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The California Supreme Court, Pettit and Disciplinary Proceedings Against Teachers

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Case Notes

The California Supreme Court, Pettit and Disciplinary Proceedings Against Teachers

The law pertaining to disciplinary sanctions against professionals for allegedly immoral conduct has been going through a period of redefinition and flux. *Pettit v. State Board of Education*[1] represents a departure from the clear trend of recent cases. In this case the issue was whether or not the plaintiff, Mrs. Pettit, had engaged in conduct which evidenced her unfitness to teach.[2] A close analysis of the facts reveals that the California Supreme Court's holding deviates from previous decisions by ignoring operant factual distinctions and controlling precedent, most notably that which was developed in the leading case of *Morrison v. State Board of Education*.[3]

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1. 10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973).
2. CAL. ED. CODE ANN. § 13202 (West Supp. 1974), *amending* CAL. ED. CODE ANN. § 13202 (West 1969).
   "[T]he . . . Commission for Teacher Preparation and Licensing shall revoke or suspend for immoral or unprofessional conduct, or for persistent defiance of, and refusal to obey, the laws regulating the duties of persons serving the public school system, or for any cause which would have warranted the denial of an application for a . . . credential or the renewal thereof, or for evident unfitness for service.
3. 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

Mrs. Pettit and her husband were representative of a segment of our society which enjoys diverse sexual activity. In 1966, both she and her husband appeared on a local television talk show, *in cognito*.[4] They expressed their "liberated," modern views of marriage and extramarital sexual activity. Approximately one year later, the Pettits applied for membership in a "swingers club." They were accepted, and, thereafter, attended a party by the "club" at a member's private home. Unbeknownst to the partygoers, their activities were being closely scrutinized by Sergeant Berk, an undercover agent present at the party. After observing plaintiff engaged in oral copulation with three different men while her husband and others looked on, the sergeant arrested her and charged her for violation of California Penal Code Section 288(a).[5] The original charge was subsequently dropped and plaintiff pleaded guilty to California Penal Code Section 650.5, a misdemeanor.[6] Mrs. Pettit was fined and put on probation. Upon paying the fine, the probation was terminated; all other criminal proceedings were dismissed.

Mrs. Pettit had held a lifetime teaching credential since 1957. During this time she had been employed in an elementary school teaching retarded children. The standard teacher evaluations which are prepared yearly by the supervising principal demonstrated that her performance had been completely satisfactory. In 1968, she was tendered a contract for re-hire to cover the 1968-69 school year, but, in 1970, the State Board of Education brought a proceeding against Mrs. Pettit seeking the revocation of her credential. Hearings were held with Sergeant Berk testifying as well as two superintendents and an assistant superintendent. The thrust of the superintendents' testimony was that plaintiff was unfit to teach moral and sexual values.[7] Dr. William Hartman,[8] testifying

4. Joe Pyne Show.

5. CAL. PENAL CODE ANN. § 288(a) (West 1970).

6. CAL. PENAL CODE ANN. § 650.5 (West 1970), (outraging public decency). This section generally refers to lewd behavior in public. Violation constitutes a misdemeanor. It was held to be unconstitutionally vague in *In re* Davis, 242 Cal. App. 2d 645, 51 Cal. Rptr. 702 (1966).

7. *Petit*, 10 Cal. 3d at 316 and n.1, 513 P.2d at 890, 109 Cal. Rptr. at 666.

8. Professor of sociology, California State University at Long Beach, licensed clinical psychologist and director of the Center for Marital and Sexual Studies.

on plaintiff's behalf, stated that Mrs. Pettit was a well-adjusted, normal individual and that the conduct in question was unlikely to be repeated. The hearing examiner concluded as follows: (1) that although her performance as a teacher had always been satisfactory, and (2) she was unlikely to repeat the conduct in question, (3) her actions were highly unconventional, immoral, and (4) evidenced her unfitness to teach. Mrs. Pettit's credential was revoked.

Mrs. Pettit then sought a writ of mandate to review and set aside the examiner's order. The Superior Court denied the writ and upheld the order. On appeal to the Supreme Court of California, the writ was again denied in a 5-2 decision authored by Justice Burke, with Justices Tobriner and Mosk dissenting.

THE *Morrison* SYLLOGISM

Any discussion of disciplinary proceedings against teachers must begin with the leading case, *Morrison v. State Board of Education.*[9] In that case, the petitioner, Morrison, was a secondary school teacher holding a general secondary life credential. In 1963, he became close friends with a fellow teacher, who was having marital problems at the time. Morrison spent several hours counseling and consoling the man, but on one such occasion they engaged in homosexual contact of a non-criminal nature. One year after this incident, Morrison's friend informed the district's superintendent of their previous conduct. Some nineteen months after the incident became known to the superintendent, action was brought by the State Board of Education. The Board, after a hearing, revoked Morrison's credential on the grounds "that the incident constituted immoral and unprofessional conduct, and an act involving moral turpitude, all of which warrant revocation of life (credentials) under Section 13202 of the (California) Education Code."[10] Morrison then sought a writ of mandate to set aside the decision and reinstate his status as a teacher; that matter eventually reached the Supreme Court of California.

In order to avoid holding Section 13202 of the California Education Code unconstitutionally vague, the court gave it a narrow construction.[11] It 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,*

9. *Morrison, supra* note 3.
10. *Id.*, at 220, 461 P.2d at 378, 379, 82 Cal. Rptr. at 178, 179.
11. *Id.*, at 232, 233, 461 P.2d at 389, 82 Cal. Rptr. at 189.

school employees, or *others* who might be *affected by his actions as a teacher.*" (Emphasis added.)[12] The Board of Education must produce substantial evidence, establishing to a reasonable certainty, that an adverse relationship exists between the conduct in question and the teacher's fitness, the ability to meet professional responsibilities.[13] In other words, the Board must establish a "*nexus* between the conduct and teaching performance." (Emphasis added.)[14]

The *Morrison* court set out a list of factors which should be considered in determining the effect of the questioned conduct upon the individual's fitness as a teacher. Among these are the *status* of the parties involved in the conduct,[15] the degree of *notoriety* the conduct has gained,[16] the proximity or *remoteness* of the conduct in relation to the disciplinary proceedings,[17] and the *likelihood of repetition.*[18] The court also indicated that standing alone, the fact that the conduct was criminal in nature or resulted in a conviction is insufficient grounds for revocation.[19]

THE MAJORITY'S APPLICATION

The majority opinion in *Pettit*, per Justice Burke, distinquished the facts before them from those in *Morrison*, and cases following, on three points. First, the conduct involved in *Pettit* was criminal in nature. Mrs. Pettit had been arrested and charged with the violation of California Penal Code Section 288(a). A conviction on this charge would have resulted in an automatic revocation of her

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

13. *Morrison, supra* note 3; *accord,* Board of Trustees v. Metzger, 8 Cal. 3d 206, 501 P.2d 1172, 104 Cal. Rptr. 452 (1972); *see, Pettit, supra* note 1, at 37 and n.1, 513 P.2d at 894, 109 Cal. Rptr. at 670.

14. Burton v. Cascade School Dist., 353 F. Supp. 254, 255 and n.1 (S.D. Ore. 1973). This case held an Oregon statute similar to Section 13202 of the California Education Code to be unconstitutionally vague.

15. *Morrison, supra* note 3; *accord,* Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318 (1971).

16. *Morrison, supra* note 3; *accord,* Comings v. State Board of Education, 23 Cal. App. 3d 94, 100 Cal. Rptr. 73; Governing Board v. Brennan, 18 Cal. App. 3d 396, 95 Cal. Rptr. 712 (1971).

17. *Morrison, supra* note 3, at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186.

18. *Morrison, supra* note 3, at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186; *Comings, supra* note 16 at 104, 100 Cal. Rptr. at 80.

19. *Morrison, supra* note 3, at 219 and n.4, 461 P.2d at 377, 82 Cal. Rptr. at 177; *accord, Comings, supra* note 16.

credential.[20] Although the court conceded that the charges had been dropped, they felt it relevant and proper to consider the original charge.[21]

Secondly, the majority characterized the conduct as having occurred in the "semi-public atmosphere of a club party."[22] This inference was then tied in with Mrs. Pettit's appearance on the television talk show in 1966. Together, the court reasoned, these created enough notoriety surrounding her conduct so as to impair her relationships with students, teachers and others.

Finally, Justice Burke stressed the testimony of the two superintendents and the assistant superintendent. Their testimony was held to indicate a clear relationship between Mrs. Pettit's conduct and her unfitness to teach. She would be unable to teach morals and sexual values or to act as an exemplar for her students.[23] All told, the evidence was held to be clear, substantial and sufficient in weight to establish the *nexus* required by *Morrison*.

The Minority's Analysis

The cogent dissent authored by Justice Tobriner analyzed the three distinctions brought out and relied upon by the majority. He indicated that the first distinction, that the conduct here was criminal in nature while that in *Morrison* was not, has no probative value standing alone. To begin with, the record did not show any conviction under California Penal Code Section 288(a). Furthermore, the plea of guilty to the misdemeanor had been cleared from the records and all proceedings dismissed. He pointed out that in *Morrison* the court had pointed out that a conviction alone was not grounds for revocation of a teacher's credential, noting the case of *Comings v. State Board of Education*.[24] This case had held that evidence of a conviction for possession of marijuana alone, was insufficient to sustain a revocation.

Justice Tobriner then sharply criticized the majority's handling of the *notoriety* issue. In his opinion, plaintiff's conduct was private in nature. By analogy to the definition of privacy developed by the court in a series of cases, he stated that he was "at a loss

20. Cal. Ed. Code Ann. §§ 12912, 13206 and 13207 (West Supp. 1974), *amending* Cal. Ed. Code Ann. §§ 12912, 13206 and 13207 (West 1969).

21. *Pettit, supra* note 1, at 33, 513 P.2d at 892, 893, 109 Cal. Rptr. at 667, 668.

22. *Id.*, at 35, 513 P.2d at 893, 109 Cal. Rptr. at 669.

23. *Id.*, at 36 and n.7, 513 P.2d at 894, 109 Cal. Rptr. at 670.

24. *See, supra* note 19.

to understand" the majority's classification of plaintiff's conduct as semi-public.[25]

Finally, he analyzed the thrust of the expert testimony supplied by the superintendents. The only conclusion that could be drawn from the testimony was that the plaintiff would not be fit to teach sexual morals to her pupils.[26] He then referred to Section 13556 of the Education Code and the regulations promulgated by the State Board of Education implementing that section; he found that nowhere are "sexual practices" included in the regulations delineating those "principles of morality" which a teacher must seek to instill in her pupils.[27] Thus, the logical inference to be drawn from the expert testimony was that the plaintiff would be unfit to teach sexual morality, but teaching sexual morality was not among her duties as a teacher. Therefore, how could the majority have held that the plaintiff was unfit to teach? The dissent concluded by chastising the majority for clouding the standards enunciated by *Morrison*: "[T]he majority is blind to the reality of sexual behavior."[28]

The other dissent was written by Justice Mosk. He concurred in Justice Tobriner's dissent, then continued in a short but interesting analysis. At the outset, he noted that both the National Education Association and the California Teacher's Association had filed *amici curiae* briefs in support of plaintiff's position. He, then, indicated that the court should be bound by two factual findings of the State Board of Education's hearing officer: first, that plaintiff's evaluation as a teacher had been satisfactory, and that she had been tendered a contract for re-hire for the 1968-69 school year; secondly, that she was unlikely to repeat the offensive conduct. Justice Mosk concluded that these factual findings left the majority's opinion devoid of factual support.

25. *Pettit, supra* note 1, at 40, 513 P.2d at 897, 109 Cal. Rptr. at 673; *see*, People v. Triggs, 8 Cal. 3d 884, 506 P.2d 232, 106 Cal. Rptr. 408 (1973); *In re* Steinke, 2 Cal. App. 3d 569, 82 Cal. Rptr. 789 (1969); *see also* CAL. PENAL CODE ANN. § 647 (West 1970).

26. First expert, "Plaintiff would be unable to teach 'moral and spiritual principles' "; second expert, ". . . could not instruct (her) students in 'clean morals' "; third expert, "plaintiff had a dishonest marriage"; *Pettit, supra* note 1, at 41, 42, 513 P.2d at 898, 109 Cal. Rptr. at 674.

27. *Petit, supra* note 1, at 42 and n.6, 513 P.2d at 898, 109 Cal. Rptr. at 674.

28. *Id.*, at 44, 513 P.2d at 899, 109 Cal. Rptr. at 675.

A THIRD APPROACH

The essence of both dissenting opinions is that the Board failed to establish the required *nexus* between plaintiff's conduct and her fitness as a teacher. As discussed previously,[29] *Morrison* and the cases which follow it have established a method of analysis through which the *nexus* issue can be resolved.[30] The principal fault of the majority opinion in *Pettit* is that it fails to deal with the pertinent factors.

The first factor that should be considered is the *status* of the parties involved in the conduct which gave rise to the disciplinary proceedings.[31] For example, in *Board of Trustees v. Stubblefield*,[32] a junior college teacher was dismissed upon evidence that he and a student of his were found undressed in the front seat of his car parked in a public lot. The status of the parties in *Stubblefield* is a clear case for the proposition that his "retention in the profession poses a significant danger of harm."[33] In *Morrison* the homosexual conduct involved two teachers, yet the revocation was not upheld. Note the difference between these cases and *Pettit*, where the conduct involved a teacher and third parties or strangers to the educational system. Her conduct did not directly involve any professional relationships, and the *status* factor should have been resolved in the plaintiff's favor.

The second factor is the degree of *notoriety* the conduct has gained in the community.[34] In the case of *Comings v. State Board of Education*[35] and its companion case, *Jones*,[36] the Court of Appeal stressed the factor of publicity or *notoriety*. Both cases involved teachers who had been arrested, charged, and convicted for possessing marijuana. The Board had brought revocation proceedings against each and had held each to be unfit. The Court of Appeal reversed the action taken against Comings but affirmed the holding against Jones. The only factual distinction between the two was that Jones' arrest received a significant degree of publicity in a local paper. The degree of *notoriety* plus the criminal nature of the conduct was held to be sufficient grounds for revoca-

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29. *See, supra* p. 4.
30. *See, supra* pp. 4 and 5.
31. *Morrison, supra* note 3; *accord, Stubblefield, supra* note 15.
32. *Stubblefield, supra* note 15; defendant had also been charged and convicted of assaulting the police officer who had discovered him.
33. *Morrison, supra* note 3 at 235, 461 P.2d at 391, 82 Cal. Rptr. at 191.
34. *Morrison, supra* note 3; *accord, Comings, supra* note 16 at 104, 100 Cal. Rptr. at 80.
35. 23 Cal. App. 3d 94, 104 Cal. Rptr. 73, 80 (1972).
36. *Id.*, at 94, 100 Cal. Rptr. 73.

tion.[37] In *Pettit* the court makes reference to plaintiff's appearance on the television show, using this to satisfy the element of *notoriety*. The weakness here is that this appearance was more than one year prior to the incident at the swingers' party. Surely, where the court has referred to *notoriety*, it is referring to the publicity surrounding the conduct at issue, not some other occurrence in the past. There was no evidence to indicate that plaintiff's actions at the party had gained any *notoriety* among her peers or students.

Having noted this weakness, the majority characterized Mrs. Pettit's conduct in the private home as having occurred in the "semi-public atmosphere of a club party." As pointed out in the dissenting opinion of Justice Tobriner, the majority failed to analyze the facts. It never dealt squarely with the issue of whether or not conduct in a private home is public in nature.[38] Thus the majority's tortured analysis of the *notoriety* factor was clearly erroneous.[39]

The third factor to consider is the proximity or *remoteness* of the conduct in relation to the disciplinary proceedings.[40] A lapse of one and one half months between the conduct and the disciplinary proceeding is clearly not remote.[41] However, a lapse of fourteen months may be too remote.[42] In *Morrison* the majority felt that the lapse of nineteen months from the time the superintendent gained knowledge of the conduct to the instigation of the proceedings had rendered the proceedings too remote.[43] Yet in *Pettit*, a full *two years and three months* had elapsed before the disciplinary proceedings were brought. The majority fails to even recognize

37. *See*, Governing Board v. Brennan, 18 Cal. App. 3d 396, 95 Cal. Rptr. 712 (1971); Board of Education v. Calderon, 35 Cal. App. 3d 490, 110 Cal. Rptr. 916 (1973). *But see*, Burton v. Cascade School Dist., *supra* note 14 (the fact that the teacher was a practicing, acknowledged homosexual was insufficient to support a dismissal, absent other evidence of unfitness); Board of Trustees v. Metzger, 8 Cal. 3d 206, 501 P.2d 1172, 104 Cal. Rptr. 452 (1972).

38. *See, supra* note 25.

39. *Compare Pettit with* Governing Board v. Brennan, *supra* note 37 *and* Board of Trustees v. Stubblefield, *supra* note 15 *and also* p. 4.

40. *Morrison, supra* note 3, at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186.

41. *Stubblefield, supra* note 15.

42. *Comings, supra* note 16.

43. *Morrison, supra* note 3.

this factor. Must our past indiscretions follow us for years? It seems unjust to allow the Board to bring action upon stale facts and incidents which are, or should have been, forgotten.

The last factor to be considered is the *likelihood* that the plaintiff will repeat the conduct.[44] Plaintiff's expert testified that she was not likely to repeat the prior offenses. This conclusion was accepted by the hearing examiner.[45] Yet the majority put little weight on this factor in contrast to the analysis stated in *Morrison*. The Court of Appeal in *Comings*, cited *Morrison* as having held that such evidence is both relevant and probative.[46] It would appear reasonable to stress this factor since the rationale behind the revocation procedure is the protection of students, teachers and others involved in the educational system. If the plaintiff has done no harm, nor threatened such, against this protected class, the fact that she poses no potential for harm in the future is significant. Isn't this the real issue in any consideration of one's fitness as a teacher?

The fact that the criminality or non-criminality of plaintiff's conduct was not dispositive of the fitness issue was conceded by the court. Was it proper for the majority to have dwelt on the issue to such an extent? The facts reveal that there was no criminal record, that ultimately all charges had been dismissed. The only charge specified in the original guilty plea was for violation of Section 650.5 of the California Penal Code. This code section had been declared unconstitutional in 1966.[47] The court duly notes that any violation of Section 288(a) (oral copulation) requires an automatic revocation, pursuant to Sections 13206, 13207 and 12912 of the California Education Code.[48] Yet it seems highly improper for the court to make any distinction between *Morrison* and *Pettit* based upon the criminality or non-criminality of the conduct involved, where the record is clear that there was no criminal conviction for the conduct in question. Furthermore, the court has held that, "[i]n determining whether discipline is authorized and reasonable, a criminal conviction has no talismanic significance."[49]

In the final analysis, it is clear that the facts in the *Pettit* case do not support the court's opinion. To establish a teacher's unfit-

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44. *Morrison, supra* note 3, at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186; *accord, Comings, supra* note 16, at 104, 100 Cal. Rptr. at 80.
45. *Petit, supra* note 1 at 32, 513 P.2d at 891, 109 Cal. Rptr. at 667.
46. *Comings, supra* note 16.
47. *See, supra* note 6.
48. CAL. ED. CODE ANN. §§ 12912, 13206 and 13207 (West Supp. 1974), *amending* §§ 12912, 13206 and 13207 (West Supp. 1969).
49. *Morrison, supra* note 3 at 219, 461 P.2d at 377, 82 Cal. Rptr. at 177.

ness to teach, the evidence must establish a *nexus* between the conduct complained of and the significant danger of harm such conduct poses to the teacher's professional relationships. Previous case law has held this to be required by considerations of due process. The *status* of the parties involved in the conduct supplies no basis for revocation whatsoever in *Pettit*. The plaintiff's actions had not gained the *notoriety* deemed sufficient to impair her professonal relationships. Cases cited by the majority in support of their position are clearly distinguishable.[50] Rather than being supportive of its position, the cases are factually contrary to the majority's analysis and characterization of the facts in *Pettit*.

The action brought by the Board of Education was too *remote*. The lapse of time was longer than any case cited by the majority. The majority failed to even consider this factor of fairness. Furthermore, the hearing commissioner's findings of fact expressly stated that there was little *likelihood* of recurrence. The expert testimony against plaintiff was far from clear. Even if accepted at face value, it concluded only that Mrs. Pettit was unfit to teach that which she had no duty to teach. The criminal nature versus the non-criminal nature issue was rendered moot by the expunging of the record.

Thus, on all factors, the evidence adduced had failed to establish that *nexus* required by law. The court, in *Morrison*, may have foreshadowed the future when it stated that "[s]urely incidents of extramarital heterosexual conduct against a background of years of satisfactory teaching would not constitute 'immoral conduct' sufficiently to justify revocation of a life diploma without any showing of an adverse effect on fitness to teach."[51] The court's opinion in *Pettit* indicates that such incidents do constitute sufficient evidence to revoke a teaching credential. The opinion is not in line with those cases that preceded it and ignores the factual distinctions that are presented therein.

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50. *See, e.g., Comings, supra* note 16; *Stubblefield, supra* note 15; Governing Board v. Brennan, *supra* note 16.

51. *Morrison, supra* note 3, at 225, 226, 461 P.2d at 383, 82 Cal. Rptr. at 183.