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Crimes

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Crimes

Crimes; marijuana

Health and Safety Code §§11006.5, 11361.5 (new); §§11357, 11360, 11363, 11364, 11365, 11550, 11590 (amended); Penal Code §853.6 (amended).
SB 95 (Moscone); STATS 1975, Ch 248
Support: State Bar of California
Opposition: Attorney General; California District Attorneys' Association; California Peace Officers' Association.

In the last several years the seriousness of the danger to the individual and society posed by the occasional use of marijuana has been questioned. After an extensive study, the National Commission on Marijuana and Drug abuse stated that "no conclusive evidence exists of any physical damage, disturbance of bodily processes or proven human fatalities attributable solely to even high doses of marijuana" [NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE, FIRST REPORT: MARIJUANA: A SIGNAL OF MISUNDERSTANDING, 56-57 (1972)]. Between 1965 and 1971 the number of individuals who were incarcerated for violations of federal marijuana statutes fell from 52 percent of the total number of persons convicted to 29 percent [*Id.* at 107]. Additionally, the average length of the sentences imposed on these individuals dropped from 58 months to 40 months [*Id.*]. This trend toward leniency in marijuana cases was largely due to the growing belief on the part of the government and public that the harshness of criminal penalties was far out of proportion to the dangers posed by the drug [*Id.*]. By 1972, the statutory penalties for marijuana possession had been reduced in 24 states, with the result that 42 of the states then classified marijuana possession as a misdemeanor [*Id.* at 108]. Chapter 248 would appear to reflect this national trend toward regarding marijuana possession as a minor offense.

Prior to the enactment of Chapter 248, no legal distinction was made between the possession of large or small amounts of marijuana nor as to the potency of the substance. Under former Section 11357 of the Health and Safety Code, possession of any amount of marijuana was punishable by imprisonment in the county jail for not more than one year, or in the state prison for not less than one year nor more than

ten years. Additionally, if the defendant had been convicted previously of any of the drug-related offenses specified in Section 11357 of the Health and Safety Code he or she was subject to increased maximum and minimum terms of imprisonment in the state prison and further restrictions on his or her eligibility for parole [CAL. STATS. 1973, c. 1078, §8, at 2176]. Chapter 248 makes a legal distinction between marijuana and "concentrated cannabis," defined in Section 1006.5 of the Health and Safety Code as the "separate resin, whether crude or purified, obtained from marijuana." Section 11357 of the Health and Safety Code has been amended by Chapter 248 to provide that simple possession of not more than one avoirdupois ounce of marijuana is punishable by a fine of not more than $100. This section further provides that if upon an officer's arrest, he or she does not demand to be taken before a magistrate and gives his or her written promise to appear, such person shall be released. If an offender has previously been convicted three or more times of simple possession of marijuana within two years prior to another arrest, he or she shall be subject to Sections 1000.1 and 1000.2 of the Penal Code providing for his or her diversion to a community program for education, treatment, or rehabilitation. For possession of *more* than one ounce of marijuana, Section 11357 has been amended to provide a penalty of imprisonment in the county jail for not more than six months or a fine of $500 or both. Possession of any amount of "concentrated cannabis" is punishable under Section 11357 either by a fine of not more than $500 or imprisonment in the county jail for not more than one year or both, or by imprisonment in the state prison for a period of not less than one year nor more than five years. Chapter 248 has also deleted the former provisions of this section which provided for increased penalties and restrictions on parole for multiple offenders.

Section 11360 of the Health and Safety Code has been similarly amended to provide that any person who furnishes, transports, or offers to furnish or transport not more than one ounce of marijuana, other than "concentrated cannabis," is guilty of a misdemeanor punishable by a fine of not more than $100. Upon his or her arrest, if such offender does not demand to be taken before a magistrate and gives a written promise to appear to the arresting officer, he or she shall be released. Chapter 248 does not change the provisions of Section 11360 regarding the furnishing of *more* than one ounce of marijuana, the sale of any amount of marijuana, or the furnishing or sale of *any* amount of "concentrated cannabis." An individual who engages in any of these acts remains subject to imprisonment in the state prison for a period of five

years to life. Furthermore, if the offender has been previously convicted of one of the drug-related offenses specified in Section 11360, he or she is subject to increased minimum and maximum penalties and restrictions on his or her eligibility for parole.

Chapter 248 has added Section 11361.5 to the Health and Safety Code to provide that records of convictions for possession of any amount of marijuana or for the furnishing or transporting of less than one ounce of marijuana shall not be kept beyond two years after any conviction occurring after January 1, 1976. This section imposes a duty on each court and public agency having custody of such records to insure that they are destroyed after the specified time period runs. This legislation also provides that individuals arrested or arrested and convicted prior to January 1, 1976 for possession of any amount of marijuana under Section 11357 may petition the superior court for an order directing that the records pertaining to the arrest or conviction be destroyed. Section 11361.5 also provides that no public agency may alter, limit, qualify, or revoke a privilege or other legal right of any person because of a conviction under Sections 11357 or 11360 on or after the date on which the records of such convictions are to be destroyed.

Former Section 11363 of the Health and Safety Code provided that an individual convicted of cultivating or processing peyote was subject to an increased penalty if the offender had prior convictions for the possession or transportation of marijuana. Chapter 248 has amended this section to provide that prior misdemeanor marijuana convictions will not make such a subsequent conviction subject to the increased penalty.

Chapter 248 repeals all criminal sanctions against possessing paraphernalia used for smoking marijuana [*former* CAL. HEALTH & SAFETY CODE §11364, CAL. STATS. 1973, c. 1078, §14, at 2181] and against being in any room where marijuana is used [*former* CAL. HEALTH & SAFETY CODE §11365, CAL. STATS. 1972, c. 1407, §3, at 2987]. This legislation also decriminalizes being under the influence of marijuana [*former* CAL. HEALTH & SAFETY CODE §§11550, CAL. STATS. 1973 c. 1078, §27, at 2187]. However, driving a vehicle under the influence of marijuana remains punishable under Section 23105 of the vehicle Code [*See Review of Selected 1975 California Legislation*, this volume at 374 (Crimes; driving under the influence)].

Formerly, offenders convicted of misdemeanor violations of Sections 11357 (possession) and 11550 (being under the influence) involving marijuana were exempt from being required to register with the police under Section 11590 of the Health and Safety Code. Chapter 248

amends this section by providing that offenders convicted of misdemeanor violations of Section 11360 for furnishing or transporting less than one ounce of marijuana are also not required to register.

COMMENT

Chapter 248 provides that possession of any amount of marijuana and furnishing less than one ounce of marijuana are misdemeanor offenses. However, under Section 182 of the Penal Code, if two or more individuals conspire to commit these misdemeanor offenses, they may be punished either by imprisonment in the county jail for not more than one year, or in the state prison for not more than three years, or by a fine not exceeding $5,000 or both. Alternatively, Section 11355 of the Health and Safety Code provides that any person who offers or negotiates to furnish or transport any amount of marijuana pursuant to an agreement is punishable by imprisonment in the county jail for not more than one year or in the state prison for not more than ten years. It would appear that if a defendant were arrested for offering to supply less than one ounce of marijuana, he or she could be charged under Section 11360 for a misdemeanor violation or under Section 11355 and be subject to a possible felony sentence. It has been held that the existence of two statutes dealing with similar subjects is proper in that the same criminal act may violate more than one statute, and, if the statutes are not inconsistent, either or both may be applied to such conduct, subject to the protections against double jeopardy and multiple punishment [CAL. PEN. CODE §654; People v. Moulton, 116 Cal. App. 552, 555, 2 P.2d 1009, 1011 (1931)]. However, the intent of Chapter 248 would appear to be to reduce the penalty imposed in cases involving small amounts of marijuana. It could be argued that statutes enacted prior to Chapter 248 which conflict with this intent are superseded [*See* People v. Lewis, 4 Cal. App. 2d Supp. 775, 778, 37 P.2d 752, 753 (1934)]. However, a more acceptable argument would probably be that Section 11355, to the extent that it deals with several drugs, is a general statute which is superseded in its coverage of marijuana violations by Section 11360, a special statute dealing only with marijuana [*See* People v. Lustman, 13 Cal. App. 3d 278, 285, 91 Cal. Rptr. 548, 553 (1970)]. Nevertheless, a special statute does not supersede a general statute unless all the requirements of the general statute are covered in the special statute [*Id.* at 286, 91 Cal. Rptr. at 554]. Because Section 11360 appears to have the same elements as Section 11355, it would seem to supersede Section 11355. However, Section 182 (con-

spiracy) requires the commission of some affirmative act pursuant to the conspiracy to complete the crime, which is not a required element of Section 11360. Therefore, Section 182 would not appear to be superseded. Furthermore, it has been held that a defendant may be tried both for committing an offense and for conspiring to commit the offense [People v. Travis, 171 Cal. App. 2d 842, 844, 341 P.2d 851, 852 (1959)]. It would appear that despite the present amendment to Section 11360 reducing a violation involving marijuana to a misdemeanor, if the elements of Section 182 are satisfied the defendant may nevertheless be subject to a possible felony sentence. Similar reasoning could be applied to cases where two or more individuals conspire to possess less than one ounce of marijuana. Although under Section 11357 the maximum punishment for simple possession is a fine of $100, under Section 182 individuals may nevertheless be subject to felony sentences.

In addition, federal laws still provide penalties for the sale or distribution of any amount of marijuana. Title 21 of the United States Code makes the distribution or possession with intent to dispense marijuana punishable by imprisonment for not more than five years or by fine of not more than $15,000 or both and provides increased penalties if the defendant has been convicted previously of specified drug offenses [21 U.S.C. §841 (1970)]. Federal law also makes possession of any amount of marijuana punishable by imprisonment for not more than one year or by a fine of not more than $5,000 or both, and provides for increased penalties if the defendant has prior convictions for specified drug offenses. It would seem that despite the reduction of penalties for the possession or distribution of marijuana under Chapter 248, individuals who use or distribute it may still be subject to federal and state laws which provide for greater penalties.

Commentators have suggested that restrictions on the use of marijuana may be unconstitutional on a variety of theories. For example, the case of In re Klor [64 Cal. 2d 816, 51 Cal. Rptr. 903 (1966) (first amendment protects private use of obscene matter)] has been relied upon for the proposition that the constitutional protection of privacy of the home protects the domestic use of psychotropic drugs [Shaprio, *Legislating Behavior Control*, 47 S. CAL. L. REV. 237, 255-56 & n.50 (1974)]. This theory was adopted in *Ravin v. State* [Alaska, P.2d , 43 U.S.L.W. 2502 (1975)] which held that the right to privacy encompasses the private use or possession of marijuana in a purely personal, non-commercial context within the home [*Id.* at , 43 U.S.L.W. at 2503]. Another theory relies on an analogy between inducing thoughts by books or pictures on the one hand, and drugs on the other

as means of communication which are both protected by the first amendment [Shapiro, *Legislating Behavior Control*, 47 S. CAL. L. REV. 237, 255-56 & n.50]. The thesis has also been advanced that the use of marijuana might be protected by the first amendment as a form of social protest [Westin, *Introduction to Symposium: Drugs and the Law*, 56 CAL. L. REV. 1, 7 n.52 (1968)]. It has been suggested that the use of marijuana might also be protected based on the idea that the mental formulation of ideas is a logically prior antecedent of communication. In *Kaimowitz v. Department of Mental Health* [Civil No. 73-19434-AW (Wayne County, Mich., Cir. Ct. July 10, 1973)] the court stated:

> A person's mental processes, the communication of ideas, and the generation of ideas, come within the ambit of the first amendment. To the extent that the first amendment protects the dissemination of the ideas and expression of thoughts, it equally must protect the individual's right to generate ideas" [*Id.* at 32].

Any restrictions on access to mind-altering agents could arguably interfere with the generation of ideas and therefore conflict with an individual's first amendment right to think. Another challenge to marijuana use laws has been made based on the first amendment's protection of freedom of religion (Leary v. United States, 383 F.2d 851 (1967), *rev'd on other grounds*, 395 U.S. 6 (1969)]. Cases dealing with religious freedom in other contexts have set forth three foci of inquiry when a law is challenged as violative of the "free exercise" clause: (1) Is the practitioner's belief and practice a "religion" within the meaning of the first amendment? Although the first amendment may preclude an inquiry into the validity of religious beliefs, it does not prevent an inquiry of the defendant's good faith in asserting such a defense. It has been held that a religious claim may not be invoked in bad faith to shield otherwise prohibited conduct [State v. Ballard, 267 N.C. 599, 148 S.E.2d 565 (1966)]. (2) Is the practice prohibited by the challenged statute essential to the practice of the "religion"? (3) Is there nevertheless a sufficiently compelling state interest to warrant overriding the practice? Only when the proscribed activity is essential to a qualified religion and the state's interest is not overwhelming will the courts invoke the first amendment to invalidate an otherwise permissible legislative proscription [NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE, FIRST REPORT APPENDIX: MARIJUANA: A SIGNAL OF MISUNDERSTANDING, 1130 (1972)]. The California Supreme Court has reversed the convictions of Indian members of the Native American Church for using peyote in their religious services [People v. Woody,

61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964)]. The court concluded that its use was the *sine qua non* of the sect, without which no service could proceed [*Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74]. However, in similar cases involving marijuana the courts have held that one of the three tests enumerated above has been lacking [Leary v. United States, 383 F.2d 851 (1967); People v. Mitchell, 244 Cal. App. 2d 176, 52 Cal. Rptr. 884 (1966)].

Despite these constitutional challenges, there has not been a definite constitutional review of these statutes by the California Supreme Court [Comment, *Marijuana Possession and the California Constitutional Prohibition of Cruel or Unusual Punishment*, 21 U.C.L.A. L. REV. 1136, 1139 (1974)]. Marijuana possession remains illegal throughout the United States, and no judicial upheaval of such laws is likely in the foreseeable future [NATIONAL COMMISSION ON MARIJUANA AND DRUG ABUSE, FIRST REPORT APPENDIX: MARIJUANA. A SIGNAL OF MISUNDERSTANDING, 1134 (1972)]. Nevertheless, the National Commission's Report concluded that:

> If the scientific evidence on marijuana continues to suggest minimal impact from its use, and if legislators do not respond to this development, courts may yet impose limits on marijuana regulations. Should courts be moved to act to protect marijuana use, . . . the critical issue will probably not be the textual source of the constitutional protection but rather the allocation of the burden of proof on the issue of marijuana's effects on human physiology and behavior. If a court casts the burden of proof on the state to support its prohibition with something more than anectdotal evidence, then the use of marijuana might become constitutionally protected" [*Id.* at 1134].

The Alaskan Supreme Court has used similar reasoning to place the burden upon the state by showing "that the proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest" [Ravin v. State, Alaska, P.2d , 43 U.S.L.W. 2502, 2503 (1975)]. Absent a showing "that the public health or welfare will in fact suffer" if the control is not applied, the court held that the "possession of marijuana by adults at home for personal use is constitutionally protected" [*Id.*].

See Generally:

1) Boyko and Rotberg, *Constitutional Objections to California's Marijuana Possession Statute*, 14 U.C.L.A. L. REV. 773 (1967).
2) Comment, *The California Marijuana Possession Statute: An Infringement on the Right of Privacy or Other Peripheral Constitutional Rights*, 19 HAST. L.J. 758 (1968).

Crimes; sex offenses

Education Code §12912 (amended); Evidence Code §§972, 985 (amended); Penal Code §§269a, 269b, 286.1, 288b (repealed); §286.5 (new), §§220, 286, 287, 288a, 290 (amended).
AB 489 (Brown); STATS 1975, Ch 71
Support: State Bar of California
Opposition: California District Attorneys' Association; California Peace Officers' Association
AB 756 (Boatwright); STATS 1975, Ch 877

Chapter 71 has been enacted to remove criminal sanctions for certain sexual conduct performed in private between consenting adults. Although proposals to reform laws regulating private, consensual sexual conduct have been numerous [*See, e.g.*, MODEL PENAL CODE Art. 213 and comments (Proposed Official Draft 1962); Comment, *Oral Copulation—A Constitutional Curtain Must Be Drawn*, 11 SAN DIEGO L. REV. 523 (1974)], efforts to enact legislation similar to Chapter 71 have failed on five previous occasions [A.B. 743, 1969 Regular Session; A.B. 701, 1970 Regular Session; A.B. 437, 1971 Regular Session; A.B. 470, 1972 Regular Session, A.B. 992, 1973-74 Regular Session]. Chapter 71 itself was adopted by a very narrow margin after a bitter political battle [Sacramento Bee, May 2, 1975, §A, at 1, col. 4]. In spite of the controversy surrounding the legislation, the *practical* effect of Chapter 71 appears to be minimal, as a lack of complaining witnesses combined with court created prohibitions on law enforcement techniques which invade private areas have heretofore made the enforcement of statutory prohibitions on private sexual conduct virtually impossible [Comment, *Sexual Freedom for Consenting Adults—Why Not?*, 2 PAC. L.J. 206, 214-17 (1971)].

Prior to the enactment of Chapter 71, Penal Code Section 288a provided punishment by imprisonment for not more than 15 years for any person participating in an act of oral copulation. As amended, this section no longer proscribes such acts by consenting persons 18 years of age or older. Oral copulation induced by force or committed with a person under the age of 18 remains unlawful. Chapter 877 has further amended Section 288a to reduce the penalty imposed upon a person who commits oral copulation with a minor from not more than fifteen years to not more than five years in state prison or more than one year in county jail. However, the conviction of a person over the age of 21 who engages in oral copulation with a person under the age of 16 must be deemed a felony.

Chapter 71 has amended Penal Code Section 286 to define sodomy as sexual conduct consisting of contact between the penis of one person and the anus of another person. Formerly this section proscribed "the infamous crime against nature" which included sexual contact with an animal. As amended, Section 286 no longer prohibits sodomy between consenting adults. The amended section retains penalties for sodomy by force and sodomy with a minor; however the penalty for sodomy with a minor has been reduced by Chapter 877 to five years in state prison or one year in county jail. As with the oral copulation statute, a person over the age of 21 who commits sodomy with a person under the age of 16 is guilty of a felony. Sexual assault on an animal is now proscribed by new Penal Code Section 286.5.

The amended sections relating to sodomy and oral copulation do not apply to those who are incarcerated. Section 288a expressly prohibits oral copulation by persons confined in any state prison or local detention facility. No exception is made based on age or consent. Section 286 contains a similar provision relating to sodomy.

Former Penal Code Sections 268a and 269b, which proscribed adulterous cohabitation, have been repealed by Chapter 71. Adultery *without* cohabitation has never been proscribed in California [*See* CAL. STATS. 1871-72, c. 266, §1, at 380-91; CAL. STATS. 1905, c. 498, §1, at 657, as amended, CAL. STATS. 1911, First Extra. Sess., c. 242, §1, at 426; Ex parte Thomas, 103 Cal. 497, 37 P. 514 (1894)]. Because adultery in any form is no longer a crime there remains no valid reason to except evidence of adultery from the privilege of interspousal immunity. Accordingly, Chapter 71 has amended Evidence Code Sections 972 and 985 to delete adultery from the list of statutory exceptions to the privilege of not testifying against one's spouse.

The California Education Code prohibits a person convicted of a sex offense from obtaining or retaining a teacher's certificate [CAL. EDUC. CODE §§13175, 13207, 13218, 13220.16, 13255, 13586]. Chapter 71 has amended Education Code Section 12912, which defines "sex offense" for teacher's certificate denial and revocation purposes to specifically include any offense defined by Penal Code Sections 286 or 288a committed prior to the effective date of Chapter 71. Thus a person who was convicted prior to January 1, 1976 of performing a private, consensual act of oral copulation or sodomy may not hold a teacher's certificate, even though these acts are no longer deemed criminal.

COMMENT

Chapter 71 has removed oral copulation and sodomy between con-

senting adults from the acts proscribed by the Penal Code without any explicit qualification that these acts must be performed in private. Penal Code Sections 314 and 370, however, forbid the commission of lewd, obscene, and indecent acts in public. Thus, many acts, such as copulation and exposure of private parts, while not specifically proscribed by the Penal Code, become offenses when they are performed in public. Presumably oral copulation and sodomy will be treated in the same manner. Therefore the *effect* of Chapter 71 is to decriminalize these acts only when they are performed in private, and the chapter makes no changes in the law relating to the definitions of "public" and "private."

In spite of the controversy surrounding Chapter 71, it appears doubtful that a conviction under the former Sections 286 and 288a, which was based on a private, consensual act, would have withstood judicial scrutiny. Although a recent California appellate case held that statutes proscribing illicit sexual conduct constitute a legitimate exercise of police power [People v. Drolet, 30 Cal. App. 3d 207, 211-12, 105 Cal. Rptr. 824, 826 (1973)], the facts in that case concerned oral copulation performed on stage. In *Griswold v. Connecticut* [381 U.S. 479 (1965)] the United States Supreme Court was concerned with a statute which proscribed the use of contraceptives. In striking down the statute, the Court found that "the First Amendment has a penumbra where privacy is protected from governmental intrusion" [*Id.* at 483]. A state may not control or prevent activities constitutionally subject to regulation by "means which sweep unnecessarily broadly and thereby invade the area of protected freedoms" [*Id.* at 485]. The Court went on to ask, "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the nations of privacy surrounding the marriage relationship" [*Id.*]. At least one court has held that the right of privacy set forth in the *Griswold* decision precludes the states from regulating private consensual sexual conduct between married persons [Buchannan v. Batchelor, 308 F. Supp. 729, 735 (N.D. Tex. 1970), *vacated* for lack of standing, 405 U.S. 438 (1972)]. In *Eisenstadt v. Baird* [405 U.S. 438 (1972)] the Supreme Court expressly extended the *Griswold* right to privacy to individuals outside the marital relationship [*Id.* at 453-54]. These cases would seem to suggest that private sexual conduct between consenting adults is constitutionally protected from government regulation.

The provisions of Chapter 71 which bar from teaching those persons convicted of committing acts which are no longer illegal may be subject

to constitutional attack. The California courts do not appear to have addressed this precise issue, nor, it would seem, have they made clear whether any conviction may be the sole basis for revoking or withholding a teacher's certificate. In *Morrison v. State Board of Education* [1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969)] the California Supreme Court held that a teacher's certificate could not, consistent with due process, be revoked for "immoral" and "unprofessional" conduct without a showing that such conduct renders a person unfit to teach. [*Id.* at 229, 461 P.2d at 386, 82 Cal. Rptr. at 186]. That case, however, involved noncriminal homosexual conduct. In two later cases, two appellate courts reached different conclusions as to the effect of a criminal conviction. In *Moser v. State Board of Education* [22 Cal. App. 3d 988, 101 Cal. Rptr. 86 (1972)] it was held that a conviction under Penal Code Section 415 for disorderly conduct involving homosexual conduct was sufficient, *in and of itself*, to demonstrate unfitness to teach [*Id.* at 992, 101 Cal. Rptr. at 88]. On the other hand, in *Comings v. State Board of Education* [23 Cal. App. 3d 94, 100 Cal. Rptr. 73 (1972)] the court held that a conviction for possession of marijuana, without a showing of adverse effect on students or fellow teachers, was *not* sufficient [*Id.* at 104-05, 100 Cal. Rptr. at 81]. A subsequent California Supreme Court case failed to resolve this apparent inconsistency. In *Petit v. State Board of Education* [10 Cal. 3d 29, 513 P.2d 889, 109 Cal. Rptr. 665 (1973)] the petitioner was convicted pursuant to Penal Code Section 650½ for outraging public decency after committing acts of oral copulation at a "swingers" party. In upholding the revocation of the petitioner's teaching certificate, the court distinguished her case from *Morrison* on three grounds: (1) the existence of a criminal conviction; (2) the fact that the conduct involved took place in a semi-public atmosphere; and (3) the fact that expert evidence concerning the petitioner's unfitness to teach was considered at the revocation hearing [*Id.* at 34-35, 513 P.2d at 892-93, 109 Cal. Rptr. at 668-69]. The opinion does not make clear whether the criminal conviction alone would have sufficiently distinguished the case from *Morrison* to permit revocation. Finally, it must be noted that none of these cases involved a conviction for a crime designated as a "sex offense" by Education Code Section 12912.

While the California courts have not resolved the issue, a line of United States Supreme Court decisions may be instructive. Whenever presented with the issue, the Court has held that statutes which create a permanent, irrebuttable presumption are unconstitutional in that due process requires at least an opportunity to rebut the presumption. This

rule has been applied to a statute which declared unmarried fathers unfit to raise children [Stanley v. Illinois, 405 U.S. 645, 658 (1972)], to a statute which classified all students who resided in another state at the commencement of school as permanent nonresidents [Vlandis v. Kline, 412 U.S. 441, 453 (1973)], and to a statute which prohibited women from teaching after the fourth month of pregnancy [Cleveland Board of Education v. LaFleur, 414 U.S. 632, 646 (1974)]. The latter case seems particularly apposite as the school board unsuccessfully defended the statute on the theory that women in their fifth month of pregnancy were unfit to teach. The California Education Code Sections which require denial or revocation of teacher's certificate on the basis of a conviction for a "sex offense" would also seem to be founded on the assumption that such a conviction renders the person unfit to teach. If so, these sections may violate due process by creating an irrebuttable presumption of unfitness. The constitutionality of such a presumption would seem particularly questionable where, as here, the acts upon which the conviction is based have subsequently been condoned.

See Generally:
1) Willemsen, *Sex and the School Teacher*, 14 SANTA CLARA LAWYER 839 (1974).
2) Comment, *Sexual Freedom for Consenting Adults—Why Not?*, 2 PAC. L.J. 206 (1971).

Crimes: prostitution involving males

Penal Code §§266a, 266b, 266d, 266e, 266f, 267, 784 (amended).
AB 1436 (Torres); STATS 1975, Ch 996

Sections 266a, 266b, 266d, 266e, and 266f of the Penal Code make various acts committed with or against females illegal. Chapter 996 has amended these sections to make these provisions applicable regardless of whether the victim or perpetrators is male or female. Pursuant to Section 266a it is now illegal to take any male or female either without his or her consent, or by procuring his or her consent fraudulently, for the purpose of prostitution (defined as any lewd act between persons for money or other consideration). Pursuant to Section 267 of the Penal Code it is now illegal to take a male or female under the age of 18 years from his or her parent or guardian for the purposes of prostitution. Additionally, Section 266b of the Penal Code now prohibits the compelling of a person, against his or her will, to live with the offender or another person in an illicit relationship. Furthermore, Section 266e of the Penal Code now prohibits paying consideration to a male or female for the purpose of prostitution, while Sections 266d and 266f of the Penal Code similarly make it illegal for anyone to receive money

in return for placing a male or female in the custody of another for the purpose of prostitution or cohabitation. Section 784 of the Penal Code formerly defined the jurisdiction of courts over the offense of enticing or taking away only a female for the purpose of prostitution. Chapter 996 has amended this section to make such an act an offense if committed by *any* person.

COMMENT

Prior to the enactment of this legislation these sections of the Penal Code dealt only with crimes involving females, making them subject to criticism as embodying a bias based on sex. Chapter 996 makes these sections applicable to acts involving either sex, eliminating any basis for such an objection.

The law formerly provided legal sanctions under other sections of the Penal Code for the acts covered by Sections 266a, 266b, 266e, and 266f involving males. For example, Section 647 of the Penal Code prohibits soliciting or engaging in acts of prostitution by males or females. Persons who aided or abetted such offenses could be liable as principals to those crimes under Section 31 of the Penal Code or as conspirators under Section 182 of the Penal Code. Alternatively, if the sexual acts involved the commission of sodomy or oral copulation, under former law the person who aided and abetted such offenses could be charged as a principal under Sections 286a or 288b of the Penal Code, making them subject to the felony punishment provided by these sections, or as a conspirator under Section 182. However, with the decriminalization of sodomy and oral copulation between consenting adults [*see* REVIEW OF SELECTED 1975 CALIFORNIA LEGISLATION, this volume at 366 (Crimes; sex offenses)], this alternative is no longer available. If the defendant is now charged as a principal under Section 647, he would be subject to a sentence for a misdemeanor violation [CAL. PEN. CODE §19]. By extending the protection of Sections 266a, 266b, 266e, and 266f to males, Chapter 996 makes such sexual acts now punishable as felonies.

Crimes; battery resulting in serious injury

Penal Code §243 (amended).
SB 554 (Presley); STATS 1975, Ch 1114
Support: California District Attorneys' Association; California Peace Officers' Association; California United Senior Citizens

Section 243 of the Penal Code provides that a battery committed on

a person other than a peace officer or fireman while engaged in the performance of his or her duties is a misdemeanor. However, when a battery is committed upon a peace officer or fireman the crime could be punishable as a *felony*. Chapter 1114 has amended Section 243 to similarly increase the penalty for battery upon any person which results in "serious bodily injury," defined by this section as any serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of the function of any bodily member or organ; a wound requiring extensive suturing; and serious disfigurement. Such an offense is now punishable by imprisonment in the county jail for a period of not more than one year or in the state prison for a period of not more than five years.

Crimes; assault with intent to commit murder

Penal Code §12022.5 (amended).
SB 37 (Grunsky); STATS 1975, Ch 278
Support: Attorney General; City of Los Angeles.

Section 12022.5 of the Penal Code requires that the sentence imposed for certain specified crimes be increased by not less than five additional years if a firearm is used in the commission of such crime. Chapter 278 has amended Section 12022.5 to include the crime of assault with intent to commit murder within its provisions. Such additional incarceration may not run concurrently with the basic sentence.

Chapter 278 appears to have been enacted partially in response to *People v. Provencher*, [33 Cal. App. 3d 546, 108 Cal. Rptr. 792 (1973)] in which the prosecution argued that assault with intent to commit murder was an offense properly included under the provisions of Section 12022.5. The court disagreed, noting that the section included several crimes—robbery, assault with a deadly weapon, murder, rape, burglary, and kidnapping—but contained no language indicating an intent to include the crime of assault with intent to commit murder within the purview of that section [*Id.* at 549, 108 Cal. Rptr. at 794].

Crimes; dangerous weapons

Penal Code §§12020, 12025 (amended).
AB 1333 (Chel); STATS 1975, Ch 1161

Prior to the enactment of Chapter 1161 the manufacture, furnishing, or possession of a blackjack, slungshot, billy, nunchaku, sandclub,

sawed-off shotgun, mental knuckles, dirk, dagger, explosive substance, or geometric throwing weapon was punishable by imprisonment in the county jail for not more than one year or in the state prison for not less than one year nor more than five years. Section 12020 of the Penal Code has been amended to reduce the maximum possible term of imprisonment in the state prison from five years to three years for this offense.

Section 12025 of the Penal Code continues to provide that a first-time conviction for carrying a concealed firearm in one's car or on one's person without a license is punishable as a misdemeanor by imprisonment in the county jail for not more than six months, a fine of not more than $500, or both [*See* CAL. PEN. CODE §19]. Chapter 1161 has amended this section to provide that an offender who is found to have concealed a firearm on his or her person and who is convicted of a crime against the person [CAL. PEN. CODE §§187-260], a crime against property [CAL. PEN. CODE §§447a-593c], or a narcotics or dangerous drug violation is guilty of a public offense punishable either by imprisonment in the state prison for not more than three years or the county jail for not more than six months, a fine of not more than $500, or both. Section 12025, however, continues to provide that a person convicted under that section who has been previously convicted of any felony or of any crime involving a concealed weapon [*See* CAL. PEN. CODE §12000 *et seq.*] is guilty of a felony, but Chapter 1161 has reduced the punishment for such a violation from five years to three years [*Compare* CAL. STATS. 1955, c. 1520, §1, at 2799 *with* CAL. PEN. CODE §12025].

See Generally:
1) 6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 253-54 (1975) (Crimes; concealed weapons).

Crimes: wilfull diversion of funds

Penal Code §484b (amended).
AB 727 (Thomas); STATS 1975, Ch 464
Support: California District Attorneys' Association; California Peace Officers' Association
Opposition: Engineering and Grading Contractors Association

Prior to the enactment of Penal Code Section 484b (CAL. STATS. 1965, c. 1145, §1, at 2890], there existed no criminal sanction against contractors who misappropriated construction funds unless an intent to defraud could be shown [CONTINUING EDUCATION OF THE BAR, REVIEW OF SELECTED 1965 CODE LEGISLATION 179]. Consequently,

Section 484b was enacted to provide that any person who receives money for the purpose of obtaining or paying for services, labor, material, or equipment, and who wrongfully diverts the funds to a use other than that for which the funds were received, shall be guilty of a public offense.

When first enacted in 1965, Section 484b provided that individuals found guilty of diverting funds were punishable by a fine not to exceed $5,000, or by imprisonment in the state prison not to exceed five years, or in the county jail not to exceed one year, or by both fine and imprisonment if the amount diverted was in exess of $10,000. If the amount diverted was less than $10,000, the individual was guilty of a misdemeanor, punishable by a maximum sentence of one year in the county jail. Section 484b was amended in 1974 [CAL. STATS. 1974, c. 910, §1, at] to reduce the demarcation line between felony diversions and misdemeanor diversions from $10,000 to $5,000. Chapter 464 has amended this section again by reducing from $5,000 to $1,000 the amount required to be diverted by a contractor so as to be punishable as a felony. Chapter 464 also reduces the maximum term of imprisonment, if a diversion is in excess of $1,000, from five years to two years. Thus, while the effect of Chapter 464 may be to increase the size of the class of individuals punishable as felons, the maximum imprisonment penalty for this class has been reduced.

See Generally:
1) 1 WITKIN, CALIFORNIA CRIMES, *Crimes Against Property* §390 (Supp. 1969).
2) 6 PAC. L.J., REVIEW OF SELECTED 1974 CALIFORNIA LEGISLATION 258 (1975) (amended Section 484b).

Crimes; driving under the influence

Vehicle Code §23102 (amended).
AB 532 (Hart): STATS 1975, Ch 285
Support: State Bar of California; California District Attorneys' Association

Under current law, a conviction under Section 23102 of the Vehicle Code relating to driving under the influence of alcohol, or the combined influence of alcohol and drugs, is deemed a second conviction if the defendant has previously been convicted under Vehicle Code Sections 23102 or 23101 (causing death or bodily injury while driving under the influence of alcohol, or the combined influence of alcohol and drugs). Chapter 285 has amended Section 23102 to provide that a prior conviction for driving under the influence of any drug or while

addicted (§23105), or for causing death or bodily injury while driving under the influence of any drug (§23106) will also make a subsequent conviction under Section 23102 a second offense. Such a second offense is punishable by imprisonment in the county jail for not less than 48 hours nor more than one year and by a fine of not less than $250 nor more than $1,000.

See Generally:
1) STATE BAR OF CALIFORNIA, 1974 CONFERENCE RESOLUTION 1-35.

Crimes; false reports by peace officers

Government Code §6204 (new).
SB 899 (Song); STATS 1975, Ch 827
Opposition: California District Attorneys' Association; California Peace Officers' Association.

Prior to the enactment of Chapter 827 a peace officer was subject to criminal punishment for filing a report containing false statements only if the officer knew the statements were false, was authorized by law to make or give the report, and delivered the report as true [CAL. GOV'T CODE §6203]. Chapter 827 has added Section 6204 to the Penal Code to provide that a peace officer who files a report regarding the commission or investigation of a crime which contains statements he or she knows to be false may be punished by imprisonment in the county jail for not more than one year. This penalty is expressly made applicable regardless of whether the statement is certified or otherwise reported as true, unless the officer attributes it in the report to any other person. Consequently Chapter 827 regulates reports which are not within the coverage of Section 6203, as many of these reports are *not* "authorized by law" as required under Section 6203.