I

ADMINISTRATIVE LAW

A. Fitness to Teach: Homosexuality

Morrison v. State Board of Education.[1] The court held that a teacher's credentials can be revoked for immoral or unprofessional conduct under Education Code section 13202[2] only if his conduct manifested an unfitness to teach. As thus interpreted, the court found the statute constitutional on its face. It also held that the statute could constitutionally be applied to a person who has participated in homosexual activities, but only if the evidence supported a finding of unfitness—a support not found in the *Morrison* record.

Since the *Morrison* opinion is the first California supreme court pronouncement on section 13202 employment standards for teachers, it has set the tone for administrative agencies' future treatment of these problems. This Note examines the court's decision and it is probable impact.

In 1963, during a brief period of extreme emotional stress, Morrison engaged in a limited, non-criminal[3] homosexual relationship with a friend who was a fellow teacher. A year later the other teacher reported the incident to the superintendant of schools; as a result, Morrison resigned his position. About 19 months after the superintendant learned of the incident, the State Board of Education conducted a hearing to determine whether Morrison's life diplomas should be revoked.[4] The Board's record revealed no criticism of Morrison's teaching performance before or after the incident nor did the Board's investigator report that Morrison had engaged in other homosexual relationships in his adult life; yet, the Board, three years after the incident came under review, revoked Morrison's life diplomas. It concluded that the incident was an act involving moral turpitude which constituted immoral and unprofessional conduct and therefore warranted revocation under section

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1. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1970) (Tobriner, J.) (4-3 decision).

2. CAL. EDUC. CODE § 13202 (West 1969):

> The State Board of Education shall revoke or suspend for immoral or unprofessional conduct, . . . or for any cause which would have warranted the denial of an application for a certification document or the renewal thereof, or for evident unfitness for service, life diplomas, documents, or credentials issued pursuant to this code.

3. If the relationship had involved criminal acts, Morrison's dismissal and the revocation of his papers would have been automatic. *Id.* §§ 13129, 13707.

4. A life diploma is the licensing paper issued by the state to teaching candidates who have met their requirements. Registration of this document is a necessary prerequisite to being hired by any local school board. *Id.* §§ 12905, 13127.1, 13163.

13202.[5] Morrison petitioned the superior court for a writ of mandamus to compel the Board to set aside is decision. The writ was denied. On appeal the supreme court reversed.[6]

The legislature has acknowledged that there are two classes of sexual behavior with differing significance for the teaching profession. The first class, consisting of conduct which has resulted in conviction under those sections of the Penal Code which define sex offenses, leads to immediate revocation of credentials and other papers of certification.[7] This statutory mandate implies that such conduct is conclusive evidence of a person's unfitness to teach. The statute does not reflect on the individual's pedagogic technique; rather it assumes that his history makes him either dangerous or a bad example to the students. If the latter, there is also the presumption that the conviction is, or may become, common knowledge among the students and that they will somehow be influenced by such knowledge.[8] The mandatory revocation provisions have been strictly enforced and consistently upheld by the courts which have joined in the legislature's pursuit of protection for school children by refusing to entertain any interpretation which narrows the scope of the statutes or limits their effects.[9]

The second class—the one in which Morrison's behavior fell[10]—comprises all other conduct. It requires an administrative evaluation of the quality and relevance of the conduct for which the rather general, abstract terms of section 13202 offer inadequate guidance.[11] Faced with possibly unconstitutionally vague language the court saved the statute by reading it narrowly.

The court formulated the basic test, implied by the statute's terms, as requiring that the employee's conduct be so related to his on-the-job performance as to disqualify him.[12] Although this general criterion is the same for all licensed activities,[13] the common goal of licensing—

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5. See note 2 *supra*.

6. Although the court might have refused to review the Board's actions on the grounds that they were within the statutorily authorized discretion of that administrative agency, the court did not deal with that issue. 1 Cal. 3d at 251, 461 P.2d at 403, 82 Cal. Rptr. at 203 (Burke, J., dissenting). *See also* Note, 58 GEO. L.J. 632 (1970); *cf.* Tringham v. State Bd. of Educ., 50 Cal. 2d 507, 326 P.2d 850 (1958).

7. CAL. EDUC. CODE §§ 13206-07, 13217-18, 12912-12.5 (West 1969).

8. Part of student awareness may come from sensitivity to the response of his fellow teachers, a response which is arguably more electric in the area of unusual sexual conduct. But see text accompanying note 38 *infra*; see also note 20 *infra*.

9. *E.g.*, DiGenova v. State Bd. of Educ., 45 Cal. 2d 255, 288 P.2d 862 (1955).

10. 1 Cal. 3d at 218 n.4, 461 P.2d at 377 n.4, 82 Cal. Rptr. at 177 n.4.

11. See note 2 *supra*.

12. 1 Cal. 3d at 225, 461 P.2d at 382, 82 Cal. Rptr. at 182.

13. *E.g.*, Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966) (attorneys); Yakov v. Board of Medical Examiners, 68

protection of the public rather than punishment of licensees[14]—necessarily means that the conduct prohibited varies according to the demands to be placed on the respective professions.[15] The supreme court admitted that the statute's terms, as construed, are "only lingual abstractions until applied to a specific occupation and given content by reference to fitness for the performance of that vocation."[16]

The particular question raised by the *Morrison* facts[17] was whether unusual[18] sexual conduct, and in particular homosexuality, is relevant to an evaluation of a teacher's classroom performance. The *Morrison* court reasoned that the Legislature did not intend by its broad language to give an employing agency the power to dismiss anyone whose conduct incurred its disapproval, nor one whose conduct did not affect students or fellow teachers.[19] It stated that the standard should not be one likely to vary widely with time, location, and popular mood; rather it should be derived from the fairly stable consensus within the profession as to what conduct would have adverse effects.[20]

There are few California cases involving unusual, but non-criminal, sexual activities by teachers. The only homosexual conduct case focusing on the power to revoke credentials was *Sarac v. State Board of Education*.[21] Sarac lost his general secondary credential after a hearing on charges that he had engaged in immoral and unprofessional conduct by making homosexual advances to another man[22] on a public

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Cal. 2d 67, 435 P.2d 553, 64 Cal. Rptr. 785 (1968) (doctors); H.D. Wallace & Assoc. v. Department of Alcoholic Beverage Control, 271 Cal. App. 2d 589, 76 Cal. Rptr. 749 (3d Dist. 1969) (liquor license).

14. *See* 1 Cal. 3d at 221-22, 461 P.2d at 379-80, 82 Cal. Rptr. at 179-80, *quoting* Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 471-72, 421 P.2d 76, 93-94, 55 Cal. Rptr. 228, 245-46 (1966); Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 73 n.6, 435 P.2d 553, 558 n.6, 64 Cal. Rptr. 785, 790 n.6 (1968).

15. 1 Cal. 3d at 220, 228, 461 P.2d at 379, 385, 82 Cal. Rptr. at 179, 185.

16. *Id.* at 239, 461 P.2d at 394, 82 Cal. Rptr. at 174.

17. And basically left unanswered by the court's "no evidence" holding. See text accompanying note 45 *infra*.

18. "Unusual" is used to avoid the negative connotations of more common descriptive adjectives. It refers to any sexual relationship occurring outside of marriage, but would also include marital relations which the legislature or others might denominate "abnormal" or "criminal."

19. 1 Cal. 3d at 229, 461 P.2d at 386, 82 Cal. Rptr. at 183.

20. *Id.* at 226-28, 461 P.2d at 383-85, 82 Cal. Rptr. at 183-85. The difficulty with relying on the profession for conduct evaluations is that it is as susceptible as the wider public to the difficulty, in defining adverse affects, of sifting out and disregarding questions of morals. As long as teachers are charged with the duty "to impress upon the minds of the pupils the principles of morality" [CAL. EDUC. CODE § 13556.5 (West 1969)], the larger question of morality will intrude into the professional consensus, the public's expectations, and the administrative decision.

21. 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (2d Dist. 1967).

22. The other man turned out to be a police officer [*id.* at 60, 63, 57 Cal. Rptr.

beach. According to the other man's testimony Sarac admitted being a homosexual and having had sexual relations with another man recently. After the Board revoked his credentials, Sarac applied to the superior court for a writ of mandamus; it was denied after review of the evidence.[23] The *Sarac* decision upheld the revocation on the basis of the one homosexual act, implying that any homosexual conduct would disqualify a teacher under section 13202.[24] The district court of appeal related the revocation to Sarac's fitness to teach only by pointing out the teacher's duty to teach morality[25] and asserting "an obvious rational connection" between Sarac's conduct and his unfitness for service in the public schools.[26]

Heavy reliance on a questionable moral judgment—only tenuously related to fitness to teach—is even more apparent in the only case reviewing power to dismiss for unusual, non-criminal heterosexual conduct—*Board of Trustees fo Mt. San Antonio Junior College District v. Hartman*.[27] There the district court of appeal upheld the dismissal[28] of a permanent teacher in a junior college for immoral conduct and evi-

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at 71, 72], but there was apparently no argument on the issue of entrapment since the court of appeals does not mention it.

23. Sarac was charged with violation of CAL. PENAL CODE § 647a (West 1970) but was subsequently convicted after pleading guilty to violation of a municipal disorderly conduct ordinance. 249 Cal. App. 2d at 60-61, 57 Cal. Rptr. at 71. Sarac's conviction did not subject him to mandatory revocation under CAL. EDUC. CODE § 13207 (West 1969) (sex offenses) as it would have if he had been convicted of the offense originally charged. The effect of plea bargaining in such a situation has not been squarely dealt with. The *Sarac* courts avoided the problem by their characterization of his public homosexual act as one involving moral turpitude and ruling on that ground. 249 Cal. App. 2d at 61, 62, 57 Cal. Rptr. at 71, 72.

24. 249 Cal. App. 2d at 63, 57 Cal. Rptr. at 72.

25. See note 2 *supra*.

26. 249 Cal. App. 2d at 63-64, 57 Cal. Rptr. at 72. 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. It is clearly, therefore, immoral conduct within the meaning of Education Code section 13202. "It may also constitute unprofessional conduct within the meaning of that statute as such conduct is not limited to classroom misconduct or misconduct with children. . . . It certainly constitutes evident unfitness for service in the public school system within the meaning of that statute."

27. 246 Cal. App. 2d 756, 55 Cal. Rptr. 144 (2d Dist. 1966).

28. Dismissal is governed by CAL. EDUC. CODE § 13403 (West 1969):

> No permanent employee shall be dismissed except for one or more of the following causes:
> (a) Immoral or unprofessional conduct.
> . . . .
> (e) Evident unfitness for service.

Although dismissal is a drastic step with unfortunate implications and repercussions for the employee's future professional life, the consequences are not as permanent as those flowing from revocation of certification which prevents a teacher from ever acquiring any job in public schools in the state (at least as long as the revocation as in effect).

dent unfitness for service. The evidence showed that Hartman had had sexual relations with a woman not his wife while he was still married and had cohabited with another woman, formerly his student, before she was validly divorced.[29] The court explored the judicial gloss on "immoral" and found that the teacher's conduct fell within it,[30] thus necessarily disqualifying him from teaching:

> But, in any event, under circumstances such as are presented in this case the evil at which the statutory provision is directed is the harmful impression on others, particularly students, arising from the fact of a teacher and a woman to whom he is not married living together openly as man and wife. If adherence to a code of proper personal conduct is not essential in all callings, it is in the teaching profession.[31]

Morrison, rejected the analysis in the two district court of appeal opinions which purported to objectively evaluate the moral content of the questioned conduct. It explicitly disapproved *Sarac's* attempt to put homosexuality in a category automatically compelling revocation,[32] and it implicitly repudiated the technique used in the *Hartman* decision when it refused to rule that homosexuality, or any other unusual sexual conduct, was per se "immoral."[33]

Instead the court formulated a list of eight factors which are to be considered, although not as a comprehensive or exclusive catalogue, by lower courts and administrative agencies in determining the relevance of particular private conduct to a person's fitness as a teacher:

[1] the likelihood that the conduct may have adversely affected students or fellow teachers,

[2] the degree of such adversity anticipated,

[3] the proximity or remoteness in time of the conduct,

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29. 246 Cal. App. 2d at 759-60, 55 Cal. Rptr. at 146-47.

30. "The term 'immoral' has been defined generally as that which is hostile to the welfare of the general public and contrary to good morals. Immorality has not been confined to sexual matters, but includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare [citation omitted] . . . . '[T]he calling [of a teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration in any legislative enactment. . . . His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his official utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention . . . .'" *Id.* at 763-64, 55 Cal. Rptr. at 148-49.

31. 246 Cal. App. 2d at 763, 55 Cal. Rptr. at 148.

32. 1 Cal. 3d at 238, 461 P.2d at 393, 82 Cal. Rptr. at 193.

33. *Id.* at 218-19 n.4, 461 P.2d at 377-78 n.4, 82 Cal. Rptr. at 177-78 n.4. *See also id.* at 225, 461 P.2d at 382-83, 82 Cal. Rptr. at 382-83.

[4] the type of teaching certificate held by the party involved,
[5] the extenuating or aggravating circumstances . . . surrounding the conduct,
[6] the praiseworthiness or blameworthiness of the motives resulting in the conduct,
[7] the likelihood of the recurrence of the questioned conduct,
[8] and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.[34]

Morrison thus avoided one common due process defect—that the challenged statute does not provide adequate guidance for adjudicative organs. The court's construction obviated the danger of statutory vagueness or overbreadth which, by giving the enforcing authorities no indication of how to apply the statute, might otherwise allow a wide range of innocent, protected or irrelevant behavior to be swept within the statutory proscription.[35] The court's illustrative questions will not eliminate subjectivity, but they may restrict it. Equally, important, they preclude the inflexible "automatically immoral" approach of *Sarac* and *Hartman*.

Although they may also enable the accused to better focus his defense, the analytical tools offered by the court are not without pitfalls. The questions basically raise two issues: First, how much of a deviant is the person being evaluated; and, second, what is the actual impact of this behavior on his teaching. The simple phrasing of the first question suggests an underlying assumption that behavior such as homosexuality is aberrant.[36] This assumption is left over from an age when there was less tolerance for conduct which differed from the prevailing norm; it conflicts not only with changing social attitudes, but also with the growing body of medical literature which denies that homosexuality is a mental illness.[37] Hopefully the courts will lead the public in developing an understanding, awareness of, and tolerance for, such different life styles by deemphasizing the aberrant connotation. But the second question, about impact on teaching, provides a better opportunity for defense since it is less emotion laden. Further, demonstrating any deterioration of teaching would probably be difficult except in the most obvious cases. The authorities in *Morrison*, for example, did not

34. *Id.* at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186 (numbers supplied).
35. *Id.* at 231, 233-34, 461 P.2d at 387, 390, 82 Cal. Rptr. at 187, 190.
36. If such were the case, the activities forming the basis for the review of the teacher's fitness would presumably not have to involve either the students or other teachers to have an adverse effect on them. Similarly, if homosexuality were a mental illness it would presumably automatically make the ill person unfit to teach schoolchildren. See note 41 *infra*.
37. *See, e.g.*, COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT 13-15 (Command No. 247, 1957).

show that homosexuals are more likely to molest children then are heterosexuals. Similarly, they offered no evidence that the one is more likely to advertise his sex practices or to encourage emulation than the other. Studies have shown, to the contrary, that children carry our their own sex exploration and experimentation fairly independently of the influence of their elders, and that in adolescent-adult homosexual activities it is often the child-hustler who initiated the relationship.[38] Thus, to the extent the suggested questions *must* be resolved against the accused before his credentials may be revoked, *Morrison* offers protection to individuals from the social mores of school authorities.

Unfortunately, the protection offered only operates after the fact; *Morrison* did not really address the second common due process problem—that of providing the individual with standards by which to evaluate his own behavior. Before *Morrison* an individual could at least be certain that if he engaged in homosexual behavior he would lose his job; now even that degree of certainty is gone. Rather, the standards promulgated by the court require a case by case evaluation of all the facts by the appropriate school board, leaving a person unable to determine in advance the consequences of his behavior. As the court noted "[t]he knowledge that he has erred is of little value to the teacher when gained only upon the imposition of a disciplinary penalty that jeopardizes or eliminates his livelihood."[39]

The court refused to believe, however, that the Legislature intended to authorize disciplinary sanctions against persons whose private conduct happened to incur the Board's disapproval.[40] It appeared satisfied that the teacher is adequately protected from such sanctions by two safeguards: First, its interpretation of section 13202 as banning only conduct which indicates an unfitness to teach;[41] and, second, the teacher's freedom[42] to make reasonable, good faith, professional judgments with which his superiors may later disagree.[43] The court apparently perceived the former safeguard as guiding private lives and the latter,

38. *See id.* at 23-24, 149-51; Reiss, *Sex Offenses: The Marginal Status of the Adolescent*, 25 LAW & CONTEMP. PROB. 309, 323, 325 (1960).

39. 1 Cal. 3d at 231, 461 P.2d at 387-88, 82 Cal. Rptr. at 187-88.

40. *Id.* at 225, 461 P.2d at 382, 82 Cal. Rptr. at 182.

41. *Id.* at 233, 461 P.2d at 389, 82 Cal. Rptr. at 189. There seems another problem with this phrasing of the standard. Is a teacher to suppress conduct which evidences his existing unfitness? Or, is he only unfit if he actually engages in the conduct?

42. For the court's attitude toward errors in professional judgment, see, for example, Yakov v. Board of Medical Examiners, 68 Cal. 2d 67, 74, 435 P.2d 553, 558, 64 Cal. Rptr. 785, 790 (1968).

43. 1 Cal. 3d at 233, 461 P.2d at 389, 82 Cal. Rptr. at 190.

professional.[44] In regard to the first safeguard, *Morrison* did not go far enough in eliminating certain characteristics or qualities from the list of relevant considerations; it will not be of much help to an individual in making the finer judgments about acceptable behavior. In fact the questions the court recommended to test the applicability of section 13202 may enable school authorities to continue to justify consideration of homosexuality. Still, there is some guidance in the court's conclusion that the record contained no direct evidence of Morrison's unfitness.[45] Apparently under the circumstances[46] Morrison's undisputed admission of homosexual conduct was not enough to disqualify him.[47]

Morrison created another danger to the individual who incorrectly judges the implications of his private behavior. Now that the court has set forth the types of questions to be asked and has suggested the requisite quality of evidence to be sought, the decisions of the administrative agency and the trial court may be even more easily characterized as findings of fact which will not then be subject to appellate review.[48]

Morrison, then, has expanded the protection available to teachers who might be charged under Education Code section 13202 in that it has established fairly clear guidelines for adjudication. The court, however, has not dealt very well with the preventive side of the vagueness problem because the majority's opinion leaves the teacher without guidance in the most troublesome areas of his personal conduct. The teacher must now rely on the protection offered by the proof problems inherent in demonstrating a relationship between a person's conduct and disqualifying unfitness which will undoubtedly discourage school boards to some extent from engaging in morality witch hunts.[49] The greatest weakness in the case is that it left intact the vague criteria, "moral turpitude" and "immoral conduct." The presence of unarticulatable standards will continue to permit the intrusion of personal prejudices and value systems[50] into a process that should be focused on

44. It would seem though that only in class-, or teaching-, related activities could a teacher be relatively sure of the professional implications of his behavior.

45. 1 Cal. 3d at 236, 461 P.2d at 391, 82 Cal. Rptr. at 191.

46. The answers to all the questions suggested by the court would have been favorable. See text accompanying note 34 *supra*.

47. *See* Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

48. 1 Cal. 3d at 250, 461 P.2d at 402, 82 Cal. Rptr. at 202. (Burke, J., dissenting).

49. *Id.* at 233-34, 461 P.2d at 390-91, 82 Cal. Rptr. at 190-91. It should be noted that the *Morrison* facts were apparently not the result of the Board's own investigative initiative, but were voluntarily brought to its attention by the other participant.

50. For a disturbing indication of what one judge's perception of evidence of unfitness may be if these elements are not expressly ruled out, see Justice Sullivan's