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ARTICLES

THE NONMARITAL SEXUAL CONDUCT OF CUSTODIAL MOTHERS: A STUDY OF CALIFORNIA'S PRECARIOUS PARENTAL RIGHTS

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I. INTRODUCTION

Mothers of minor children engage in sexual conduct with men to whom they are not married. That is no longer a shocking truth. Nonetheless, those mothers continue to live with a Damocles sword hanging over their heads. Their sexual conduct can still cause them to lose their children, even in these supposedly liberated times in the state of California.[1]

Four factors combine to produce such an insecure status for the sexually active custodial mother:[2]

[1] the multiplicity of statutes available as tools for those who might seek to take her children from her;[3]

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1. This Article focuses exclusively on heterosexual behavior of custodial mothers. For a study of the legal status of lesbian mothers, see Comment *The Lesbian Family: Rights in Conflict Under the California Uniform Parentage Act*, 10 GOLDEN GATE U.L. REV. 1007 (1980) and sources cited therein.

2. The term "sexually active mother" will refer throughout to the mother who engages in sexual activity with one or more men to whom she is not married, whether or not she is married to someone else.

3. Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 STAN. L. REV. 703, 704-05 (1971): *see infra* text accompanying notes 43-

[2] ambiguous language in those statutes;[4]

[3] the broad discretion of trial courts in both making custody awards[5] and later modifying them;[6] and

[4] appellate courts' insistence upon a "very strong presumption in favor of the order[s] of the court[s] below"[7] such that "over the years the appellate courts have almost completely abdicated in [the custody] field in favor of the trial courts."[8]

This Article surveys the cases in which the most commonly used ambiguous statutes together with secure judicial discretion have been brought to bear on custodial mothers who either by choice or by economic necessity do not live conventional middle-class lives. The survey shows that, in general, poor women stand to lose more than middle-class women, but in some respects it is more difficult for the poor to lose. Fourteenth amendment due process protections inhibit the authorities who seek total, irrevocable termination of parental rights; discretion aids the vindictive, monied ex-husband who seeks only transfer of custody, which gets managed far more simply on the premise that a later modification will always be available if another transfer becomes appropriate.

II. THE HISTORY OF CUSTODY LAW

Any discussion of child custody law should begin with recognition that at common law not only was the father's right to custody of minor legitimate children superior to that of their mother;[9] his right was "virtually undefeatable" except for "flagrant" unfitness.[10] This is not surprising because the custody right began as a feudal property right in a culture where a child was a financial asset to its father.[11] California family law began

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4. *See infra* text accompanying notes 66-85, 95-102, 113-16, 126-28.

5. *See infra* text accompanying notes 50, 120, 148, 184.

6. *See infra* text accompanying notes 137, 139-47.

7. Stack v. Stack, 189 Cal. App. 2d 357, 372, 11 Cal. Rptr. 177, 188 (1961).

8. *Id.* at 272-73, 11 Cal. Rptr. at 188.

9. E. PECK, THE LAW OF PERSONS AND OF DOMESTIC RELATIONS 371 (1930).

10. W. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 343 (1921).

11. tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 2), 16 STAN. L. REV. 900, 925 (1964). See Foster & Freed, *Child*

largely as a codification of the common law[12] except insofar as the California Civil Code of 1872 was founded on the New York Field Draft Codes.[13] It still reflected the father's nearly unqualified custody right;[14] not until 1913 was the Civil Code amended to give both parents equal right to custody.[15]

Before the code was amended, however, California case law began to lay down "[t]he enduring rule . . . that parents [not just fathers] have a paramount right to their children unless they are affirmatively found to be unfit."[16] This means that "the right . . . cannot be taken away merely because the court may believe that some third person can give the child[ren] better care and greater protection."[17]

The parental preference doctrine has fostered giving less attention to children as property and instead acknowledging "that parents generally are more likely than strangers to give children the care they need because of the nature of parenthood."[18] The doctrine has retained respect in California in such pronouncements as this one: "[I]t must be taken as settled law that in this state the courts place more stress on the right of the parent to custody of the child (except where the parent is unfit) than on the best interests and welfare of the child."[19] The doctrine's vitality has been acknowledged even in cases where parents lost their children because the parents were found unfit,[20] and even

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Custody 39 N.Y.U. L. REV. 423, 424-25 (1964) for discussion of the English statutes that gave and gradually expanded mothers' custodial rights.

12. tenBroek, *supra* note 11, at 913.

13. tenBroek, *supra* note 11 (pt. 1), 16 STAN. L. REV. 257, 258. For further discussion of California's reliance on the Field Codes, see Kleps, *The Revision and Codification of California Statutes 1849-1953*, 42 CALIF. L. REV. 766 (1954); Parma, *The History of the Adoption of the Codes of California*, 22 L. LIBR. J. 8 (1929).

14. tenBroek, *supra* note 13, at 313.

15. CAL. CIV. CODE § 197 (West 1954).

16. tenBroek, *supra* note 11, at 923 (discussing *In re* Campbell, 130 Cal. 380, 62 P. 613 (1900)).

17. *In re* White, 54 Cal. App. 2d 637, 640, 129 P.2d 706, 708 (1942). For further discussion of the history of the doctrine in California, see Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10 (1975); Porter & Walsh, *The Evolution of California's Child Custody Laws: A Question of Statutory Interpretation*, 7 SW. U.L. REV. 1 (1975).

18. tenBroek, *supra* note 11, at 926-27 (commenting in part on Guardianship of Smith, 42 Cal. 2d 91, 265 P.2d 888 (1954)).

19. Shea v. Shea, 100 Cal. App. 2d 60, 66, 223 P.2d 32, 35 (1950).

20. *See* Adoption of D.S.C., 93 Cal. App. 3d 14, 155 Cal. Rptr. 406 (1979); Adoption of Oukes, 14 Cal. App. 3d 459, 92 Cal. Rptr. 390 (1971).

though it has been criticized for its rigidity, its continuing to manifest some interest in children as property, and its failure to attend sufficiently to the children's own interests.[21]

The United States Supreme Court has recognized the interest of a parent in retaining custody as both "cognizable and substantial."[22] More importantly, the Court has spoken of that interest in terms that distinguish it from any property interest in a child as chattel: "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' "[23]

The right to custody has traditionally carried with it the freedom to bring up one's child one's own way, a freedom regarded by the Supreme Court as worthy of fourteenth amendment due process protection.[24] Probably the best known comment by the Court on parental custody rights is in *Prince v. Massachusetts*:[25] "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[26] Yet the Court in that case upheld the Massachusetts child labor laws as a reasonable exercise of the state's "wide range of power for limiting parental freedom and authority in things affecting the child's welfare."[27] Thus, *Prince* might more appropriately be known for its expression of the power of the state as parens patriae[28] to limit parents' rights. The Court has often since affirmed the parens patriae power of the state, grounded in an interest in "[t]he well-being of its children."[29]

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21. Adoption of Oukes, 14 Cal. App. 3d 459, 469, 92 Cal. Rptr. 390, 397 (1971) (citing *In re* Neal, 265 Cal. App. 2d 482, 489-90, 71 Cal. Rptr. 300, 305 (1968)).

22. Stanley v. Illinois, 405 U.S. 645, 652 (1972).

23. *Id.* at 651 (quoting Kovacs v. Cooper, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

24. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (relying on Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

25. 321 U.S. 158 (1944).

26. *Id.* at 166.

27. *Id.* at 167.

28. *Id.* at 166.

29. Ginsberg v. New York, 390 U.S. 629, 639 (1968). *See also* Parham v. J.R., 442

The state's parens patriae power should be understood as distinct from its police power, the latter being its "inherent plenary power both to prevent its citizens from harming one another and to promote all aspects of the public welfare."[30] While both powers may rightfully limit parental rights, "to the extent that the state may not directly regulate morality within the family through its police powers, it is difficult to justify such regulation under its parens patriae role."[31] Either power, especially if misused, has the capacity to interfere drastically with family privacy.

The Supreme Court's recognition of a constitutionally protected right of privacy in the context of the family has been expressed often[32] and linked expressly with due process protection.[33] However, this recognition came in connection with contraceptives and pregnancy, matters more strictly related to the marital relationship than to the parent-child relationship.

Furthermore, for all its rhetorical support for family autonomy and privacy, the Court has also consistently expressed support for the family as an institution promoting the moral education and protection of youth.[34] In *Moore v. City of East Cleveland*,[35] the Court proclaimed: "[T]he Constitution prevents [the state] from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns."[36] Yet the ordinance it struck down was constitutionally defective for defining "family" so as to exclude a group of relatives consisting of a woman, her son, and two grandsons; the case in no way disturbed the Court's earlier decision to sustain an ordinance restricting unrelated individuals living together.[37] Even more striking is the reference in *Moore* to the family's role of

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U.S. 584 (1979); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Wisconsin v. Yoder, 406 U.S. 205 (1972).

30. *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198-99 (1980) [hereinafter cited as *Developments in the Law*].

31. *Id.* at 1320.

32. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 153 (1973); Griswold v. Connecticut, 381 U.S. 479, 485-87 (1965) (Goldberg, J., concurring).

33. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974).

34. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974); Ginsberg v. New York, 390 U.S. 629, 639 (1968).

35. 431 U.S. 494 (1977).

36. *Id.* at 506.

37. *Belle Terre*, 416 U.S. 1.

"inculcat[ing] and pass[ing] down many of our most cherished values, moral and cultural."[38] "The Court has never [expressly] decided . . . whether the state has any interests in enforcing morality that are sufficiently important to override an individual's fundamental rights in the family context."[39] On the other hand, it appears that various individual justices believe "that the states constitutionally may prohibit extramarital, premarital, or other 'immoral' sexual behavior."[40]

III. THE STRUGGLE BETWEEN PARENTS' RIGHTS AND CHILDREN'S BEST INTERESTS

It flies in the face of nature to expect of every custodial mother that she either be married and fulfill her sexual needs exclusively with her husband or else remain celibate for the duration of her children's minority, however many years that may be. "Among the personal liberties ranked as fundamental must be those necessary to satisfy basic needs that every human being experiences [including t]he need for sexual fulfillment . . . . That fact is now so firmly buttressed by modern science as to be unquestionable . . . . "[41] Yet the mother who for any of a myriad of reasons fulfills some of her basic sexual needs outside of marriage must do so under the Damocles sword.

The sword bears a government stamp.

> When one observes the expanding power of government into the family sphere, one must begin to readjust one's legal concept of family relationships, especially that of parent and child . . . . From a legal perspective, that relationship is probably the least secure in the family constellation . . . . [I]t is susceptible to subtle, indirect, and sometimes direct intrusions.[42]

In California there are at least eight different statutory pro-

38. *Moore*, 431 U.S. at 503-04.

39. *Developments in the Law*, *supra* note 30, at 1209.

40. *Id.* at 1208-09 (citing, *e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 702 (1977) (White, J., concurring in relevant part); Griswold v. Connecticut, 381 U.S. 479, 498-99 (1965) (Goldberg, J., concurring); Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

41. W. BARNETT, SEXUAL FREEDOM AND THE CONSTITUTION 97 (1973).

42. S. KATZ, WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN 5 (1971).

ceedings to affect the custody of children.[43] These include "three major bodies of law . . . : the law of guardianship of the person, the law of juvenile dependency, and what may be termed general custody law, applied most frequently in marriage dissolution proceedings,"[44] as well as a variety of specialized proceedings.[45]

In this multiplicity of available proceedings, it is not that the old notion of parental right has died. In a contest between parent and non-parent, it survives in a well-established presumption of fitness.[46] Another old presumption that has not survived, however, is the "tender years" presumption. When the contest for custody is between the mother and the father, it used to be to the mother's advantage if the child was of "tender years";[47] however, since the 1972 amendments to California Civil Code Section 4600,[48] that advantage has been taken away.[49] Moreover, any advantage provided by the statutory presumption before 1972 may have been more illusory than real, given the discretion with which trial courts could choose to abandon it or find it successfully rebutted.[50]

The concept that is supposed to have overcome all the old presumptions and is to govern every custody award is the "best interests of the child."[51] Mr. Justice Cardozo is credited with first fully setting forth the concept:

> The Chancellor in exercising his jurisdiction . . . does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as parens patriae to do what is best for the interest of the child . . . . He is not adjudicating a controversy between adversary parties,

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43. Bodenheimer, *supra* note 3, at 704-05.

44. *Id.* at 704 (citations omitted).

45. *Id.* at 704-05.

46. *See In re* Marriage of Williams, 101 Cal. App. 3d 507, 511, 161 Cal. Rptr. 808, 810 (1980) (citing *In re* Estate of Barassi, 265 Cal. App. 2d 282, 287, 71 Cal. Rptr. 249, 253 (1968)).

47. *E.g.*, White v. White, 109 Cal. App. 2d 522, 523, 240 P.2d 1015, 1015-16 (1952).

48. (West Supp. 1982).

49. *See In re* Marriage of Carney, 24 Cal. 3d 725, 730, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385 (1979).

50. *See* Luck v. Luck, 92 Cal. 653, 28 P. 787 (1892); Wood v. Wood, 207 Cal. App. 2d 33, 24 Cal. Rptr. 260 (1962).

51. *See* R. POUND, THE SPIRIT OF THE COMMON LAW 189 (1921).

> to compose their private differences. He is not determining rights "as between a parent and a child" or as between one parent and another . . . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.[52]

Unfortunately, to proclaim that the best interests of the child should be paramount is still merely to engage in fine-sounding but insubstantial rhetoric unless there are standards for determining what in fact is in a child's best interests. The American Bar Association once polled its members involved in custody litigation and was forced to conclude that "there is total disagreement and variety as to what aspects of family life make up 'best interests and welfare.' "[53]

It is not that standards have never been developed. They have been. Professor Katz, who formerly chaired the ABA Section of Family Law, describes what he calls the "constellation of social values incorporated in the 'best interests of the child' doctrine":[54]

> We say that we expect children to be physically and emotionally secure; to become responsible citizens in their community and to become economically independent; to acquire an education and develop skills; to respect people of different races, religions, and national, social and economic backgrounds; to become socially responsible and honorable and to have a sense of family loyalty.[55]

Such a list is helpful insofar as it spells out goals, that is, the long view of what custody awards are hoped to accomplish.

For the short view, that is, for the participants in litigation, more immediately practical help is also available in the Uniform

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52. Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925). For the same principle elucidated in California, see Prouty v. Prouty, 16 Cal. 2d 190, 195, 105 P.2d 295, 298 (1940). CAL. CIV. CODE § 138 (1872), referring to "necessary or proper" custody orders, provided no standards at all. The "best interest" provision was not added until 1931 (West 1954). For a discussion see tenBroek, *supra* note 11, at 917.

53. *Summary of ABA Report*, 2 FAM. L. REP. 2719 (1976).

54. S. KATZ, *supra* note 42, at xv, n. 2.

55. Katz, *Book Review*, 64 MICH. L. REV. 756, 763 (1966).

Marriage and Divorce Act,[56] which sets out the following method for determining custody:

> The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:
>
> (1) the wishes of the child's parent or parents as to his custody;
>
> (2) the wishes of the child as to his custodian;
>
> (3) the interaction and inter-relationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
>
> (4) the child's adjustment to his home, school, and community; and
>
> (5) the mental and physical health of all individuals involved.[57]

With respect to the concerns of the sexually active mother, the most significant part of the Uniform Act's best interest provision may be its concluding sentence, specifying what is not relevant: "The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child."[58] California has amended its custody law several times since the Uniform Act became available as a model,[59] yet the Uniform Act has never been incorporated into California law.

Finally, although it is typical to refer to the parent's "rights" and the child's "interests," those interests may also deserve to be thought of as rights. The best interest standard "arguably has become a rule of constitutional necessity, based in due process. Such reasoning is based on the premise that the child has a liberty interest in his custody . . . ."[60] There is, of course, a United States Supreme Court history establishing that children have constitutional liberties of their own.[61] Moreover, it

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56. *See* R. LEVY, UNIFORM MARRIAGE AND DIVORCE LEGISLATION: A PRELIMINARY ANALYSIS 93-95 (1969).

57. UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1970).

58. *Id.*

59. CAL. CIV. CODE § 4600 (West Supp. 1982).

60. Strickman, *Marriage, Divorce and the Constitution*, 15 FAM. L.Q. 259, 328 (1982).

61. *See* Bellotti v. Baird, 443 U.S. 622, 633 (1979); Ingraham v. Wright, 430 U.S. 651 (1977); Goss v. Lopez, 419 U.S. 565 (1975); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); *In re* Gault, 387 U.S. 1 (1967).

is tempting to rely on this impressive history to reach a conclusion that because "[a] child's welfare may best be served in the custody of his adulterous . . . or otherwise immoral parent, [it follows that] a categorical rule disqualifying a parent found morally deficient would seem to violate the right of the child not to be deprived of liberty without due process of law."[62]

However, to advise a mother about her conduct based on the Supreme Court's actual explanations of due process principles, one must take care not to rest too heavy a weight on *Gault*[63] and its successors. In *Bellotti v. Baird*,[64] the most recent case in the series, the Court recalls *Moore v. City of East Cleveland*[65] and warns:

> The unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children. We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.[66]

This scarcely sounds like a view compatible with approving of a child's remaining in the custody of an "immoral" parent.

IV. CALIFORNIA'S STATUTORY BATTLEGROUNDS

A. Freedom from Parental Custody and Control

The most drastic loss that can befall a mother under the California statutes occurs if her child is "declared free from [her] custody and control,"[67] for such a declaration "terminates all parental rights and responsibilities with regard to the child,"[68] thereby freeing the child for adoption.[69]

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62. Strickman, *supra* note 60, at 330.
63. *In re* Gault, 387 U.S. 1 (1969).
64. 443 U.S. 622 (1979).
65. 431 U.S. 494.
66. 443 U.S. at 634.
67. Cal. Civ. Code § 232(a) (West Supp. 1982).
68. *Id.* § 232.6.
69. *Id.*

Of the categories of children who might be declared "free from parental custody and control," two are especially susceptible of application to the children of sexually active mothers: "neglected" children[70] and children "whose parent . . . [is] morally depraved."[71] The statute provides no definition of either category. However, for a child in either category to be found free from parental custody and control, that child must have been removed from the parent's custody and made a dependent of the juvenile court for a full year.[72] Therefore, such a drastic loss as this cannot occur without there having been earlier court proceedings resulting in the parent's loss of custody.

On the other hand, a statutory section has been added that calls for liberal construction "to serve and protect the interests and welfare of the child."[73] One court has said of the addition that its purpose "was to change 'the rigidity of existing custody rules preferential to the natural parents over third parties' which stressed 'a proprietary or property interest in children' and did not assure the 'best interests of the children.' "[74] A more recent opinion insists that "the right of parenting is not to be subordinated to the best interests of the child. Rather, the parental right . . . is to be terminated only if the parent is found to be unfit and parental custody is found to be harmful to the child."[75] Other cases are not appreciably more precise in establishing what parental conduct is sufficiently reprehensible to invoke the statute, although there is acknowledgement that termination is "drastic"[76] and appropriate only in "extreme cases."[77]

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70. *Id.* § 232(a)(2).

71. *Id.* § 232(a)(3).

72. *Id.* §§ 232(a)(2), 232(a)(3). *Cf.* MODEL ACT TO FREE CHILDREN FOR PERMANENT PLACEMENT § 4, *reported at* 13 FAM. L.Q. 329, 333-34 (1979) (no requirement as to length of time passing since adjudication of neglect; no reference to "moral depravity" or any other language that could be similarly construed.)

73. CAL. CIV. CODE § 232.5 (West Supp. 1982).

74. Adoption of Oukes, 14 Cal. App. 3d 459, 469, 92 Cal. Rptr. 390, 397 (1971) (quoting *In re* Neal, 265 Cal. App. 2d 482, 489-90, 71 Cal. Rptr. 300, 305 (1968)).

75. Adoption of D.S.C., 93 Cal. App. 3d 14, 24, 155 Cal. Rptr. 406, 411 (1979). *See also In re* Susan Lynn M., 53 Cal. App. 3d 300, 310, 125 Cal. Rptr. 707, 713 (1975) ("A judgment freeing a child from the custody and control of its parents . . . amounts to the taking of 'a liberty' under the due process clause of the United States Constitution."). *Cf.* MODEL ACT TO FREE CHILDREN FOR PERMANENT PLACEMENT 1(b)(4), *supra* note 71, at 330 ("[T]he interests of the child shall prevail if the child's interests and parental rights conflict . . . .").

76. *In re* T.M.R., 41 Cal. App. 3d 694, 703, 116 Cal. Rptr. 292, 298 (1974); *In re* Zimmerman, 206 Cal. App. 2d 835, 845, 24 Cal. Rptr. 329, 334 (1962).

With respect to the terminology that might be expected to apply to sexually active mothers, there is some helpful narrowing in the moral depravity cases. Attention has been given to the statute's reference to parents who "*are* morally depraved,"[78] with the present tense of the verb as grounds for not admitting evidence of past conduct.[79] One case provides even more specific guidance in mentioning that there was "no substantial evidence of any immoral conduct on [the mother's] part at the time of the hearing or during a period of at least four to five months immediately preceding it."[80] Furthermore, the law requires that the one year's loss of custody prior to the termination petition must have been "because of such . . . moral depravity."[81] Therefore, at the very least, the history of the mother's own case ought to put her on notice and at the same time provide her with the potential means of preventing the permanent loss of her chid. If, and only if, her sexual conduct caused her to lose custody in dependency proceedings, continuing that same conduct should result in termination of parental rights; it is at least arguable that refraining from that conduct for some months prior to the hearing should stave off the termination.

With respect to a sexual relationship per se substantiating an allegation of neglect, such has been tried and has failed.[82] Voicing its criticism for the confusion of issues, one court said: "[A] parent's relationship to a live-in nonspouse may be relevant to determine the suitability of the home . . . . [However, e]vidence of immorality must be connected causally to a detrimental effect on the children's welfare."[83]

This same court also distinguishes between the strict neg-

77. *In re* Carmaleta B., 21 Cal. 3d 482, 489, 579 P.2d 514, 518, 146 Cal. Rptr. 623, 627 (1978); *In re* T.M.R., 41 Cal. App. 3d 694, 703, 116 Cal. Rptr. 292, 298 (1974). For arguments against precise language, see Howe, *Development of a Model Act to Free Children for Permanent Placement: A Case Study in Law and Social Planning*, 13 FAM. L.Q. 257, 296-98 (1979).

78. CAL. CIV. CODE § 232(a)(3).

79. *In re* Zimmerman, 206 Cal. App. 2d 835, 844, 24 Cal. Rptr. 329, 335 (1962), *quoted in In re* R.R.R., 18 Cal. App. 3d 973, 982, 96 Cal. Rptr. 308, 313 (1971) (construing former statute with identical language).

80. *In re* Zimmerman, 206 Cal. App. 2d 835, 845, 24 Cal. Rptr. 329, 335 (1962).

81. CAL. CIV. CODE § 232(a)(3).

82. *In re* Jack H., 106 Cal. App. 3d 257, 165 Cal. Rptr. 646 (1980).

83. *Id.* at 268-69, 165 Cal. Rptr. at 653.

lect standard required for termination and the much less strict standard acceptable for a finding of dependency at the earlier proceedings. Over and over again, the court insists that for termination "mere neglect" will not suffice.[84] Rather, the mother deserves "to have the circumstances leading to the earlier order reviewed in the light of subsequent events, and with consideration of the nature of the order sought in the second proceedings.[85] Furthermore, " '[d]etriment' must be found in the present circumstance rather than upon assumptions as to the circumstances thought to have existed at the time of the . . . dependency evaluation."[86] Here then is additional authority to say not only that past acts, if relevant at all, are not sufficient in and of themselves, but also that even present acts may not be presumed detrimental but instead must be shown to be so.

Termination proceedings have long been recognized by the United States Supreme Court as proper occasions for fourteenth amendment due process protection.[87] Determining that due process applies, however, is only the first step. One must then inquire as to the extent, for "[t]he extent to which procedural due process must be afforded . . . is influenced by the extent to which [one] may be 'condemned to suffer grievous loss.' "[88] In *Santosky v. Kramer*,[89] the Court applies the three-pronged test of extent set out in *Mathews v. Eldridge*[90] and concludes: "In parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard [such as the evidentiary standard challenged in *Santosky*] is substantial; and the countervailing governmental interest favoring that standard is comparatively slight."[91] The Court then holds that "due process requires that the State support its allegations by at least clear and convincing evidence."[92]

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84. *Id.* at 267, 165 Cal. Rptr. at 652.

85. *Id.* (quoting *In re* Morrow, 9 Cal. App. 3d 39, 55, 88 Cal. Rptr. 142, 152 (1970)).

86. *Id.* (citing *In re* James M., 65 Cal. App. 3d 254, 265, 135 Cal. Rptr. 222, 228 (1976)).

87. *See* Santosky v. Kramer, 50 U.S.L.W. 4333 (U.S. Mar. 23, 1982); Lassiter v. Department of Social Serv., 452 U.S. 18 (1981); Quilloin v. Wolcott, 434 U.S. 246 (1978); Armstrong v. Manzo, 380 U.S. 545 (1965).

88. Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

89. 50 U.S.L.W. 4333 (U.S. March 23, 1982).

90. 424 U.S. 319, 335 (1976).

91. 50 U.S.L.W. at 4336.

92. *Id.* at 4333.

In *Santosky*, California is listed as one of the states that mandate the proper standard by statute.[93] However, the code subdivision in question[94] applies to only certain restricted kinds of evidence about only one category of children, those who have been in foster homes or other specified facilities for at least two years. The clear and convincing standard is by no means statutorily mandated as to evidence in general sufficient to result in a finding of freedom from custody and control. However, what California has not done by statute it has done by case law. In fact, it has gone farther than the Supreme Court requires in *Santosky* by requiring clear and convincing evidence even in the less drastic dependency setting.[95]

What emerges from studying the application of due process in cases decided under California's termination law is the conclusion that a sexually active mother can probably prevent permanent termination of her parental relationship on account of her sexual conduct; at least she can if she is either well educated as to her rights or well represented. Precisely because termination is drastic, questions about procedure and due process almost completely overshadow attention to the particular facts about any given mother's conduct. The cases abound with references to liberties and rights. Much less is said about any particular factors affecting the child's best interests. Ultimately, since the Supreme Court has chosen to grant this particular form of family law proceedings' constitutional ramifications, the mother has much in the law to protect her.

B. Dependency

The wardship that is a condition precedent to termination proceedings for neglected children or those of morally depraved parents is accomplished through dependency proceedings.[96] The applicable language in the dependency statute says that among the children who may be adjudged dependent is one "who is in need of proper and effective parental care and control and . . .

93. *Id.* at 4334, n.3 (referring to Cal. Civ. Code § 232(a)(7)(West Supp. 1982)).

94. Cal. Civ. Code § 232(a)(7).

95. *See In re* W.O., 88 Cal. App. 3d 906, 909, 152 Cal. Rptr. 130, 132 (1979); *In re* Robert P., 61 Cal. App. 3d 310, 319, 132 Cal. Rptr. 5, 10 (1976), *appeal dismissed*, 431 U.S. 911 (1977).

96. Cal. Welf. & Inst. Code art. 6 (West Supp. 1982).

has no parent . . . willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control."[97] Likewise subject to a dependency action is the child "whose home is an unfit place for him by reason of neglect . . . [or] depravity . . . of either of his parents."[98] Since having a child judged dependent and a ward of the court does not mean an end to the legal parental relationship or even necessarily a permanent termination of physical custody, the parent's due process rights are regarded as considerably less extensive.[99] Nonetheless, California does attend to those rights by requiring the clear and convincing evidentiary standard and by restricting the consideration of fitness to the time of the hearing.[100]

The test by which the court must decide in a dependency case is provided by statute:

> Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it must make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child.[101]

This provision has been specifically held applicable to juvenile court proceedings;[102] in the same case the California Supreme Court acknowledges the difficulty of defining "detrimental":

> It is a nearly impossible task to devise detailed standards which will leave the courts sufficient flexibility to make the proper judgment in all circumstances . . . *The important point is that the*

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97. CAL. WELF. & INST. CODE § 300(a) (West Supp. 1982) (formerly § 600(a), the relevant language of which was the same).

98. *Id.* § 300(d) (formerly § 600(d), the language of which was the same).

99. Singleman, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1057 (1975).

100. *See In re* Robert P., 61 Cal. App. 3d 310, 132 Cal: Rptr. 5 (1976), *appeal dismissed* 431 U.S. 911 (1977).

101. CAL. CIV. CODE § 4600(b)(1) (West Supp. 1982).

102. See *In re* B.G., 11 Cal. 3d 679, 683, 523 P.2d 244, 246, 114 Cal. Rptr. 444, 446 (1974), for legislative history of Section 4600 in the 1966 REPORT OF THE GOVERNOR'S COMM'N ON THE FAMILY, providing explanation of the purposeful shift from the earlier requirement of finding a parent unfit to present requirement of finding parental custody detrimental; for discussion of the earlier standard, see tenBroek, *supra* note 11, at 966-67.

> *intent of the Legislature is that the court consider parental custody to be highly preferable. Parental custody must be clearly detrimental to the child before custody can be awarded to a nonparent.*[103]

This may be a little like attempting to explain what will warrant termination by saying over and over again that it is "drastic." Emphatic devices are not an entirely satisfactory substitute for actual definitions and spelled-out standards, but they are better than nothing. Presumably "clearly detrimental" is more detrimental than, say, "merely detrimental" would be.

The trouble with assuming that courts will regard detriment under the Civil Code provision as difficult to prove is that Civil Code Section 4600 operates here in the context of the dependency statute, Section 300 of the Welfare and Institutions Code,[104] part of a body of law specifically designed for the poor.[105] In feudal England "[p]oor people were excluded from the idea that parents should be allowed to raise their own children."[106] The Elizabethan Poor Law[107] embodies the principle of taking children away from parents who could not provide for them and making the children indentured apprentices.[108] Given the history of California family law, it is not surprising for it to be characterized as "not single, uniform, and equal as to all families whatever their status, condition, or wealth. On the contrary, it is dual and distinguishes among families on the basis of poverty."[109]

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103. *In re* B.G., 11 Cal. 3d 679, 698, 523 P.2d 244, 257, 114 Cal. Rptr. 444, 457 (1974) (quoting 4 CAL. ASSEM. J. (1969 Reg. Sess. 8060-61) (court's emphasis)).

104. (West Supp. 1982).

105. See tenBroek, *supra* note 13, at 291-317 for a discussion of how English poor law and common law were received in New York and adapted in California through the Field Draft Codes of the 1850's and 1860's.

106. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C.L. REV. 205, 250 (1971).

107. 43 ELIZ., ch. 2, § I (1601).

108. See tenBroek, *supra* note 11, at 961-66 for discussion of how this principle lingers in present welfare legislation.

109. tenBroek, *supra* note 11, at 978. For further explanation of the differences between (1) the public law for the poor, dealing politically with expending and conserving public funds, and having penal overtones, and (2) the private law for the well-to-do, dealing non-politically with distributing family funds, and focusing on civil rights and responsibilities, see tenBroek, *supra* note 13, at 257. For a critique of tenBroek's analysis, see Lewis & Levy, *Family Law and Welfare Policies: The Case for "Dual Systems,"*

On its face, the dependency law is to provide for neglected and mistreated children, a proper exercise of the state's power of parens patriae. It is improper to use that power, however, "to further other objectives, deriving from its police power, that may conflict with the [children's] welfare,"[110] yet such is the charge leveled.

> [T]he common usage of neglect proceedings to punish parents for such behavior as promiscuity . . . , absent any proof that their children are either aware of or harmed by their conduct, represents a distortion of child-welfare laws to further society's collective interest in morality . . . . To advance indirectly a collective state goal such as morality by resort to child-welfare regulation allows state officials to infringe upon deeply personal and emotional attachments between parent and child in order to punish parental conduct peripheral to the relationship.[111]

Middle-class households do not come under the scrutiny that poor households do;[112] middle-class parents are presumed fit, but poor parents are not.[113] Moreover, the poor who are called upon to defend themselves must do so before middle-class judges. "[A]t the heart of most child welfare decisions is essentially a value judgment as to 'what kind of child one hopes to produce . . . .' Yet, the values of juvenile judges . . . are reflections of their personal biases and . . . of their class biases."[114]

Professor Katz focuses blame for this misuse of power on vagueness in the statutes, which get used as "a means of policing the poor, especially parents on public welare, and other parents, often young, who do not conform either in dress, life-style, or child-rearing practices to dominant middle-class norms. Here the interests of the child become secondary to the desire to punish, thus subverting child protection . . . ."[115] California Welfare

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54 CALIF. L. REV. 748 (1966); for a defense, see Weyrauch, *Dual Systems of Family Law: A Comment*, 54 CALIF. L. REV. 781 (1966).

110. *Developments in the Law*, *supra* note 30, at 1199.

111. Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383, 1388-89 (1974).

112. S. KATZ, *supra* note 42, at 42.

113. tenBroek, *supra* note 11 (pt. 3), 17 STAN. L. REV. 614, 676 (1965).

114. Note, *supra* note 111, at 1386-87.

115. S. KATZ, *supra* note 42, at 651.

and Institutions Code Section 600(a),[116] the earlier version of the current Section 300, survived a challenge for vagueness[117] that prompted the court to defend it thus: "[I]t gives fair notice of the evil to be combatted in language giving fair notice to a parent that in the proper care and support of his or her child the parent must exercise such control over the child as parents ordinarily exercise."[118]

Such a dismal picture is brightened somewhat by Professor Katz's acknowledgment that "[a]ppellate judges appear increasingly unwilling to employ neglect laws to impose their middle-class mores upon families and to punish a parent's undesirable conduct unless that conduct can be shown to result in damage to the child."[119] It has also been suggested that exposing a double standard—such as one law for the rich and another for the poor—[120] may hurry its demise.[121]

The trouble is that liberal virtue on the part of appellate judges cannot be as valuable as it might be. This is because appeals are not common even though the typical neglect proceeding is informal and marked by considerable deference to the discretionary judgments of social workers and court investigators.[122] Some idea of welfare agency thinking emerges from a California State Social Welfare Board proposal urging legislative enactment of a presumption that any woman who gives birth to three illegitimate children is morally depraved.[123] At least the Board was willing to regard the presumption as rebuttable. In any event, its position never became the law. However, the implication in it that illicit sexual conduct per se could have the effect of making one an unfit mother has indeed been reflected in court opinions in the form of assumptions about the effect of conduct on children too young to know about it.[124]

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116. (West 1972).

117. *In re* J.T., 40 Cal. App. 3d 633, 115 Cal. Rptr. 553 (1974).

118. *Id.* at 638, 115 Cal. Rptr. at 556.

119. S. KATZ, *supra* note 42, at 69.

120. *See supra* text accompanying notes 109, 113.

121. Weyrauch, *supra* note 109, at 791.

122. Krause, *Child Welfare, Parental Responsibility and the State*, 6 FAM. L.Q. 377, 393 (1972).

123. CAL. HUMAN RELATIONS AGENCY, DEPT. OF SOCIAL WELFARE, POSITION STATEMENT: ILLEGITIMACY 11 (1972).

124. *See e.g., In re* Corrigan, 134 Cal. App. 2d 751, 756, 286 P. 32, 36 (1955):

Ironically, a sexually active mother involved in neglect proceedings may find it to her advantage to be poor. Mothers have been excused for not legitimizing their relationships because they were financially unable to pursue divorce actions against the husbands from whom they had long since parted.[125] One can only speculate how a rich woman would fare in such proceedings, that is, one who did not marry the father of her children because she chose not to marry, not because she was unable to afford it. The speculation would be idle, however, because it is exceedingly unlikely that such a person would have to defend herself in dependency proceedings, no matter how she treated her children. The law more likely to affect the custody of the upper- and middle-class children is Civil Code Section 4600, not Welfare and Institutions Code Section 300. If their mother loses their custody, it is not likely to be to the state but to their father. In this context, the "temporary" loss is regarded as much too insignificant for attention to be given to due process. Thus, mothers lose their children for indiscreet sexual behavior, behavior that one would think insignificant, especially in contrast to the behavior of the father of one James M.[126] Yet this father was allowed to keep his children although he had killed their mother by stabbing her twenty-two times. It appeared to matter to the court that he did not engage in this behavior in front of James and his three siblings.[127]

C. Custody and Best Interests

Civil Code Section 4600 on the custody of children has undergone numerous revisions over the years.[128] In its present form, it retains the best interest standard without any express

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> The capability of a parent to exercise proper parental control is largely determined by external standards and the likely effect continued misconduct will ultimately have on the welfare of a child as it grows up and realizes the significance of such misbehavior rather than the immediate effect upon the child, particularly where it is very young.

125. *E.g.*, *In re* A.J., 274 Cal. App. 2d 199, 201, 78 Cal. Rptr. 880, 882 (1969); *In re* Raya, 255 Cal. App. 2d 260, 266-67, 63 Cal. Rptr. 252, 256-57 (1967).

126. *In re* James M., 65 Cal. App. 3d 254, 135 Cal. Rptr. 222 (1976).

127. *Id.* at 259, 266, 135 Cal. Rptr. at 225, 229.

128. It began as Section 138, enacted in 1872; the "best interest" standard was added in 1931; it became Section 4600 in 1970. The most recent amendment, in 1979, has deleted the tender years presumption and instead given a strong preference to joint custody, which by its nature is a substantial movement away from the best interest standard. *See* Cal. Civ. Code § 138 (West 1954); § 4600 (West 1970 & Supp. 1982).

definition. However, new language at least implicitly indicates a legislative assumption about what is in a child's best interest: "In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex."[129] In the final clause, the rejection of the tender years presumption is pointed. As to the preference for the parent who will more likely foster continuing contact with the other parent, that appears mainly to reinforce the strong preference for joint custody that has been added to the section.[130] It is mentioned as being "among other factors"; alone it provides no workable tool for discovering what is in a child's best interest.

Given the lack of statutory guidance, it appears especially appropriate to look to the experts in the field of child psychology,[131] although courts rarely appear to do that.[132] According to such experts, what makes the best interest test particularly treacherous to apply is that it necessarily involves predictions,[133] even though long-term predictions as to how children will be affected by their present environment are not trustworthy.[134] Another problem is that the best interest test "does not . . . convey to the decisionmaker that the child . . . is already a victim of his environmental circumstances, that he is greatly at risk, and that speedy action is necessary to avoid further harm being done to his chances of healthy psychological development."[135]

Awareness of these difficulties has led one critic to propose substituting for the best interest standard one that looks instead for "the least detrimental available alternative."[136] This at least has the virtue of sounding less pretentious. It recognizes human fallibility and encourages humility on the part of the judge hav-

129. CAL. CIV. CODE § 4600(b)(1) (West Supp. 1982).

130. *Id.*

131. Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 73 (1969).

132. Foster & Freed, *supra* note 11, at 427.

133. Watson, *supra* note 131, at 73.

134. *Id.*; J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 49-53 (1973) [hereinafter cited as GOLDSTEIN].

135. GOLDSTEIN, *supra* note 134, at 54.

136. *Id.* at 53.

ing to make the decision as to which of two parents should have custody of their child.

In the experts' assessments of custody law, there is also much attention given to the importance for a child of "[c]ontinuity of relationships, surroundings, and environmental influence,"[137] so that "[w]hen a child is kept suspended, never quite knowing what will happen to him next, he must likewise suspend the shaping of his personality. This is a devastating result and probably represents one of the greatest risks which current procedures pose for children."[138] The procedures include the constant possibility of modifying the initial custody award made at the time of divorce or dissolution. The California custody laws have consistently provided for any "necessary or proper" award, whether initial or modified. Never in California has there been a statutory "change of circumstances" rule.[139] The law thus all but encourages frequent litigation attempting to modify custody, even though "[i]n the view of most child psychiatrists stability of the environment is far more crucial than its precise nature and content. The one thing with which chil-

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137. *Id.* at 31.

138. Watson, *supra* note 131, at 64.

139. *Compare e.g.*, OHIO REV. CODE ANN. § 3109.04(b) (Page 1980), providing:

> The court shall not modify a prior custody decree unless it finds, based on facts which have arisen since the prior decree or which were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian, and that the modification is necessary to serve the best interests of the child. In applying these standards, the court shall retain the custodian designated by the prior decree unless one of the following applies: (1) The custodian agrees to a change in custody. (2) The child, with the consent of the custodian, has been integrated into the family of the person seeking custody. (3) The child's present environment endangers significantly his physical health or his mental, moral, or emotional development and the harm likely to be caused by a change of environment is outweighed by the advantages of such change to the child.

This section then goes on to incorporate the Uniform Marriage and Divorce Act's list of factors relevant to best interest. See *supra* text accompanying note 57. The Ohio statute is designed to favor continuity and stability by posing a complicted and difficult test before a custody decree is to be modified. However, having practiced family law in Ohio for three years, this author can testify to the limited value of even the most carefully drawn statute in an area where the trier of fact has great discretion. If the trier of fact wants the decree modified, the requisite change of circumstances will be found; if not, the change will not be found.

dren have most difficulty coping is unpredictable variation."[140]

The history of California modification cases has been full of shifts. A leading early California Supreme Court case explaining best interest principles insisted that for modification there must be compelling change.[141] This position was reinforced in a subsequent appellate court's insistence that the custodial parent's conduct producing the changed circumstances must have some specific impact on the child's well-being.[142]

However, when a court wanted to modify and had no changed circumstances on which to base the modification, it simply pointed out that the change is not required by statute, that the "rule" is really only a policy to prevent "vexatious litigation," and that, furthermore, this policy is only an evidentiary aid to a court exercising its discretion in a child's best interest.[143] Citing this case, another appellate court went to far greater lengths to try to kill the rule, producing limitations never expressed before, although it would seem from the court's opinion that they were not new:

> The rule that there must be a showing of "changed circumstances" has no application where the trial court has modified a decree. That rule only applies where the trial court has refused to modify a decree and it is contended an abuse of discretion occurred. To show such abuse there must be a showing of changed circumstances.[144]

While this view has not been given subsequent attention, the view has been followed that change of circumstances, or lack of it, is only evidence, like any other.[145]

Another later expressed limitation is that no change of circumstances should be necessary to modify a stipulated custody award because the parties' agreement forestalled any litigation

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140. Watson, *supra* note 131, at 71.

141. Prouty v. Prouty, 16 Cal. 2d 190, 193, 105 P.2d 295, 297 (1940).

142. Washburn v. Washburn, 49 Cal. App. 2d 581, 587, 122 P.2d 96, 100 (1942).

143. Kelly v. Kelly, 75 Cal. App. 2d 408, 415-16, 171 P.2d 95, 96 (1946).

144. Frizzell v. Frizzell, 158 Cal. App. 2d 652, 655, 323 P.2d 188, 191 (1958).

145. *See* Urquhart v. Urquhart, 196 Cal. App. 2d 297, 301, 16 Cal. Rptr. 469, 471 (1961).

of the best interest of the child.[146] The case setting forth this limitation was expressly disapproved in a much more recent California Supreme Court case, *In re Marriage of Carney*,[147] proclaiming the continued vitality of the change of circumstances rule. The real lesson of *Carney*, however, is to be learned not from its pronouncements but from its facts. The mother having given up custody by stipulation five years earlier, it was the perfect modification setting in which to argue that no change should be required because best interest had not been litigated. If change was to be required, however, it certainly was available; the custodial father had in the interim become a quadraplegic. Nonetheless, the Supreme Court reversed the trial court's transfer of custody to the mother. The opinion is a model of respect for the state's policy of not punishing the handicapped.[148] It is perhaps admirable in its insistence that good fathering is not to be defined exclusively in terms of participation in sports.[149] However, if this case is supposed to teach that the change of circumstances rule is alive and well, but that here there was no change, then it gives a double message. The lesson though is clear: Practitioners rely at their peril on the supportive rhetoric in court opinions. They should look instead with cold, clear eye at what courts do and why.

Whether or not a change of circumstances is said to be required by a given court for modification, and indeed whether the setting is modification or initial award, sexual activity between the mother and a man other than the father has the capacity to produce custody battles that are at least vigorous and at most vituperative to the point that one wonders whether the father is motivated more by concern for the best interests of his child or by desire to take revenge upon the child's mother.

In the exercise of their discretion, courts can respond to allegations about the mother's sexual conduct by viewing it in one of four ways: (1) taking the position that such conduct conclusively disqualifies the mother as custodian, (2) rebuttably presuming her unfit, (3) rebuttably presuming a future direct

146. *See* Loudermilk v. Loudermilk, 208 Cal. App. 2d 705, 707-08, 25 Cal. Rptr. 434, 436 (1962).

147. 24 Cal. 3d 725, 730-31, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385 (1979).

148. *Id.* at 736-40, 598 P.2d at 42-46, 157 Cal. Rptr. at 389-92.

149. *Id.* at 737-39, 598 P.2d at 43-44, 157 Cal. Rptr. at 389-91.

adverse impact of her conduct on the child, or (4) requiring such impact be presently shown before denying her custody.[150] While it is possible to work out complicated tests for which approach is actually applied in any given case, a survey of the California cases lends itself to a simpler division between those cases in which some level of presumption works against the mother and those in which an actual showing of present adverse impact is required for denial of custody.

A sexually active mother should be denied custody "when [her] child's physical or emotional well-being is immediately, demonstrably, and seriously threatened."[151] The reason to require that the adverse impact be present and demonstrated rather than predicted or presumed is that to allow prediction and presumption is to encourage "a decision based more on abhorrence of parental moral values and conduct than on an analysis of what disposition would be in the best interests of the child,"[152] and to "creat[e] an unacceptably high risk that a desire to punish rather than a genuine concern with the best interests of the child will influence the exercise of judicial discretion."[153] These concerns focus on the potential for judges to make decisions based on improper motives, but more important than motive is result. If the experts are right that stability, predictability, and continuity are the primary values, then it may be that attending to the sexually active mother's rights and attending to her child's best interests lead to the same conclusion: Absent actual present harm, the mother's conduct should not cause her to lose custody.

The United States Supreme Court has in other contexts pointed out the inappropriateness of legal classifications based on "sin,"[154] and decisions that have the effect of punishing the child for the mother's immorality.[155] Comparable principles have been expressed by California courts,[156] sometimes in cases in-

150. Lauerman, *Nonmarital Sexual Conduct and Child Custody*, 46 U. CIN. L. REV. 647, 654, 670-71 (1977).

151. *Id.* at 723.

152. *Id.* at 675.

153. *Id.* at 672.

154. *See, e.g.*, Glona v. American Guar. Liab. Ins. Co., 391 U.S. 73, 75 (1965).

155. *See, e.g.*, King v. Smith, 392 U.S. 309, 325 (1968).

156. *See, e.g.*, *In re* W.O., 88 Cal. App. 3d 906, 910, 152 Cal. Rptr. 130, 132 (1979)

volving parental battles for custody. *Washburn v. Washburn*[157] was decided forty years ago, but the court sounds quite contemporary in its approach:

> [A]cts and conduct of one of the parties to the divorce which give offense to the other, or even to the public at large, are not a matter that calls for or permits a change of custody unless such acts and conduct are shown to affect directly the welfare and best interests of the child. Where a court has decreed custody to one parent, such parent may not be deprived of the custody for any supposed unfitness unless it be shown that he or she is so unfit as to endanger the child's welfare. A custody proceeding is not one to discipline one parent for such parent's shortcomings as an *individual*, nor to reward the other for any wrong suffered therefrom.[158]

However, by no means are all the California opinions immune from the criticisms of Professors Foster and Freed that "as a group [cases involving custody awards] are marked by question-begging, rigid rules, and platitudes . . . ."[159] Here is what an appellate court had to say about one adulterous woman: "[W]e do not well see how it can be reasonably contended that . . . a married woman having such loose ideas of morality . . . can be said to be a fit and proper person to control, shape or guide the destinites of minor children."[160]

It may seem easy to write off such a statement as reflecting the outmoded thinking of half a century ago; yet here is a far more recent statement in which the tone is not appreciably different. The court describes a relationship as "a defiant maintenance . . . of living conditions in which a child, rapidly leaving babyhood, was being continuously exposed to almost inevitable

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("Punishing the parent distorts the focus of the custody inquiry; that focus must be exclusively on the question whether actual harm will come to the child.").

157. 49 Cal. App. 2d 581, 122 P.2d 96 (1942).

158. *Id.* at 587-88, 122 P.2d at 100 (court's emphasis), *quoted with approval in* Sorrels v. Sorrels, 105 Cal. App. 2d 465, 471, 234 P.2d 103, 106 (1951); *see also* Ashwell v. Ashwell, 135 Cal. App. 2d 211, 217, 286 P.2d 983, 987 (1955) *quoted with approval in* Bialac v. Bialac, 240 Cal. App. 2d 940, 947, 50 Cal. Rptr. 12, 16 (1966).

159. *See* Foster & Freed, *supra* note 11, at 427.

160. Warren v. Warren, 127 Cal. App. 231, 239-40, 15 P.2d 556, 559 (1932).

discovery of his mother's improbity"[161] and also as "an open and notorious bringing of a paramour into the home under circumstances defying accepted social concepts."[162] After such statements as these, the unvarnished statement of the general principle begins to seem something of an understatement: "[I]n nearly every case, one of the things considered in deciding what is for the welfare of the child is the personal behavior and characteristics of the parent."[163]

Ultimately, there appear to be no significant differences in California between initial award and modification cases, either in what the standards are or in how they are applied. What does matter, to a critical degree, is whether the court employs some level of presumption that the mother's sexual activity will be harmful to the child. No matter how easily the presumption is claimed to be rebuttable, if the court requires anything less than an actual showing of present direct adverse impact, the mother is very likely not to be granted custody.

In affirming the denial of custody to one adulterous mother for conduct described as "indiscriminate, profligate and shameless,"[164] the court expressed the principle that has been at the root of the presumption against sexually active mothers: "To be entrusted with the rearing of children a mother should be possessed of such character and conduct that by the force of her example she can train them in the paths of morality, righteousness and rectitude."[165] Here surely is the sort of rigid and platitudinous statement to which Professors Foster and Freed refer. Long is the list of mothers who have lost their children because of just such thinking.[166] The sexually active mother can lose her children to a bigamist;[167] she can lose them to a child-snatch-

161. Dahl v. Dahl, 237 Cal. App. 2d 407, 412, 46 Cal. Rptr. 881, 884 (1965).

162. *Id.*

163. Stack v. Stack, 189 Cal. App. 2d at 371, 11 Cal. Rptr. at 188.

164. Currin v. Currin, 125 Cal. App. 2d 644, 650, 271 P.2d 61, 65 (1954).

165. *Id.*

166. *See, e.g.*, Dahl v. Dahl, 237 Cal. App. 2d 407, 46 Cal. Rptr. 881 (1965); Foley v. Foley, 214 Cal. App. 2d 802, 29 Cal. Rptr. 857 (1963); Mathewson v. Mathewson, 207 Cal. App. 2d 532, 24 Cal. Rptr. 466 (1962); Santens v. Santens, 180 Cal. App. 2d 809, 4 Cal. Rptr. 635 (1960); Bush v. Bush, 72 Cal. App. 2d 487, 164 P.2d 774 (1946); Warren v. Warren, 127 Cal. App. 2d 231, 15 P.2d 556 (1932); Russell v. Russell, 20 Cal. App. 457, 129 P. 467 (1912).

167. *See, e.g.*, Grubaugh v. Grubaugh, 200 Cal. App. 2d 151, 19 Cal. Rptr. 141

er.[168] She can lose a child far too young to have any knowledge of her sexual conduct or its impact.[169] She can lose her child even if she has attempted to "cure" her fault by marrying the man with whom she has had her sexual involvement.[170]

How completely a court can discard the best interest standard is perhaps best illustrated in a case where the appellate court affirmed the transfer to the father of custody of a fifteen month old baby.[171] The court expressly acknowledged that the child "did not appreciate the impropriety of his mother's conduct."[172] That, however, was of no consequence. The appellate court approved of the fact that the mother's "deceitful and immoral conduct was the paramount and primary factor upon which [the trial judge] based his decision."[173] Here is a court openly more interested in punishing a mother than protecting her child—and proud of it.

Presumption cases are not the only ones in which a mother loses custody. She also loses custody when the court requires a showing of direct adverse impact and finds it, such as in a case where the mother's sexual encounters involve her leaving her children alone all night,[174] or where having men stay overnight produces "an unwholesome environment for a boy at [an] impressionable age."[175] The only cases in which the mother consistently prevails are those in which direct adverse impact is required and not found.[176]

(1962).

168. *See, e.g.*, Currin v. Currin, 125 Cal. App. 2d 644, 271 P.2d 61 (1954).

169. *See, e.g.*, Dahl v. Dahl, 237 Cal. App. 2d 407, 46 Cal. Rptr. 881 (1965); Foley v. Foley, 214 Cal. App. 2d 802, 29 Cal. Rptr. 857 (1963); Mathewson v. Mathewson, 207 Cal. App. 2d 532, 24 Cal. Rptr. 466 (1962); Edwards v. Palleschi, 167 Cal. App. 3d 555, 334 P.2d 671 (1959); Currin v. Currin, 125 Cal. App. 2d 644, 271 P.2d 61 (1954).

170. *See, e.g.*, Edwards v. Palleschi, 167 Cal. App. 2d 555, 334 P.2d 671 (1959).

171. Mathewson v. Mathewson, 207 Cal. App. 2d 532, 24 Cal. Rptr. 466 (1962).

172. *Id.* at 539, 24 Cal. Rptr. at 471.

173. *Id.* at 538, 24 Cal. Rptr. at 470.

174. *See, e.g.*, Harris v. Harris, 186 Cal. App. 2d 788, 9 Cal. Rptr. 300 (1960).

175. Coil v. Coil, 211 Cal. App. 2d 411, 416, 27 Cal. Rptr. 378, 381 (1962).

176. *See, e.g., In re* Marriage of Wellman, 104 Cal. App. 3d 992, 164 Cal. Rptr. 148 (1980); *In re* Marriage of Russo, 21 Cal. App. 3d 72, 98 Cal. Rptr. 501 (1971); Nelson v. Nelson, 261 Cal. App. 2d 800, 68 Cal. Rptr. 427 (1968) (particularly noteworthy because child here did see mother in bed with man); Bialac v. Bialac, 240 Cal. App. 2d 940, 50 Cal. Rptr. 12 (1966); Newell v. Newell, 146 Cal. App. 2d 166, 303 P.2d 839 (1956); Ashwell v. Ashwell, 135 Cal. App. 2d 211, 286 P.2d 983 (1955); Sorrels v. Sorrels, 105 Cal. App. 2d 465, 234 P.2d 103 (1951).

Reading the range of the cases, one begins to suspect that courts decide result first and then make a compatible decision about the presumption. If a court decides, for whatever reason, expressed or not, that a woman ought not to have custody, then that court can either make the presumption operate or it can insist on a showing of impact and find the impact. Likewise, if a court decides that a woman ought to have custody, then that court can refuse to accept any presumption, require impact, and not find it.

In the search for predictability, three factors are worth noting. The first is that the courts tend to express much more moral outrage at mothers who are promiscuous than at those who have but one sexual relationship.[177] Second only to promiscuity as a trigger for a court's ire is the mother's lying about her sexual conduct,[178] especially if she attempts to conceal a pregnancy from the court.[179] Finally, courts that find in favor of the sexually active mothers in spite of their sex lives are quick to note any evidence of remorse or "reform" and make much of it.[180] The key may be that some judges like to patronize as much as they like to punish, as in a statement such as this one: "The frankness and candor with which [the mother] explained her transgressions . . . impressed the court and gave credence to other evidence of her good faith and determination to rectify past errors."[181]

Sexual activity has not been the issue on appeal very often in the last ten years. It would be a mistake to conclude, however, that this means that courts and litigants alike have come to see it as a matter irrelevant to the best interests of children. The continuing potential for controversy is illustrated in a 1980 case where an appellate court held invalid a condition in a custody award that prohibited the mother from living with a man to

177. *Compare* Dahl v. Dahl, 237 Cal. App. 2d 407, 46 Cal. Rptr. 881 (1965) *and* Coil v. Coil, 211 Cal. App. 2d 411, 27 Cal. Rptr. 378 (1962) (promiscuity) *with In re* Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (1967) (stability).

178. *See, e.g.*, Santens v. Santens, 180 Cal. App. 2d 809, 4 Cal. Rptr. 635 (1960).

179. *See, e.g.*, Mathewson v. Mathewson, 207 Cal. App. 2d 532, 24 Cal. Rptr. 466 (1962); Edwards v. Palleschi, 167 Cal. App. 2d 555, 334 P.2d 671 (1959).

180. *See e.g., In re* Russo, 21 Cal. App. 3d 72, 98 Cal. Rptr. 501 (1971); Nelson v. Nelson, 261 Cal. App. 2d 800, 68 Cal. Rptr. 427 (1968).

181. Nelson v. Nelson, 261 Cal. App. 2d at 802, 68 Cal. Rptr. at 428 (1968).

whom she was not married.[182] Because the court's opinion mentions the rights of privacy and association,[183] it would be tempting to make much of this case as imposing constitutional sanctions on violating custodial mothers' rights. However, it would be a misrepresentation of the case to do so, for the court declines to make the constitutional issues the basis for the decision. Rather, the decision rests simply on there having been no evidence presented with respect to impact.[184] In other words, this case is actually just one more that requires impact and does not find it. The door is still very much open for impact to be found in future cases and to govern their results.

Furthermore, there is a concurring opinion in this 1980 case couched in language reminiscent of the opinions of many decades ago:

> If the evidence were otherwise, I would, of course, be glad to leap . . . into the murky waters of parental sexual morality and its impact upon minor children. There are other rights dimly discernable in those depths: the rights, for example, of noncustodial parents to have their children raised in circumstances consonant with still widely shared notions of decent behavior; the rights of children to be protected from the effects of 'depravity' . . .; and the right of government to insist that certain traditional notions of morality be maintained within families, for the benefit of the state.[185]

V. CONCLUSION

What may matter most—no matter which statute is invoked to try to take custody from the sexually active mother—is that appellate courts are loath to reverse cases in an area about which trial courts have such broad discretion.[186] Thus, "the force of a case as a precedent depends very greatly on whether it re-

182. *In re* Wellman, 104 Cal. App. 3d 992, 999, 164 Cal. Rptr. 148, 152-53 (1980).

183. *Id.* at n.5, 164 Cal. Rptr. at 152.

184. *Id.* at 999, 164 Cal. Rptr. at 152-53.

185. *Id.* at 1000, 164 Cal. Rptr. at 153 (Newson, J., concurring).

186. *See* Prouty v. Prouty, 16 Cal. 2d 190, 191, 105 P.2d 295, 296 (1940) (citing Taber v. Taber, 209 Cal. 755, 290 P. 36 (1930); Simmons v. Simmons, 22 Cal. App. 448, 134 P. 791 (1913)).

versed or affirmed the order appealed from . . . ."[187] Likewise, the usefulness of a case turns out to depend on how the court approaches its task in the opinion. What particularly frustrates careful analysis occurs when the court narrates at length the facts about the mother's life style and then abruptly concludes that it was no breach of discretion to remove a child from such a home.[188] One reads in vain to discover whether the result would change if one or another or all but one of the facts were altered.

Opinions in cases reversing custody denials are organized quite differently. If the mother gets the child, the court analyzes and explains at length after narrating the facts very briefly, if at all.[189] In any event, this is definitely not an area in which mothers can look to the appellate court to right trial court wrongs. Even if a given mother has the rare case that produces an appellate reversal in her favor, the damage done to the continuity and stability in the child's life will not be undone by that reversal.

Twice so far, the United States Supreme Court has been asked to enter the custody area and twice it has refused to grant certiorari. The first time, a father had brought an habeas corpus action to regain custody of his son from the maternal grandparents to whom he had turned over the boy after the mother died. The Iowa Supreme Court preferred the conventional, middle-class Iowa grandparents in their sixties to have custody of the boy of seven instead of his California "Bohemian" father. The United States Supreme Court would not become involved.[190]

The second time the Court would not grant certiorari was when a mother lost custody of her three daughters to their father because the Illinois Supreme Court found that her violation of the state's fornication statute showed "disregard for existing standards of conduct [that] instructs her children, by example that they too, may ignore them and could well encourage the

187. Stack v. Stack, 189 Cal. App. 2d at 372, 11 Cal. Rptr. at 188.

188. *See, e.g.*, Mathewson v. Mathewson, 207 Cal. App. 2d 532, 24 Cal. Rptr. 466 (1962).

189. *See, e.g., In re* J.T., 40 Cal. App. 3d 633, 115 Cal. Rptr. 553 (1974).

190. Painter v. Bannister, 258 Iowa 1390, 1393-96, 140 N.W.2d 152, 154-55, *cert. denied*, 385 U.S. 949 (1966).

children to engage in similar activity in the future."[191]

Justices Brennan, Marshall and Blackmun dissented from the denial of certiorari to address "the question whether the Due Process Clause entitles [the mother] to a meaningful hearing at which the trial judge determines, without use of a conclusive presumption, whether violation of the fornication statute adversely affects the well-being of the children."[192] Justice Brennan goes further than simply to acknowledge that the use of such a presumption poses a due process question, however. On the substance of the presumption he says in his opinion, joined by Justice Marshall: "Nothing . . . in logic supports a conclusion that divorced parents who fornicate, for that reason alone, are unfit or adversely affect the well-being and development of their children in any degree over and above whatever adverse effect separation and divorce may already have had on the children."[193]

While it is good to know that there are at least two, and possibly three, justices who understand the inadequacy of the presumption to address the interests of children, it remains unlikely that any time soon custody disputes between parents will be viewed by the entire Court as deserving attention to due process. There is still represented on the Court the view that even termination proceedings do not warrant such attention. In his dissenting opinion in *Santosky v. Kramer*, Justice Rehnquist worries that the majority "begins . . . a trend of federal intervention in state family law matters which surely will stifle creative responses to vexing problems."[194]

If custody problems are "vexing," as they surely are; if "creative responses" are the products of state courts' discretion, which is often virtually immune from review; and if the legal loss of a child is only now beginning to be recognized as of sufficient magnitude to warrant due process protection in any statutory setting, then at their peril do mothers themselves engage in presumptions about the courts of a liberal state in liberated times?

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191. Jarrett v. Jarrett, 78 Ill. 2d 337, 346-47, 400 N.E.2d 421, 424 (1979), *cert. denied*, 449 U.S. 927 (1980).

192. 449 U.S. at 931 (Brennan, J., dissenting).

193. *Id.* at 930.

194. 50 U.S.L.W. 4333, 4345 (U.S. March 23, 1982).

Given a custody statute that is silent on some important matters and vague on others, together with a collection of inconsistent court opinions for precedents, judges may do with their discretion virtually whatever they will.

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