

should benefit from *Olk*. Certainly, other members of the service industry are likely to challenge the income classification of their tips.<sup>66</sup>

PHIL AURBACH

## CALIFORNIA "CONSENTING ADULTS" LAW: THE SEX ACT IN PERSPECTIVE

A continuing debate has raged over the propriety of state regulation of the private sexual conduct of consenting adults.<sup>1</sup> It has been questioned whether the state should attempt to regulate sexual behavior by imposing criminal sanctions.<sup>2</sup> The California

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66. Sidney Weidenfeld recently initiated a class action suit against the Commissioner of Internal Revenue on behalf of Gifts For Cabbies, an organization representing about 300 cab drivers. Hoping to benefit from the *Olk* decision, he alleged that drivers' tips are gifts. *Las Vegas Review Journal*, Sept. 27, 1975, at 3, col. 3.

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1. Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 643, 648 (1966). For an illustration of the continuing debate, compare G. MUELLER, *LEGAL REGULATION OF SEXUAL CONDUCT* (1961) and Williams, *The Proper Scope and Function of the Criminal Law*, 74 L.Q. REV. 76 (1958) with P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1968).

2. Numerous recent articles have recommended that private consensual sexual behavior no longer be a criminal offense. See E. SCHUR, *CRIMES WITHOUT VICTIMS* 67-119 (1965); Fisher, *The Sex Offender Provisions of the Proposed New Maryland Criminal Code: Should Private Consenting Adult Homosexual Behavior be Excluded?*, 30 MD. L. REV. 91 (1970); Hefner, *The Legal Enforcement of Morality*, 40 U. COLO. L. REV. 199 (1968); Project, *supra* note 1; Comment, *Criminal Law—Consensual Homosexual Behavior—The Need for Legislative Reform*, 57 KY. L.J. 591 (1969); Comment, *Homosexuality and the Law—An Overview*, 17 N.Y.L.F. 273 (1971); Comment, *Sexual Freedom for Consenting Adults—Why Not?*, 2 PAC. L.J. 206 (1971); Comment, *Oral Copulation: A Constitutional Curtain Must be Drawn*, 11 SAN DIEGO L. REV. 523 (1974); Comment, *Sodomy Statutes—A Need for Change*, 13 S. DAKOTA L. REV. 384 (1968).

Legislature has attempted a resolution of this controversy through the enactment of Assembly Bill 489, the so-called "consenting adults" law.<sup>3</sup> Basically, the new law applies a common-sense standard to the matter of permissible sexual conduct. The law, which became effective January 1, 1976, removes criminal sanctions from specific sexual practices, provided those practices are engaged in privately and consensually by adults.<sup>4</sup>

Under the former law, every person who lived in a state of adulterous cohabitation was guilty of a misdemeanor.<sup>5</sup> Similarly, if two married persons lived together in a state of cohabitation and adultery, each was guilty of a misdemeanor.<sup>6</sup> The new "consenting adults" law removes such criminal sanctions from adulterous cohabitation. The prior law excluded adultery proceedings<sup>7</sup> from those evidentiary provisions which grant a married person the privilege not to testify against his spouse<sup>8</sup> and those which establish a privilege for confidential marital communications.<sup>9</sup> The new law makes conforming changes in these provisions to reflect the elimination of adulterous cohabitation as a crime.<sup>10</sup>

Under former section 286 of the Penal Code, every person who committed the "infamous crime against nature" with "mankind or with any animal" was guilty of a felony.<sup>11</sup> The new legislation eliminates the vagueness of this statute by specifically defining sodomy as "sexual conduct consisting of contact between the penis of one person and the anus of another person."<sup>12</sup> In addition, the new law imposes severe criminal sanctions on those persons who

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3. A "consenting adults" law was first introduced seven years ago by Assemblyman Willie Brown of San Francisco. Neither house had approved such a bill. However, after an emotional debate, the Assembly voted 45-28 to send the measure to the Senate. The key vote came in the Senate where Lieutenant Governor Mervyn Dymally was required to return to Sacramento to break the 20-20 vote. Governor Brown, a proponent of individual freedoms, signed the bill immediately. 6 CALIF. J. 216 (1975).

4. L. A. Times, April 30, 1975, pt. 2, at 4, col. 1.

5. CAL. PENAL CODE § 269a (West 1970).

6. *Id.* § 269b.

7. CAL. EVID. CODE §§ 972, 985 (West 1966).

8. *Id.* § 971.

9. *Id.* § 980.

10. *Id.* §§ 972, 985 (West Supp. 1976). The term "adultery" has been eliminated from these amended code sections.

11. CAL. PENAL CODE § 286 (West 1970) provides:

Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than one year.

12. (a) Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person.

(b) Any person who participates in an act of sodomy with another person who is under 18 years of age shall be punished by imprison-

commit sodomy with a minor, or by force, violence, duress, menace, or threat of great bodily harm, or while confined in a state prison.<sup>13</sup> Because the reference to animals is eliminated in the amended sodomy statute, the new law provides that any person who sexually assaults an animal is guilty of a misdemeanor.<sup>14</sup>

Prior to the recent amendment, section 288a of the Penal Code prohibited oral copulation.<sup>15</sup> The code now provides criminal penalties in only those instances in which the individual engages in oral copulation with a minor, by force, or while confined in a state prison.<sup>16</sup> Thus, the criminal sanctions for both sodomy and

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ment in the state prison for a period of not more than 15 years or in a county jail for a period of not more than one year.

(c) Any person who participates in an act of sodomy with another person who is under 14 years of age and more than 10 years younger than he, or who has compelled the participation of another person in an act of sodomy by force, violence, duress, menace, or threat of great bodily harm, shall be punished by imprisonment in the state prison for a period of not less than three years.

(d) Any person who, while voluntarily acting in concert with another person, either personally or by aiding and abetting such other person, commits an act of sodomy by force or violence and against the will of the victim shall be punished by imprisonment in the state prison for a period of five years to life.

(e) Any person who participates in an act of sodomy with any person of any age while confined in any state prison, as defined in Section 4504, or in any local detention facility as defined in Section 6031.4, shall be punished by imprisonment in the state prison for a period of not more than five years, or in a county jail for a period of not more than one year. *Id.* (West Supp. 1976).

13. *Id.*

14. Any person who sexually assaults any animal protected by Section 597f for the purpose of arousing or gratifying the sexual desire of the person is guilty of a misdemeanor. *Id.* § 286.5.

15. Any person participating in an 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 15 years, or by imprisonment in the county jail not to exceed one year. . . . *Id.* § 288a (West 1970).

16. (a) Oral copulation is the act of copulating the mouth of one person with the sexual organ of another person.

(b) Any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison for a period of not more than 15 years or in a county jail for a period of not more than one year.

(c) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he, or who has compelled the participation of another person in an act of oral copulation by force, violence, duress, menace, or threat of great bodily harm, shall be punished by imprisonment in the state prison for a period not less than three years.

(d) Any person who, while voluntarily acting in concert with an-

oral copulation are eliminated when such sexual activities are engaged in privately and consensually by adults.

Under the former law, the conviction of an individual of a sex offense was a ground for denial or revocation of a teaching credential or certificate.<sup>17</sup> A "sex offense," as used in the Education Code, was defined by reference to the Penal Code provisions which prohibit specific sexual conduct.<sup>18</sup> The new law provides that, for purposes of those sections which define the grounds for revocation, the offenses of sodomy and oral copulation committed prior to the effective date of the law will be considered sex offenses.<sup>19</sup>

The law formerly required the registration of any person who had been determined a mentally disordered sex offender.<sup>20</sup> The new legislation specifies that a mentally disordered sex offender includes any person who has been determined to be a sexual psychopath or mentally disordered sex offender under any provision of the Welfare and Institutions Code, upon or prior to the effective date of this law.<sup>21</sup> Thus, the law is not retroactive in the sense of removing the designation of sex offender from those persons who were found guilty of sodomy or oral copulation prior to the effective date of the new law.

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other person, either personally or by aiding and abetting such other person, commits an act of oral copulation by force or violence and against the will of the victim shall be punished by imprisonment in the state prison for a period of five years to life.

(e) Any person who participates in an act of oral copulation while confined in any state prison as defined in Section 4504 or in any local detention facility as defined in Section 6031.4, shall be punished by imprisonment in the state prison for a period of not more than five years, or in a county jail for a period of not more than one year. *Id.* (West Supp. 1976).

17. Whenever the holder of any credential issued by the State Board of Education or the Commission for Teacher Preparation and Licensing has been convicted of any sex offense as defined in Section 12912 . . . the commission shall forthwith suspend the credential. . . . When the conviction becomes final or when imposition of sentence is suspended, the commission shall forthwith revoke the credential. CAL. EDUC. CODE § 13207 (West 1975).

See *id.* §§ 13175, 13220.16, 13218, 13255, 13586.

18. CAL. EDUC. CODE § 12912 (West 1975).

"Sex offense" as used in Sections 13175, 13207, 13220.16, 13218, 13255, and 13586 means any one or more of the offenses listed below:

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

19. . . .  
(g) Any offense defined in Section 286 or 288a of the Penal Code prior to the effective date of the amendment of either section enacted at the 1975-76 Regular Session of the Legislature committed prior to the effective date of the amendment. *Id.* (West Supp. 1976).

20. CAL. PENAL CODE § 290 (West 1970).

21. *Id.* (West Supp. 1976).

The controversial debates which preceded the enactment of the sex offense law echoed the historic arguments of the past. The opponents of the bill<sup>22</sup> seized upon the biblical injunctions against unnatural sex.<sup>23</sup> In addition, the opposition contended that such legislation would be the first step in the breakdown of moral values and the family.<sup>24</sup> Specifically, the opponents feared that such legislation would put a "legal stamp of approval on homosexuality,"<sup>25</sup> thus permitting homosexuals to qualify for positions in schools, police departments, and other public agencies.<sup>26</sup> It was also proposed that such legislation would prohibit prosecution for solicitation of lewd acts.<sup>27</sup> The enactment of such legislation was viewed by the opposition as a condonation of a "perversion and sickness."<sup>28</sup>

The proponents of the legislation<sup>29</sup> claimed that the private sexual conduct of consenting adults was not a proper concern of

22. Organizations opposed to the bill included the Conference of the Free Methodist Church, the Greater San Jose Association of Evangelicals, and the Woman's Christian Temperance Union of Southern California.

23. "Thou shall not lie with man, as with woman, it is an abomination." *Leviticus* 18:22. "If a man lie with a male as one lieth with a woman, both of them have committed an abomination; they shall surely be put to death, their blood shall be upon them." *Leviticus* 20:13.

24. One attorney stated that "[l]egalization of such things as sodomy and adultery and oral copulation would mean the breakdown of the family as we know it today." *San Diego Union*, July 19, 1975, § A, at 6, col. 3. "Opponents argue the bill would be a first step toward a breakdown in moral values already seriously threatened." *L. A. Times*, May 1, 1975, pt. 1, at 31, col. 1.

25. *Evening Tribune* (San Diego), July 22, 1975, § A, at 10, col. 5.

26. "They [the opponents] also contend that since homosexual conduct among consenting adults will soon be legal, that schools, police departments, and other public agencies could not discharge a homosexual from a job. . . ." *San Diego Union*, July 19, 1975, § A, at 6, col. 3.

27. One attorney stated that "the legislation raised a serious question over whether public solicitation for current illegal sex acts would remain against the law." *Evening Tribune* (San Diego), March 7, 1975, § A, at 9, col. 2. It was also questioned whether the new legislation would prohibit prosecution of prostitution since such activity is generally conducted in private. However, such an argument was discounted. "Prostitution is something in which one solicits or engages in sexual intercourse for payment," pointed out one city attorney. "Where no money is involved no crime is involved." *L. A. Times*, May 14, 1975, pt. II, at 6, col. 3.

28. *Evening Tribune* (San Diego), May 13, 1975, § A, at 1, col. 3.

29. Organizations supporting the legislation included the American Psychiatric Association, the California State Bar, the California National Organization of Women, the Friends Committee on Legislation, the American

the state.<sup>30</sup> It was asserted that state regulation of sexual behavior violated individual freedoms and rights of privacy.<sup>31</sup> A few supporters advocated the elimination of such victimless crimes in light of the extensive amount of time and expense utilized on their enforcement.<sup>32</sup> The proponents called for the enactment of the law in order to eliminate the "obnoxious, ineffective and unseemly duty" of enforcing the "moral traditions of the past."<sup>33</sup>

The viability of the contrary arguments on decriminalization of specific sexual behavior must now be considered in light of the enactment of a "consenting adults" law in California. A few of the potential and diverse ramifications of this legislation are the subject of this article.

#### PROSECUTION OF HOMOSEXUAL ACTIVITY

According to the prior law, all persons who engaged in sodomy or oral copulation were subject to criminal sanctions. Thus, according to a strict interpretation of the statutes, both married and unmarried couples as well as heterosexual and homosexual couples could have been prosecuted for these sexual offenses. However, the actual enforcement of these statutes did not reflect the apparent intent of the legislation to penalize all such deviant behavior. A primary consideration affecting enforcement procedures was the futility of any attempt to enforce laws against sexual behavior conducted in private.<sup>34</sup> The case law in this area proved that it was virtually impossible to arrest an individual for private sexual activity without exceeding search and seizure limitations.<sup>35</sup> Thus,

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Civil Liberties Union-Southern California, and the League of Women Voters of San Francisco.

30. Their position was best summed up by Brown during last year's campaign when he repeatedly insisted: "The private sexual conduct of consenting adults should be no business of the state." L. A. Times, May 9, 1975, pt. 1, at 31, col. 5.

31. *Id.*, May 2, 1975, pt. 1, at 31, col. 1.

32. *Id.*

33. Letter from Herbert W. Nobriga, Assistant Legislative Representative, to Governor Edmund G. Brown, Jr., May 5, 1975, on file in the office of the *San Diego Law Review*.

34. See Slovenko & Phillips, *Psychosexuality and the Criminal Law*, 15 VAND. L. REV. 797, 799 (1962); Project, *supra* note 1, at 689; Comment, *Sexual Freedom for Consenting Adults—Why Not?*, *supra* note 2, at 214; Evening Tribune (San Diego), May 17, 1975, § C, at 1, col. 2. The newspaper article indicated that the San Diego Police Department did not foresee any change in its law enforcement procedures following the legalization of the "consenting adults" law. The article quoted the chief of police, Ray Hoobler, as stating that he could not "recall the last time we arrested anybody for a sex act in private."

35. See Project, *supra* note 1, at 689.

enforcement of the sexual offense laws was limited to those instances in which the criminal activity was committed in public.<sup>36</sup>

A second consideration is the inequality of enforcement of the sodomy and oral copulation laws as applied to homosexual and heterosexual couples. Although the former law did not distinguish between homosexual and heterosexual conduct, a disproportionately high percentage of the arrests and convictions for sexual offenses involved homosexual activity.<sup>37</sup> The basis for such disparate enforcement was twofold. The majority of public sexual behavior involved homosexual activity<sup>38</sup> and thus was subject to criminal sanction. In addition, the deviant sexual conduct of homosexual couples was regarded as more "abominable and detestable" than the same conduct of a heterosexual couple.<sup>39</sup>

A final consideration in the enforcement of those laws proscribing specific sexual behavior was the disposition of those cases involving public homosexual conduct. Although criminal homosexual behavior was proscribed by the sodomy and oral copulation statutes, the majority of cases involving homosexual acts were not disposed of as felonies.<sup>40</sup> Most often overt homosexual behavior was considered "disorderly conduct" and thus, treated as a misdemeanor under section 647 of the Penal Code.<sup>41</sup> Such an enforcement pro-

36. *Id.*; Comment, *Sexual Freedom for Consenting Adults—Why Not?*, *supra* note 1, at 214.

37. See Project, *supra* note 2, at 689 (research showed that nearly half of the arrests made for deviant sexual violations are for acts that take place in a public restroom); Hefner, *The Legal Enforcement of Morality*, 40 U. Colo. L. Rev. 199, 215 (1968).

38. Comment, *Sexual Freedom for Consenting Adults—Why Not?*, *supra* note 2, at 214.

39. Slovenko, *Sexual Deviation: Response to an Adaptational Crisis*, 40 U. Colo. L. Rev. 222, 233 (1968); Hefner, *The Legal Enforcement of Morality*, 40 U. Colo. L. Rev. 199 (1968).

In the enforcement of the laws, however, a disproportionately high percentage of the sodomy arrests and convictions involve homosexual contacts—presumably because a heterosexual cop and a heterosexual judge find a homosexual crime against nature a good deal more "abominable and detestable" than a heterosexual one. *Id.* at 215.

40. See Project, *supra* note 1, at 673.

41. *Id.* at 783.

[L]ess than 1% of those who were originally charged with felonious homosexual activity ultimately received felony dispositions. The remaining 99% were disposed of as misdemeanants, either by conviction, by sentence, or by judicial declaration. *Id.*

cedure was based on the rationale that "the courts are unwilling to impose such severe penalties for consensual activities."<sup>42</sup> Thus, the enforcement of laws proscribing sexual activity was generally limited to the imposition of misdemeanor penalties for public homosexual conduct.

The impact of the "consenting adults" law on the prosecution of homosexual activity appears to be minimal. The new law removes criminal sanctions from sodomy and oral copulation only when committed by consenting adults in private. Since the words "in public" had been read into the former statutes,<sup>43</sup> such private sexual activity was rarely penalized. In addition, the disorderly conduct statute was unaltered by the new legislation and thus it can be assumed that overt homosexual behavior will continue to be prosecuted as a misdemeanor. Yet, the legalization of private homosexuality may reflect societal acceptance of such conduct<sup>44</sup> and possibly a future reluctance to impose even misdemeanor sanctions for homosexual conduct.

#### PROSECUTION OF SOLICITATION

Prior to the enactment of the "consenting adults" law, a debate arose concerning the potential effect of the law on the criminal offense of solicitation of lewd acts.<sup>45</sup> The opposition argued that

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42. *Id.* at 685.

43. Slovenko, *Sexual Deviation: Response to an Adaptational Crisis*, 40 U. COLO. L. REV. 222, 236 (1968).

44. While there is almost no objective information on the degree of public tolerance of homosexuality, the trend is "toward a more enlightened, dispassionate perspective." Wheeler, *Sex Offenses: A Sociological Critique*, 25 LAW & CONTEMP. PROB. 258, 270 (1960). According to the National Institute of Mental Health:

Although many people continued to regard homosexual activities with repugnance, there is evidence that public attitudes are changing. Discreet homosexuality, together with many other aspects of human sexual behavior, is being recognized more and more as the private business of the individual rather than a subject for public regulation through statute. NATIONAL INSTITUTE OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY 18-19 (1969).

This trend has also been recognized by the judiciary:

[T]he social and moral climate in New York (and probably throughout the Western World) has in recent years changed dramatically with respect to homosexuality and consensual homosexual acts. Today they are generally viewed as no more indicative of bad character than heterosexuality and consensual heterosexual acts. *In re Kimball*, 40 App. Div. 2d 252, 258, 339 N.Y.S.2d 302, 308-09 (2d Dep't 1973) (Martuscello & Shapio, JJ., dissenting).

45. CAL. PENAL CODE § 647 (West 1970) provides:

Every person who commits any of the following acts shall be guilty of disorderly conduct, a misdemeanor:

(a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.



such legislation would preclude prosecution for solicitation of those acts legalized by the bill.<sup>46</sup> However, the Legislative Counsel concluded that enactment of a law legalizing private acts between consenting adults would not affect the present prohibitions against public solicitation.<sup>47</sup>

Solicitation is proscribed by Penal Code section 647 which specifies that every person "who solicits any one to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view" is guilty of disorderly conduct, a misdemeanor. Although the statutory language is ambiguous, courts have concluded that the legislature intended both soliciting and engaging in lewd or dissolute conduct in public to be a violation of the statute.<sup>48</sup> In addition, the disorderly conduct law prohibits public solicitation of lewd or dissolute conduct regardless of whether the solicited acts are to be performed in public or in private.<sup>49</sup>

The language of the solicitation statute contemplates the "presence or possibility of the presence of some one to be offended by the conduct."<sup>50</sup> Courts have held that the purpose of the solicitation prohibition is to protect innocent members of society from the "public blandishments of deviates"<sup>51</sup> which tend to "engender outrage in the vast majority of people."<sup>52</sup> However,

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46. Evening Tribune (San Diego), March 7, 1975, § A, at 9, col. 2.

47. Legislative Counsel of California, Opinion No. 75-5424 (March 5, 1975).

48. *People v. Mesa*, 265 Cal. App. 2d 746, 750-51, 71 Cal. Rptr. 594, 597 (1968); *People v. Dudley*, 250 Cal. App. 2d Supp. 955, 959, 58 Cal. Rptr. 557, 559 (1967).

49. *People v. Mesa*, 265 Cal. App. 2d 746, 751, 71 Cal. Rptr. 594, 598 (1968).

50. *In re Steinke*, 2 Cal. App. 3d 569, 576, 82 Cal. Rptr. 789, 795 (1969).

51. We cannot believe the Legislature intended to subject innocent bystanders, be they men, women or children, to the public blandishments of deviates so long as the offender was smart enough to say that the requested act was to be done in private. Nor do we feel the legislators were unaware of the open, flagrant and to decent people disgusting solicitations of sexual activity which have occurred on the public streets of some of our cities. Moreover, it is not to be forgotten that to some a homosexual proposition is inflammatory, which public utterance might well lead to a breach of the peace. *People v. Dudley*, 250 Cal. App. 2d Supp. 955, 959, 58 Cal. Rptr. 557, 559 (1967).

52. *People v. Mesa*, 265 Cal. App. 2d 746, 751, 71 Cal. Rptr. 594, 597 (1968).

the enactment of the "consenting adults" law, which legalizes private homosexual activity, may reflect an awareness of the legislature of the gradual societal acceptance of homosexuality. The spread of "unabashed homosexuality"<sup>53</sup> combined with modern insights into human sexual behavior<sup>54</sup> may lead to a more tolerant view of homosexual conduct. If such acceptance is the effect of the legalization of homosexual activity, then the purpose of the solicitation statute is defeated. The solicitation of homosexual activity would be unlikely to either "engender outrage" or provoke "breaches of the peace."

Prosecution for solicitation of sexual acts legalized by the "consenting adults" law turns on the definition given the words "lewd and dissolute"<sup>55</sup> in the disorderly conduct statute. In a recent decision, *Silva v. Municipal Court*,<sup>56</sup> a court of appeals held that the statute was not unconstitutionally vague if the terms "lewd and dissolute conduct" were given the meaning of "obscene" conduct. The court then defined obscene conduct under Penal Code section 647 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.<sup>57</sup>

The court acknowledged that "any true definition of obscene conduct, or interpretation of such definition, will vary from place to place and from time to time."<sup>58</sup> It is questionable whether contemporary community standards consider sodomy and oral copulation either "grossly repugnant" or "patently offensive" in light of the recent legislation which removes criminal sanctions from such conduct. Rather, the legislation may reflect a change in the definition of obscene so as to exclude consensual sexual activity by adults.

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53. TIME, Sept. 8, 1975, at 32.

54. Hefner, *The Legal Enforcement of Morality*, 40 U. COLO. L. REV. 199 (1968).

Modern insights into human behavior have radically changed society's views on the subject of perversion, of course, and what was once considered "unnatural" in sex is now recognized as perfectly normal and, in many instances, desirable. *Id.* at 212.

55. "Lewd" is defined to mean "[l]ustful, indecent, lascivious, lecherous." BLACK'S LAW DICTIONARY 1052 (4th ed. 1951). "Dissolute" is defined to mean "[l]oosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched. . . ." *Id.* at 559.

56. 40 Cal. App. 3d 733, 115 Cal. Rptr. 479 (1974).

57. *Id.* at 741, 115 Cal. Rptr. at 484.

58. *Id.* at 740, 115 Cal. Rptr. at 483.

A more limited and precise definition of "lewd and dissolute conduct" was suggested by Justice Sims in his concurring opinion in *Silva*. In effect, only that conduct which is prohibited by a specific penal statute would constitute "lewd and dissolute conduct."<sup>59</sup> Since private consensual sodomy and oral copulation by adults is no longer prohibited, such activities should not constitute "lewd and dissolute conduct" under Justice Sims' construction of the disorderly conduct statute. Thus, the new law may prohibit the prosecution of solicitation of those acts no longer considered to be lewd or dissolute.

#### REVOCATION OF TEACHING CREDENTIALS

The potential effect of the "consenting adults" law on the teaching profession is extensive. The Education Code<sup>60</sup> provides for the denial or revocation of a teaching certificate or credential when the applicant or holder has been convicted of a "sex offense" as defined in the Education Code.<sup>61</sup> The prior definition of a sex offense included acts of sodomy and oral copulation. Upon conviction of such an offense, the certificate or credential was revoked "forthwith" and no hearing was provided the licensee.<sup>62</sup> By removing criminal sanctions from formerly criminal conduct, the "consenting adults" law eliminates convictions based upon such conduct after the effective date of the law. Thus, such convictions are elimi-

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59. *Id.* at 742, 115 Cal. Rptr. at 484. I would resolve this ambiguity and uphold the statute by limiting it, in cases of solicitation to private conduct, to a solicitation made in a public place, or in a place open to the public, or in a place or manner where the solicitation is audible to the public, to engage in a lewd or dissolute act which is prohibited by law, i.e., an infamous crime against nature, lewd or lascivious acts against children, sex perversion and similar offenses, reserving, however, the question of whether any such proscribed conduct when conducted in private between consenting adults may properly be prohibited by the state. *Id.* (citations omitted).

60. CAL. EDUC. CODE §§ 13175, 13207, 13218, 13220.16 (West 1975).

61. *Id.* § 12912.

62. In such cases there is no real necessity to examine the facts, resolve any conflicts in the evidence, and exercise any judgment with respect thereto, but the only question is a legal one, i.e., whether the licensee was convicted of a crime of the character specified in the statute. In these cases due process is satisfied because the licensee had his day in court when he was put to trial for and convicted of the commission of such crime. *Slaughter v. Edwards*, 11 Cal. App. 3d 285, 294, 90 Cal. Rptr. 144, 150 (1970) (citations omitted).

nated as grounds for the denial of a teaching credential or certificate. However, the new law provides that "sex offense" shall continue to refer to the offenses of sodomy and oral copulation committed *prior* to the law's effective date.<sup>63</sup> Thus, those teachers who lost or were denied credentials or certificates will not be reinstated under the revisions to the Education Code.

The impact of the "consenting adults" law on the revocation of teaching credentials may be minimized by the ability of the authorities to "rely upon the statutory provisions which refer not to convictions but to the underlying conduct."<sup>64</sup> Traditionally, the majority of credential revocation actions were brought under those statutes which base revocation on noncriminal sexual conduct found to be immoral, unprofessional, involving moral turpitude, or evident unfitness to teach.<sup>65</sup> In such a case, the licensee is entitled to a hearing prior to denial or revocation of the teaching certificate or credential.<sup>66</sup> In effect, the new legislation will require that all actions based on sexual conduct be brought under such statutory provisions. Thus, the new "consenting adults" law will, at a minimum, provide that all licensees be given a hearing prior to denial or revocation of a teaching credential or certificate. The question remains whether the consensual sexual activity legalized by the new law can constitute "immoral" or "unprofessional" conduct.

In *Morrison v. State Board of Education*,<sup>67</sup> the California Supreme Court limited such proscriptive statutes to "immoral or unprofessional conduct or moral turpitude of the teacher which indicates unfitness to teach."<sup>68</sup> The court held 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."<sup>69</sup> In this context there is little doubt that the private consensual sexual activity legalized by the new legislation does not constitute immoral and unprofessional conduct.<sup>70</sup> The California Supreme Court in *Pettit v. State Board*

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63. CAL. EDUC. CODE § 12912 (West Supp. 1976).

64. Willemsen, *Sex and the School Teacher*, 14 SANTA CLARA LAW. 839, 843 (1974).

65. CAL. EDUC. CODE §§ 13202, 13174 (West 1975). Willemsen, *Sex and the School Teacher*, 14 SANTA CLARA LAW. 839, 843 (1974).

66. CAL. EDUC. CODE § 13204 (West 1975).

67. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

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

69. *Id.* at 235, 461 P.2d at 391, 82 Cal. Rptr. at 191.

70. There is no evidence available indicating that a teacher who engages in consensual behavior with another adult is more likely than other teachers

of *Education*<sup>71</sup> further defined the *Morrison* holding by equating notoriety and criminal conduct with unfitness to teach.<sup>72</sup> The criminal aspect of consensual sexual activity is eliminated by the new legislation. In addition, the legalization of such conduct reflects societal acceptance which implies a minimal amount of notoriety arising from knowledge of consensual sexual activity.<sup>73</sup> Thus, it appears that the requisite specific connection between non-criminal consensual sexual activity and unfitness to teach is lacking. Such conduct alone should not provide the basis for revocation or denial of a teaching credential or certificate.

#### EMPLOYMENT OF HOMOSEXUALS

Discrimination in the employment of homosexuals is quite common.<sup>74</sup> The weight of case law has sustained discriminatory employment practices against homosexuals in public employment.<sup>75</sup> Although discriminatory employment practices against

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to seduce or molest children. Comment, *Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 CALIF. L. REV. 1442, 1443 (1973).

71. 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973).

72. The *Pettit* case has been highly criticized for this modification of the *Morrison* test for fitness to teach. See Willemsen, *Sex and the School Teacher*, 14 SANTA CLARA LAW. 839 (1974); Comment, *Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 CALIF. L. REV. 1442 (1973); Comment, *Pettit v. State Board of Education—Out-of-Classroom Sexual Misconduct as Grounds for Revocation of Teaching Credentials*, 1973 UTAH L. REV. 797; Case Note, *The California Supreme Court, Pettit and Disciplinary Proceedings Against Teachers*, 1 PEPPERDINE L. REV. 404 (1974).

73. Comment, *Unfitness to Teach: Credential Revocation and Dismissal for Sexual Conduct*, 61 CALIF. L. REV. 1442 (1973).

In the teaching profession, the requisite specific connection between notoriety and effect in ability to teach might flow from the abhorrence with which certain forms of sexual behavior are regarded by some segments of the public. *Id.* at 1450.

74. See generally Kovarsky, *Fair Employment and the Homosexual*, 1971 WASH. U.L.Q. 527; Note, *Government Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738 (1969); Note, *Is Governmental Policy Affecting the Employment of Homosexuals Rational?*, 48 N.C.L. REV. 912 (1970); Note, *Government Employment and the Homosexual*, 45 ST. JOHN'S L. REV. 303 (1970); Recent Development, *Federal Employment of Homosexuals: Narrowing the Efficiency Standard*, 19 CATH. U.L. REV. 267 (1969); Recent Decision, *Dismissal of Homosexuals from Government Employment: The Developing Role of Due Process in Administrative Adjudications*, 58 GEO. L.J. 632 (1970).

75. *Anonymous v. Macy*, 398 F.2d 317 (5th Cir. 1968), cert. denied, 393

homosexuals involve possible constitutional questions,<sup>76</sup> this issue has not yet been decided by the United States Supreme Court. However, arbitrary dismissal of a homosexual employee constitutes, at a minimum, a denial of due process in the absence of a rational basis for such action.<sup>77</sup> The promotion of efficiency,<sup>78</sup> the criminal nature of homosexual activity,<sup>79</sup> and the societal abhorrence of deviant sexual activity<sup>80</sup> have frequently been cited by courts as a basis for the arbitrary dismissal of homosexuals. The rationality of such bases will certainly be questioned in light of the "consenting adults" law.

In *Norton v. Macy*,<sup>81</sup> a federal circuit court held that homosexual conduct of an employee might bear on the efficiency of the service because of the potential for blackmail, which "might jeopardize the security of classified communications."<sup>82</sup> The legalization of homosexual activities would tend to reduce such potential for blackmail. In addition, government studies have indicated that homosexual employees are no less efficient than heterosexual workers.<sup>83</sup> Although criminal conduct serves as a basis for disqualification from employment, the fact of criminality has never been controlling.<sup>84</sup> The legalization of homosexual activity will eliminate the possibility of employment disqualification based on criminal conduct. The notion that societal abhorrence of

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U.S. 1041 (1969); *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 951 (1964).

76. Discussion of the possible constitutional ramifications of such employment practices is beyond the scope of this Recent Development. See Comment, *Homosexuality and the Law—A Right to be Different?*, 38 ALBANY L. REV. 84 (1973); Comment, *Homosexuality and the Law—An Overview*, 17 N.Y.L.F. 273 (1971); Recent Decision, *Dismissal of Homosexuals from Government Employment: The Developing Role of Due Process in Administrative Adjudications*, 58 GEO. L.J. 632 (1970).

77. Comment, *Homosexuality and the Law—A Right to be Different?*, 38 ALBANY L. REV. 84, 100 (1973).

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

79. *Moser v. State Bd. of Educ.*, 22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972).

80. *McConnell v. Anderson*, 451 F.2d 193 (8th Cir. 1971).

81. 417 F.2d 1161 (D.C. Cir. 1969).

82. *Id.* at 1166.

83. Note, *Government Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738, 1741 (1969). See also AMERICAN PSYCHIATRIC ASSOCIATION REPORT, Dec. 15, 1973:

Whereas homosexuality in and of itself implies no impairment in judgment, stability, reliability, or vocational capabilities, therefore, be it resolved, that the APA deplores all public and private discrimination against homosexuals in such areas as employment

84. Note, *Government Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738, 1742 (1969).

homosexual activity should serve as a basis for employment disqualification is opposed to the "elementary concepts of liberty, privacy, and diversity."<sup>85</sup> Courts have also recognized that the "social and moral climate . . . has in recent years changed dramatically with respect to homosexuality. . . ."<sup>86</sup> The legalization of homosexual activities by the legislature indicates the changing public attitude toward such conduct. Thus, in light of the new legislation, there is no rational basis for employment disqualification of homosexuals, and such arbitrary dismissal may constitute a denial of due process.

### CONCLUSION

The California legislature has acknowledged that the private and voluntary sexual behavior of adults is not properly the concern of the state. The "consenting adults" law gives adults the legal right to freedom of choice concerning sexual conduct, so long as the decision causes no harm to others and gives no public offense. The legalization of private consensual sexual activity may reflect a societal acceptance of such conduct and thus, may affect the prosecution of those offenses which purportedly offend "public decency." Further, the legislation may limit the grounds for revocation of teaching credentials as well as encourage employment of homosexuals. In sum, the "consenting adults" law constitutes a victory for individual freedoms through the elimination of unwarranted intrusion by the state into the private sexual lives of adults.

MARY LEE TAYRIEN

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85. *Norton v. Macy*, 417 F.2d 1161, 1165 (D.C. Cir. 1969).

86. *In re Kimball*, 40 App. Div. 2d 252, 258, 339 N.Y.S.2d 302, 308-09 (2d Dept. 1973) (Martuscello & Shapio, JJ., dissenting).