. Rptr. 64 (1976).
\textsuperscript{40} California Supreme Court Minutes of April 4, 1973.
\textsuperscript{41} 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965).
\textsuperscript{42} 18 Cal. 3d at 304, 555 P.2d at 1318, 134 Cal. Rptr. at 69.
gation or repeal of a criminal statute benefits those whose cases are pending appeal.

Collateral Consequences of Sexual Behavior

Although it did little to nullify the laws against unconventional sexual behavior, the supreme court, and Justice Tobriner in particular, played a very significant role in ameliorating the collateral consequences of such behavior. In *Lerner v. Los Angeles City Board of Education*,\(^{43}\) written by Justice Tobriner shortly after his supreme court appointment, the court made it possible for a teacher convicted of a homosexual act to regain a teaching credential. The state and city school boards had revoked Lerner's credential, but judicial decision later established that the statute authorizing revocation could not be applied retroactively to conduct, such as Lerner's, that occurred before its enactment.\(^{44}\) The state board then restored Lerner's credential, but the city board refused to do so. The issue before the supreme court was solely a procedural one: whether Lerner's mandamus action against the city board was barred by the statute of limitations or laches. Concluding that Lerner's delay in filing suit until after the state board restored his credential was reasonable, the court held the action timely. The case features no broad issues or sweeping reform, but it exemplifies Justice Tobriner's mastery of technical legal argument to achieve a desired result.

Far more significant is Justice Tobriner's 1969 opinion in *Morrison v. State Board of Education*.\(^{45}\) Morrison had engaged in noncriminal homosexual acts with another teacher. Acting under Education Code section 13202, which authorized the revocation of a teaching credential for "immoral or unprofessional conduct,"\(^{46}\) the State Board of Education revoked Morrison's credential.

On appeal to the supreme court Morrison contended that section 13202 was unconstitutionally vague. He argued also that the section barred him from practicing a lawful profession for reasons unrelated to his fitness to perform the duties and responsibilities of that profession and thus denied him due process of law. Justice Tobriner's opinion acknowledged the abstract merit of both contentions but

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45. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).
avoided holding the statute unconstitutional by construing it to permit revocation of a teaching credential only upon a showing that the holder is unfit to teach. That construction in itself is not a significant improvement, for as United States Supreme Court decisions of the 1950’s illustrate, the concept of “unfitness” can be used to bar the nonconformist on the theory that employment of such persons will “impair the integrity of the schools.”

Justice Tobriner, however, interpreted the concept of “unfitness” to be tied to specific and objective criteria. A teacher is unfit, he explained, only if he “poses a significant danger of harm to either students, school employees, or others who might be affected by his actions as a teacher.”

This construction provides substantial protection for the nonconformist, whether the nonconformity concerns sexuality or some other characteristic. Unfitness now becomes an empirical question. The old, seldom articulated notion that all homosexuals are child molesters will not support revocation of a teaching credential. Essential factual premises must be supported by evidence, preferably expert psychological evidence concerning the significance of deviant sexual behavior or secondarily, facts which are so well established that they are a proper subject for judicial notice. Because in Morrison the record contained no such evidence as to the significance and implications of Morrison’s conduct, the supreme court reversed the judgment against him.

In sum, Morrison established two propositions of great importance: first, that a person may be barred from practicing a lawful profession only if he is unfit to do so, and second, that unfitness is to be proved not by vague and unsupported prejudices but by evidence which reliably predicts behavioral consequences. Eight years after Morrison the fight to protect and enforce those propositions continues.

The belief that persons who commit unorthodox sexual acts somehow contaminate a school system remains a strong one and has led to a

48. 1 Cal. 3d at 235, 461 P.2d at 391, 82 Cal. Rptr. at 191.
49. 1 Cal. 3d at 235, 461 P.2d at 391, 82 Cal. Rptr. at 191.
50. See notes 64-76 & accompanying text infra.
51. The Washington Supreme Court recently held that proof that a teacher was a known homosexual was sufficient proof of his unfitness. Gaylord v. Tacoma School Dist. No. 10, __ Wash. 2d ___, 559 P.2d 1340 (1977).
number of court of appeal decisions that, although citing Morrison, limit or evade that decision in a manner quite out of harmony with the views that inspired it. Nonetheless, Morrison remains the landmark decision in California and the nation establishing that "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 deems fit."

In addition to the legal principles it establishes, Morrison is an interesting example of Justice Tobriner's judicial technique. In Morrison, Justice Tobriner resolved the constitutional issue by construing a borderline statute to conform to constitutional principles, a technique that he employs frequently. This technique has several advantages over the alternative of declaring the statute unconstitutional: it permits exposition and enforcement of constitutional principles while avoiding a direct confrontation between the legislative and judicial branches; it enables a court to buttress its opinion with the presumption in favor of a statute's validity instead of having to overcome the presumption of constitutionality; and it avoids creating a hiatus in the legislative scheme that might result from striking down an enactment. These advantages are particularly significant in close cases. Morrison, a four to three decision, might well have gone the other way had the majority proposed to strike down Education Code section 13202 and leave the State Board without statutory authority to revoke credentials even for conduct which demonstrated unfitness to teach.

The teacher's appeal in Pettit v. State Board of Education returned the court to the issues it had considered in Morrison. Mrs. Pettit, a teacher of mentally retarded elementary school children, belonged to a swingers club. At a club party she engaged in sexual acts that tells homosexual teachers to "get back in the closet," to conceal their sexual orientation on pain of discharge.


53. 1 Cal. 3d at 239, 461 P.2d at 394, 82 Cal. Rptr. at 194.


with three men in view of an undercover police agent. Charged with a violation of then existing Penal Code section 288a, a conviction of which would have resulted in automatic revocation of her teaching credential, she pled guilty to the lesser offense of outraging public decency. The State Board of Education then initiated revocation proceedings against her under Education Code section 13202, the statute construed in *Morrison*.

Although upholding the revocation, the majority did not overrule *Morrison*. Rather, Justice Burke for the majority accepted *Morrison's* holding that a teaching credential could be revoked only for unfitness to teach but distinguished *Morrison* on three grounds: Pettit's sexual activities violated criminal statutes, they occurred in a "semi-public setting," and expert witnesses testified that she was unfit to teach. None of the suggested distinctions can withstand analysis. The real distinction between *Morrison* and *Pettit* is that the replacement of Justice Peters and Chief Justice Traynor by more conservative justices swung the balance in favor of the *Morrison* dissenters.

Justice Tobriner, now in dissent, rejected the distinctions advanced in the majority opinion. Conviction of a crime, he pointed out, "has no talismanic significance." No one would suggest that the commission of a traffic offense, for example, would result in the disbarment of an attorney or the disqualification of a teacher. The semipublic place in which Pettit's acts occurred was the bedroom of a private home, and the viewers were persons who had certified in writing their

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57. *Cal. Penal Code* § 650 1/2 (West 1970). The majority decision equivocates on the significance of the criminal conviction. Although in text it distinguishes *Morrison* on the ground that Pettit's conduct was criminal, in a footnote it rejects as irrelevant her contention that the criminal statutes in question were unconstitutional on the ground that "the sole question presented herein is whether the record contains sufficient evidence to sustain the trial court's determination that plaintiff's conduct rendered her unfit to teach." 10 Cal. 3d at 33 n.4, 513 P.2d at 892, 109 Cal. Rptr. at 668.

Numerous law review commentaries on *Pettit* have emphasized that proof that conduct is criminal does not vitiate the *Morrison* standard but simply constitutes one factor which may be considered in determining whether the person in question is fit. See Willemsen, supra note 33, at 853; Comment, *Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 Calif. L. Rev. 1442, 1455-57 (1973); Note, *The California Supreme Court, Pettit and Disciplinary Proceedings Against Teachers*, 1 Pepperdine L. Rev. 404 (1974); Comment, *Dismissal of a Transsexual from a Tenured Teaching Position in a Public School*, 1976 Wis. L. Rev. 670.

58. See Willemsen, supra note 33, at 849.
59. 10 Cal. 3d at 39, 513 P.2d at 896, 109 Cal. Rptr. at 672 (quoting Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 219 n.4, 461 P.2d 375, 378, 82 Cal. Rptr. 175, 178).
willingness to view or participate in sexual acts. The dissent points up the fallacy of this distinction:

In essence the majority are saying that even though her fellow “swingers” were not offended, they — the majority — find plaintiff’s behavior shocking and embarrassing. Yet this important issue of plaintiff’s right to teach should not turn on the personal distaste of judges; the test, as this court has announced in the cases, is the rational one of the effect of the conduct, if any, on the teacher’s fitness to teach.

The expert testimony was the only ground that could truly distinguish this case from Morrison, but it was virtually worthless. One expert opined that Pettit was unfit because she could not teach “sexual morality” to her students but admitted on cross-examination that the teaching of sexual morality was not among her duties. Another expressed the view that anyone who committed an extramarital sex act was lacking in “clean morals” and hence unfit to teach. A third expert in effect disqualified himself by admitting that his opinion was affected by his desire to remain employed by the school board, which would want him to designate her as unfit.

Justice Tobriner’s dissent exposes the underlying values involved in the revocation of Pettit’s credential. Concerned that competent and highly skilled teachers such as Mrs. Pettit could be barred from California schools by a casual determination of unfitness by the State Board of Education, he noted: “The danger of the majority’s decision becomes especially onerous when we know that a large proportion of the younger generation do engage in unorthodox sexual activities deemed anathema by some members of the older generation.”

Two recent opinions written by Justice Tobriner illustrate his continuing efforts to protect teachers threatened with the loss of their livelihood because of sexual acts unrelated to teaching competence. Newland v. Board of Governors involved an applicant for a community college credential who had been convicted seven years earlier of lewd conduct in a public place, a misdemeanor sex offense. At

60. See text accompanying note 56 supra.
61. 10 Cal. 3d at 41, 513 P.2d at 897-98, 109 Cal. Rptr. at 673-74.
62. Id. at 41-42, 513 P.2d at 898, 109 Cal. Rptr. at 674.
63. Id. at 37-39, 513 P.2d at 894-96, 109 Cal. Rptr. at 670-72.
64. 19 Cal. 3d 705, 566 P.2d 254, 139 Cal. Rptr. 620 (1977).
65. See CAL. PENAL CODE § 647(a) (West 1970). Newland’s conduct consisted of masturbating in a closed toilet booth at a bus station rest room. It is questionable whether such conduct violated § 647(a), and even more questionable whether the police observation of that conduct constituted an unlawful search. See People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973). Nevertheless Newland was found guilty of the charge, and did not appeal from his conviction.
the time Newland applied for his credential, Education Code section 13220.16 prohibited issuance of a community college credential to anyone convicted of a sex offense as defined in section 12912, including the offense of lewd conduct in a public place. The Board of Governors therefore refused to grant Newland a fitness hearing and denied his application.

Newland then sued to compel the board to grant him a fitness hearing, contending that the statutorily mandated rejection of his application denied him the equal protection of the law, and rested implicitly upon a conclusive presumption of unfitness which violated due process of law. While his appeal was pending, the Legislature amended section 13220.1666 to permit an applicant to obtain a community college credential, despite a prior conviction of a sex offense, provided he was found fit to teach and met three conditions. One of the conditions, however, was that he apply for a certificate of rehabilitation, a document available only to convicted felons. Newland, a misdemeanant, could not fulfill this condition. Thus as Justice Tobriner explained, “the 1976 amendment [worked] the Kafka-like perverse effect of providing that a person convicted of a felony sex crime who applies for a certificate of rehabilitation and who is otherwise fit, can obtain certification to teach in the community college system but that an otherwise fit person, convicted of a misdemeanor sex crime, is forever barred.”67

Avoiding other difficult constitutional issues raised by Newland, the court reversed on the ground that the amendment’s denial of relief to misdemeanants denied them the equal protection of the law. The amendment’s discrimination in favor of felons and against misdemeanants, the court declared, lacked any rational relationship to the objective of protecting the schools from unsuitable teachers: “The Legislature could not possibly or sensibly have concluded that misdemeanants, as opposed to felons, constitute a class of particularly incorrigible offenders who are beyond hope of rehabilitation.”68

Board of Education v. Jack M.,69 filed the same day as Newland, involved a tenured teacher who was threatened with dismissal following an incident in which he allegedly solicited a homosexual act in a public restroom. The trial court, finding on conflicting evidence that the teacher was not unfit to teach, held that the board of education

68. Id. at 712, 566 P.2d at 758, 139 Cal. Rptr. at 624.
lacked authority to discharge him. The Court of Appeal reversed, holding that the commission of a public sexual offense demonstrated unfitness to teach as a matter of law.  

The supreme court granted the teacher's petition for hearing and, in a unanimous opinion by Justice Tobriner, sustained the trial court. Justice Tobriner's opinion reaffirmed unequivocally the Morrison standard of fitness to teach, and classified that question as one of fact, an issue left open by Morrison. Reciting psychological testimony that the teacher's conduct was an isolated, aberrant act, unlikely to be repeated, the court concluded that substantial evidence supported the trial court's finding that the teacher was not unfit to teach.

Although both Newland and Jack M. turned on relatively narrow issues — the language of amended section 13220.16 in Newland, the substantial evidence rule in Jack M. — these cases take on a broader significance because of their explicit rejection of arguments which, in past decisions, have often been employed to justify decisions depriving teachers of employment or certification. Both Newland and Jack M. expressly rejected the contention that any person who commits a sex offense is per se unfit to teach. Newland went on to interpret the amendment to section 13220.16 as legislative recognition that some persons who committed sex offenses, and were convicted for such offenses, may nevertheless be rehabilitated and thus fit to teach. Jack M. expressly denounced the broader proposition, implicitly rejected in Newland, that proof of commission of a criminal act demonstrates unfitness as a matter of law. Finally, Jack M. limited the force of the frequently used arguments that a teacher who committed some unorthodox sexual act is necessarily unfit because he cannot serve as a suitable exemplar for his students, or because he cannot instruct them in manners and morals. Such arguments, the opinion explains, are merely possible inferences arising from the evidence which the trial court is free to reject.

These decisions, from Lerner and Morrison through Newland and Jack M. demonstrate that the guidance of Justice Tobriner has

70. 133 Cal. Rptr. 275 (2d Dist. 1976).
71. See Morrison v. Board of Educ., 1 Cal. 3d 214, 238, 461 P.2d 375, 393, 82 Cal. Rptr. 175, 193 (1973).
72. 19 Cal. 3d 691, 698, 566 P.2d 602, 605, 139 Cal. Rptr. 700, 703 (1977).
74. 19 Cal. 3d at 712, 566 P.2d at 258, 139 Cal. Rptr. at 624.
75. Id. at 702, 566 P.2d at 609, 139 Cal. Rptr. at 707.
76. Id. at 699, 566 P.2d at 606, 139 Cal. Rptr. at 704.
given the California Supreme Court impetus to take the lead in overturning the notion that sexual orthodoxy and conformity are proper conditions for employment in the public service generally or in the teaching profession in particular. Unfitness to practice, the opinions hold, is the only proper ground for barring a person from pursuing his chosen profession; such unfitness is an individual, empirical question, not an issue to be resolved by social stereotypes.

Sex Oriented Expression

Defining Protected Expression

Several of Justice Tobriner's opinions have contributed significantly to the establishment of a pattern of tolerance toward sex oriented expression that still prevails.77 Zeitlin v. Arnebergh,78 the most important of these decisions, protected Henry Miller's *Tropic of Cancer* from suppression as obscene. In holding that *Tropic of Cancer* was not obscene, Justice Tobriner set out his views of the relationship between the law and artistic creativity:

[A] legal proscription cannot . . . constrict artistic creation. Man's drive for self-expression, which over the centuries has built his monuments, does not stay within set bounds; the creations which yesterday were the detested and the obscene become the classics of today. The quicksilver of creativity will not be solidified by legal pronouncement; it will necessarily flow into new and sometimes frightening fields. . . . The new forms of expression, even though formally banned, will, as they always have, remain alive in man's consciousness. The court-made excommunication, if it is too wide or if it interferes with true creativity, will be rejected like incantations of forgotten witch-doctors. Courts must therefore move here with utmost caution; they tread in a field where a lack of restraint can only invite defeat and only impair man's most precious potentiality: his capacity for self-expression.79

Anticipating the later United States Supreme Court decision in *Stanley v. Georgia*,80 Justice Tobriner in *In re Klor*81 held that private preparation and possession of obscenity is not a crime. In *People v.
Noroff\textsuperscript{82} he turned to the subject of pictorial expression and held that "representation of the nude human form in a nonsexual context is not obscene."\textsuperscript{83} Finally, in \textit{In re Giannini},\textsuperscript{84} a case involving topless dancing in a nightclub, Justice Tobriner reviewed the dance as an art form and held that the first amendment barred suppression of non-obscene dances before an audience.

The most notable feature of the \textit{Giannini} opinion — a feature which survived the later overruling of \textit{Giannini} in \textit{Crownover v. Musick}\textsuperscript{85} — was its holding that the community standard by which obscenity is judged is the standard of the state as a whole. As we have witnessed in recent federal prosecutions,\textsuperscript{86} a rule relying on local community standards allows the attitudes of the most benighted community to determine what books, magazines, or movies can safely be distributed. \textit{Giannini}'s statewide standard steers clear of that danger for California prosecutions.

In the 1970's, the California Supreme Court refused to extend the earlier decisions of Justice Tobriner and even retreated by disapproving the holding in \textit{Giannini} that full first amendment freedoms protect non-obscene communicative dance. Justice Tobriner accordingly found himself in dissent. In \textit{People v. Luros}\textsuperscript{87} he advanced the view, later advocated by the liberal minority on the United States Supreme Court,\textsuperscript{88} that the state's only legitimate purpose in regulating obscenity was the protection of children and unwilling viewers. Subsequently, when a majority of the California Supreme Court held that the definition of obscenity in Penal Code section 311.2(a) complied with the specificity requirements of \textit{Miller v. California},\textsuperscript{89} Justice Tobriner took the opportunity to elaborate on the view he expressed in his \textit{Luros}

\begin{itemize}
  \item \textsuperscript{82} 67 Cal. 2d 791, 433 P.2d 479, 63 Cal. Rptr. 575 (1967).
  \item \textsuperscript{83} Id. at 797, 433 P.2d at 483, 63 Cal. Rptr. at 579.
  \item \textsuperscript{84} 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968).
  \item \textsuperscript{85} 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973).
  \item \textsuperscript{86} The federal government prosecuted Harry Reems, an actor in the film, \textit{Deep Throat}, in Memphis, Tennessee; Al Goldstein, publisher of \textit{Screw} magazine, in Topeka, Kansas; and Larry Flynt, publisher of \textit{Hustler} magazine, in Cincinnati, Ohio. In each of these cases venue appears to have been selected by the prosecution not because that district had the closest relationship to the defendant's activities but because it had conservative community standards and would probably produce a jury hostile to the defendant.
  \item \textsuperscript{87} 4 Cal. 3d 84, 480 P.2d 633, 92 Cal. Rptr. 833 (1971), cert. denied 404 U.S. 824 (1971).
  \item \textsuperscript{88} See \textit{Paris Adult Theatre I v. Slaton}, 413 U.S. 49, 103-07 (1973) (Brennan, J., dissenting).
  \item \textsuperscript{89} 413 U.S. 15 (1973).
\end{itemize}
The statutory definition of obscenity, he pointed out, requires the jury to determine a unitary community standard although in fact Californians entertain a broad range of views on that subject. Thus the process of determining and applying community standards is an extremely subjective one, and the outcome in any given case is so problematic that an author or seller cannot predict which works are and which are not protected. Beyond the problems arising from the vagueness of the statutory test, the fundamental problem with obscenity laws, he reiterated, is that the state has no legitimate interest in suppressing erotic communication to consenting adults because the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society."91

Justice Tobriner also dissented from the court's decision in Crownover v. Musick,92 in which the majority, overruling In re Giannini,93 upheld the constitutionality of ordinances banning nude dancing and performances. Distinguishing between speech that is protected under the first amendment and conduct, which cannot claim that shield, the

91. 16 Cal. 3d at 99, 545 P.2d at 244, 127 Cal. Rptr. at 332 (quoting Stanley v. Georgia, 394 U.S. 557, 564 (1969)).
92. 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973). The decision in Crownover was complicated by the problem of interpreting the United States Supreme Court decision in California v. LaRue, 409 U.S. 109 (1972), which upheld a regulation of the California Department of Alcoholic Beverage Control prohibiting nude dancing in bars. Justice Rehnquist's emphasis on the sweeping authority of states to regulate sale of alcoholic beverages under the twenty-first amendment appears at times to suggest that the twenty-first amendment amended the first and fourteenth amendments and thus authorized the state to abridge freedom of speech in connection with the sale of alcoholic beverages. Such emphasis seems to indicate that a prohibition of nude dancing might be unconstitutional if applied to an establishment which did not sell alcoholic beverages. The Crownover majority, however, distinguished LaRue on the ground that the only language potentially applicable to the case at bar concerned regulation of motion pictures and theatrical performances. 9 Cal. 3d at 428 n.15, 509 P.2d at 512, 107 Cal. Rptr. at 696.

The Supreme Court's later decision in Doran v. Salem Inn, Inc., 422 U.S. 922 (1975), suggests that the distinction drawn by the Crownover majority is too narrow. Doran involved an ordinance which prohibited nudity in any public place. Noting that the ordinance was not limited to places dispensing alcoholic beverages, the Court held that the lower court had not abused its discretion in granting a preliminary injunction restraining enforcement of the ordinance.

In Craig v. Boren, 429 U.S. 190 (1976), the Supreme Court wrote the latest chapter of this story, holding that the twenty-first amendment does not validate classifications which offend the equal protection clause of the fourteenth amendment. Although Craig v. Boren does not overrule California v. LaRue, the gulf separating the views of Justice Brennan, writing the plurality opinion in Craig, and Justice Rehnquist in LaRue respecting the role of the twenty-first amendment is beyond reconciliation.

93. 69 Cal. 2d 563, 446 P.2d 535, 72 Cal. Rptr. 655 (1968).
majority concluded that dancing is a mixture of speech and conduct and is thus not entitled to a full measure of protection under the first amendment, even if not obscene by constitutional standards. Justice Tobriner's dissent points out the danger that can arise from such an attempt to dichotomize communicative acts into separate components of speech and conduct:

The adoption of this theory would let the censor loose without constitutional restriction to condemn at will any and all communicative entertainment. While avoiding reference to the actor's speech, the state could ban his gestures, his costuming (or amount of costuming), the positioning of the actors, the lighting of the stage, or whatever other "conduct" it chooses.94

A recent obscenity case, People ex rel Busch v. Projection Room Theater,95 held that sale or exhibition of obscene books or movies could be suppressed as a public nuisance. Justice Tobriner again was forced to dissent. His argument, by now a familiar one, emphasized the absence of a public interest in suppressing communication to consenting adults.

The patent unworkability and unenforceability of the present obscenity laws may yet lead courts or legislatures to adopt the views that Justice Tobriner has long advocated. Whether the courts and legislatures will eventually arrive at Justice Tobriner's conclusion is debatable. Largely through the opinions of Justice Tobriner, however, much of the danger that serious literary, photographic, or theatrical works will be chilled by threat of prosecution has been significantly reduced in California.

Collateral Consequences of Sex Oriented Expression

Expression considered vulgar because of its sexual orientation, as well as sexual acts previously discussed, can have collateral consequences.96 Lindros v. Governing Board97 involved a probationary teacher who read to his class a short story he had written describing his emotions while attending the funeral of a black student who died of a heroin overdose. The story recounted that as he left the funeral, a young black addressed him as "White-mother-fuckin Pig." The use of that epithet in the classroom formed the gravamen of the school district's complaint. The charges led to Lindros' dismissal.

The single use of vulgar language in an appropriate literary

94. 9 Cal. 3d at 436, 509 P.2d at 518, 107 Cal. Rptr. at 702.
95. 17 Cal. 3d 42, 550 P.2d 600, 130 Cal. Rptr. 328 (1976).
96. See notes 43-63 & accompanying text supra.
context seems insufficient to justify terminating a teacher with a satisfactory overall record. Apparently, the court's difficulty in overturning the discharge stemmed from Education Code section 13443(d),\textsuperscript{98} which, as interpreted in \textit{Griggs v. Board of Trustees},\textsuperscript{99} provides that whenever the cause for dismissal relates to the welfare of the schools and pupils, the courts cannot consider whether the facts justify dismissal.

Taken literally, the \textit{Griggs} rule would have permitted the school board to seize upon any trivial or innocuous event which affected the school as grounds for discharge. Indeed the board attempted such a maneuver in the \textit{Lindros} case, asserting as a second ground for Lindros' discharge the fact that on one occasion he allowed students to go to the library without a pass in order to return books needed by another teacher. Justice Tobriner adroitly avoided this construction of section 13443 by holding that the only real basis for Lindros' discharge was the reading of "The Funeral." He further held that the event did not adversely affect the "welfare of the school or the pupils thereof" and thus did not constitute "cause for dismissal" under section 13443.\textsuperscript{100}

Here, as in \textit{Morrison} and \textit{Pettit}, Justice Tobriner reiterated his belief that competent teachers should not be deprived of their livelihood because a governing authority has been personally offended by an incident that does not demonstrate unfitness to teach. Expression characterized as obscene in certain contexts may not be the basis for dismissal from employment if all the circumstances indicate the propriety of that usage.

\section*{Marijuana}

\subsection*{Criminal Sanctions}

Another area in which changing social patterns clashed with harsh penal sanctions was the use of drugs, particularly marijuana. Two decisions written by Justice Tobriner in the 1960's served to ameliorate to some extent the undue strictness of the laws. In \textit{People v. Woody}\textsuperscript{101}

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\item \textsuperscript{98} \textsc{Cal. Educ. Code} § 13443(d) then stated in relevant part that "[t]he governing board's determination not to reemploy a probationary employee for the ensuing school year shall be for cause only. The determination of the governing board as to the sufficiency of the cause pursuant to this section shall be conclusive, but the cause shall relate solely to the welfare of the schools and the pupils thereof . . . ." (Now \textsc{Cal. Educ. Code} § 44949(d) (West Supp. 1976)).
\item \textsuperscript{99} 61 \textsc{Cal. 2d} 93, 389 P.2d 722, 37 \textsc{Cal. Rptr.} 194 (1964).
\item \textsuperscript{100} 9 \textsc{Cal. 3d} at 538-40, 510 P.2d at 370-71, 108 \textsc{Cal. Rptr.} at 194-95.
\item \textsuperscript{101} 61 \textsc{Cal. 2d} 716, 394 P.2d 813, 40 \textsc{Cal. Rptr.} 69 (1964).
\end{itemize}
\end{footnotesize}
the court upheld the right of members of the Native American Church to sacramental use of peyote. In People v. Leal\textsuperscript{102} it held that possession of an unusable quantity of a drug does not justify a conviction for possession.

Subsequent attacks on the drug laws failed, however, because no justice was willing to adopt the view that the state had no interest in preventing the ingestion of harmful substances and because arguments based on freedom of religion usually arose in a context that suggested that the religious claim was spurious.\textsuperscript{103} Beginning in 1974 with an opinion by former Justice Burke, the court began to strike down some of the most severe penalties as cruel and unusual punishment,\textsuperscript{104} but the marijuana laws, perhaps the most vulnerable to such an attack,\textsuperscript{105} escaped when the legislature reduced the penalty for possession to an infraction punishable by a fine not to exceed $100.

Collateral Consequences of Marijuana Use

The court did take an active role in ameliorating the collateral consequences of marijuana convictions when it decided In re Higbie.\textsuperscript{106} Higbie, a lawyer convicted of failure to pay a federal marijuana transfer tax, faced disbarment. Rejecting the contention that Higbie's crime necessarily involved moral turpitude, the court observed that measured by the morals of the day . . . [marijuana] possession or use does not constitute "an act of baseness, vileness, or depravity . . . contrary to the accepted and customary rule of right and duty between man and man" . . . [nor does it] indicate that an attorney is unable to meet the professional and fiduciary duties of his practice.\textsuperscript{107}

The court found that Higbie's conduct went beyond the failure to pay the tax and amounted to a conspiracy with one of his clients to import

\textsuperscript{102} 64 Cal. 2d 504, 413 P.2d 665, 50 Cal. Rptr. 777 (1966).
\textsuperscript{103} See, e.g., People v. Mullins, 50 Cal. App. 3d 61, 123 Cal. Rptr. 201 (1st Dist. 1975).
\textsuperscript{104} See In re Grant, 18 Cal. 3d 1, 533 P.2d 590, 132 Cal. Rptr. 430 (1976) (opinion by Wright, C. J.); In re Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974) (opinion by Burke, J.).
\textsuperscript{105} See People v. Rogers, 5 Cal. 3d 129, 140 n.1, 489 P.2d 129, 136, 95 Cal. Rptr. 601, 608 (1971) (dissenting opinion of Mosk, J.) which compares the penalties for transportation of marijuana with those for various violent crimes.
\textsuperscript{106} In re Higbie, 6 Cal. 3d 562, 493 P.2d 97, 99 Cal. Rptr. 865 (1972) (opinion of the court).
\textsuperscript{107} Id. at 572, 493 P.2d at 103, 99 Cal. Rptr. at 871 (quoting In re Craig, 12 Cal. 2d 93, 97, 82 P.2d 492, 444 (1938)). Craig defined an act of moral turpitude as one of "baseness, vileness, or depravity . . . contrary to the accepted and customary rule of right and duty between man and man." Id.
large quantities of marijuana. Although finding that such conduct warranted discipline, the court nonetheless concluded that the protection of the public did not require disbarment. Higbie was suspended from practice for two years.

Following Higbie, the court of appeal in Comings v. State Board\textsuperscript{108} held that a conviction for possession of marijuana was not in itself sufficient grounds for revocation of a teaching credential.\textsuperscript{109} The issue of the collateral consequences of a marijuana conviction did not reach the supreme court again until 1976, when the court granted a hearing in Governing Board v. Mann.\textsuperscript{110} While Mann's appeal from a decision upholding his dismissal was pending, the legislature enacted a new statute\textsuperscript{111} designed to eliminate the disproportionately severe criminal and civil sanctions inflicted on persons convicted of relatively minor marijuana offenses. This statute expressly prohibited any public entity from revoking any right on the basis of a pre-1976 marijuana conviction so long as two years had elapsed from the date of the conviction. The court, in a unanimous opinion by Justice Tobriner, ruled that the new statute applied to cases pending on appeal and therefore held that the school district could not dismiss Mann from his tenured teaching position.

Thus, as in the case of consensual sex acts, discussed earlier in this article, legislative action and judicial decisions have combined to narrow the gap between social attitudes that condone use of marijuana and laws dating from an earlier era that inflict criminal and civil punishment upon the user.

**Conclusion**

Central to the changing social attitudes and practices that have been discussed is the philosophical concept that each person should be free to do what he chooses with his life, limited only by the precept that he cannot interfere with another's rights. Thus limitations imposed by traditional orthodoxies, whether moral, religious, or political, should no longer bind those who choose other modes of living. Atavistic stereotypes of gender, sexual orientation, and the like should not be permitted to stand in the way of individual fulfillment.

\textsuperscript{108} 23 Cal. App. 3d 94, 100 Cal. Rptr. 73 (1st Dist. 1972).

\textsuperscript{109} Vielehr v. State Personnel Bd., 32 Cal. App. 3d 187, 107 Cal. Rptr. 852 (5th Dist. 1973), held conviction for possession of marijuana to be insufficient to constitute inability to function as a tax representative trainee and therefore to justify dismissal of that state employee.

\textsuperscript{110} 18 Cal. 3d 819, 558 P.2d 1, 135 Cal. Rptr. 526 (1977).

\textsuperscript{111} \textsc{Cal. Health \\& Safety Code \S 11361.7(b)} (West Supp. 1977).
This philosophy struck a responsive chord with Justice Tobriner, a man whose actions refute the common assumption that people become less tolerant as they grow older. Justice Tobriner believes strongly in the right of each person to achieve individual happiness and fulfillment, free from unnecessary social and legal barriers. His receptiveness to new ideas and attitudes and tolerance toward unorthodox behavior has significantly influenced the attitudes of the other justices and shaped the decisions of the court to minimize the injustice that so often results when the law lags behind evolving social attitudes.