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SURVEY: WOMEN AND CALIFORNIA LAW

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A. FETAL RIGHTS

1. *A child has a cause of action based on the constitutional violation of his right to familial companionship and society, even though a fetus at father's death.*

Crumpton v. Gates, 947 F.2d 1418 (9th Cir. 1991). John Crumpton, a six year old boy, brought a civil rights action under 42 U.S.C. § 1983[1] against Los Angeles Police Chief Daryl Gates, several former police chiefs, and various political officials, including the Mayor of Los Angeles, Tom Bradley. Crumpton alleged that the killing of his father by an alleged "death squad" team of the L.A. police department constituted a violation of his own constitutional rights.

The district court granted summary judgment on the ground that, because Crumpton was a fetus at the time his father was killed, he was not a person within the meaning of § 1983, and was therefore unable to bring the civil rights claim. The U.S. Court of Appeals, Ninth Circuit reversed and remanded holding that Crumpton's injury and cause of action did not arise until his birth, and therefore he was entitled to proceed in his civil rights claim. The case was one of first impression and the court noted, "our research has uncovered no federal case on all fours."[2] Nevertheless, the court used common law tort principles, rejected the potential to impact the important principles behind *Roe v Wade*[3] and made a sound, thoughtful decision. But, as this note will examine, potential dangers loom from the decision: namely the potential implications for women and their constitutional right to privacy.

The story begins on September 15, 1982, when a group of police officers of the L.A. police department "death squad" killed John Crumpton's father. The mission of the "death squad" officers was to execute those criminals who were "escaping the arm of the law in that they were not being convicted for crimes they had committed, and when convicted, their sentences were too short and/or inadequate."[4] At the time of his father's death, Crumpton was a two-month old fetus.

1. 42 U.S.C. § 1983 (1988) [hereinafter § 1983].
2 Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991).
3. Roe v. Wade, 410 U.S. 113 (1973).
4. *Crumpton*, 947 F.2d at 1419.

Six years later, Crumpton brought a civil rights action for his own damages sustained as a result of the loss of his father. Under § 1983, Crumpton sought compensatory and punitive damages based on violations of his Fourteenth Amendment rights, namely an assertion of his substantive due process rights based on the violation of his right to familial companionship and society.[5]

The applicable law, § 1983, does not create substantive rights, it merely serves as the procedural device for enforcing substantive provisions of the Constitution and federal statutes.[6] Thus, as the court indicated, a § 1983 plaintiff must allege an independent basis for relief, namely a violation of rights protected by the Constitution or created by federal statute.[7] Here, while the Fourth Amendment right of Crumpton's father "not to be subjected to the use of excessive force" did not give rise to Crumpton's own cause of action, in *Smith v. City of Fontana*[8], the court allowed the decedent's children to assert a substantive due process claim based on the violation of their right to familial companionship and society.[9] The court in *Fontana*[10] characterized the child's interest as "a cognizable liberty interest which the state has no legitimate interest in interfering with...through the use of excessive force."[11] Moreover, the Crumpton court noted that congressional intent found in the legislative history of § 1983's precursor, the Klu Klux Klan Act, was to remedy the "wrongs, arsons, and murders done."[12] In particular, this remedy was available for those children whose father had been killed.

In addition to alleging "a deprivation of constitutional proportion"[13] to sustain relief under § 1983, the plaintiff must be a citizen of the United States or other "person."[14] Indeed, "the crux of this case...", according to the court, was "not the nature

5. *Crumpton*, 947 F.2d at 1420. In addition, Crumpton sought injunctive relief in the form of either an order that the "death squad" disband or court supervision of "death squad" activities.

6. *See, e.g.* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617 (1979); and *Parratt v. Taylor*, 451 U.S. 527, 535 (1981).

7. *Crumpton*, 947 F.2d at 1420.

8. Smith v. City of Fontana, 818 F.2d 1411, 1418 (9th Cir.), *cert. den'd* 484 U.S. 935 (1987).

9. *Id.*

10. *Id.*

11. *Id.* at 1419-20.

12. *Id.* at 1421.

13. *Crumpton*, 947 F.2d at 1421.

14. *Id.*

of the constitutional right asserted, but rather *who* may bring a suit under § 1983."[15] (emphasis added).

Defendants cited *Roe v. Wade*[16] to support their argument that Crumpton was not a proper party to bring a cause of action under § 1983. According to *Roe*[17], the word "person" as used in the Fourteenth Amendment, does not include the unborn.[18] The defendants argued that because Crumpton was a fetus at the time his father was killed, Crumpton was not a "person" as contemplated by § 1983 and required under the Fourteenth Amendment. Therefore, he was precluded from raising a cause of action. The district court adopted this reasoning and granted summary judgment. The U.S. Court of Appeals departed entirely from this line of reasoning and found that *Roe v Wade* was "inapposite."[19] "This case ... does not involve a physical injury to a fetus. Here the substantive constitutional injury upon which Crumpton relies is ... a substantive due process liberty interest in having familial relations with a parent."[20]

Despite the fact that the child was a fetus at the time of his father's murder, the child's injury and cause of action for loss of familial companionship arose at the time of his birth.[21] Thus, according to the U.S., Crumpton was a "person" under the 14th Amendment of the Constitution and therefore able to bring a claim under § 1983. The court reached this conclusion by distinguishing the wrongful act of the father's murder from the actual injury it ultimately inflicted upon the little boy. The issue framed by the court was not whether John Crumpton had any rights while he was a fetus. Instead, in permitting him to bring a claim that he was unconstitutionally deprived of his father, the court focused on the common law tort concept that "although the term 'wrongful act' is often thought to be synonymous with the injury, if an injury does not result immediately, the cause of action arises upon its occurrence."[22]

Similarly, although the wrongful act occurred while Crumpton was *in utero*, the injury or suffering which flowed

15. *Id.*
16. *Roe,* 410 U.S. at 113.
17. *Id.*
18. *Id.* at 158.
19. *Crumpton,* 947 F.2d at 1421.
20. *Id.* at 1422.
21. *Id.*
22. Vaughn v. J.C. Penney, Inc., 822 F.2d 605, 609-10 (6th Cir.) (1987).

from that wrongful act occurred postnatally. The focus of the inquiry therefore was the time of injury. According to the court: "[w]here a child claims unwarranted state interference with his rights to familial companionship and society, the injury to this right can only occur after birth since a familial right cannot arise until a fetus is born and actually suffers from not having a parent."[23]

The court's decision is sound and logical; it is supported by applicable case law, particularly in the area of torts, and supported by the history and legislative intent of § 1983 to be "broadly construed to effectuate remedial purposes."[24] Yet, the legal community has called this an "unusual legal ruling."[25] In particular, the court failed to address the issue of whether a fetus was a person, and left many unanswered questions about the rights of a fetus to assert a § 1983 claim.

The court specifically avoided relying on *Roe v. Wade*[26], thus "sidestepping the issue of whether a fetus should be considered a person with the right to sue in federal courts."[27] The attorney who represented John Crumpton commented after their victory: "the case now brings within the coverage of federal civil rights all persons who were *in utero* at the time that injuries were inflicted on their parents."[28] Has the court really sidestepped *Roe*[29], or rather has the decision moved us closer to recognizing the fetus as a person, with all rights and liberties espoused under the Constitution?[30]

While the court seems to agree with *Roe v. Wade*[31] and its reasoning that a fetus is not a person, the dicta is worrisome

23. *Crumpton*, 947 F.2d at 1422.

24. *Id.* at 1423.

25. *San Francisco Chron.*, Nov. 15, 1991, at A-15, col. 4.

26. *Roe*, 410 U.S. at 113.

27. *San Francisco Chron.*, Nov. 15, 1991, at A-15, col. 4.

28. Attorney Steven Yagman estimated, based on considerable research, that this new cause of action amounts to about 10% of all the civil rights cases that could be filed nationally. Phone conversation with Mr. Yagman (February 21, 1992).

29. *Roe*, 410 U.S. at 113.

30. In an unrelated case involving allegations of excessive force and the rights of unborn children, Mr. Yagman won a $415,229 award in May 1988. His plaintiff, Brenda Cornwell, said a Riverside police officer punched her in the stomach when she was three months pregnant during a party that had become raucous. The jury did not award damages to the women's daughter, who was 18 months old. But the district court judge presiding, Ferdinand F. Fernandez, issued a tentative ruling that *constitutional rights begin at conception.*" (emphasis added) Cornwell v. City of Riverside, 896 F.2d 398 (9th Cir.); *cert. denied*, 110 S.Ct. 3274 (1990).

31. *Roe*, 410 U.S. at 113.

as it may contribute to the current trend of eroding women's right to privacy as more courts begin to acknowledge the fetus as a person. The current trend is that many states do provide a cause of action for injury to a viable fetus, regardless of whether it is later born alive.[32] In fact, one recent case noted that "[a] majority of the states allow an action for wrongful death of a viable fetus even when it is still born as a result of prenatal injuries."[33] Moreover, virtually every jurisdiction, including California, currently allows children born to recover in tort for prenatal injuries caused by third parties.[34]

One commentator noted: "[t]he inclusion of fetuses in the group of persons protected by...tort law is not necessarily inconsistent with the interests of the mother."[35] Moreover, "judicial recognition of a child's right to recover damages for tortious prenatal injury does not mean that the courts recognize unborn fetuses as persons with full legal rights."[36] Indeed, the decision in *Crumpton* seems to suggest that they are interested in protecting the interests of the damaged live born person against third parties only, in this case, the police. As another commentator noted: "The courts are not compensating fetuses but are instead compensating children who need

32. *Crumpton*, 947 F.2d. at 1423.

33. Humes v. Clinton, 792 P.2d 1032, 1036 (Kan. 1990). In *Humes*, the court reasoned that an unborn non viable fetus is not a person within the definition of the wrongful death act, and therefore incapable of bringing an action on its own behalf. A viable fetus, on the other hand was a "person" within the meaning of the wrongful death statute because it was capable of an independent existence and regarded as a separate entity." This is the position of a majority of the states for determining standing for wrongful death actions against third parties. *See also* Hale v. Manion, 368 P.2d 1 (Kan. 1962).

34. International Union U.A.W. v. Johnson Controls, 111 S. Ct. 1196 (1991) (White, J. joined by Rehnquist, C.J. and Kennedy, J., concurring in part and concurring in judgment). The right of recovery for a prenatal injury inflicted by a third party now appears to be well settled principle in tort law. RESTATEMENT (SECOND) OF TORTS § 869 (I) (1977). *See also* W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *Prosser and Keeton*, § 55, at 368 (5th ed. 1984).

35. Kim, *Reconciling Fetal/Maternal Conflicts*, 27 IDAHO L. REV. 223 (1991) [hereinafter Kim]. To a certain extent, laws that recognize fetal rights against third parties, also protect the mother from having other people interfere or harm her pregnancy against her will. "Holding third parties responsible for the negligent or criminal destruction of fetuses is ...consistent with, and even enhances, the protection of pregnant women's interests." *See* Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L.J., 599, 603 [hereinafter Johnsen].

36. Nelson, *Forced Medical Treatment of Pregnant Women: Compelling Each to Live as Seems Good to the Rest*, 37 HASTINGS L.J. 703, 733 (1986) [hereinafter Nelson]. *See also*, Glantz, *Is the Fetus a Person?* A LAWYER'S VIEW, in ABORTION AND THE STATUS OF THE FETUS 114 (W. H. ENGELHARDT, JR., S. SPICKER & D. WINSHIP ed. 1983).

special medical treatment....The point in pregnancy when those acts occur does not serve to deflect the courts from their *rightful goal of compensating the injured child.*"[37] (emphasis added).

But, this is where the danger lies: the recognition of fetal rights which conflicts with the mother's privacy rights. While the *Crumpton* principle does not address fetal rights per se, does it have the potential to be a disguise for the same potential harm —is it the wolf in sheep's clothing? Under *Crumpton* will a child now have a cause of action against his/her mother based on "the right to freedom from excessive force?" And if so, does this ultimately conflict with women's privacy rights?

Many argue that the recognition of some legal protections for the fetus does not transform the fetus into a person with full legal rights.[38] A fetus may or may not possess legal protections depending on the legal context and the social policies at stake.[39] The reasoning in *Crumpton* indicates that, based on the societal context and remedial nature of § 1983, the court recognized the importance of the constitutional right involved. By allowing Crumpton to proceed with a cause of action, there is the possibility of compensaton to a child for losing a father. It is precisely the nature of the right involved, the rights to familial companionship and society, that forms the basis for Crumpton's cause of action which the court narrowly defines by distinguishing the rights of a fetus as compared with a born child.

Despite the Court's ruling, which focused on a post-birth "injury," the court seems willing to allow a cause of action to a child for injuries sustained from prenatal activity *while in utero*. (emphasis added). The court challenges the reasoning behind *Harman v. Daniels*[40], which established the principle that a child cannot sue the police department for direct prenatal

37. Kim, *supra* note 34, at 229.

38. Johnsen, *supra* note 34.

39. The legal status of the fetus should be determined largely by the purpose of the particular law in question, rather than by a particular philosophical view of fetal "personhood." For example, the legal capacity of an unborn fetus, if born alive, to inherit property is better understood as a way to fulfill the intentions of the testator, a goal of inheritance law, than as recognition of fetal personhood. And in the context of tortious context, the law attempts to compensate the innocent victims of injury. Nelson, *supra* note 35, at 739-740.

40. Harman v. Daniels, 525 F. Supp. 798 (W.D. Va. 1981).

injuries caused while *in utero*.[41] The Court notes in footnote, that "we have grave doubts about the *Harman*[42] Court's proposition that an infant injured *in utero* and later born alive simply must bear their federally cognizable afflictions without the hope of remedy."[43] Indeed the Court recognizes "a right to freedom from excessive force..."[44] and seems willing to hold third parties liable under § 1983 for physical injuries caused to fetuses where there is also injury at birth. Whether the right to freedom from excessive force is a recognizable constitutional claim, the Court does not answer. While it seems logical and even justifiable to hold third parties, such as the police, responsible for injuries to one's child, it is troubling in the context of potential liability of a mother, where the "injury" to the child was due to some behavior on the part of the mother.

The use of tort law to hold third parties liable for injuries inflicted on a fetus does indeed compensate the parents. This is because in some cases, any injury inflicted on the fetus is necessarily inflicted on the parents as well.[45] The recognition of fetal rights, however, increases the potential conflicts between the women and the fetus. By allowing the fetus to have independent rights as a "person" the law focuses upon the individuality of the fetus. And as the individuality of the fetus becomes increasingly recognized by the law, there is greater potential and justification for the assertion of fetal rights against the woman bearing the fetus.[46] Moreover, "decisions recognizing this rightful goal of compensating the live-born child may be misinterpreted as granting a fetus broad rights it does not, and should not possess."[47]

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41. See also, Ruiz Romero, 681 F. Supp 123 (D. Puerto Rico 1988); where a woman was beaten by police when she was nine months pregnant, the court held that the woman's child had no cause of action under 1983. As to these two decisions, the court notes: "Even assuming arguendo, that *Harman and Ruiz Romero* were correctly decided, *a presumption we question....*" (emphasis added). *Crumpton* 947 F. 2d. at 1422.

42. *Harman,* 525 F. Supp. at 798.

43. *Crumpton* 947 F.2d at 1424, n.6. In dicta the court also noted: "We need not decide whether *Harman* was incorrectly decided." at 1423.

44. *Crumpton*, 947 F. 2d at 1422.

45. Johnsen, *supra* note 34, at 603.

46. As fetuses take on more and more characteristics of personhood, women lose access to their bodies, to the right to privacy espoused under *Roe v. Wade.* "Because persons are sovereign, deeming the fetus to be a person, "like me" has seemed the way to take away women's control over it, hence over themselves." MacKinnon, "Reflections on Sex Equality Under Law," 100 YALE L.J. 1281, 1314 (1991) [hereinafter MacKinnon].

47. Nelson, *supra* note 35, at 734.

While *Crumpton* does not explicitly address the issue of fetal rights, the case raises serious issues about where fetal rights, children's rights and women's rights converge. Any legal definitions or redefinitions of the applicability of the principles behind *Roe*[48] have the potential of eroding the constitutional protections *Roe* created: a woman's constitutional right of privacy. While the court in *Crumpton* clearly noted that whether a fetus was a person entitled to sue under § 1983 was not dispositive of the case, the issue of fetal rights should not be overlooked. As one author commented: "It is now the fetus that dominates the debate."[49] In fact, the legal system has reached a stage where fetuses can be assigned counsel[50], pregnant women are prosecuted and jailed for prenatal negligence[51], and in some jurisdictions "personhood" is said to begin at conception.[52] Expanding the remedial purposes of § 1983[53] creates a potential fetal/child/maternal conflict whereby the woman is pitted against her fetus and child.[54]

The very decision in *Roe*[55] gave no absolute guarantees of a woman's right to chose.[56] In particular, a woman's constitutional right to privacy is at stake when she is faced with state-compelled medical treatment for the sake of the fetus.[57] Far

48. *Roe* 410 U.S. at 113.

49. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE JOURNAL OF LAW AND FEMINISM," 327, 330 (1991) [hereinafter Neff].

50. *See, e.g.* In re A.C., 533 A.2d 617 (D.C. App. 1987), vacated, 573 A.2d 1235 (1990) (counsel assigned to fetus to argue necessity of forced cesarean).

51. Cases in which a pregnant women and her fetus are constructed as adversaries before the state are becoming commonplace. Criminal prosecution of women for pregnancy-related behavior deemed harmful to the fetus, see Paltrow, *When Becoming Pregnant is a Crime*, CRIM. JUST. ETHICS 41 (1990).

52. Mo. Rev. Stat § 1.205.1(1) - .1(2) (1986). The preamble of the Missouri abortion statute reads: [t]he life of each human being begins at conception....Unborn children have protectable interests in life, health and well-being."

53. *See, e.g.* Golden State v. City of Los Angeles, 493 U.S. 103, 110 (1989). The court in Crumpton seems to articulate that a child should be compensated for a federally cognizable injuries he or she must bear. That "a contrary rule flies in the face of the remedial purposes of section 1983." *Crumpton* at 1424.

54. *See* PETCHESKY, ROSALIND, *Abortion and Women's Choice*, (2d ed. 1990); also POLLIT, , *"Fetal Rights - A New Assault on Feminism,"* THE NATION, March 25, 1990, at 409. Generally, see MacKinnon, *supra* note 45. As one author noted: "...identifying itself as the 'defender of fetal rights', the state reveals its latent suspicion that a pregnant woman is untrustworthy irresponsible, and an adverse to her fetus." Neff, *supra* note 48, at 331.

55. *Roe* 410 U.S. at 113.

56. The court developed the trimester system whereby the interests of the woman would be balanced against those of the state, and its interest in protecting the fetus. Thus at the later time of the pregnancy, particularly at viability, the state is said to have "compelling" interests, whereby the state can prevent a woman from choosing to have an abortion at that time. Roe V. Wade, 410 U.S. 158 (1973).

57. Nelson, *supra* note 35, at 745.

from protecting women's privacy rights, the limited trimester analysis established by *Roe*[58] "has permitted the state to exercise increasing control."[59] Indeed, a woman's status under the Constitution, while in theory superior due to her "personhood," is melting away as the fetus looks more like a "person" and the courts are more willing to redress harms done to "infants injured *in utero* and later born alive...."[60]

Under *Crumpton*, the timing of injury, post birth, alleviates the necessity to confront the "amorphous and unsettled legal status of the fetus."[61] Unfortunately, it is possible the Court did not completely avoid the implications of *Roe v. Wade*.[62] In particular, the potential cause of action of a child against his/her mother merely exacerbates the pitting of fetus against woman and now (possibly) child against mother.

Maternal tort liability[63] raises serious dangers as it focuses on the rights of the fetus, rather than the woman, as the party with the right of recovery in a tort claim.[64] In 1980, the Michigan Court of Appeals held that an expectant mother would be held to the same standard of conduct as a third party tortfeasor.[65] However, in *Stallman v. Younquist*[66], the Illinois Supreme Court refused to hold a mother liable for prenatal injuries that her child sustained in a car accident.[67]

The Court realized the potential fetal rights issue raised in *Crumpton*, yet by overruling the district court's decision, the

58. *Roe* 410 U.S. at 113.

59. Neff, *supra* note 48, at 331. "...the right to privacy cannot be said to be absolute." *Roe* 410 U.S. at 172. Under *Roe* the pregnant woman is not alone and her rights must be weighed against the competing potential of life.

60. *Crumpton* 947 F.2d at 1424, n.6.

61. Nelson, *supra* note 35, at 735.

62. *Roe* 410 U.S. at 113.

63. For a more comprehensive analysis of maternal tort liability, see Beal, *Can I Sue Mommy? An Analysis of a Woman's Tort Liability To Her Child Born Alive*, 21 SAN DIEGO L. REV 325 (1984).

64. *Id.*

65. Grodin v. Grodin, 301 N.W. 2d 869, 870 (1980). In *Grodin*, the "reasonableness" of the mothers conduct in taking tetracycline while pregnant presented a triable issue of fact. The case represents the first case to shift the focus in a prenatal injury tort claim from the pregnant woman to the fetus.

66. Stallman v. Younquist, 531 N.E. 2d 355, 359 (1988).

67. *Id.* Criticizing the *Grodin* court for not realizing the profound implication of its decision, *Stallman* emphasized that "[a] legal duty to guarantee the mental and physical health of another has never before been recognized in law." The court noted that recognizing the fetus as an individual was a "legal fiction" that would infringe on women's right to privacy and bodily autonomy. The court concluded that the way to ensure healthy babies was not tort liability but before-the-fact education of all women and families about prenatal development. *Id.* at 361.

Court sidestepped the issue entirely.[68] The Court focused on Crumpton's birth as the point of inquiry and therefore found him to be a "person" to assert his constitutional claim. Crumpton may now redress the wrongs he suffered as a result of the actions committed by the Los Angeles Police Department who allegedly killed his father. This is justice. What remains unclear is whether other fetuses born later will be considered "persons" with the right to redress the "wrongs" committed by their mothers? Will the state then have a compelling interest to assert a cause of action against the mother on behalf of the fetus/child? This is not justice. By not addressing *Roe v Wade*[69] and failing to re-affirm the principle that a fetus is not a person, the Court has left the door open to provide more rights to fetuses, at the expense of women's rights.

Feminist legal scholar Catherine MacKinnon recently commented on the implications of fetus as "person".[70] The overall message is strikingly poignant and applicable as one attempts to predict the implications of *Crumpton v. Gates* for women:

> Now place the legal status of the fetus against the backdrop of women's tenuous to nonexistent equality. Women have not been considered "persons" by the law for very long; the law of persons arguably does not recognize the requisites of female personhood yet. Separate fetal status of any sort, in a male-dominated system in which women have been controlled through the control of their procreative capacity, risks further entrenchment of women's inequality. If the fetus were deemed a person, it may well have more rights than women do, especially since fetal rights would be asserted most often by men in traditionally male institutions of authority...Fetal rights as such are thus in direct tension with sex equality rights.[71]

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68. *Crumpton*, 947 F.2d at 1422.
69. *Roe*, 410 U.S. at 113.
70. MacKinnon, *supra* note 45, at 1315.
71. *Id.*
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II. CRIMINAL LAW

A. BATTERED WOMAN SYNDROME

1. *Evidence of the Battered Woman Syndrome is relevant to support a battered woman's claim of self-defense.*

People v. Day, No. F014113 (Cal. Ct. App. Jan. 6, 1992). In *People v. Day,* the court held that evidence of the Battered Woman Syndrome[1] was relevant on the issue of whether Day honestly believed she needed to use deadly force in self- defense; it was also relevant to explain a behavior pattern that might otherwise appear unreasonable to the average person.[2]

FACTS

PROSECUTION CASE

The prosecution presented the following facts at trial. On the night of June 10, 1988, appellant, Valoree Jean Day, stabbed Steve Brown, the man with whom she lived. At approximately 11 p.m. that night, a neighbor in the adjacent apartment, Jan Fernandez, overheard an argument between Day and Brown. Fernandez called the building's security twice that night, to request that they intervene in the fight next door. Russell Holt, another neighbor, heard the front door of the Day/Brown apartment slam shut, as Brown yelled, "You don't have to lock me out. I have a key of my own, bitch."[3] Holt then heard Brown's truck leave, and return five to ten minutes later.

Just before 1 a.m. on June 11, 1988, Tuolumne County Deputy Sheriff Antone and Groveland Constable Jarratt arrived at Day's apartment. The front door was open, the master bedroom was locked from the inside and was missing the exterior knob, a chair was pushed over, and no one was in the apartment. The officers searched outside the apartment, and found Brown lying face-down with several stab wounds, at the west corner of the complex.

1. Hereinafter referred to as BWS.
2. People v. Day, No. F014113 (Cal. Ct. App. Jan. 6, 1992).
3. *Id.* at 195.

Brown died early that morning; the cause of death was stab wounds to his chest. He had four frontal wounds: a deep wound in his chest, a superficial wound, and two slices. He had a deep stab wound to his back, and superficial cuts on his fingers, hips and forehead.

At about the same time that Brown was found, Day appeared at the door of her friend's, Lynn Olson. Day told Olson that she stabbed Brown after he attacked her with a knife. Olson called the home of Constable Jarratt, who arrived shortly thereafter and took Day into custody.

In jail, Day was examined by a nurse and the following injuries were discovered: bruises to Day's right upper arm, inner arm, forearm, and outside of the arm. The knuckles of both Day's hands were red and swollen, and she had a bruise and abrasion on her right knee. Day had a shallow abrasion on her right elbow. During the examination, Day was told that Brown had died, and she began to cry and hyperventilate; the nurse gave Day librium to calm her.

Five days later, Day was examined in jail by a doctor. He found additional injuries including bruises on Day's chest, and on the triceps of her right arm. Day's left eardrum was perforated, she had a contusion on her right kneecap and a contusion and abrasion on her right shinbone. There was also bruising on her rear hip.

DEFENSE CASE

Day testified at trial as to her version of the fight and stabbing on June 10, 1988, and revealed a perspective which differed significantly from that of the prosecution. In order to more fully understand the apparent discrepancies, it is helpful to first examine the history of Day's relationship with Brown.

1. *History*

At trial, Day testified that Brown began to beat her early in their relationship. Day attributed the beatings to Brown's drinking, and felt that if she stayed with him, and helped him, things would get better. However, over time, the frequency and severity of the beatings increased.

Before they moved in together, Brown tried to strangle Day, and in 1987 he tried to run her over with his car. Brown frequently went to bars, drank, and came home angry. Day would lock herself in the bedroom to escape Brown's violence.

One day in the fall of 1987 Day came home without her keys. Brown had been drinking and would not let her in. When Day knocked at the back door, Brown opened it and began to punch her. Brown then sat on top of Day, pinned her arms to the ground, and banged her head against the deck. Day screamed to her neighbor for help, and eventually a security officer came and took Day to a friend's house.

The ongoing abuse and violence notwithstanding, Day never filed a formal complaint against Brown. She felt that the officers always sided with Brown, and additionally, she hoped that she and Brown could resolve their problems on their own.

During the time that Day and Brown lived together, neighbors and friends saw injuries on Day including facial bruises, black eyes, swollen lips, and red marks and bruises on her body.

On occasion, Day fought back,[4] and in one instance, a friend saw a bite mark on Brown's cheek.

2. Incident

Day testified that on the night of June 10, 1988, Brown went out for the evening. Day was in bed around 11 p.m. when she heard the downstairs door slam and the sound of a beer can opening. Brown then came upstairs and Day heard him trying to unlock the bedroom door. Brown said, "I'm going to kill you,"[5] and Day screamed for help. Day heard what she thought was a stabbing sound at the door, and then a knife blade penetrated through the door.

At approximately 12:30 a.m. on June 11, Brown left the house, saying as he left, "Don't try and lock me out, I have keys."[6] Day locked the front door, and grabbed a knife to protect herself. She saw cigarettes on the counter, and, fearful that

4. The record indicates only one such specific instance, when Day hit Brown on the head with a tennis racquet.

5. *Day*, No. F014113, slip op. at 196 (Cal. Ct. App. Jan. 6, 1992).

6. *Id.*

Brown might use them to set the house on fire, took them upstairs and wet them. Day then locked herself in the master bedroom.

When Brown returned he said, "I'm going to kill you, Valoree. I've had it with you."[7] Day told him to leave, and that she had a knife to protect herself. Brown broke open the master bedroom door, and Day ran into the bathroom. After a few minutes, Brown left the bedroom.

Day then went into the guest bedroom and put a chair against the door. Brown returned, and pounded on the guest bedroom door. Again, Day screamed to her neighbors for help. Brown opened the door and rushed Day with a knife. They fell to the floor. Brown tried to stab Day but missed. "The next thing [Day] knew, Brown was hurt."[8]

Day did not realize the gravity of Brown's injuries, and was afraid he would return to renew the attack. She quickly left the apartment, and when she realized she still had the knife in her hand, she dropped it. Day made sure Brown was not near her car, and drove to Lynn Olson's house.

COURT'S ANALYSIS

PROCEDURAL HISTORY

Day was tried by a jury, and convicted of involuntary manslaughter, and assault with a deadly weapon. After her conviction, Day obtained new counsel, and moved for a new trial. Day argued that her assistance of counsel was ineffective because her attorney made no effort to investigate or present evidence of the BWS. The trial court agreed that Day's counsel was deficient, but concluded that Day had not been prejudiced, and denied her motion for a new trial.

Day argued that the trial court erred in finding no prejudice. She claimed that evidence of the BWS was admissible to prove the objective reasonableness of her use of deadly force in self-defense, and to rehabilitate her in light of the prosecution's assertion that her conduct, both before and after the incident, was not consistent with having acted in self-defense.

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7. *Id.*

8. *Id.* at 196-97. The facts do not clearly indicate how Brown received the fatal wounds.

EXTRALEGAL FACTORS

In support of her motion for a new trial, Day filed several affidavits which the appellate court used to analyze Day's claims of error.

Day's trial counsel filed an affidavit and admitted that he knew nothing about BWS, and that he never considered researching or presenting evidence on Day's behalf regarding BWS. He further acknowledged that if he were to try the case again, he would present such evidence.

M. Gerald Schwartzbach, a legal expert witness, submitted an affidavit which stated that in 1981 he used the expert witness testimony of psychologist Dr. Lenore E. Walker[9] to obtain an acquittal for his client charged with homicide on the grounds of self-defense.[10]

Dr. Lee H. Bowker,[11] an authority on BWS, submitted an affidavit in which he concluded, based on an in-depth interview with Day, and on materials presented by Day's attorney, that Day suffered from BWS. Although Day occasionally defended herself against Brown's attacks, she was no less a battered woman. Dr. Bowker stated that, "[t]wo of the personal strategies commonly employed by battered women are flight and active self-defense, more commonly known as counter-violence."[12]

Pat Cervelli, a counselor with extensive experience in the domestic violence field, also filed an affidavit in which she concluded that Day suffered from the BWS. Ms. Cervelli stated that it is common for a battered woman to forget and to minimize the severity of the beatings she receives, which enables her to stay in a very dangerous situation. Ms. Cervelli listed some of the reasons a woman stays in a battering relationship, which include loving the batterer, and hoping or believing the violence will end.[13] Additionally, a battered woman typically feels her batterer is far more powerful and strong than he

9. Dr. Lenore E. Walker is an authority on BWS. Two of her books include: LENORE E. WALKER, THE BATTERED WOMAN (1979); LENORE E. WALKER, THE BATTERED WOMAN SYNDROME (1984).

10. *Day*, No. F014113, slip op. at 197 (Cal. Ct. App. Jan. 6, 1992).

11. Dr. Lee H. Bowker is a psychologist and Dean of Behavioral and Social Sciences at Humboldt State University.

12. *Day*, No. F014113, slip op. at 197 (Cal. Ct. App. Jan. 6, 1992).

13. *Id.*

actually is, which reinforces her sense of helplessness and futility. Ms. Cervelli explained that a "perception of a lack of protection by law enforcement (or by anyone else) is part of the BWS. Attempts to stop the violence usually fail, because the battered woman has a belief that it is useless, a previous experience with law enforcement officials that was unsupportive, fear of retaliation by the batterer, and lastly, fear of loss of the relationship."[14] Finally, although she may have difficulty leaving the relationship, or seeking outside help, a battered woman often does fight back. Ms. Cervelli explained that "what defines a woman as being 'battered' is the fact that she is the victim of violence perpetrated by her partner, and that she remains in the relationship after repeated violent incidents. She if [sic] often angry and often hits back."[15]

OBJECTIVE REASONABLENESS OR SUBJECTIVE HONESTY

The court first assessed Day's claim that evidence of the BWS was admissible to prove the objective reasonableness of her use of deadly force[16] in self defense. The court cited with approval *People v. Aris*[17] which held that "expert testimony about a defendant's state of mind is not relevant to the reasonableness of the defendant's self-defense."[18] However, the *Aris* court concluded that evidence of BWS is relevant to prove that the defendant honestly believed that deadly force was necessary to defend herself.[19] Similarly, the court in *Day* held that evidence of the BWS was relevant to prove Day's honest belief that she had to use deadly force to defend herself,[20] although it was not relevant to show that she acted as would a reasonable person in similar circumstances.[21]

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14. *Id.*

15. *Id.* at 198, quoting Gelles, Straus, 1987.

16. Justifiable homicide, as defined by the California Penal Code, requires that the person exercising self-defense have a "reasonable ground to apprehend a design to do ...great bodily injury, and ...must really and in good faith have endeavored to decline any further struggle before the homicide was committed...." Cal. Penal Code § 197 (3) (West 1988). Courts have interpreted this standard as requiring a double showing: first, the defendant must actually have been in fear of his or her life, or of serious bodily injury; and second, the conduct of the other party must have been such as to produce that state of mind in a reasonable person. People v. Sonier, 113 Cal. App. 2d 277, 278, 248 P.2d 155, 156 (1952).

17. People v. Aris, 215 Cal. App. 3d 1178, 264 Cal. Rptr. 167 (1989).

18. *Day*, No. F014113, slip op. at 198 (Cal. Ct. App. Jan. 6, 1992), citing *Aris*, 215 Cal. App. 3d at 1196, 264 Cal. Rptr. at 179.

19. *Day*, No. F014113, slip op. at 198 (Cal. Ct. App. Jan. 6, 1992), citing *Aris*, 215 Cal. App 3d at 1199, 264 Cal Rptr. at 181.

20. *Id.* at 200.

21. *Id.* at 198.

REHABILITATION OF WITNESS CREDIBILITY

Day's second claim was that evidence of the BWS was admissible to show that her conduct was consistent with self-defense. The court held that evidence of the BWS was admissible for this purpose, and cited as authority, *People v. McAlpin*.[22]

In *McAlpin*, the Supreme Court held that expert testimony on the common reactions of child molestation victims "is admissible to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident...is inconsistent with his or her testimony claiming molestation."[23] The *McAlpin* court analogized expert testimony on "child sexual abuse accommodation syndrome" to expert testimony on rape trauma syndrome[24] previously held admissible in *People v. Bledsoe*.[25] The *McAlpin* court explained that this expert testimony is necessary "to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior."[26]

The court in *Day* concluded that the reasoning of *McAlpin*[27] applied equally to the battered woman context. Evidence of the BWS would have helped to counter the prosecutor's challenge to Day's credibility, and to dispel many of the commonly held misconceptions about battered women which the prosecutor exploited, and which defense counsel failed to rebut.

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22. People v. McAlpin, 53 Cal. 3d 1289, 812 P.2d 563, 283 Cal. Rptr. 382 (1991).

23. *Day*, No. F014113, slip op. at 199 (Cal. Ct. App. Jan. 6, 1992), citing *McAlpin*, 53 Cal. 3d at 1300, 812 P.2d at 569, 283 Cal. Rptr. at 388.

24. 53 Cal. 3d at 1300, 812 P.2d at 569, 283 Cal. Rptr. at 388.

25. People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984). In *Bledsoe*, the court held that expert testimony was inadmissible to prove that the complaining witness in a rape case had in fact been raped. 36 Cal. 3d at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460. However, the court distinguished expert testimony presented in order to rehabilitate the complaining witness after the defendant had impeached her credibility by suggesting that her conduct after the incident was inconsistent with having been raped. The court reasoned that expert testimony on rape trauma syndrome was useful to disabuse the jury of widely held misconceptions about rape and rape victims, so that it could evaluate the evidence free of the constraints of popular myths. 36 Cal. 3d at 247-48, 681 P.2d at 298, 203 Cal. Rptr. at 457.

26. 53 Cal. 3d at 1301, 812 P.2d at 569, 283 Cal. Rptr. at 388.

27. *Id.*

First, the prosecutor at trial argued that Day and Brown were engaged in "mutual combat," and even defense counsel characterized their relationship as one of "mutual combat." The appellate court reasoned that expert testimony would have "disabused the jury of the notion that because a woman strikes back at her batterer, she is engaging in "mutual combat."[28] The court cited *Commonwealth v. Stonehouse*[29] and Dr. Bowker's affidavit[30] as support for the proposition that it is not uncommon for a battered woman to resort to counter-violence.[31] The *Stonehouse* court reasoned that a woman who attempts to defend herself against her batterer is no less a battered woman "in that her attempts do not stop the repeated episodes of physical and emotional abuse."[32]

Second, the prosecutor at trial argued that if Day were being beaten by Brown, she could have left him. Due to defense counsel's ignorance of the BWS, he presented no evidence to counter this myth, nor did he present any argument to explain why Day did not leave Brown. The appellate court cited *State v. Hodges*[33] for the proposition that "expert testimony on the [BWS] would help dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time."[34]

Finally, the prosecutor argued that Day's flight after stabbing Brown evidenced a consciousness of guilt. Defense counsel failed to offer any alternative explanation for Day's flight. Referring to Day's motion for a new trial,[35] the appellate court stated that evidence of the BWS would have explained that some women do not realize they are safe even after the abuser is dead or injured, and that they take further protective measures against the retaliation they expect to follow an aggressive attack.

The appellate court concluded that Day was prejudiced by counsel's failure to present evidence of the BWS, because there

28. *Day*, No. F014113, slip op. at 199 (Cal. Ct. App. Jan. 6, 1992).

29. Commonwealth v. Stonehouse, 521 Pa. 41, 555 A.2d 772 (1989).

30. *Day*, No. F014113, slip op. at 197 (Cal. Ct. App. Jan. 6, 1992).

31. *Id.* at 199, citing *Stonehouse* 555 A. 2d at 784.

32. *Day*, No. F014113, slip op. at 199 (Cal. Ct. App. Jan. 6, 1992), citing *Stonehouse*, 555 A. 2d at 784, n.10.

33. State v. Hodges, 716 P.2d 563, 239 Kan. 63 (1986), disapproved on other grounds in State v. Stewart, 763 P.2d 572, 579, 243 Kan. 639 (1988).

34. *Hodges*, 716 P.2d at 579.

35. *Day*, No. F014113, slip op. at 199 (Cal. Ct. App. Jan. 6, 1992).

was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[36] Counsel's lack of knowledge of the BWS left him unable to counter the prosecutor's claim that Day's conduct was inconsistent with self-defense, and it left him equally unable to counter the myths about battered women upon which the prosecutor built his case.

CONCLUSION

Courts are now beginning to recognize the BWS as a legitimate theory of self-defense.[37] Implicit in this recognition is an acknowledgement that the social and psychological factors that comprise the BWS are important to legal analysis. When the BWS is applied to the facts of a given case, what was formerly a more traditional rights-based analysis moves away from rigidly defined rules and becomes necessarily more contextual. The court in *Day* compared different characteristics of the prototypical battered woman, as defined by the BWS, with Day's specific conduct both preceding and following the stabbing of Brown. This analysis led the court to conclude that Day's actions were consistent with those of a battered woman, and that Day did honestly believe that she needed to use deadly force to defend herself. This case clearly demonstrates the importance of teaching practitioners to analyze the legal and factual issues of any case, in light of relevant psychological and sociological factors. To fail to do so is to fail to adequately represent a client.

*Heather Allyson Elrick**

36. *Id.* at 200, citing In re Sixto, 48 Cal. 3d 1247, 1257, 774 P.2d 164, 169, 259 Cal. Rptr. 491, 496 (1989).

37. *Day*, No. F014113, slip op. at 195 (Cal. Ct. App. Jan. 6, 1992); State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984).

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III. EMPLOYMENT LAW

A. SEX DISCRIMINATION

1. *A policy of excluding women from employment because they are fertile is unlawful discrimination.*

Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n, 218 Cal. App. 3d 517, 267 Cal. Rptr. 158 (1990), cert. denied. In *Johnson Controls, Inc. v. Fair Employment and Housing Commission*, the California Court of Appeal struck down the Fetal Protection Program (FPP) instituted by Johnson Controls and exposed it as a clear case of *wrongful discrimination.* The Court noted that Johnson Controls' policy did not seek to educate women about the risks of lead exposure to fetuses or remove those risks, but rather sought to remove from women "the opportunity to make any choices in the matter at all."[1] The Court held the FPP to be unlawful discrimination based on sex, as it prevented fertile women from engaging in specific areas of employment.

Ms. Foster, "a young, physically able woman seeking and needing employment"[2], applied for a job at Globe Battery, a division of Johnson Controls. Ms. Foster was unaware that the job she sought was subject to female exclusion. Johnson Controls' FPP prevented women of child bearing capacity from working in areas of the battery plant that were exposed to high levels of lead. The FPP required documentation of infertility as a prerequisite to employment *only* for women.[3]

After having been denied the job because of her refusal to produce medical evidence of infertility, Ms. Foster filed a complaint with the Fair Employment and Housing Commission (Commission). The Commission investigated her complaint and found that "[Johnson Controls'] hiring practices were

1. Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n, 218 Cal. App. 3d 517, 551, 267 Cal. Rptr. 158, 178 (1990).

2. *Id.* at 525, 267 Cal. Rptr. at 160.

3. *Johnson Controls,* 218 Cal. App. 3d at 533, 267 Cal. Rptr. at 166. The Company's policy claims only to be directed at women of child bearing capacity, but it is actually directed at "*all* women except those whose inability to bear children is medically documented." *Id.* (emphasis added).

discriminatory on the basis of sex [and] that the FPP was not based upon a bona fide occupational qualification (BFOQ)."[4] The Commission ordered Johnson Controls to hire Ms. Foster and to discontinue its FPP.[5]

The subject of fetal protection programs is neither of first impression for the courts nor for Johnson Controls. The United Auto Workers sued Johnson Controls on a similar complaint which led to a finding of unlawful discrimination by the United States Supreme Court: "sex-specific fetal protection policies [are] unlawful in light of Title VII [of the Civil Rights Act of 1964], as amended by the Pregnancy Discrimination Act."[6] In this case, the California Court of Appeal relied on the Fair Employment and Housing Act (Act) as its authority.[7] The Act provides that employment discrimination based on sex is unlawful "unless based upon a bona fide occupational qualification."[8] "The BFOQ defense...has two components: First, the employer must demonstrate that the occupational qualification is 'reasonably necessary to the normal operation of [the] particular business'. Secondly, the employer must show that the categorical exclusion based on protected class characteristic is justified...."[9]

The availability of the BFOQ defense "was in fact meant to be an extremely narrow exception to the general prohibition of discrimination based on sex."[10] The applicability of the BFOQ is dependent on women's ability to perform the job in question:

4. *Id.* at 526, 267 Cal. Rptr. at 161.

5. *Id.*

6. International Union, UAW v. Johnson Controls, 111 S. Ct. 1196 (1991). Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1982), prohibits employment discrimination based on race, sex, religion or national origin. The Pregnancy Discrimination Act of 1978 is an amendment to Title VII that explicitly holds discrimination based on pregnancy or the ability to become pregnant in violation of Title VII.

7. *Johnson Controls*, 218 Cal. App. 3d at 532, 267 Cal. Rptr. at 164. The court applied the standards of the Fair Employment and Housing Act used by the Commission in reviewing the Commission's finding of overt discrimination. *Id.* at 530, 267 Cal. Rptr. at 164. The Commission, in construing the California statute, is neither bound to consider nor follow Federal law. *Id.* at 540, 267 Cal. Rptr. at 170.

8. CAL. GOV'T CODE § 12940 (West 1980).

9. *Johnson Controls*, 218 Cal. App. 3d at 540, 267 Cal. Rptr. at 170 (citing Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

10. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977). This was the first case to construe the BFOQ. The case involved a woman seeking employment as a counselor in a maximum-security male prison in Alabama. The Court found that "[a] woman's relative ability to maintain order in a male, maximum-security, unclassified penitentiary could be directly reduced by her womanhood." *Id.* at 335. As a result of the relationship between the ability to perform the job and the gender of the applicant, the court found this case to fall within the narrow exception of the BFOQ.

"the BFOQ exception will not justify the exclusion of all women from employment unless the employer shows that a male sexual characteristic is 'crucial to the successful performance of the job' involved."[11] Based on the information presented, the Court stated that "the foregoing evidence and evidentiary paucity supports the factual conclusion that the exclusion of fertile women only from the battery factory workplace is a facial, blatant, overt gender-based job discrimination...unless warranted by a BFOQ."[12]

The Court then concluded that "the facts do not satisfy the BFOQ test."[13] There was "no evidence that fertile women cannot efficiently perform jobs involving contact with lead at the [Johnson Controls] facility."[14] In addition, the risk of fetal harm did not justify the program as "there was no evidence of any harm to a single child."[15] Johnson Controls did not demonstrate acceptable reasons for excluding fertile women from battery production, therefore, it was unable to satisfy the BFOQ exception.

Johnson Controls also raised another defense to employment discrimination based on sex called the Business Necessity Defense (BND). The BND arises under the "'disparate impact' theory in which an employer institutes a policy that appears neutral on its face but discriminates in effect against certain employees on the basis of their race, sex, or religion."[16] The BND cannot be used in this case, as it is "concerned with facially neutral rules, standards and criteria, rather than with class-based exclusion."[17] The policy applied in this case

11. Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798, n.3 (1981)(citing Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1224 (9th Cir. 1971)). In *Rosenfeld*, a woman sought the position of agent-telegrapher at a railroad company. The Court held that there was no basis for the BFOQ, as the company did not contend that "the sexual characteristics of the employee are crucial to the job." *Id.* Strenuous physical demands of a job are not enough to prevent women from employment: "the company attempts to raise a commonly accepted characterization of women as the 'weaker sex' to the level of a BFOQ." *Id. Rosenfeld* emphasizes the extremely high standard of the BFOQ.

12. *Johnson Controls*, 218 Cal. App. 3d at 539, 267 Cal. Rptr. at 169.

13. *Id.* at 542, 267 Cal. Rptr. at 171.

14. *Id.* The Court further emphasized this point by stating that the "'essence' of the business operation — making automotive batteries — would not be undermined". *Id.*

15. *Id.*

16. Note, *Fetal Protection Policies: A Statutory Proposal in the Wake of International Union UAW v. Johnson Controls, Inc.*, 75 CORNELL L. REV. 1110, 1114 (1990).

17. *Johnson Controls*, 218 Cal. App. 3d at 541, 267 Cal. Rptr. at 171.

was aimed directly at women, hence it was not facially neutral; therefore, the BND was not available.

In analyzing the two defenses used by Johnson Controls in support of its fetal protection program, the Court found deficiencies and inconsistencies. The Court first examined the standards for control of lead exposure in a work environment adopted by the Federal Occupational Safety and Health Administration (OSHA). Those standards neither differentiate between safe levels for men and women, nor exclude fertile women from jobs including lead exposure.[18] Instead, OSHA warns that *both* men and women who plan to have children should keep their lead levels below a specified level.[19] Consequently, divergent policies for men and women in terms of fetal protection is not justified.[20] By ignoring the proven impact of health risks to men and *their* future offspring, Johnson Controls' supposed interest in fetal protection is exposed as sex discrimination.

Johnson Controls' supposed concern for fetal protection was further weakened by the lack of scientific evidence established by Johnson Controls to support their claim of fetal danger: "The company's expert Dr. Culver admitted there were no recent studies that showed birth defects from lead exposure of a mother."[21] Johnson Controls neither tracked the pregnancies nor documented effects on the infants of those workers who *did* become pregnant while exposed to high lead levels at the plant.[22] Indeed, "[t]he company's experts were unable to identify or quantify the harm the FPP was supposed to remedy."[23] Johnson Controls' argument of genuine concern for the fetus, therefore, was severely undermined by this "total lack of

18. *Id.* at 528, 267 Cal. Rptr. at 162.

19. *Id.* The Court cites the Commission's finding number 12: the Federal OSHA lead standard states that "both males and females exposed to lead who wish to plan pregnancies should keep their lead levels below 30ug/100ml because of possible adverse effects to the fetus." *Id.* It is therefore clear that males are also affected by high levels of lead.

20. *Id.* at 536, 267 Cal. Rptr. at 167.

21. *Id.* at 537, 267 Cal. Rptr. at 168. Based on the expert testimony during the trial, the Court found that the "Company's policy is based on speculation (extrapolations) about the fetus and lead exposure, assumptions that lack sound scientific support." Dr. Fishburn, one of the Company's expert witnesses, stated that he had seen thousands of battery workers and could only think of one case in which a fetus suffered from lead exposure. Even in this sole case, however, there was no follow-up to determine whether the effect (hyperactivity of the child) was permanent. *Id.*

22. *Id.* at 529, 267 Cal. Rptr. at 163.

23. *Id.* at 537, 267 Cal. Rptr. at 168.

evidence of harm to any fetus in [Johnson Controls'] experience."[24]

Johnson Controls attempted to cloak discrimination against women in the supposed "objective differences" between men and women[25]; in particular, the ability to become pregnant. The Court, in its dicta, found that Johnson Controls based its arguments on "unfounded assumptions about women"[26] including: that all women are sexually active, that those who are, are involved with fertile men, that those who are involved with fertile men cannot be trusted to use birth control, and that women are incapable of making decisions regarding an unexpected pregnancy in a hazardous worksite.[27] The Court then condemned the overarching assumption which seems to have fueled the FPP, and Johnson Controls' discrimination against women: "[Johnson Controls'] policy is predicated upon the presumption that the employer is better suited to safeguard the interest of a woman's future offspring, should there be an unexpected pregnancy, than is the woman herself."[28] The Court recognized the inherent contradictions found within Johnson Controls' FPP, and confronted the hidden agenda of this policy: "...[Johnson Controls] may not effectuate their goals...at the expense of a woman's ability to obtain work for which she is otherwise qualified."[29]

It has been noted that "historically, an effective means for employers, legislatures, and courts to limit the equal employment opportunities of women was to restrict their employment out of a professed concern for the health of women and their offspring."[30] At first glance, the FPP appears only to be another example of a paternalistic policy that dictates what is 'best' for women and their offspring. In actuality, Johnson Controls is also attempting to prevent women from engaging in certain types of employment. It is not uncommon for fetal protection programs to predominate in traditionally male domains: "The scope of [fetal protection] policies is influenced by the sexual composition of the work force. When the work

24. *Id.* at 538, 267 Cal. Rptr. at 169.
25. *Id.* at 551, 267 Cal. Rptr. at 177.
26. *Id.* at 550, 267 Cal. Rptr. at 177.
27. *Id.*
28. *Id.* at 551, 267 Cal. Rptr. at 177-78.
29. *Id.* at 552, 267 Cal. Rptr. at 178.
30. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984).

force is predominantly male, some employers exclude all fertile women from hazardous jobs. When the work force is predominantly female, some employers exclude only pregnant women from hazardous jobs."[31] The effort to restrict women's employment opportunities at Johnson Controls is evidenced by the fact that "both at the time of [Ms. Foster's] application and at the time of hearing, no women were employed [in the position Ms. Foster sought] at [Johnson Controls'] Fullerton plant."[32] The Court was not deceived by the supposed altruism of the FPP, but instead saw through to Johnson Controls' ulterior motive of employment discrimination.

By failing to monitor the children born of women who worked in the plant during and prior to pregnancy, and failing to conduct adequate research on the subject in general, Johnson Controls was not advocating better care for a woman's fetus, but rather was instituting a policy which denied women fair employment and opportunities. An honest Fetal *Protection* Program, concerned about protecting workers and their children, would provide a safe work environment and would ensure the future good health of the offspring of *both* male and female employees.

Both the Court's ruling and its powerful, reprimanding dicta send a clear message to California employers seeking to implement an FPP. This case emphasizes the importance of recognizing women's ability to make intelligent, personal choices regarding their health and the health of their potential offspring, and the danger of placing that power in others' hands. The decision in *Johnson Controls* also sends a strong message to employers that society and the courts will not accept disguised excuses for discrimination. This case is a critical step in the eradication of employment discrimination in all its forms.

*Julie Hammel Brook**

31. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1239 (1986).

32. *Johnson Controls*, 218 Cal. App. 3d at 529, 267 Cal. Rptr. at 163.

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B. SEXUAL HARASSMENT

1. *Sexual harassment and discrimination claims in employment may be brought under both the Fair Employment and Housing Act and the common law either sequentially or simultaneously.*

Rojo v. Kliger, 52 Cal. 3d 65, 276 Cal. Rptr. 130, 801 P.2d 373 (1990). In *Rojo v. Kliger,* the California Supreme Court held that a victim of sexual harassment and discrimination in employment need not file a statutory claim under the Fair Employment and Housing Act (FEHA) before filing a common law claim in civil court.[1] The Court also held that "sex discrimination in employment may support a claim of tortious discharge."[2]

I. FACTS

Plaintiffs, Emma Rojo and Teresa Maloney, were both employed by the defendant, Dr. Erwin Kliger, as assistants. Both women were "subjected by defendant to sexually harassing remarks and demands for sexual favors which ultimately forced them to leave their employment."[3]

Ms. Rojo and Ms. Maloney filed a complaint against Dr. Kliger for violations of FEHA and for intentional infliction of emotional distress. At the trial court, Dr. Kliger successfully moved for summary judgment on the grounds that the "FEHA constituted plaintiffs' exclusive remedy and that plaintiffs had failed to exhaust their administrative remedies under the act."[4] Ms. Rojo and Ms. Maloney had opposed the motion by arguing that the FEHA "does not supplant other state law remedies" and "pursuit of the administrative remedy is not a condition precedent to judicial relief."[5] In addition to

1. Rojo v. Kliger, 52 Cal. 3d 65, 70, 276 Cal. Rptr. 130, 132, 801 P.2d 373, 375 (1990). For a discussion of tort causes of action available to victims of sexual harassment, *see* Note, *Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions,* 10 GOLDEN GATE U.L. REV. 879 (1980).

2. Rojo v. Kliger, 52 Cal. 3d at 70, 276 Cal. Rptr. at 132, 801 P.2d at 375.

3. *Id.* at 71, 276 Cal. Rptr. at 132, 801 P.2d at 375. The specific allegations included, among others: touching Ms. Rojo's breasts and french-kissing her; forcibly grabbing Ms. Maloney in the groin and forcing her to feel the defendant's groin. *Id.*

4. *Id.*

5. *Id.*

responding to the defendant's motion, the plaintiffs also requested leave to amend their complaint in order to assert additional causes of action, including assault and battery and tortious discharge in contravention of public policy.[6] The Court of Appeal reversed the trial court's decision and held that the plaintiffs could seek state common law remedies without first exhausting remedies under FEHA. The Court of Appeal also ruled that "plaintiffs' allegations of sexual harassment and discrimination could support a claim of tortious discharge in contravention of public policy."[7] The California Supreme Court affirmed the decision of the Court of Appeal.

II. FAIR EMPLOYMENT AND HOUSING ACT (FEHA)

The FEHA, created in 1980 by the merging of the California Fair Employment Practices Act with the Rumford Fair Housing Act, "establishes that freedom from job discrimination on specified grounds, including sex, is a civil right...such discrimination is against public policy and an unlawful employment practice."[8] The FEHA consists of two administrative bodies, one that investigates and prosecutes and the other that hears and decides claims.[9] The complaint process of the FEHA is inhibiting to some employees because they must contact one of only eleven offices in California, "be interviewed by a non-lawyer who decides whether the employee appears to have a valid claim...[and] be able to prove the discrimination case...."[10] The potential difficulty of this process explains why some women would choose to pursue judicial remedies instead.

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6. *Id.*

7. *Id.*

8. *Id.* at 72, 276 Cal. Rptr. at 133, 801 P.2d at 376 (citing Commodore Home Sys., Inc. v. Superior Court, 32 Cal. 3d 211, 213, 185 Cal. Rptr. 270, 271, 649 P.2d 912, 913 (1982). The broad goal of the FEHA, set out in the California Government Code § 12920, is to protect the right and opportunity for all to "seek, obtain, and hold employment without discrimination...." CAL. GOV'T CODE § 12920 (Deering 1982).

9. Rojo v. Kliger, 52 Cal 3d. at 72, 276 Cal. Rptr. at 133, 801 P.2d at 376. The Department receives complaints and investigates them. If a claim is deemed valid, the Department attempts to resolve the matter. If private resolution is ineffective or inappropriate, the Department may issue an accusation and act as prosecutor before the Commission which hears the claim. If either no accusation is issued within 150 days of filing the complaint, or the Department decides not to prosecute, the Department must issue a "right to sue" letter which allows a complainant to bring a civil suit. *Id.* For further discussion of this process, *See* Oppenheimer, *Employment Discrimination and Wrongful Discharge: Does the California Fair Employment and Housing Act Displace Common Law Remedies?* 23 U.S.F. L. REV. 145, 155-58 (1989).

10. Oppenheimer, *supra* note 9, at 156-57.

Under FEHA, sexual harassment is an unlawful employment practice separate from discrimination, however, "the regulations and Commission decisions recognize that sexual harassment is a form of sex discrimination in employment."[11] Specifically, the Fair Employment and Housing Commission has stated that sexual harassment "deprives its victim of a discrimination-free work environment...when the harassment creates an intimidating, oppressive, hostile or offensive work environment...."[12] Ms. Rojo and Ms. Maloney were clearly subjected to such an environment. As a result of the extreme nature of the harassment that they endured, Ms. Rojo and Ms. Maloney were victims of sex discrimination.

III. THE FEHA DOES NOT PREEMPT OR PRECLUDE OTHER STATE LAW CLAIMS RELATING TO EMPLOYMENT DISCRIMINATION.

The Court found that the FEHA was not intended to preempt other state laws relating to employment discrimination, but rather, the Legislature intended to "amplify, not abrogate, an employee's common law remedies for injuries relating to employment discrimination."[13] The Court found that both the statutory language and its prior decisions establish that the FEHA was intended to supplement other state law remedies, and that the defendant's arguments to the contrary are unpersuasive.[14] The FEHA expressly states that "nothing contained in this part shall be deemed to repeal any of the provisions of the Civil Rights Law or any other law of this state relating to discrimination [based on sex]."[15] The Court also pointed to case law in which it has been held that "both administrative and judicial remedies are available to victims of employment discrimination."[16] The FEHA has widened the scope of actions a

11. Rojo v. Kliger, 52 Cal. 3d at 73, 276 Cal. Rptr. at 133-34, 801 P.2d at 376-77.

12. *Id.*

13. *Id.* at 75, 276 Cal. Rptr. at 135, 801 P.2d at 378.

14. *Id.*

15. CAL. GOV'T CODE § 12993(a) (Deering 1982). In addition, the court found that CAL. GOV'T CODE § 12993(c), which states that the FEHA is intended to "occupy the field" of regulation of employment discrimination, indicates only an intention to preempt local laws, but not to displace state laws. *Rojo v. Kliger*, 52 Cal. 3d at 78, 276 Cal. Rptr. at 137, 801 P.2d at 380.

16. Rojo v. Kliger, 52 Cal. 3d at 74, 276 Cal. Rptr. at 135, 801 P.2d at 378. As an example of caselaw, the Court cites Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n, 43 Cal. 3d 1379, 241 Cal. Rptr. 67, 743 P.2d 1323 (1987). This case held that although punitive damages may not be awarded under the FEHA, a complainant can seek punitive damages in a separate civil action alleging tort causes of action either with or without a FEHA claim. *Id.*

victim of sexual discrimination and harassment in employment may pursue, not contracted it as the defendant asserts.

IV. EXHAUSTION OF FEHA ADMINISTRATIVE REMEDIES IS NOT A PREREQUISITE TO PURSUIT OF OTHER REMEDIES.

The Court emphasized a distinction between pursuing a civil suit based on a *statutory* claim and a civil suit based on a *common law* claim. Agreeing in part with Dr. Kliger's motion, the Court found that "exhaustion of the FEHA administrative remedy is a precondition to bringing a civil suit *on a statutory cause of action.*"[17] However, the Court found that there is no exhaustion requirement before filing "a civil action for damages alleging non-statutory causes of action."[18]

In making this distinction, the court examined the goals of the exhaustion requirement and found that the interests served by the requirement do not apply in this case.[19] The interests of the exhaustion requirement are not served in the employment discrimination context because "these are not cases having such a paramount need for specialized agency fact-finding expertise...."[20] Unlike other issues in which an administrative agency has particular expertise, FEHA does not have a special ability to administer and regulate the employer-employee relationship and to assess and prevent discrimination and related wrongs in the workplace.[21] In addition, the factual issues in an employment discrimination case are neither too complex nor too technical for the judicial system to handle.[22]

V. SEXUAL HARASSMENT MAY GIVE RISE TO A CAUSE OF ACTION FOR WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY.

Ms. Rojo and Ms. Maloney assert that both their refusal to tolerate the sexual harassment and their failure to acquiesce in the sexual demands of their employer resulted in their

17. *Id.* at 83, 276 Cal. Rptr. at 141, 801 P.2d at 384 (original emphasis).

18. *Id.* at 88, 276 Cal. Rptr. at 144, 801 P.2d at 387.

19. *Id.* at 86, 276 Cal. Rptr. at 143, 801 P.2d at 386. The interests served by the exhaustion requirement include: "bolstering administrative autonomy; permitting the agency to resolve factual issues, apply its expertise and exercise statutorily delegated remedies; mitigating damages; and promoting judicial economy." *Id.*

20. *Id.* at 88, 276 Cal. Rptr. at 144, 801 P.2d at 387.

21. *Id.*

22. *Id.*

wrongful discharges.[23] Ms. Rojo and Ms. Maloney claim that under the California Constitution there is "a fundamental public policy against sex discrimination in the workplace...."[24] The Court denied defendant's contention that the constitutional provision applies only to state action and found instead that it covers private employers as well.[25] The Court then explained that in order to find a violation of public policy, "the policy must be 'fundamental' and 'public' in nature."[26] Public policy has been further defined as a policy that "inures to the benefit of the public at large rather than to a particular employer or employee."[27] The Court found that the policy against sex discrimination and sexual harassment is both public and fundamental: "so long as it exists, we are all demeaned."[28] The Court held that Ms. Rojo and Ms. Maloney could base a claim of tortious discharge in contravention of public policy on sex discrimination in employment.[29]

VI. CONCLUSION

With this decision, the California Supreme Court has supported and underscored the breadth of forums and remedies available to victims of sexual harassment and discrimination in employment. Women subjected to sexual harassment can seek common law remedies without having to first exhaust their remedies under FEHA; the FEHA remedies are in addition to, not instead of, other common law remedies. This significant decision has empowered the victims of sexual harassment and discrimination in employment. Hopefully, "[i]nvolvement of the legal system in the [sexual harassment problem] is one step towards the elimination of sexual harassment."[30] When forcibly subjected to harassment and discrimination, Ms. Rojo and Ms. Maloney were denied the freedom of choice; now, the choice of forum and remedy is all theirs.

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23. *Id.* at 89, 276 Cal. Rptr. at 145, 801 P.2d at 388. Ms. Maloney was discharged and Ms. Rojo was constructively discharged. *Id.*

24. *Id.* The California Constitution in Article I, section 8, provides that: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or natural or ethnic origin." CAL. CONST. art. I, § 8.

25. *Id.*

26. *Id.* (citing Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988)).

27. *Id.*

28. *Id.*

29. *Id.* at 71, 276 Cal. Rptr. at 132, 801 P.2d at 375.

30. Note, *supra* note 1, at 928.

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C. RIGHT TO PRIVACY

1. *Department store violated job applicant's right to privacy because it failed to demonstrate a compelling interest in administering personality test.*

Soroka v. Dayton Hudson Corp., 235 Cal. App. 3d 654, 1 Cal. Rptr. 2d 77 (1991). In *Soroka v. Dayton Hudson Corp.*[1], the plaintiffs sought to enjoin Target Stores from their practice of administering a psychological screening test to job applicants for security officer positions[2]. In reversing the trial court's denial of injunctive relief, the California Court of Appeal, First District held that the California Constitution confers an inalienable right to privacy on job applicants and employees alike[3]. It further held that an employer must demonstrate a compelling interest in order to overcome the employee's or applicant's right to privacy[4]. More significantly for the purposes of this note, the *Soroka* court explicitly held that the California Labor Code prohibits both private and public employers from discriminating against job applicants and employees on the basis of sexual orientation[5].

I. BACKGROUND

The plaintiffs, in their prayer for injunctive relief, contended that Target violated their constitutional and statutory right to privacy when it forced them to respond to questions regarding religious attitudes and sexual orientation as a prerequisite to job consideration[6]. The trial court denied the motion for the preliminary injunction because it did not find the questions regarding religious attitudes and sexual orientation to be unjustifiably intrusive[7]. Thus, the court was not persuaded that the plaintiffs would prevail at a trial on the merits of either their constitutional or statutory claims[8], a necessary prerequisite for injunctive relief. The Court of

1. Soroka v. Dayton Hudson Corp., 235 Cal. App. 3d 654, 1 Cal. Rptr. 2d 77 (1991).
2. *Id.* at 658, 1 Cal. Rptr. 2d at 79.
3. *Id.* at 668, 1 Cal. Rptr. at 86.
4. *Id.*
5. *Id.* at 670-71, 1 Cal. Rptr. 2d at 88.
6. *Id.* at 660, 1 Cal. Rptr. 2d at 79.
7. *See Soroka,* 235 Cal. App. 3d 654, 1 Cal. Rptr. 2d 77. The trial court found the questions were not unjustifiably intrusive because it erroneously applied a reasonableness/ legitimate interest test to overcome an applicant's constitutional right to privacy when it should have applied a compelling interest standard.

Appeal found that the trial court had abused its discretion by committing an error of law[9]. It found that the appellants had established a prima facie case for injunction relief[10]. Accordingly, the appellate court reversed the trial court's denial of the preliminary injunction[11].

II. FACTS

Sibi Soroka, Sue Urry and William d'Arcangelo (hereinafter, "Appellants") were all applicants for security officer positions at a Target Store (hereinafter, "Respondent"), owned and operated by Dayton Hudson Corporation (hereinafter, "Respondent")[12]. As a condition of employment, Respondent required all applicants for security officer positions to take a psychological screening test (hereinafter, "Psychscreen")[13]. This test was composed of 704 true-false questions and the applicants were instructed to answer every question[14]. The completed test would be scored and interpreted by a psychological consulting firm[15]. The applicants would be rated on five traits: emotional stability, interpersonal style, addiction potential, dependability and reliability, and socialization[16]. Based upon the rating, the firm would recommend whether the appli-

8. Having determined that plaintiffs were not likely to prevail on the merits of their claims, the trial court did not consider the second requirement for issuing a preliminary injunction, i.e. whether the plaintiffs would suffer greater harm if the injunction did not issue than the defendant would if it did issue.

9. *Soroka*, 235 Cal. App. 3d at 668, 1 Cal. Rptr. 2d at 86. The appellate court determined that the trial court committed several errors of law. The reversal of the trial court was based on its erroneous application of a reasonableness/legitimate interest test instead of the compelling interest test.

10. *Id.* at 672, 1 Cal. Rptr. 2d at 89. The appellate court found the questions on the psychological screening test were unjustifiably intrusive, and thus, the appellants would likely prevail at trial on the merits of both their constitutional and statutory claims. In addition, the appellate court found that the appellants would suffer a greater harm if the injunction did not issue, than would the respondent if the injunction did issue.

11. *Id.*

12. *Id.* at 658, 1 Cal. Rptr. 2d at 79.

13. *Id.* Respondent contends that the test is intended to screen out those applicants who are emotionally unstable, who would not take directions and who would jeopardize customers or other employees. Though security officers do not carry guns, they do have handcuffs and are authorized to use force in self- defense. Respondent defends the test as being necessary for safety reasons and to insure fitness for the position. The test is a combination of two psychological tests that have been used to screen out emotionally unfit applicants for public safety positions such as police officers, pilots, air traffic controllers and nuclear power plant operators.

14. *Id.* at 659, 1 Cal. Rptr. 2d at 79.

15. *Id.* at 659, 1 Cal. Rptr. 2d at 80.

16. *Id.*

cants should be hired[17]. This recommendation would carry great weight in the final hiring decisions[18].

Appellants did not challenge the practice of administering psychological evaluations per se; they challenged certain questions on the "Psychscreen" as being invasive and not job- related[19]. Specifically, Appellants claimed that the questions regarding religious attitudes[20] and the questions regarding sexual orientation[21] violated their constitutional right to privacy[22], the Fair Employment and Housing Act[23], and the California Labor Code[24].

The trial court held that a job **applicant's** constitutional right to privacy may be violated by an employer who could show a legitimate interest for the violation[25]. The trial court believed that the use of the "Psychscreen" was reasonable because the employer had showed a legitimate interest for using it[26]. In addition, the trial court found that the questions regarding religious attitudes were not intended to reveal an applicant's religious beliefs, and thus, were not violative of the Fair Housing and Employment Act[27]. Finally, the trial court held that the questions regarding sexual orientation were not intended to

17. *Id.*

18. *Id.*

19. *Id.* at 660, 1 Cal. Rptr. 2d at 80.

20. *Id.* at 659, 1 Cal. Rptr. 2d at 79-80. The questions regarding religious attitudes included: "I feel sure that there is only one true religion...I have no patience with people who believe there is only one true religion...My soul sometimes leaves my body...A minister can cure disease by praying and putting his hand on your head...Everything is turning out just like the prophets of the Bible said it would...I go to church almost every week...I believe in the second coming of Christ...I believe in a life hereafter...I am very religious (more than most people)...I believe my sins are unpardonable...I believe there is a God...I believe there is a Devil and a Hell in afterlife."

21. *Id.* at 659, 1 Cal. Rptr. 2d at 80. The questions regarding sexual orientation included: "I wish I were not bothered by thoughts about sex....I have never been in trouble because of my sex behavior....I have been in trouble one or more times because of my sex behavior....My sex life is satisfactory....I am very strongly attracted by members of my own sex....I have often wished I were a girl.... (Or if your are a girl) I have never been sorry that I am a girl....I have never indulged in any unusual sex practices....I am worried about sex matters....I like to talk about sex....Many of my dreams are about sex matters."

22. Cal. Const. art. I, § 1 (1879, amended 1972).

23. Cal. Gov't Code §§ 12920, 12940 (West 1980).

24. Cal. Lab. Code §§ 1101, 1102 (West 1989).

25. *Soroka,* 235 Cal. App. 3d at 661, 1 Cal. Rptr. 2d at 81.

26. *Id.* The trial court found that Target had demonstrated a legitimate interest in psychologically screening applicants for security positions to minimize the potential danger to its customers and others. Presumably, a "legitimate interest" is sufficient to pass the deferential reasonableness test, whereas it would be insufficient to pass the more exacting standard of "compelling interest".

27. *Soroka,* 235 Cal. App. 3d at 669, 1 Cal. Rptr. 2d at 87.

force applicants to reveal their sexual orientation, and thus, were not violative of the Labor Code[28].

III. COURT'S ANALYSIS

A. CONSTITUTIONAL RIGHT TO PRIVACY

1. *standard for permissible violation of privacy right*

The appellate court held that the trial court abused its discretion by committing an error of law when it applied the wrong standard in assessing a potential violation of the state constitutional right to privacy[29].

The California Constitution provides:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy"[30].

California courts have held that public and private employers must justify any intrusion into an employee's privacy by demonstrating a compelling interest[31]. If the employer is able to show a compelling interest, the employer must still show that the inquiries were job related[32].

The question presented here was whether there was a distinction between an employee's privacy rights and an applicant's, i.e., whether the compelling interest standard should also be applied when questioning job **applicants**. Appellants

28. *Id.* at 670, 1 Cal. Rptr. 2d at 87.

29. *Id.* at 668, 1 Cal. Rptr. 2d at 86.

30. Cal. Const. Art. I, § 1 (1879, amended 1972).

31. White v. Davis, 13 Cal. 3d 757, 774-75, 533 P.2d 222, 234, 120 Cal. Rptr. 94, 106 (1975) [any intervention into right to privacy must be justified by compelling interest]; Luck v. Southern Pacific Transportation Co., 218 Cal. App. 3d 1, 17-20, 267 Cal. Rptr. 618, 626-629 (1990) [public and private employers must demonstrate a compelling interest] cert. denied, __ U.S. __, 111 S.Ct. 344 (1990); Wilkinson v. Times Mirror Corporation, 215 Cal. App. 3d 1034, 1040-43, 264 Cal. Rptr. 194, 202, (1989) [the right to privacy is protected from private as well as public employers, but also held that if the right is not substantially burdened compelling interest may not be required].

32. *Soroka,* 235 Cal. App. 3d at 666, 1 Cal. App. 2d at 85.

argued that Respondent was required to demonstrate a compelling interest before intruding on their right to privacy, just as would be required if they were employees[33].

The trial court, relying on *Wilkinson v. Times Mirror Corporation*[34], which recognized a distinction between employees and applicants[35], applied a reasonableness test[36] and held that the state constitution only required Respondent to show a legitimate interest in order to overcome a job applicant's right to privacy[37]. Respondent argued that the "Psychscreen" was used for screening out emotionally unstable security officer applicants in order to protect its customers[38], which the trial court found to be a legitimate interest. Using the *Wilkinson* reasonableness standard, the court found that Respondent's legitimate interest was sufficient to overcome Appellants' right to privacy[39].

The appellate court disagreed with *Wilkinson*'s distinction between employees and job applicants and held that the trial court's reliance on it amounted to a reversible error of law[40]. It held that a compelling interest is uniformly required because there was no legitimate distinction between the privacy rights of employees and job applicants[41]. In declining to follow *Wilkinson*[42], the appellate court relied on several sources: 1) an

33. *Id.* at 663, 1 Cal. Rptr. 2d at 82.

34. Wilkinson v. Times Mirror Corporation, 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989) [pre-employment drug testing did not violate job applicants' state constitutional right to privacy because employer had a legitimate interest and it was **reasonable**]. By requiring a mere showing of a legitimate interest to overcome a job applicant's constitutional right to privacy, this case, by distinguishing between employees and applicants departed significantly from prior California case law which had always required a demonstration of a compelling interest to overcome this right.

35. *Id.* at 1049, 264 Cal. Rptr. at 204: "Simply put, applicants for jobs...have a choice; they may consent to the limited invasion of their privacy resulting from the [drug] testing, or may decline both the test and the conditional offer of employment."

36. *Id.* at 1048, 264 Cal. Rptr. at 203.

37. The two standards differ significantly. A compelling interest is a strict level of judicial scrutiny which is more difficult to prove in order to pass constitutional muster than the less exacting, deferential reasonableness standard, which requires only a showing of a legitimate interest.

38. *Soroka,* 235 Cal. App. 3d at 658, 1 Cal. Rptr. 2d at 79.

39. *Id.* at 663, 1 Cal. Rptr. 2d at 82.

40. *Soroka,* 235 Cal. App. 3d at 668, 1 Cal. Rptr. 2d at 86.

41. *Id.* at 664, 1 Cal. Rptr. 2d at 83.

42. As a matter of stare decisis, an intermediate appellate court's holding is only binding on inferior courts. Intermediate appellate courts are "not compelled to apply the law as interpreted by a court of equivalent jurisdiction if [it] find[s] that court's reasoning unpersuasive". *Soroka,* 235 Cal. App. 3d at 668, 1 Cal. Rptr. 2d at 86, n.8.

examination of the legislative history of the state constitutional amendment which elevated privacy to an enumerated and inalienable right; 2) pre-*Wilkinson* case law; and 3) a critical analysis of the *Wilkinson* rationale.

a) legislative history

Before 1972, privacy was not an enumerated right in the state constitution. In 1972, California voters amended the state constitution; "California [has] accord[ed] privacy the constitutional status of an inalienable right[43], on a par with defending life and possessing property"[44]. In its decision, the court relied heavily on the arguments the state set forth in the ballot pamphlet for the proposed amendment to the constitution[45]. This "ballot argument" encompasses the only legislative history behind the state constitutional right to privacy[46]. First, the court noted that the ballot argument provided that the constitutional right to privacy could only be overcome by a compelling interest[47]. Next, the court found that the voters affirmatively intended for there to be no distinction between the privacy rights of employees and job applicants[48]. In sum, the court found that a requirement of a compelling interest to overcome a job applicant's privacy right was in accord with the intent of the voters and thus was constitutionally mandated.

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43. An inalienable right is one "which may not be violated by anyone". Wilkinson v. Times Mirror Corporation, 215 Cal. App. 3d 1034, 1042, 264 Cal. Rptr. 194, 199 (1989).

44. *Soroka*, 235 Cal. App. 3d at 662, 1 Cal. Rptr. 2d at 82; *see also* Luck v. Southern Pacific Transportation Co., 218 Cal. App. 3d 1, 18, 267 Cal. Rptr. 618, 627 (1990) [Appellate courts have repeatedly held that the right to privacy is an inalienable right] cert. denied, __ U.S. __, 111 S.Ct. 344 (1990); Wilkinson v. Times Mirror Corporation, 215 Cal. App. 3d 1034, 1037, 264 Cal. Rptr. 194, 199 (1989) ["Privacy is... considered an inalienable right, which may not be violated by anyone".]; Porten v. University of San Francisco, 64 Cal. App. 3d 825, 829, 134 Cal. Rptr. 839, 842 (1976).

45. Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to the voters, Gen. Elec. (Nov. 7, 1972) pp. 27-28.

46. *Soroka*, 235 Cal. App. 3d at 666-67, 1 Cal. Rptr. 2d at 85.

47. *Id.* at 665, 1 Cal. Rptr. 2d at 84; *see* Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) pp. 27-28; *see also* White v. Davis, 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106; Luck v. Southern Pacific Transportation Co., 218 Cal. App. 3d at 20, 267 Cal. Rptr. at 629.

48. The appellate court found that when voters amended the constitution, it was their intent to give inalienable privacy rights to job applicants as well as employees. "The ballot argument specifically refers to job applicants when it states, '[e]ach time we...interview for a job,...a dossier is opened and an informational profile is sketched.'" *Soroka*, 235 Cal. App. 3d at 664, 1 Cal. Rptr. 2d at 83; *see also*, Central Valley Ch. 7th Step Foundation, Inc. v. Younger, 214 Cal. App. 3d 145, 151, 162- 65, 262 Cal. Rptr. 496, 499, 506-07 (1989) [applied compelling interest in case involving job applicant].

b) pre-Wilkinson case law

The court examined pre-Wilkinson case law and discovered that no distinction had previously been made between employees and applicants in regard to their privacy rights. For instance, in *Central Valley Chap. 7th Step Foundation, Inc. v. Younger*[49], a public employer was required to demonstrate a compelling interest in order to obtain an applicant's arrest records. The fact that this case involved a public employer was irrelevant because private and public employers are equally bound by the terms of the privacy provision[50].

The appellate court was satisfied that the Wilkinson distinction between applicants and employees was not in harmony with either the legislative history or prior case law.

c) critical analysis of the Wilkinson rationale

Finally, the appellate court found that *Wilkinson*'s aberrant rule was derived in part from improper inferences drawn from *Schmidt v. Superior Court*[51]. In *Schmidt,* the petitioners argued that their constitutional right to familial privacy was violated by an age-based restriction at a private mobilehome park[52]. The California Supreme Court rejected those claims because it found that the regulation was "neither irrational or arbitrary..."[53]. The *Wilkinson* court interpreted this holding to mean that "as long as [the right to privacy] is not substantially burdened or affected, justification by a compelling interest is not required. Instead, the operative question is whether the challenged conduct is reasonable"[54].

The appellate court found *Wilkinson*'s interpretation untenable for several reasons. First, it found that the property interests in *Schmidt* were distinguishable as being of a less personal nature than the privacy interests contemplated by the

49. Central Valley Chap. 7th Step Foundation, Inc. v. Younger, 214 Cal. App. 3d 145, 262 Cal. Rptr. 496 (1989).

50. *Luck,* 218 Cal. App. 3d at 19, 267 Cal. Rptr. at 627 (1990); Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 1040-44, 264 Cal. Rptr. 194, 198-200 (1989) [article 1, section 1 limits private entities].

51. Schmidt v. Superior Court, 48 Cal. 3d 370, 769 P.2d 932, 256 Cal. Rptr. 750 (1989) [upholding a rule limiting residence in a private mobilehome park to persons 25 years of age or older].

52. *Id.*

53. *Id.* at 383, 769 P.2d at 945, 256 Cal. Rptr. at 763.

54. *Wilkinson*, 215 Cal. App. 3d at 1047, 264 Cal. Rptr at 203.

constitutional amendment[55]. Secondly, a reasonableness standard is at odds with the ballot argument which provides solely for a compelling interest standard when privacy interests are at stake[56]. Finally, the court asserts that if the California Supreme Court in *Schmidt* were going to make such a substantial deviation from the previous rule, it would have indicated this unambiguously[57].

After justifying its unwillingness to follow *Wilkinson*, the appellate court found that the trial court had abused its discretion by applying the reasonableness test, rather than the compelling interest test[58]. Furthermore, the appellate court held that under the proper, compelling interest test, Appellants were likely to prevail on the merits of their constitutional claims[59].

2. *nexus requirement*

In addition to demonstrating a compelling interest, Respondent also needed to show a nexus between the "Psychscreen" questions asked and the security officer positions being applied for[60]. Respondent asserted that the questions were job-related because they were used to determine the emotional stability of its applicants[61]. Respondent made general claims that since it implemented the "Psychscreen" it had seen an overall improvement in the quality and performance of its security officers[62]. The trial court, relying on *Wilkinson*[63], held that these generalized claims were sufficient to satisfy the nexus requirement.[64]

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55. *Soroka*, 235 Cal. App. 3d at 665, 1 Cal. Rptr. 2d at 84.

56. *See* Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) pp.27-28; White v. Davis, 13 Cal. 3d 757, 775, 533 P.2d 222, 234, 120 Cal. Rptr. 106, (1975); Luck v. Southern Pacific Transportation Co., 218 Cal. App. 3d 1, 20, 267 Cal. Rptr. 618, 628-29 (1990), cert. denied __ U.S. __, 111 S.Ct. 344.

57. *Soroka*, 235 Cal. App. 3d at 665, 1 Cal. Rptr. 2d at 84.

58. *Id.* at 668, 1 Cal. Rptr. 2d at 86.

59. *Id.*

60. *Soroka*, 235 Cal. App. 3d at 667, 1 Cal. Rptr. 2d at 85.

61. *Id.* at 668, 1 Cal. Rptr. at 86.

62. *Id.*

63. *Wilkinson*, 215 Cal. App. 3d at 1053, 264 Cal. Rptr. at 206. [Court held that an employer has a legitimate interest in not hiring individuals whose drug abuse may render them unable to perform their job responsibilities in a satisfactory manner. The court further held a general claim that pre-employment drug testing was related to this legitimate interest satisfied nexus requirement.]

64. *Soroka*, 235 Cal. App. 3d at 667, 1 Cal. Rptr. 2d at 85.

The appellate court again declined to follow *Wilkinson*. It found that the trial court had committed an error of law because a generalized justification was insufficient to intrude on an individual's privacy rights[65]. To support its conclusions the court relied on: 1) federal precedent; 2) legislative history; and 3) California Supreme Court decisions[66].

a) federal precedent

When interpreting the state right to privacy, California courts have looked to federal precedents for guidance[67]. Accordingly, the appellate court considered the federal nexus requirement. It found that federal courts require "a clear, direct nexus between the nature of the employee's duty and the nature of the [privacy] violation"[68]. Because the California Constitution enumerates the right to privacy while the Federal Constitution does not, the state right to privacy is necessarily broader than the federal right[69]. Thus, the federal requirement of a "clear, direct nexus" establishes the bare minimum that is required in California courts[70]. The appellate court held that since the state constitution required at least a "clear, direct nexus", Target's generalized nexus was insufficient to overcome Appellants' privacy rights.[71]

b) legislative history

Next, the appellate court turned to the only legislative history for the privacy amendment, the ballot argument. The ballot argument asserted that the right to privacy would "preclude the collection of extraneous or frivolous information"[72]. The appellate court found that this language supported a negative inference that employers could only compel employees to

65. *Id.*

66. Long Beach City Employees Assn. v. City of Long Beach, 41 Cal. 3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986); *White v. Davis,* 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

67. *Soroka,* 235 Cal. App. 3d at 666, 1 Cal. Rptr. 2d at 85.

68. *Luck*, 218 Cal. App. 3d 1, 24, 267 Cal. Rptr. 618, 632 (1990).

69. *Soroka*, 235 Cal. App. 3d at 666, 1 Cal. Rptr. 2d at 85.

70. *Id.*

71. *Id.* at 668, 1 Cal. Rptr. 2d at 86. "In its opposition to Soroka's motion for preliminary injunction, Target made no showing that a person's religious beliefs or sexual orientation have any bearing on the emotional stability to perform a [store security officer's] job responsibilities. It did no more than to make generalized claims about the Psychscreen's relationship to emotional fitness and to assert that it has seen an overall improvement in [store security officer] quality and performance since it implemented the Psychscreen."

72. Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 28.

answer questions that were "necessary to achieve the purpose for which the information has been gathered"[73].

c) California Supreme Court decisions

In addition to the legislative history, the appellate court found that the California Supreme Court had recognized the nexus requirement. In *Long Beach City Employees Assn. v. City of Long Beach*[74], the California Supreme Court held that a public employer may only require workers to answer questions that are "specifically, directly and narrowly related[d] to the performance of the employee's official duties"[75]. In *White v. Davis*[76] the Supreme Court held that the privacy amendment was intended "to avoid "the overbroad collection...of unnecessary personal information"[77].

In light of these cases, the appellate court found that Respondent failed to show the requisite clear, direct nexus between the Psychscreen's questions and its stated purpose of determining an applicant's emotional stability[78]. Since the information sought was not job-related, the court held the "collection [was] overbroad, and the information unnecessary"[79], and thus was unconstitutional.

Therefore, Respondent had failed to show both the compelling interest and the requisite nexus. The appellate court concluded that the trial court had abused its discretion when it found that Appellants would not prevail on the merits of their constitutional claim[80].

B. STATUTORY CLAIMS

Since the appellate court had already determined that the injunction should have issued based on Appellants' constitutional claim, determining whether Appellants would have

73. Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972) p. 28.

74. Long Beach City Employees Assn. v. City of Long Beach, 41 Cal. 3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986).

75. *Id.* at 947, 719 P.2d at 670, 227 Cal. Rptr. at 95-96.

76. White v. Davis, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

77. *Id.* at 775, 533 P.2d at 240, 120 Cal. Rptr. at 106.

78. *Soroka*, 235 Cal. App. 3d at 668, 1 Cal. Rptr. 2d at 86.

79. *Id.* at 667, 1 Cal. Rptr. 2d at 85.

80. *Id.* at 668, 1 Cal. Rptr. 2d at 86.

prevailed on their statutory claims was unnecessary[81]. Despite this lack of necessity, the appellate court chose to address the claims for the purpose of guiding the lower court[82]. Appellants contended that they would have prevailed at trial on their claims that Respondent violated the Fair Housing and Employment Act[83] and the California Labor Code[84].

1. *Fair Housing and Employment Act*

The Fair Housing and Employment Act prohibits employers from refusing to hire a person on the basis of their religious beliefs[85]. Employers are also prohibited from making any non-job-related inquiry that expresses "any specification... as to...religious creed...."[86]. The trial court held that the questions regarding religious attitudes were not intended to reveal the applicant's religious beliefs[87].

The appellate court disagreed and held that the trial court had committed an error of law[88]. The appellate court found that Appellants had made a prima facie showing of an impermissible inquiry[89]. The burden then shifted to Respondent to prove that the inquiry was justified as being job-related[90]. The court had already determined in its nexus discussion that the questions regarding religious beliefs were not job-related[91]. Thus, the Psychscreen's questions relating to religious attitudes did constitute the type of inquiry that the Act expressly prohibits. Accordingly, the court determined that Appellants would likely prevail at trial on the merits of this claim[92].

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81. *Id.* at 669, 1 Cal. Rptr. 2d at 86.

82. *Id.* Because the appellate court was not required to address the statutory issues, it is unclear whether the remaining discussion is case law or whether it is dicta.

83. Cal. Gov't Code §§ 12920, 12940 (West 1980).

84. Cal. Lab. Code §§ 1101, 1102 (West 1989).

85. Cal. Gov't Code §§ 12920, 12940 (West 1980).

86. Cal. Gov't Code § 12940 (d) (West 1980).

87. *Soroka,* 235 Cal. App. 3d at 669, 1 Cal. Rptr. 2d at 87.

88. *Id.*

89. To make a prima facie showing of impermissible inquiry, the complainant must show that the questions asked were intended to reveal their religious beliefs. Upon a prima facie showing, the burden shifts to the respondent to show that their questions fall into the "job-related" exception provided for in the Act.

90. *Id.* at 670, 1 Cal. Rptr. 2d at 87.

91. *Id.* In the nexus discussion, the court held that in order for a question to be considered job-related, there must at least be a clear, direct nexus between the inquiry and the purpose sought to be achieved and that the inquiry must be necessary to achieve that purpose.

92. *Id.*

2. *Labor Code*

Sections 1101 and 1102 of the California Labor Code[93] protect an employee's fundamental right to engage in political activity without employer interference[94]. This right was held to protect applicants as well as employees[95]. In *Gay Law Students v. Pacific Tel. & Tel. Co.*[96] the California Supreme Court, per Justice Tobriner, held that being homosexual falls within the purview of political activity, and thus is protected by sections 1101 and 1102 of the California Labor Code[97]. *Gay Law Students* seemed only to prohibit **public** employers from discriminating on the basis of sexual orientation. Then in 1986, the California Attorney General published his opinion that Labor Code sections 1101 and 1102 also prohibited **private** employers from discriminating on the basis of sexual orientation[98].

Appellants argued that Respondent was in violation of the Labor Code because certain questions on the Psychscreen were intended to reveal the applicant's sexual orientation[99]. The trial court disagreed[100]. However, the appellate court held

93. Cal. Lab. Code §§ 1101, 1102 (West 1989).

> Section 1101 provides: "No employer shall make, adopt, or enforce any rule, regulation, or policy: a) forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office. b) controlling or directing, or tending to control or direct the political activities or affiliations of employees."
>
> Section 1102 provides: "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

94. Gay Law Students Assn. v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 487, 595 P.2d 592, 610, 156 Cal. Rptr. 14, 32 (1979).

95. *Id.* at 487 n.16, 595 P.2d at 610, 156 Cal. Rptr. at 32.

96. Gay Law Students Assn. v. Pacific Tel. & Tel. Co, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

97. *Id.* at 487, 595 P.2d at 610, 156 Cal. Rptr. at 32: Justice Tobriner speaking for the court: "The struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity."

98. 69 Ops. Cal. Atty. Gen. 80, 82 (1986). In 1986, then Assemblyperson Art Agnos, requested Attorney General John Van De Kamp's opinion as to whether Labor Code sections 1101 and 1102 prohibited private employers from discriminating on the basis of sexual orientation. He was of the opinion that they did. The fact that the appellate court cites this opinion is significant because the record does not evidence any assertion by the trial court that the Labor Code would not apply to a private employer.

99. *Soroka,* 235 Cal. App. 3d at 670, 1 Cal. Rptr. 2d at 87.

100. *Id.*

that the trial court committed an error of law when it determined that questions such as "I am very strongly attracted by members of my own sex"[101] were not intended to reveal the applicant's sexual orientation. The appellate court reasoned that a person who would identify themselves as homosexual, might be "stigmatized as willing to defy or violate traditional values and mores"[102] and thus would receive low marks for "socialization"[103]. The appellate court held that these questions were discriminatory as a matter of law[104]. It further held that Target's practice was an attempt to coerce the applicant to refrain from expressing a homosexual orientation by the threat of loss of employment. Such a practice is an express violation of the Labor Code[105]. The court then concluded that Appellants would likely have prevailed on the merits of this claim as well.[106]

C. INTERIM HARM

In order for a preliminary injunction to issue, there must be proof that the movant will likely prevail on the merits at trial **and** that the movant would suffer greater harm if the injunction did not issue than non-movant would if it did issue[107]. Having determined that Appellants would likely prevail at trial on the merits of their claims, the appellate court only had to determine whether Appellants would suffer greater harm if the injunction did not issue, than Respondent would if it did.

The court found that Appellants would suffer the greater harm if the injunction were not granted[108]. The appellate court concluded that both prongs of the preliminary injunction test had been met and reversed the trial court's denial of the motion.

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101. *Id.* at 671, 1 Cal. Rptr. 2d at 88.

102. *Id.*

103. *Id.* "Socialization" is one of the five traits that the Psychscreen is used to evaluate. It defines socialization as "the extent to which an individual subscribes to traditional values and mores and feels an obligation to act in accordance with them."

104. *Id.*

105. *Id.*

106. *Id.*

107. *Wilkinson,* 215 Cal. App. 3d at 1039, 264 Cal. Rptr. at 197.

108. The harm to Appellants would be significant because they had already demonstrated a strong probability that the test violated their rights. If no injunction were issued, Respondent would be allowed to continue to administer the test, putting Appellants in the precarious position of either surrendering their constitutional rights or surrendering their option to apply for security officer positions at Target stores.

IV. CONCLUSION

This note is included in the Women's Law Forum primarily because this case stands as the only case law in California that expressly recognizes that it is illegal in California for employers, public and private, to discriminate against people on the basis of sexual orientation. Sexual orientation is not an enumerated protected class. In 1991, the California state legislature passed Assembly Bill 101 that would have added sexual orientation to the Fair Housing and Employment Act's list of enumerated protected classes. Similar statewide protective legislation for lesbians and gay men has been enacted in Connecticut, Hawaii, Massachusetts, Wisconsin, and most recently, in New Jersey. In September 1991, Governor Wilson disgraced the state of California when he vetoed the bill. Defending his action, Wilson claimed that there were already sufficient protections for homosexuals against employment discrimination. To support his claim, he pointed to the California Supreme Court's holding in *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*[109]

Gay Law Students was a 4-3 decision, and was decided by a very liberal Supreme Court[110]. If the present conservative Supreme Court were to have the occasion to reconsider the rationale supporting *Gay Law Students*, it might well be overturned. By embracing *Gay Law Students* and its rationale, the Court of Appeal is strengthening the shaky ground upon which our protections rest.

Governor Wilson also cited Attorney General John Van De Kamp's 1986 opinion[111] to support his claims. This opinion has gone largely ignored. More importantly, by itself, the opinion has no force of law. By citing it, the court in *Soroka* gave the opinion the force of law.

109. Gay Law Students Assn. v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979). (interpreting homosexuality as political activity, bringing homosexuals within the employment discrimination protection of the Labor Code).

110. In 1979 the California Supreme Court Justices were: Chief Justice Bird, and Justices Tobriner, Mosk, Newman, Richardson, Clark, and Manuel. The majority opinion in *Gay Law Students* was written by Tobriner, with whom Bird, Mosk, and Newman concurred. Today the California Supreme Court Justices are: Chief Justice Lucas, and Justices Arabian, Baxter, Broussard, George, Kennard, Panelli, and Mosk.

111. 69 Ops. Cal. Atty. Gen. 80, 82 (1986). (concluding that the Labor Code prohibits private employers from discriminating against individuals on the basis of their sexual orientation, private or manifest).

What is interesting to note, is that there seemed to be no argument from the trial court about how to interpret the Labor Code. The courts only disagreed on the interpretation of the "Psychscreen" questions. The appellate court referred to both *Gay Law Students* and to the Attorney General's opinion without provocation or necessity. It seems that the appellate court wanted to provide very clear guidance for the trial court. Perhaps it is in the wake of the AB 101 veto that the court felt compelled to clarify and validate the protections that Governor Wilson boasted. Although this case is only binding on lower courts, it represents some hope that other courts will adhere to and expand upon the present, albeit sketchy, protections that Governor Wilson felt were adequate to protect the homosexual population from employment discrimination.

V. ADDENDUM

At the time of this note's publication, the California Supreme Court has granted review of this case. As of yet, no briefing schedule has been set.

The California Supreme Court is currently reviewing another state constitutional right to privacy case, *Hill v. NCAA*[112], where Stanford University athletes alleged that the National Collegiate Athletic Association's drug testing policy violated their state constitutional right to privacy. After that case is decided, it is likely that the Supreme Court will not review *Soroka*, but instead will remand to the appellate court for reconsideration according to *Hill*. If *Soroka* is remanded for reconsideration on the constitutional claim only, the sexual orientation issue may not be implicated.

However, even if the appellate court is forced to reverse its position on the constitutional right to privacy issue, the preliminary injunction should still issue because the appellate

112. Hill v. N.C.A.A, 230 Cal. App. 3d 1714, 273 Cal. Rptr. 402 (1990); review granted December 20, 1990. In this case, student athletes sued the National Collegiate Athletic Association seeking to have the NCAA enjoined from enforcing its drug testing program. The Superior Court, Santa Clara County found that the program violated student athletes' state constitutional right to privacy. The Court of Appeal, Sixth District affirmed. That court held 1) the state constitutional right to privacy extends to voluntary, private association's actions; and 2) drug testing program violated state constitutional right to privacy because association did not show compelling need for program.

court found that Appellants would likely prevail on their statutory claims. But a decision based solely on the statutory claims promotes the real possibility that the sexual orientation issue will resurface as the target of dispute. This is disconcerting because of the fear that the current conservative Court may overturn *Gay Law Students*, one of the only existing protections for the gay community.

Solace exists however. Without *Gay Law Students*, the lack of protection for lesbians and gay men in employment will be so conspicuous that Governor Wilson will be unable to assert otherwise when the new AB 101-type bill, just introduced in the California Legislature, (hopefully) arrives on his desk. Albeit oddly paradoxical, if *Gay Law Students* were overturned, Governor Wilson might be forced to sign the new gay rights bill into law because he would be unable to defend a veto of the new bill on the grounds that there were adequate protections already in place.

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IV. FAMILY LAW

A. LESBIAN PARENTING

1. *Refusal to grant custody or visitation rights to lesbian partner who shared equally in parenting of children with partner, the natural mother.*

Nancy S. v. Michele G., 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1991). In *Nancy S. v. Michele G.*,[1] the California Court of Appeal, First District, unanimously affirmed the trial court's ruling that a lesbian, who had shared equally in the parenting of two children with her partner, the children's natural mother, was unable to establish the existence of a parent-child relationship under the Uniform Parentage Act[2]. Without establishing such status, the lesbian partner had no legal rights to visit with or have custody of the children[3]. The appellate court further affirmed that the natural mother was the only legal parent of the two minor children, entitling her to sole legal and physical custody[4]. Therefore, any further contact between the lesbian partner and the children would require the natural mother's consent[5].

I. FACTS

Nancy (hereinafter, "Respondent") and Michele (hereinafter, "Appellant") began living together in August 1969. In November of that year they had a private "marriage ceremony"[6]. Eventually, they decided to have children together by inseminating Respondent[7]. Respondent gave birth to two children: K. in June 1980, and S. in June 1984[8]. In both instances, Appellant was listed on the birth certificate as the father and both children were given Appellant's family name[9]. Both children referred to Appellant as "Mom"[10]. Appellant and

1. Nancy S. v. Michele G., 228 Cal. App. 3d 831, 279 Cal. Rptr. 212 (1991).
2. Uniform Parentage Act, Cal. Civ. Code § 7000 et seq. (West 1983).
3. *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 831, 279 Cal. Rptr. at 214.
4. *Id.* at 835, 279 Cal. Rptr. at 215.
5. *Id.* at 834, 279 Cal. Rptr. at 214.
6. *Id.* The court did not decide whether the marriage was entitled to any legal recognition because Appellant did not raise the issue.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

Respondent had considered arranging for Appellant to adopt the children, but they never initiated the formal adoption proceedings[11].

In January 1985, Appellant and Respondent separated[12]. For the next three years the parties abided by an agreement that K. would live with Appellant and S. would live with Respondent[13]. Respondent wanted to change the arrangement so that both children would be with each adult fifty percent of the time[14]. Appellant opposed any change and attempts to mediate the dispute failed[15]. Respondent commenced this action under the Uniform Parentage Act (hereinafter "UPA") seeking three declarations: 1) that Appellant was not a parent of either child; 2) that Respondent, as the biological mother, was entitled to sole legal and physical custody; and 3) that Appellant was entitled to visitation only with Respondent's consent[16]. Appellant sought to qualify as a parent in order to attain rights of custody and visitation under the UPA[17]. Appellant admitted that she was not the biological mother and had not adopted the children, but argued that notwithstanding the UPA, she had either attained the status of a de facto parent[18], or alternatively that Respondent should be estopped to deny Appellant's status as a parent[19].

The trial court found that Appellant was not a parent under the UPA. Thus, even if Appellant could prove that she had attained the status of de facto parent, the court was without jurisdiction to grant the visitation and custody rights, over the objections of Respondent, who did qualify as a parent under the act[20]. Further, by denying Appellant all relief, the court also impliedly found as a matter of law that Appellant could not attain the status of a parent by equitable estoppel[21].

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 835, 279 Cal. Rptr. at 214.
18. A "de facto" *parent* is defined in In re B.G., 11 Cal.3d 679, 692, 523 P.2d 244, 253, 114 Cal.Rptr. 444, 453 (1974) at n.18 as "that person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his psychological need for affection and care". *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 836, 279 Cal. Rptr. at 216.
19. *Id.*
20. *Id.* at 835 n.2., 279 Cal. Rptr. at 215.
21. *Id.* at 835 n.1., 279 Cal. Rptr. at 215.

II. COURT'S ANALYSIS

A. JURISDICTION.

The Court of Appeal first decided whether the trial court had jurisdiction to award custody and/or visitation rights to Appellant. The court held that the trial court did have jurisdiction. "A court...lacks 'jurisdiction' only if it has no power to render a decision over the subject in dispute"[22]. It cited *Curiale v. Reagan*[23], a case strikingly similar to the case at bar, but where the court lacked jurisdiction[24]. There, the lesbian partner was asserting that she was a de facto parent, as opposed to a parent. The case was dismissed because the court lacked the power to decide whether she was a de facto parent. The case here is distinguishable in that Appellant had always maintained that she was a parent, as opposed to a de facto parent. In addition, Appellant did not institute the proceedings here, as the lesbian partner in *Curiale* did. Thus, the appellate court, here, found that the trial court did have jurisdiction under the UPA to make the parental determination[25]. Upon

22. *Id.* at 835 n.2., 279 Cal. Rptr. at 215.

23. Curiale v. Reagan, 222 Cal. App. 3d 1597, 272 Cal. Rptr. 520 (1990).

24. Curiale v. Reagan, 222 Cal. App. 3d 1597, 272 Cal. Rptr. 520 (1990), involved two lesbians disputing the custody of their child, conceived during their relationship by artificial insemination. The *Curiale* court held that 1) plaintiff, non- biological mother lacked standing to bring an action for custody and/or visitation; and 2) that the court lacked subject matter jurisdiction to award custody and/or visitation rights over the objections of the "natural" mother. Plaintiff had asserted that Civil Code section 7015 (UPA) conferred standing upon any interested person to bring an action to determine the existence of a parent-child relationship. Cal. Civ. Code § 7015 (West 1983). On appeal, the court held that Civil Code section 7015 (UPA) had no application where the defendant was the undisputed natural mother of the child. *Curiale v. Reagan,* 222 Cal. App. 3d at 1600, 272 Cal. Rptr. at 522. Plaintiff asserted that Civil Code section 4600 (Family Law Act) conferred subject matter jurisdiction. Cal. Civ. Code § 4600 (West 1983). It provides in relevant part: "In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding or at any time thereafter, make such order for the custody of the child during minority as may seem necessary or proper." *Id.* at 1600 n.2., 272 Cal. Rptr. at 522. On appeal, the court held that Civil Code section 4600 did not create subject matter jurisdiction; there had to be an independent basis. *Id.* at 1600, 272 Cal. Rptr. at 522. It held that jurisdiction to adjudicate custody depended on some proceeding properly before the court such as dissolution, dependency, or guardianship. *Id.* The court concluded that it had no jurisdiction to award custody or visitation rights to plaintiff because plaintiff had no colorable claim of right to custody and there was no statutory basis for plaintiff's claim of parental status. *Id.* at 1598, 272 Cal. Rptr. at 522. On appeal, the court affirmed the dismissal of plaintiff's claim.

25. Nancy S. v. Michele G., 228 Cal. App. 3d 831, 835, 279 Cal. Rptr. 212, 215 (1991). The distinction the court makes between the cases is unclear. In *Curiale*, the lesbian partner sought standing through the UPA and subject matter jurisdiction through the Family Law Act. The court denied both claims, arguably because without standing, the proceeding involving custody was not properly before the court. *Curiale v. Reagan,* 222 Cal. App. 3d at 1600, 272 Cal. Rptr. at 521. In *Nancy S.*, the

finding that Appellant was not a parent under the UPA, the trial court had jurisdiction to deny Appellant custody and/or visitation rights[26].

B. PARENTAL STATUS DETERMINATION UNDER THE UPA.

The appellate court next decided whether the trial court correctly found that Appellant was not a parent under the UPA definition. The UPA defines a parent as one who is the natural or adoptive parent of a child[27]. The appellate court reviewed the undisputed facts and held that the trial court correctly determined that Appellant could not establish parental status under the UPA because: 1) Appellant was not the natural mother; 2) she had not adopted either of the children; and 3) she did not contend that she and Respondent had a legally recognized marriage when the children were born[28].

C. SIGNIFICANCE OF UPA PARENTAL STATUS.

Whether a party has the status of a parent or a non-parent is of critical importance because that status dictates the proper test to be applied in a custody/visitation dispute under Civil Code section 4600[29]. If both parties have parental status, the award of custody or visitation will be decided on the basis

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lesbian partner did not need to establish standing because the natural mother brought the action. It appears that subject matter jurisdiction was held to exist because the action (determining parentage under UPA) was a proceeding properly before the court where custody was at issue. However, a determination of parentage under the UPA is not an enumerated proceeding upon which jurisdiction depends, i.e. dissolution, guardianship, or dependency. *Curiale v. Reagan,* 222 Cal. App. 3d at 1600, 272 Cal. Rptr. at 522.

26. *Nancy S. v. Michele G.,* 228 Cal. App. 3d at 835 n.2., 279 Cal. Rptr. at 215.

27. Cal. Civ. Code § 7001 (West 1983).

28. *Nancy S. v. Michele G.* 228 Cal. App. 3d at 836, 279 Cal. Rptr. at 215. By referring to the existence of a legally recognized marriage, the court followed a *rebuttable* presumption in the state of California that a man who is legally married to a woman is the natural father of the children she bears during the marriage. (Cal. Civ. Code § 7004(a)(1) (West 1983). The court seemed to imply that if Appellant had contended that she and respondent had a legally recognized marriage it would have made a difference. This could be of notable importance as gay and lesbian relationships become more recognized by the Legislature and the courts. For example, in some cities, domestic partnership legislation allows lesbian and gay couples to officially register their relationships at City Hall. In San Francisco, health care benefits for city employees, previously only extended to the spouses of city employees, were recently extended to domestic partners. Perhaps as the concept of domestic partnerships becomes more widespread, a similar conclusive presumption of parentage would apply as to the children born during the partnership.

29. Cal. Civ. Code § 4600 (West 1983) is also known as the Family Law Act.

of the "best interests" of the child[30]. If one of the parties is unable to establish the status of parent, the determination to award custody to the non-parent will be reached based on a two-prong test[31].

Therefore, if the court had granted Appellant the status of parent, she would have been entitled to seek custody and visitation over the objections of the "natural" mother based solely on the "best interests" of the children. The determination that Appellant did not have the status of a parent meant that she had the additional burden of proving to the court that an award of sole custody to Respondent would be detrimental to the children[32]. The court articulated the two-pronged test, but did not apply it.

D. THE EQUITABLE DOCTRINES.

Appellant was unable to establish the status of parent under the UPA, but contended that the UPA did not provide the exclusive definition of a parent[33]. She asserted several legal theories: 1) de facto parent; 2) in loco parentis; and 3) parent by equitable estoppel, in support of her argument that as a "psychological parent" both she and Respondent should stand on equal footing, as two legally recognized parents[34].

1. *De Facto*

The court dismissed Appellant's argument that establishing de facto parenthood would give her status of a parent. "These facts may well entitle [A]ppellant to the status of a 'de facto' parent. It does not, however, follow that as a 'de facto' parent [A]ppellant has the same rights as a parent to seek custody and visitation over the objection of the children's natural mother."[35] The court relied on *In re B.G.*[36], where it was held

30. Cal. Civ. Code § 4600 (West 1983). Subsection (b) provides in pertinent part:
> "Custody should be awarded in the following order of preference according to the best interests of the child...: (1) [t]o both parents jointly...."

31. Cal. Civ. Code § 4600 (West 1983). Subsection (c) provides in pertinent part: "Before the court makes any order awarding custody to a person or persons other that a parent, without the consent of the parents, [1] it shall make a finding that an award of custody to a parent would be detrimental to the child and [2] the award to a non-parent is required to serve the best interests of the child."

32. Cal. Civ. Code § 4600 (c) (West 1983).

33. *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 836, 279 Cal. Rptr. at 215.

34. *Id.*

35. *Id.* at 837, 279 Cal. Rptr. at 216.

36. In re B.G., 11 Cal.3d 679, 114 Cal. Rptr. 444 (1974).

that de facto parents could not be awarded custody over the objections of the natural mother unless it were shown that custody to the natural mother would be detrimental to the child[37]. Thus, even if Appellant were to establish that she was a de facto parent, the two-prong test would still be applied.

2. *In Loco Parentis*

Next, Appellant asserted that the common law doctrine of "in loco parentis"[38] could be applied to confer upon her the same rights as a parent to seek custody and visitation[39]. In loco parentis has been used in other contexts to confer parental rights and obligations on non-parents[40]. The court here, however, held that in loco parentis could not be applied in a custody context. The court relied on *Perry v. Superior Court*[41] where in loco parentis was referred to in a custody/visitation context. *Perry* held that the trial court had no authority to award custody or visitation unless the minor was a "child of the marriage"[42]. In a concurring opinion, Associate Justice Hopper suggested that if the "...[h]usband had raised the issue and had been found by the superior court to be in loco parentis with regard to the [child], one could conclude that the [child] was a 'child of the marriage' within Civil Code section 4351"[43]. The court cited *Perry* to illustrate that in loco parentis in a custody/visitation dispute has only been referred to as a way to establish that a minor was a child of the marriage for jurisdictional purposes. The court refused to expand the doctrine to confer parental rights on a non-parent in a custody dispute.

3. *Equitable Estoppel / Equitable Adoption / Equitable Parent*

(a) Equitable Estoppel:

Appellant next argued that Respondent should be estopped to deny the parent-child relationship between the children

37. *Id.* at 692-95, 114 Cal. Rptr. at 456-58.

38. In loco parentis is defined as: "[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities." Black's Law Dictionary 896 (4th ed. 1968).

39. *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 838, 279 Cal.Rptr. at 219.

40. In Costello v. Hart, 23 Cal. App. 3d 898, 100 Cal. Rptr. 554 (1972), in loco parentis was used to hold a non-parent liable, as a parent would have been, in a tort context.

41. Perry v. Superior Court, 108 Cal. App. 3d 480, 166 Cal. Rptr. 583 (1980).

42. *Perry*, 108 Cal. App. 3d at 481, 166 Cal. Rptr. at 584. Civil Code section 4351 requires that the minor, whose custody is at issue, be a child of the marriage before the court can award custody or visitation. Cal. Civ. Code § 4351 (West 1983).

43. *Perry*, 108 Cal. App. 3d at 484, 166 Cal. Rptr. at 586-87. (Associate Justice Hopper, concurring).

and Appellant because Respondent had encouraged and supported that relationship for many years, and now denied it in order to gain sole legal custody[44]. The court dismissed Appellant's argument relying on the fact that equitable estoppel had never before been used against a natural parent in a custody battle with a non- parent.

The doctrine had, however, been used by natural mothers against nonbiological fathers to estop them from denying paternity in order to avoid child support obligations[45]. The court referred to a Wisconsin case, *In re Paternity of D.L.H*[46], where the non-parent "father" was permitted to prove the elements of equitable estoppel in a paternity suit for custody and visitation rights. However, the court, there, reserved the question of whether, even if he were able to establish the elements of equitable estoppel[47], he would have attained the status of a parent in a custody dispute. The court, here, distinguished the use of equitable estoppel in *In re Paternity of D.L.H.*[48], by noting that "the use of the doctrine of equitable estoppel, in these out-of-state cases, is rooted in '[o]ne of the strongest presumptions in law, [i.e.], that a child born to a married woman is the legitimate child of her husband'"[49], then added that no similar presumption applies here[50].

(b) Equitable Parent/Equitable Adoption:

Next, the court distinguishes the doctrine of equitable estoppel, asserted by Appellant, from the concept of an "equitable parent"[51]. Equitable parent was recognized in Michigan, in *Atkinson v. Atkinson*[52], a custody dispute where the husband, albeit the nonbiological father, was allowed to stand on equal footing against the natural mother of the child pursuant to the best interests of the child[53]. The court explained that "equitable

44. *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 839, 279 Cal. Rptr. at 217.

45. In re Marriage of Johnson, 88 Cal. App. 3d 848, 152 Cal. Rptr. 121 (1979); Clevenger v. Clevenger, 189 Cal. App. 2d 658, 11 Cal. Rptr. 707 (1961).

46. In re Paternity of D.L.H., 142 Wis. 2d 606, 419 N.W.2d 283 (1987).

47. The elements of equitable estoppel are set forth in In re Paternity of D.L.H., 142 Wis. 2d 606, 610, 419 N.W. 2d 283, 286 (1987) as follows: 1) action or nonaction which induces 2) reliance by another 3) to his detriment.

48. In re Paternity of D.L.H, 142 Wis. 2d 606, 419 N.W.2d 283 (1987).

49. Runner, *Protecting A Husband's Parental Rights When His Wife Disputes The Presumption Of Legitimacy*, 28 J. Fam. L. 116 (1989-90).

50. *Nancy S. v, Michele G.*, 228 Cal. App. 3d at 840, 279 Cal. Rptr. at 218.

51. *Id.* at 840, 279 Cal. Rptr. at 218.

52. Atkinson v. Atkinson, 160 Mich. App. 601, 408 N.W. 2d 516 (1987).

53. *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 840, 279 Cal. Rptr. at 218.

parent" differs from "equitable estoppel" in that "equitable parent" is related to the "equitable adoption" theory which operates for the purposes of inheritance by a child from the estate of a non-parent[54]. The Michigan court reasoned that if a "non-parent" would be a "parent" in death (for inheritance purposes), they ought to be a "parent" in life (for custody purposes)[55]. Though California, like Michigan recognizes "equitable adoption" for inheritance purposes[56], it has declined in at least one other case to extend the concept to a custody proceeding[57].

4. *New Definition of Parenthood*

Appellant finally urged the court to adopt a broader definition of parenthood than the UPA to protect relationships between children and those who function as their parents. Under this proposed definition, the class of persons entitled to seek custody and visitation according to the same standards as a natural parent, would include "anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature"[58]. The court refused to accept this expanded definition because it feared the complex practical, social, and constitutional ramifications of such an expansion[59].

III. CRITIQUE

A. JURISDICTION.

The court relied on *Curiale*[60] to illustrate that in some custody/visitation cases the problem is one of standing and jurisdiction. Though the opposite result was reached here, the court failed to distinguish the cases in a manner that

54. *Id.*

55. *Atkinson,* 160 Mich. App. at 605, 408 N.W.2d at 519.

56. Cal.Prob.Code § 6408 (West 1983).

57. In re Marriage of Lewis and Goetz, 203 Cal. App. 3d 514, 250 Cal. Rptr. 30 (1988). The court declined to adopt the equitable parent theory to award a stepfather joint custody over the objection of the natural mother. The court declined to do this in large part because Civil Code § 4351.5, adopted only a few years prior, specifically governed the rights of a stepparent. The court also felt that it was better left to the legislature because of the "complex practical, social and constitutional ramifications" of expanding the class of persons entitled to assert parental rights.

58. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 Georgetown L.J. 459, 464 (1990).

59. *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 841, 279 Cal. Rptr. at 219.

60. Curiale v. Reagan, 222 Cal. App. 3d 1597, 272 Cal. Rptr. 520 (1990).

provides any insight or guidance to future cases. What remains are the following inferences: 1) there is no statutory basis for a lesbian partner to assert standing to sue a natural mother for custody, and thus, a court is precluded from having jurisdiction to decide the case[61] when the nonbiological mother institutes the proceeding, and 2) when the natural mother institutes the proceeding, the court will only have jurisdiction to decide the case if the lesbian partner asserts that she is a parent[62].

B. Parental Status Determination Under the UPA.

Upon determining that Appellant did not fit into the definition of a parent under the UPA, the court decided that she was a non-parent. This determination has tremendous legal significance. Appellant, known as "Mom" in the eyes of the children, became a "stranger" in the eyes of the law. The UPA definition is extremely narrow. In order for a lesbian partner to claim any parental rights, she must adopt the children. Under the UPA, a person who adopts a child is a parent, and thus stands on equal footing with a natural parent in a custody/visitation dispute and can assert solely the best interests of the child standard. This would seem to be true whether the adoptive parent had participated in the parenting since the child's birth or had only recently been acquainted with the child. Conversely, a person who has acted as a parent for eight years since birth, but has not formally adopted, as here, is unable to attain the status of parent under the UPA, and is unable to stand on equal footing with the natural parent. Thus, neither the duration nor the quality of the relationship bear any significance.

The only route left for the non-parent is to establish parental status under equitable doctrines such as de facto parent or in loco parentis. However, even if she succeeds, her rights will still be subordinate to the natural mother. The courts seems resistant, no matter how unfair the result, to award custody/visitation to a non-parent over the objections of a "UPA parent".

C. SIGNIFICANCE OF UPA PARENTAL STATUS.

The court dictates that the test to be applied is the two pronged "detriment to the children/best interests of the children" test, but then does not apply it to the facts of this case.

61. See Curiale v. Reagan, 222 Cal. App. 3d 1597, 272 Cal. Rptr. 520 (1990).
62. *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 835 n.2, 279 Cal. Rptr. at 215.

The court fails to examine the possibility that awarding sole custody to Repondent, with no visitation rights for Appellant, could be a detriment to the children and not in their best interests, because they would be denied the parental relationship with Appellant that they had both known since birth. This would be especially true for K. because she lived with both parties until she was five, and then with Appellant until she was eight. Both children had formed the kind of trusting and loving relationship with Appellant that children form with their parents. By denying the children contact with Appellant, they suffer the loss of this special, parent-like relationship. As to the second prong, Appellant might have contended that the best interests of the children would be most adequately served by having substantial contact with her; having two parent-type influences on the children would be better than only one.

Furthermore, the court, in failing to do more than state the test, provides no guidance or clarity regarding what "detriment" means. Civil Code § 4600 (c) does not define detriment[63]. Presumably, if a parent were found unfit for parenting, detriment to the child would be obvious. But, arguably, if detriment were only capable of being established by a finding of unfitness, the statute would have stated this unequivocally. Possibly the Legislature envisioned that children could be detrimented in a variety of ways, even where a parent was found to be perfectly fit for parenting.

In *In re B.G.*[64], the California Supreme Court held that custody may be awarded to a non-parent despite the fact that the natural parent was expressly found fit to be a parent[65]. Clearly, unfitness is not a prerequisite to finding detriment to the children. Thus, the fact that Appellant did not contend that Respondent was unfit should not have rendered the issue moot, nor excused the court from applying the test. A reasonable argument could have been made that the award of sole custody to Respondent was detrimental to the children, despite the fact that Respondent was not unfit, because the children would be denied their parent-like relationship with Appellant.

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63. Cal. Civ. Code § 4600 (c) (West 1983).

64. In re B.G., 11 Cal.3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

65. *Id.* at 681, 114 Cal. Rptr. at 445: Justice Tobriner, speaking for the Court, concluded "that under [Civil Code section 4600] it is no longer essential that a court, to award custody to a non-parent, find the parent unfit to care for the child".

The language Tobriner uses indicates that a finding of unfitness was previously required.

Additionally, the court makes no distinction between custody and visitation rights, and essentially treats them as inextricably entwined. Even if the court had applied the test and ultimately found that sole custody to Respondent would not meet the detriment requirement, a complete denial of visitation rights to Appellant would certainly be a detriment. By holding that all further contact between the Appellant and the children must be by Respondent's consent, the court appears not even to have considered whether the children would be detrimented. "Reasonable visitation rights shall be awarded to a parent unless it is shown that such visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child"[66].

By not granting custody rights or any reasonable visitation rights, which the court clearly has the discretion to do, it seems that the court has taken the position that the best interests of the children could not be served by a continuing relationship with a lesbian partner. By taking an all or nothing approach, the court has taken away from S. and K. the person whom they know as "Mom". Thus, the court appears also to have totally disregarded the second prong of the proposed test, the best interests of *these* children.

D. THE EQUITABLE DOCTRINES.

1. *De Facto.*

The appellate court held that even if Appellant could establish de facto status she would still have to meet both prongs of the test, rendering her de facto status meaningless. The court, however, does not reach a conclusion regarding Appellant's de facto status, and thus did not apply the test. Interestingly, the court did indicate that Appellant would likely have been able to establish de facto status[67]. Its failure to reach a conclusion as to whether Appellant would qualify as a de facto parent combined with the court's total avoidance of applying the test supports an inference that the court believed that the Appellant's claim

66. In re Halpern, 133 Cal. App. 3d 297, 305, 184 Cal. Rptr. 740, 744 (1982), citing Cal. Civ. Code § 4601 (West 1983).[non- biological "father" unsuccessfully sought visitation rights with his ex-wife's minor child after she sought child support from him in the dissolution of their marriage].

67. "These facts may well entitle [A]ppellant to the status of a 'de facto' parent...." *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 840, 279 Cal. Rptr. at 216.

would certainly fail under the two-pronged test. This belief arguably stems from the court's bias underlying its entire analysis, that it would not be a detriment to the children to deny them all contact with a lesbian partner and that their best interests were not served by allowing their continued relationship with her. By failing to apply the test, the court suggests that such a conclusion is obvious. However, the court is hesitant to explicitly articulate its bias, possibly because it was uncertain of its ability to prevail on this position.

Arguably, by avoiding ruling on whether Appellant was a de facto parent, the court was indirectly suggesting that applying the test would be futile. Alternatively, if a finding of de facto had been made, the court would have been required to justify the denial of contact between two children and the person they call "Mom" as being in the children's best interest, and to show that it was not to their detriment.

2. *In Loco Parentis.*

The court quickly dispensed with Appellant's in loco parentis argument by holding that since the doctrine had never been applied to confer parental rights on a non-parent in a custody dispute before, it could not be done. The *Perry*[68] court, being dissatisfied with the result in the case, invited the Legislature to address the concerns of step-parents who establish close relationships with their stepchildren. The Legislature did so by enacting Civil Code section 4351.5[69], providing a limited form of visitation rights for stepparents. In contrast, this court did not expressly invite the Legislature to address the concerns of lesbian and gay parents.

3. *Equitable Estoppel / Equitable Parent / Equitable Adoption.*

(a) Equitable Estoppel:

The reasoning here was much like the in loco parentis analysis. Equitable estoppel had been applied to impose support obligations on a husband who represented to his wife's children that he was their natural father, and then sought to deny paternity for the purpose of avoiding support obligations[70]. The court held that equitable estoppel may be

68. Perry v. Superior, 108 Cal. App. 3d 480, 166 Cal. Rptr. 583 (1980).

69. Cal. Civ. Code § 4351.5 (West 1983).

70. In re Marriage of Johnson, 88 Cal.App. 3d 848, 152 Cal. Rptr. 121 (1979) and Clevenger v. Clevenger, 189 Cal.App.2d 658, 11 Cal. Rptr. 707 (1961).

appropriately applied against a non-parent to make them pay support as a parent would[71]. On the other hand, the court holds that a non-parent may not use equitable estoppel against a parent to seek visitation or custody. The court does not justify why the doctrine can only be applied against a non-parent, but simply asserts that it does not work reciprocally in the non-parent's favor. If a non- parent can unwillingly be made a parent in the eyes of the law, there should also be ways for the non-parent to establish parenthood under the same circumstances. Again, the court is content with relying on the fact that the doctrine has never before been applied in California in the custody/visitation context, and therefore cannot be applied here.

The court cites, *In re Paternity of D.L.H.*[72], where in a very progressive step the court allowed a non-parent to seek custody by trying to establish equitable estoppel. The Wisconsin court recognized that rights of parenthood might be judicially granted without legislative permission. In an effort to avoid reading this decision as based on sound equitable policy, which then it would have to justify not following here, the court here attributed this progressive judicial posture in *D.L.H.* to the antiquated, patriarchal presumption that the husband is the father[73].

(b) Equitable Parent/Equitable Adoption:

The court then goes on to distinguish the equitable estoppel doctrine from the "equitable parent" concept. The "equitable parent" concept was recognized in Michigan in a divorce proceeding to permit the husband/non-biological father to obtain the status of a parent in a custody dispute with the natural mother, and to have the dispute settled as between two natural parents: according to the child's best interests[74]. The court distinguished Appellant's equitable estoppel theory from the *Atkinson* "equitable parent" theory, noting that the latter is rooted in a statutory recognition of the "equitable adoption" theory for purposes of intestate succession[75]. California and Michigan courts recognize the doctrine of "equitable adoption" which allows a child to take an intestate share in a person's estate who was not their parent, but who acted like one[76].

71. *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 839, 279 Cal. Rptr. at 218.
72. In re Paternity of D.L.H., 142 Wis. 2d 606, 419 N.W.2d 283 (1987).
73. *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 840, 279 Cal. Rptr. at 218.
74. Atkinson v. Atkinson, 160 Mich. App. 601, 408 N.W.2d 516 (1987).
75. *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 840, 279 Cal. Rptr. at 218.
76. Cal. Prob. Code § 6408 (West 1983).

However, in *Atkinson*, the court was willing to recognize the reciprocity of that theory: "[i]f a person would be a parent in death, they should be considered a parent in life"[77]. The Michigan court adopted this doctrine of "equitable parent" and held that a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce; (2) the husband desires to have the rights afforded to a parent; and (3) the husband is willing to take on the responsibility of paying child support[78].

Though California statutorily recognizes "equitable adoption"[79], it has not yet recognized "equitable parent." The court here refers to one other case that has declined to adopt the "equitable parent" theory[80]. However, *In re Marriage of Lewis and Goetz*[81] is distinguishable from the case at bar because the Legislature had enacted Civil Code § 4351.5[82] which specifically addressed the right of stepparents to seek a limited award of visitation. Here, there is no statute that addresses lesbian families. The court ignores the distinction, and defers to the Legislature once again, taking refuge behind the shield of the "complex practical, social, and constitutional ramifications" of expanding the class of persons entitled to assert parental rights[83].

4. *New Definition of Parenthood*

Based on its treatment of the equitable arguments Appellant had already asserted, it was not surprising that the court refused to accept this argument. Arguably, if the court had wanted to find that Appellant was entitled to some parental rights based on her relationship to the children, it would have done so before reaching this issue. This argument however would have provided a sound policy basis for the court to conclude that Appellant was entitled to visitation rights or shared custody.

77. *Atkinson*, 160 Mich. App. at 605, 408 N.W.2d at 518.
78. *Id.* at 605, 408 N.W.2d at 518.
79. Cal. Prob. Code § 6408 (West 1983).
80. In re Marriage of Lewis and Goetz, 203 Cal.App.3d 514, 250 Cal. Rptr. 30 (1988).
81. *Id.*
82. Cal. Civ. Code § 4351.5 (West 1983).
83. *Nancy S. v. Michele G.*, 228 Cal. App. 3d at 840, 279 Cal. Rptr. at 219.

IV. CONCLUSION

The outcome of this case underscores the legal void in which lesbians and gay men frequently find themselves, and the heavy price we pay for being outside the mainstream. Non-traditional families are not afforded the same kinds of protection that other, traditional families are. The Legislature needs to address the realities of contemporary life. In the absence of clear guidelines, gay men and lesbians are not able to protect themselves from devastating results such as this one. The lack of legislation does not deter the non-traditional family from existing; it only leads to more litigation and inconsistent outcomes. As long as the law requires that a child can only have two natural parents, one of each sex, and grants them all the attendant rights of parenthood, while granting others none, non- traditional families will suffer the agony and humiliation of legal nonexistence. For lesbian and gay families, the ideal solution would be to revise the Uniform Parentage Act, expanding its definition of parent. The revision would need to address lesbian and gay parents, and also other non-traditional families such as foster parents and stepparents. The language of the revision would need to be broad to address the diversity of circumstances. However, there is another consideration. All parents, traditional and otherwise, would probably agree that the definition of parent should not become so broad as to undermine the policy that those who are parents should be afforded special rights. If nearly anyone could claim parental status under the revised UPA definition, there would not be any point in having a UPA. No parent would want to find themselves being called into a custody battle over their child, with the neighbor, the baby sitter, or the teacher at school. The effort to revise the UPA should be concentrated on striking the balance between generality, to allow legitimate claims, and specificity, to exclude all others.

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B. SURROGATE PARENTING

1. *In the absence of parental preference, the best interests of the child control custody decisions.*

Adoption of Matthew B. 232 Cal. App. 3d 1239, 284 Cal. Rptr. 18 (1991). *Adoption of Matthew B.*[1] is the first case focusing on surrogate parenting that has reached the Appellate level in the California Court system. As such, it can be expected to have importance in future cases. The importance of this case, however, does not lie in the court's ruling on issues inherent to surrogate parenting as the court's judgement was primarily dependent upon procedural issues. The real importance of *Adoption of Matthew B.* lies in the court's dictum. This may be viewed as an indication of how the courts will decide cases of this type until legislation is enacted to fill the widening gulf created by the techno-medical advances in the field of infertility treatment.

I. FACTS AND PROCEDURAL HISTORY

In 1984, appellant Nancy B. contacted the Center for Reproductive Alternatives expressing an interest in becoming a surrogate mother.[2] According to Nancy's application, her primary motivation was a desire to have a positive birth experience and "to give the gift of a child to a couple that could not otherwise have children".[3] She expressed strong feelings against becoming a single mother and did not want the responsibility of raising a child.[4]

Nancy and the Respondent, M's, were first introduced at the Center for Reproductive Alternatives in April of 1985.[5] At their next meeting in May of 1985, the provisions and legal considerations of a proposed surrogate parenting contract were discussed in great detail.[6] Subsequent to that discussion, Nancy met with a private attorney who had been hired for her but paid for by the M's.[7] The terms of the contract specified Timothy M. as the natural father and his wife Charlotte as the adopting mother.[8] After discussions which included the potential

1. Adoption of Matthew B., 232 Cal. App. 3d 1239, 284 Cal. Rptr. 18 (1991).
2. *Id.* at 1251.
3. *Id.*
4. *Id.*
5. *Id.* at 1252.
6. *Id.*
7. *Id.*
8. *Id.*

illegality and unenforceability of the contract, and after several modifications were made at her request, Nancy signed the contract in June of 1985.[9]

Nancy became pregnant and delivered a boy, Matthew, nine months later on September 1, 1986.[10] Nancy designated Timothy as the father on the birth certificate and signed a form authorizing the hospital to release Matthew to the M.'s, citing the purpose as adoption planning.[11] On September 23, 1986 Timothy filed a paternity action and a judgment was entered by stipulation declaring Timothy to be Matthew's father and granting him sole custody.[12]

Charlotte filed a petition for stepparent adoption on September 25.[13] On November 13, 1986, Nancy presented Charlotte with a signed consent to Charlotte's adoption of Matthew.[14] The occasion also marked Nancy's first contact with Matthew since Timothy and Charlotte took the baby home from the hospital.[15]

In late February of 1987 the relationship between Nancy and the M's began to deteriorate and the M's decided that it was no longer in Matthew's best interest to allow Nancy to continue contact with him.[16]

Nancy filed a petition on July 2, 1987 seeking to withdraw her consent to the stepparent adoption and seeking periods of custody of Matthew.[17] At the close of hearings Nancy moved to amend her petition and she moved to vacate the paternity judgement.[18] Both motions were denied.[19] Although the case of *Adoption of Matthew B.* consolidates both appeals, this paper will be concerned only with the petition to withdraw consent to the stepparent adoption.

II. ANALYSIS

California Civil Code § 226a addresses the matter of a natural parent's withdrawal of consent to the adoption of their

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 1253.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

child. In pertinent part § 226a states: "Once given, consent of the natural parent to the adoption of the child by the person or persons to whose adoption of the child the consent was given, may not be withdrawn except with court approval."[20] For approval to be granted, two conditions must be met; first, withdrawal must be reasonable in view of all the circumstances and second, it must be in the best interests of the child.[21]

A. REASONABLE UNDER THE CIRCUMSTANCES

Substantial discretion is vested in the trial court due to the intangibility of the values that are reflected in the requirements for withdrawal. These intangibles include in part, "the demeanor, attitudes, intonation, sincerity, and personality of the witnesses as well as more exact concerns as to the relative fitness of the parties, educational...opportunities for the child, the emotional and love attachments the parties have for the child and the child's mental and physical health."[22] Its decision may be reversed only on a finding of an abuse of discretion, that is, only if the decision was not supported by substantial evidence.[23]

1. *Illegality of the contract*

The appellate court found no merit in Nancy's argument on the illegality of the contract for two reasons. First, the question of illegality was not raised in the original petition.[24] Section 226a requires that petitions for withdrawal of consent "shall be in writing and shall set forth the reasons for withdrawal..."[25] Nancy's original petition did not ever allege the existence of a surrogate contract. The appellate court held that as a result of this failure to comply with § 226a, the trial court properly refused to decide the issue of illegality of the surrogate parenting contract.

Secondly even if the issue had been raised, it would not have helped Nancy's argument.[26] After finding that there was no need to determine the illegality of the surrogate parenting

20. CAL. CIV. CODE § 226(a) (amended 1988, repealed 1991, current version CAL. CIV. CODE § 227.46)(West Supp. 1992).

21. *Id.*

22. *Id.*, citing, Guardianship of Baby Boy M., 66 Cal. App. 3d 254, at 267, 135 Cal. Rptr. 866 (1977). (Appeal from a holding that allowed the natural mother to withdraw her consent to adoption. Affirmed.)

23. *Matthew B.*, 232 Cal. App. 3d 1239 at 1254.

24. *Id.* at 1255.

25. CAL. CIV. CODE *supra* note 23, at 6.

26. *Id.*

contract, the Court went on to state the insignificance of the issue of illegality to the case at hand. Applying traditional contract law, it stated "[c]ourts generally will not assist parties who seek to obtain relief by showing they entered into an illegal transaction."[27] Furthermore, "courts will not intercede where the parties have fully performed under the illegal contract"[28] and where "the parties assumed the risk of illegality in entering into the contract."[29]

This dicta is significant because of the Court's speculation as to the outcome had the contract been found to be illegal. Based on the premise that primary consideration should be given to public policy and how it would best be served, the Court found the overriding interest to be that of Matthew's welfare. With that in mind the court stated:

> [A] ruling that the surrogate contract's alleged illegality automatically vitiates the consent, regardless of whether it was otherwise freely given, would deprive the court of the power to order an adoption it found to be in Matthew's best interests, and would fail to preserve the integrity of the only family he has ever known.[30]

Citing *Stewart v. Stewart*, the court thus concluded that "the best interests of the child control custody determinations, regardless of the parties agreement."[31]

2. *Use of stepparent adoption procedure*

Nancy's second argument contended that the stepparent adoption procedure was unavailable in this instance. She stated that section 7005(b)[32] of the Uniform Parentage Act in

27. *Id.*, citing, Hooper v. Barranti, 81 Cal. App. 2d 570, at 576, 184 P.2d 688 (1947). (Action for dissolution of a partnership.)

28. *Id.*, citing, Denning v. Taber, 70 Cal. App. 2d 253, at 258-259, 160 P.2d 900 (1945). (Action for an accounting of partnership property.)

29. *Id.*, citing, Guthrie v. Times-Mirror Co., 51 Cal. App. 3d 879, at 885, 124 Cal. Rptr. 577 (1975). (Action by seller for recision of contract.)

30. *Id.* at 1258.

31. *Id.*, citing, Stewart v. Stewart, 130 Cal. App. 2d 186, at 193, 278 P.2d 441 (1955). (Custody case involving the children of divorced parents. Stipulation by the parties as to custody did not prohibit the admission of evidence as to the mother's fitness.)

32. CAL. CIV. CODE §7005(b) drafted to protect married women using artifical insemination provides "[t]he donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." (West 1983).

the California Civil Code prevented Timothy from being Matthew's father and thus rendered the paternity judgment void. The appellate court rejected Nancy's claims.[33]

The court, as above, found that Nancy's original petition did not allege problems with the paternity judgment, Timothy is referred to throughout the petition as "the natural father". Secondly, "the judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes".[34] Thus, Nancy's challenge was prohibited by collateral estoppel.

3. *Knowledge of her rights*

Nancy's third argument was that she did not know her rights and did not have independent counsel. On appeal, substantial evidence was found to support the trial court's rejection of this argument. It was held that the consent form itself provided sufficient notice of Nancy's rights. The consent form warned that the court's execution would deprive Nancy of all custody rights, that court approval would be needed to withdraw, and also indicated a place to call if she had any questions.[35]

Nancy's claim that she lacked independent counsel was also dismissed. Although her attorney for the contract signing was paid for by the M's, the evidence showed that he acted independently and on Nancy's behalf. In reaching this conclusion the court pointed to the numerous changes made to the contract at Nancy's request.[36]

Finally, Nancy testified that she had contacted counsel whenever she thought it necessary. In fact, prior to signing the consent form, Nancy had consulted with another attorney regarding a malpractice suit against the Center.[37] At no time

33. In so deciding, the court denied Nancy the same protection that is given to married women under § 7005. Perhaps the court is merely reflecting the societal value placed on having two parents, perhaps the message to women runs deeper. At any rate, single women going through reproductive clinics who thought they were protected from paternity suits by sperm donors under § 7005(b), cannot count on being protected under this court's reasoning.

34. *Matthew B.* 232 Cal. App. 3d 1239, citing, County of San Diego v. Hotz, 168 Cal. App. 3d 605, at 608, 214 Cal. Rptr. 658 (1985). (Appeal from an order requiring appellant to submit to blood testing to determine the probability of his being father of child conceived by wife during marriage. Held, contest precluded by collateral estoppel.)

35. *Id.*, at 1260.

36. *Id.* at 1261.

37. This suit was against the Center for Reproductive Alternatives regarding malpractice in connection with treatment to facilitate Nancy's pregnancy.

did Nancy choose to consult an attorney regarding the consent to adoption.

4. *Promise of visitation.*

Nancy's final argument, that withdrawal of consent was reasonable under the circumstances, charged the trial court with error in finding that the M's had not made a false promise of visitation and for finding that Nancy did not rely on that promise of contact prior to signing the consent. The appellate court, citing three factors, upheld the trial court ruling.

First, there was the surrogate contract itself. In the contract Nancy warranted a lack of desire on her part to have a parent-child relationship with the child that would be born.[38] Secondly, and most damaging was a provision that had been modified at Nancy's request. That provision, as requested by Nancy, stipulated that she would "not seek to view the infant [c]hild after the child leaves the hospital".[39] Third, several letters written by Nancy supported the finding that she understood that there would be no visitation with the child in the future.[40] In light of this evidence, and a provision in the contract requiring that amendments be in writing, the trial court rejected Nancy's claim of an unwritten modification.

B. BEST INTERESTS OF THE CHILD

The second test that a petition to withdraw consent must pass is that the withdrawal must be in the best interests of the child. Best interest, like the above reasonable under the circumstances test, rests on a number of intangible factors. Again, the trial court could only be reversed only if there was clear abuse of discretion. The best interest standard does not compare a situation to an absolute, rather it holds it in comparison to an available alternative; here, the M's versus Nancy.[41]

As a result of signing the consent to adoption, Nancy lost the preference given to natural parents. That loss was

38. *Matthew B.* 232 Cal. App. 3d 1239 at 1262.

39. *Id.*

40. *Id.*

41. *Id.*, citing, Adoption of Michelle T., 44 Cal. App. 3d 699, at 707, 117 Cal. Rptr. 856, 84 A.L.R. 3d 654 (1975). (Appeal from judgment denying petition for custody. Proposed parents were 71 and 55 years of age. Held, Superior Court abused its discretion by denying petition solely on the basis of age. Reversed with directions.)

critical in that it shifted the burden to Nancy, to make a positive showing that withdrawal would be in Matthew's best interests.[42] The court, focusing on Matthew's bonding and need for stability, and on the relative fitness of the parties as parents, held that there was sufficient evidence to support the trial court's decision that withdrawal of consent would not be in Matthew's best interest.

III. CONCLUSION

In his conclusion Justice Chin, writing for the majority, summarized the potential problems in this area of law:

> Surrogacy raises many constitutional, public policy, and human questions that we do not discuss in this opinion. It is, of course, for the Legislature to consider these important questions and provide answers through legislative action...Absent legislative guidance, the courts of necessity will ultimately be called upon to determine the questions associated with surrogacy...[43]

In the absence of guidance from the Legislature, the implication is clear that these cases will continue to be resolved by looking to the best interests of the child. This is as it should be, and undoubtedly will prove to be in the best interests of society as a whole.

Problems arise in cases where the mother has not signed a consent to adoption, and therefore has not lost the parental preference. In those cases custody by the mother must be shown to be detrimental to the child, not merely against the best interests of the child. It is in this type of case where the courts, without legislation, must struggle with the ethics of applying traditional contract law as an alternative.

Surrogate parenting and its related issues are highly charged and emotionally sensitive areas, reaching the very

42. *Id.*, citing, Adoption of Jenny L., 111 Cal. App. 3d 422, at 429, 168 Cal. Rptr. 695 (1980). (Appeal from judgment allowing natural mother to withdraw consent to adoption. Held, trial court applied the wrong standard when it failed to determine best interest of the child. Instead, the trial court had applied the parental preference standard which requires only that withdrawal not be detrimental to the child. Reversed and remanded with directions.)

43. *Id.* at 1273-1274.

foundations of our beliefs in the fundamental rights to procreate and parent. The absence of legislative guidance will inevitably result in many inequities due to the highly discretionary nature of decisions on these issues. At this point in time, the consequences of choosing surrogate parenting are impossible to guarantee. The potential cost both to society and to the individuals involved is great and it is up to the Legislature to act now in providing guidance.[44]

*Susan M. Crocker**

44. As this note goes to press, Senator Diane Watson has introduced the Alternative Reproduction Act. Already passed by the Senate and now before the Assembly Judiciary Committee, the bill would legalize paid surrogacy [either pregnancy through artificial insemination or implantation of a fertilized egg] and paid egg donations [for *in vitro* fertilization].

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C. ADOPTION

1. *An adopted child does not have a fundamental right to a family.*

Adoption of Kay C., 228 Cal. App. 3d 741, __ Cal. Rptr. __ (1991). In the *Adoption of Kay C.*,[1] the California Court of Appeals held that an adopted child does not have a fundamental right to a family, nor are the mentally ill a suspect class requiring a strict scrutiny analysis. Instead, the court held that an adoptive child has only the amount of rights as bestowed by the adoption statutes.[2]

FACTS

At six years old, Kay C.'s natural parents became unable to care for her and Kay was placed with foster parents. After two years, Kay's natural parent's relinquished all rights to her, making Kay eligible for adoption.

When the adopting parents (respondents) became interested in Kay, they requested all available information on her background. However, they never received certain reports suggesting Kay should remain with her foster parents. One court appointed evaluator recommended to the Department of Social Services[3] that Kay stay with her foster parents because the secure relationship was important for Kay.[4] In fact, Kay herself asked to remain with the foster family.[5] Instead, the Department of Social Services followed the recommendation of Dr. Albert DeRanieri, Kay's therapist, who decided she was ready for adoption.[6]

For unstated reasons, the adopting parent's anticipated Kay might have trouble adjusting to a new home. While they were willing to help Kay make the transition to her new life with them, the adopting parents were unwilling to adopt a child with

1. Adoption of Kay C., 228 Cal. App. 3d 741, __ Cal.Rptr. __ (1991).
2. *Id.* at 753-54.
3. The Department of Social Services for the State of California makes decisions concerning whether children should be placed for adoption. A licensed agency, in this case The Children's Home Society of California, actually places the children with prospective parents.
4. *Kay,* 228 Cal. App. 3d at 746.
5. *Id.*
6. *Id.*

severe emotional problems, "specifically a psychotic or violent child".[7]

Kay and her adoptive family regularly attended therapy sessions to help Kay adjust to her new environment. Despite these sessions, Kay's behavior became increasingly erratic and unpredictable. Several months before the finalization of the adoption, Kay was diagnosed as having a borderline personality disorder with psychological defenses of splitting, projection and denial.[8] Again, the adopting parents were never told of the extent of Kay's psychological problem until after the final adoption decree.[9]

Two years after the adoption, Kay was diagnosed as psychotic, and she exhibited paranoid, delusional thinking.[10] Kay began accusing her new parents of child abuse and threatened to call the police.[11] Kay also accused her adoptive mother of trying to choke her.[12] Respondents became unable to handle Kay's increasingly unstable behavior. Consequently, Kay was placed in a home for emotionally disturbed children.[13]

Respondent's sought to abrogate the adoption under California Civil Code section 227b, which permits vacation of an adoption in certain situations.[14] The statute directs the adoptive parents to present evidence that the child had a "developmental disability or a mental illness as a result of conditions prior to the adoption to such an extent that the child cannot be relinquished to an adoption agency on the grounds that the child is considered unadoptable."[15] The statute also requires that the parents had no knowledge or notice of the condition prior to the final decree and that the petition for vacation be filed within five years of the entry of the final decree.[16]

COURT'S ANALYSIS

The trial court found Kay C. did have serious mental prolems resulting from conditions prior to her adoption. The court

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 747.
11. *Id.* at 746.
12. *Id.*
13. *Id.* at 747.
14. Cal. Civ. Code § 228.10 (227b renumbered with change by statutes 1990, Chapter 1363 (Assem Bill No.3532)) (West 1982).
15. *Id.*
16. *Id.*

also decided the respondents did not have knowledge or notice of her condition, Kay's mental problems rendered her unadoptable and finally it was in Kay's best interest that the adoption be vacated.[17] The criterion the court used for determining best interest includes, consideration of "the welfare of the child, the extent, nature, duration and prognosis as to the disability of the child, the degree of dependency, the length of the adoption, and the bonds of affection or attachment."[18]

Kay asserts that section 227b violates both the due process and the equal protection clauses of the 14th Amendment. Kay maintains she is entitled to a strict scrutiny analysis because she has a fundamental right to a family and because her mental illness places her in suspect class.

The California Court of Appeals rejected both of Kay's arguments. First, the court examined whether an adoptive child has a fundamental right in the family unit. The court concluded that natural children and parents have a fundamental right in the family unit.[19] However, the court refused to extend this right to include adoptive children.[20] The court stated, that "under certain circumstances, an adoptive child, like the natural child has a liberty interest in his or her family relationship."[21] However, the court found that section 227b does not trespass on any of Kay's fundamental rights to family. The court reasoned the creation of Kay's relationship with her adoptive family was statutory and contractual. Consequently, her potential fundamental rights could not extend to termination proceedings which are also statutory.

The court stressed that statutory rights do not create fundamental rights.[22] While in contrast, the court found the biological family, is not based in state law, but "in intrinsic human rights," there is an adequate basis for the distinction between natural and adoptive family rights.[23]

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17. *Kay*, 228 Cal App. 3d at 747.

18. *Id.* at 752 (citing Department of Social Welfare v. Superior Court, 1 Cal. 3d 1, 6, 8 Cal. Rptr. 354, 459 P.2d 897 (1969)).

19. *See* Moore v. East Cleveland 431 U.S. 494, 499 (1977): Smith v. City of Fontina, 818 F.2d. 1411 (9th Cir. 1987).

20. *Kay*, 228 Cal. App. 3d at 750.

21. *Id.*

22. *Id.* at 749-50 (citing Moore v. E. Cleveland, 431 U. S. at 503.) The Claimed interest derives from a knowingly assumed contractual relation with the state, it is appropriate to ascertain from state law the expectations and entitlement of the parties. *Id.*

23. *Kay*, 228 Cal. App. 3d at 749 (quoting *Moore*, 431 U.S. at 503).

The court emphasized adoption is not a common law concept, but instead an idea contemplated by statute and contract.[24] Looking carefully at the criteria required for a legal adoption, the court found, "(T)he proceeding is essentially one of contract between the parties whose consent is required."[25] The judiciary oversees that the criteria is properly executed.[26]

Continuing with the idea that the adoption relationship is contractual, the court referred to section 227b as the "the legislative perceived equivalent of mistake...".[27] The court observed that other sections of the adoption code allow for vacation of the adoption, if the termination of the natural parents rights were obtained through fraud, duress or mistake.[28] Extending this reasoning to the adoptive parents, the court found that they were deprived all the relevant information concerning Kay's condition, "which if known would have affected their agreement to adopt."[29] The court declared that parents need all available information to make a decision and if the information is not provided, "Section 227b serves retrospectively to remedy this gap in the vital information process."[30] The court found this was a valid reason for maintaining section 227b.

The court also dismissed Kay's equal protection argument. Kay contended that section 227b discriminates against developmentally disabled and mentally ill adopted children.[31] Kay argued the mentally ill form a suspect class and deserve the protection of strict scrutiny.

Rejecting Kay's argument for strict scrutiny, the court relied on the United States Supreme Court decision, *Cleburne v. Cleburne Living Center, Inc.*,[32] which held mentally retarded persons are not a suspect class. The court in *Cleburne*

24. *Kay*, 228 Cal. App. 3d at 750.

25. *Id.*

26. *Id.* (citing Estate of Taggert, 190 Cal. 493, 498, 213 P. 504 (1923). The criterion used by the court in *Taggert* is as follows: 1. That the person adopting is ten years older than the child, 2. that all the parties whose consent is required do consent, fully and freely, to the making of such contract, 3 that the adoption contemplated by the contract will be for the best interest of the child. *Id.*

27. *Kay*, 228 Cal. App. 3d at 751.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 753. Kay asserts that since the statute doesn't apply to physically ill or emotionally healthy adopted children that the statute is discriminatory.

32. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 445-46 (1985).

reasoned, "it would be too difficult to find a principled way to distinguish a variety of groups who have perhaps immutable disabilities... One need only mention this in respect to the aging, the disabled, the mentally ill, and the infirm."[33] Further the court intoned that no other California court had ever found the mentally ill formed a suspect class.[34]

Kay also claimed her interest in family was a fundamental right under the equal protection clause thus requiring strict scrutiny. Kay argued the principles used by the California Supreme Court to hold education as a fundamental right under the equal protection clause of the California Constitution, should be extended to the adoptive family relationship.[35] Without further discussion, the court again firmly stated that Kay's rights were limited to those found in the adoption statutes.[36]

Dismissing a strict scrutiny analysis because neither a fundamental right nor a suspect class were at stake, the court employed the rational relation test of minimal scrutiny. Using the rational relation test, the court explained it "must determine whether the Legislature could have reasonably found the challenged classification would promote a legitimate state interest."[37]

The court determined that the legislative purpose of section 227b is to promote adoption, "and thus promote the welfare of children available for adoption."[38] The court found this was a legitimate state interest.

Kay protested that no evidence showed the statute actually promoted adoption.[39] Having determined that section 227b's purpose was valid, the court stated they were not required to look into whether the statute successfully fulfilled its purpose.[40] The court also commented that the specific

33. *Id.* at 445-56.

34. *Kay*, 228 Cal.App.3d at 753-754. *See* In Re Eugene W., 29 Cal App. 3d 623, 105 Cal. Rptr. 736 (1972), The court stated the distinction between physical and mental illness is "amply warranted" by reason of the differing nature of the two disabilities.

35. *Kay*, 228 Cal. App. 3d at 753-54.

36. *Id.*

37. *Id.* at 754 (citing Western & Southern L.I. Co. v. Bd. of Equalization, 451 U.S. 648, 671-72 (1981)).

38. *Kay*, 228 Cal. App. 3d at 755 (citing *Department of Social Welfare*, 1 Cal.3d at 6.)

39. *Kay*, 228 Cal. App. 3d at 755.

40. *Id.* at 755 (citing Minnesota v. Cloverleaf Creamery Co. 449 U.S. 456, 466, (1981). "the constitutionality of a measure under the equal protection clause does not depend on a court's assessment of the empirical success or failure of a measures provisions.")

provisions of section 227b, such as the five year statute of limitations, and the requirement that the mental illness exist prior to the adoption were extremely reasonable.

Finally, the court observed that while adoption codes are designed to further children's interests, prospective parents must also be given consideration. The court examined the various factors adopting parents need to evaluate when deciding whether to adopt and or terminate the adoption.[41] The court found the ability to form emotional bonds was paramount and determinative of whether a relationship should be initiated or continued.[42] The court noted some parents, though aware of section 227b may chose to continue the relationship with the child, but in other cases, setting aside the relationship might be best for all parties.[43] For Kay, the court found setting aside her adoption was best.

CONCLUSION

In support of the court's abrogation of the adoption is the fact that Kay may be more harmed by staying with a family who doesn't want her. The court emphasized that adopting parents could not form an emotional bond with Kay. However, left unaddressed are Kay's emotional needs. For determining Kay's best interest, the court relied on the trial court's discretion.[44] Yet, how the trial court applied the best interest test of *Department of Social Welfare*[45] remains unclear. In this situation there does not appear to be any good solutions, and regardless of the court's decision, Kay's future seems bleak.

*Theresa M. Kolish**

41. *Kay*, 228 Cal. App. 3d. at 756.
42. *Id.*
43. *Id.*
44. *Id.* at 752.
45. *See supra* note 18.

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V. INSURANCE LAW

A. RATE DISCRIMINATION

1. *Insurance Companies are required to cover female insureds for pregnancy and childbirth but are allowed to rely on questionably discriminatory methods when pricing these policies.*

Kirsh v. State Farm Automobile Insurance Co., 233 Cal. App. 3d 84, 284 Cal. Rptr. 260 (1991). In *Kirsh v. State Farm Mutual Automobile Insurance Company,*[1] the California Court of Appeal reversed a Superior Court grant of summary judgment in favor of the defendant State Farm Automobile Insurance Company. The Court of Appeal found that defendant's challenged pricing policy was permissible.[2] Although this policy, on its face, violated the Unruh Civil Rights Act (Unruh Act)[3], the court held that the more specific anti-discrimination statute found in the Insurance Code[4] superseded the Unruh Act.[5] The court reached this conclusion because the Insurance Code applied specifically to rates charged by insurance companies.[6]

The court did find that the insurance company violated the Unruh Act when it omitted coverage for costs of normal pregnancy and childbirth from the health insurance policy issued to the plaintiff.[7]

FACTS

Plaintiff was 36 years old when she first purchased a hospital-surgical policy and catastrophic rider from defendant.[8] At that time the policy premium was $564.60 per 6 month period as opposed to $344.90 if the policy had been issued to a man similarly situated.[9] This price disparity continued throughout the plaintiff's five year period of coverage.[10] Because plaintiff's

1. Kirsh v. State Farm Mut. Auto. Ins. Co., 233 Cal. App. 3d 84, 284 Cal. Rptr. 260 (Cal. Ct. App. 1991) (modified)
2. *Id.* at 92, 284 Cal. Rptr 265.
3. Cal. Civil Code §51 (West 1982)
4. Cal. Ins. Code §10140 (West 1972)
5. Higher premiums were charged to plaintiff, a woman, than to a man similarly situated. *Kirsh*, 233 Cal. App. 3d at 88, 284 Cal. Rptr. at 264
6. *Kirsh*, 233 Cal. App. 3d at 92, 284 Cal Rptr. at 265
7. *Id.* at 92, 284 Cal. Rptr at 266.
8. *Id.* at 88, 284 Cal. Rptr at 262.
9. *Id.* at 88, 284 Cal. Rptr. at 262.
10. *Id.* at 88, 284 cal. Rptr at 262.

policy did not include coverage for normal pregnancy and childbirth, defendant offered plaintiff a pregnancy rider for an additional $633.00 per six month period.[11] Plaintiff declined this rider.[12]

Plaintiff challenged as arbitrary discrimination two of the insurance company's practices: 1) charging women higher premiums than men, and 2) excluding coverage for pregnancy and childbirth from policies issued to women while omitting no conditions which are unique to men[13] from policies issued to men.[14]

Defendant responded with three arguments which it alleged permitted it to disparately price: 1) the Unruh Act does not apply to the life and disability insurance industry because an insurance company is not a business establishment within the meaning of the Unruh Act, 2) the Insurance Code permits gender based premiums and exclusion of pregnancy and childbirth coverage, 3) the actuarial research which justified the disparity in premiums rendered its practice non arbitrary discrimination within the meaning of the Unruh Act[15]

COURT'S ANALYSIS

Addressing the first argument, the court found that the defendant was a business establishment by relying on the broad definition of the term as promulgated by *O'Connor v. Village Green Homeowners Ass'n.*[16] The defendant was subject to the Unruh Act, however the court found that only some of its practices violated it.[17] The court reached this conclusion by separating plaintiff's allegations of discrimination into two issues: 1) discrimination which affects the *rates* charged women, and 2) discrimination which affects the *terms of policies* issued

11. *Id* at 88, 262

12. *Id.* at 88, 284 Cal. Rptr. at 262.

13. Conditions which are unique to men include prostate cancer and testicular cancer.

14. *Id.* at 88, 284 Cal. Rptr. at 262.

15. *Id.* at 89, 284 Cal. Rptr. at 263.

16. The term "business establishment" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade engaged in for the purpose of making a livelihood or gain." The word "establishment" as broadly defined includes ...a permanent "commercial force or organization." O'Connor v. Village Green Homeowner's Ass'n 33 Cal.3d 790,795, 662 P.2d 427,430, 191 Cal Rptr. 320, 323 (1983)

17. *Kirsh,* 233 Cal. App. 3d at 90, 284 Cal. Rptr. at 263

18. *Id.* at 92, 284 Cal. Rptr. at 263.

to women[18]. These two issues were then subjected to an analysis under the Unruh Act[19] and Insurance Code §10140[20].

The court stressed that the purpose of the Unruh Act is to interdict all arbitrary discrimination by a business enterprise[21]. The court reaffirmed the public policy determination it made in *Rotary Club of Duarte v. Board of Directors*[22]; specifically the inclusion of "sex" in the Unruh Act is clearly a declaration of California's public policy mandate and objective that men and women be treated equally.[23] In light of this public policy mandate, the court declared that the defendant's practices on their face could not escape the scrutiny of the Unruh Act.[24] The court stressed that "...were our inquiry limited to the Unruh Act, summary judgment in favor of the defendant clearly would be improper."[25]

However, the existence of the Insurance Code itself compelled the court to expand the scope of its analysis beyond the application of the Unruh Act. The court did so by focusing on defendant's argument that Insurance Code §10140 supersedes the Unruh Act and thereby permits gender based premiums as

19. The Unruh Act provides in pertinent part: All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, or ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of very kind whatsoever. Cal. Civil Code §51 (West 1982)

20. Insurance Code §10140 provides in pertinent part: No admitted insurer, licensed to issue life or disability insurance, shall fail or refuse to accept an application for that insurance, to issue that insurance to an applicant therefore, or issue or cancel that insurance, under conditions less favorable to the insured than in comparable cases, except for reasons applicable alike to persons of every race, color, religion, national origin, ancestry or sexual orientation. Race, color, religion, national origin, ancestry or sexual orientation shall not, of itself, constitute a condition or risk for which a higher rate, premium, or charge may be required of the insured for that insurance. Cal. Ins. Code §10140 (West 1972)

21. *Kirsh*, 233 Cal. App. 3d at 92, 284 Cal. Rptr. at 264

22. Rotary Club of Duarte v. Board of Directors 178 Cal App. 3d 1035, 224 Cal. Rptr. 213 (1986), aff'd, 481 U.S. 537 (1987)

23. *Kirsh*, 233 Cal. App. 3d at 92, 284 Cal. Rptr. at 264

24. On the issue of differential pricing the court cites from Koire v. Metro Car Wash which held that, "differential pricing based on sex is detrimental to both men and women because it reinforces harmful stereotypes and is not permissible merely because it is profitable. Koire v. Metro Car Wash 40 Cal.3d 24, 32- 38, 707 P.2d 195, 219 Cal. Rptr 133 (1985)

On the issue of the terms of the policy the court relies on Colorado Civil Rights Com. v. Traveler's Ins. Co. which held, "(t)he failure to provide coverage for the treatment of pregnancy in an otherwise comprehensive insurance policy discriminates against women on the basis of sex as surely as, for example, the failure to provide coverage for the treatment of prostate conditions in a comprehensive policy would discriminate against men on the basis of sex." Colorado Civil Rights Com. v.Traveler's Ins. Co. 759 P.2d 1358, 1364 (Colo. 1988)

25. *Kirsh*, 233 Cal. App. 3d at 91, 284 Cal. Rptr 264

well as exclusion of pregnancy and child birth from the terms of coverage.[26] The defendant urged the court to rely on a plain reading of Insurance Code §10140 and the Unruh Act and find that because sex is omitted from the Insurance Code statute but mentioned in the Unruh Act, the Unruh Act did not apply to the defendant's practices involving discrimination based on sex.[27]

Faced with these two anti discrimination statutes, one general (the Unruh Act) the other specific (Insurance Code §10140), the court resorted to two basic statutory principles of construction: 1) that a specific statute governs a general statute, and 2) where one statute contains a provision regarding one subject and a similar statute omits such a provision regarding a related subject this omission is an indication of different legislative intent.[28]

In applying these principles of statutory interpretation, the court concluded the Unruh Act was not applicable to defendant's practice of charging women higher premiums than men.[29] It was able to so conclude by relying on the plain reading of the two statutes as urged by defendants. Because the Insurance Code omits sex from its list of proscribed discrimination and the Unruh Act clearly includes sex in its list the court read a legislative intent to allow insurance companies to consider the sex of the insured when issuing or canceling policies.[30] This legislative intent is bolstered by the failure of the Legislature to include "sex" when it revised Insurance Code §10140 to include "sexual orientation" in 1990.[31]

However, the court did not accept defendant's argument that Insurance Code §10140 allowed it to exclude coverage for pregnancy and childbirth from the policies it issued to women.[32] The court reached this conclusion because Insurance Code §10140 applies only to the issuance or cancellation of policies.[33] The Unruh Act remains in full force regarding the issue of terms of coverage in defendant's policies.[34] The court, relying on *Colorado Civil Rights Com. v. Traveler's Insurance Co.*,[35] read-

26. *Id.* at 92, 284 Cal. Rptr at 264.
27. *Id.* at 92, 284 Cal. Rptr at 264.
28. *Id.* at 92, 284 Cal. Rptr. at 264.
29. *Id.* at 92, 284 Cal. Rptr. at 265.
30. *Id.* at 92, 284 Cal. Rptr at 265.
31. *Id.* at 92, 284 Cal. Rptr. at 265.
32. *Id.* at 92, 284 Cal. Rptr at 265.
33. *Id.* at 92, 284 Cal. Rptr at 265 and see supra Note 18
34. *Id.* at 92, 284 Cal. Rptr. at 265.
35. Colorado Civil Rights Com. v. Traveler's Insurance Co. 759 P.2d 1358 (Colo. 1988)

ily found that failure to cover the plaintiff for costs of normal pregnancy and childbirth is a violation of the Unruh Act.[36]

DISCUSSION

The court was quick to rely on general principles of statutory construction when conducting its analysis of the Unruh Act and Insurance Code §10140. However, there is one statutory principle of construction which the court did not consider. This is the principle that a specific statute will not govern a general statute if the legislative intent is that the general statute should be of universal application notwithstanding the specific statute.[37]

Arguably the Unruh Act is a general statute meant to be of universal application. The discussion in *Rotary Club of Duarte v. Board of Directors*[38] is persuasive on this point:

"The Unruh Act is to be liberally construed with a view of effectuating the purposes for which it was enacted and to promote justice...One of the policies underlying the enactment of the Unruh Act is the eradication of discrimination by private or public action on the basis of sex by 'business establishments' in the furnishing of accommodations, advantages, facilities, privileges or services.'"

In view of this language, it is difficult to perceive that the Unruh Act was not meant to be universally applied. The court conceded defendant's practice of charging women higher premiums than men is clearly discriminatory and thus violates the Unruh Act.[39] In spite of this, the court chose not to invoke a universal application of the Unruh Act.

One must bear in mind that the court "chose" to base its finding on a reconciliation of the two statutes (and therefore prompted the most damaging result). The court did not consider defendant's third argument; that the actuary tables on which it based its rates rendered gender specific premiums non-

36. *Kirsh*, 233 Cal. App. 3d at 92, 284 Cal Rptr. at 265

37. 58 Cal. Jur.3d Statutes §109 (1980) provides in part: (A) special statute dealing expressly with a particular subject constitutes an exception so as to control and take precedence over a conflicting general statute on the same subject. ...But this rule has no application if the two statutes can be reconciled...*or if it is manifest that the legislative intention is that the general act should be of universal application notwithstanding the special act.*

38. Rotary Club of Duarte v. Board of Directors 178 Cal. App. 3d 1035, 224 Cal. Rptr. 218 (1986), aff'd, 481 U.S. 537 (1987)

39. *Kirsh* 233 Cal. App. 3d at 91, 284 Cal. Rptr. at 264

arbitrary discrimination,[40] thus not violative of the Unruh Act[41]. Although the end result of exploring this argument might have been the same[42], the implications might have been less harmful to the integrity of the Unruh Act. Further, in choosing to selectively apply the Unruh Act to defendant's practices by stating that a specific statute can supersede this general anti-discrimination statute, this court is permitting clever "result driven" drafting by the legislature (or insurance companies) that results in practices which the Unruh Act specifically prohibits.

On a positive note, the court did announce that it is gender based discrimination and a violation of the Unruh Act to omit coverage for normal pregnancy and childbirth from comprehensive health insurance policies issued to women.[43] This issue had never been decided by the court, and its willingness to rely on a Colorado Supreme Court case is significant.[44] Although the court cites only that portion of *Colorado Civil Rights Com. v. Traveler's Ins. Co.*[45] which unequivocally declares that failure to cover pregnancy and childbirth in a comprehensive health insurance policy is gender based discrimination, it implicitly accepts the reasoning used by the Colorado court to reach its decision. In *Colorado Civil Rights Com. v. Traveler's*, the Colorado Supreme Court clearly stated that an insurance company is discriminating against its insureds, based on their gender, when the insurance company fails to cover its female insureds for pregnancy and childbirth[46]. Its holding rejected framing the issue of such discrimination in non-gender based terms which would have compelled an analysis that this policy failed to cover women for pregnancy and

40. In support of the motion defendant submitted the declaration of an actuary who stated: Defendant charges women in the 20-54 age group a higher premium for the policy than it charges men in the same age group; this result is consistent with and justified by defendant's claim cost experience which shows that defendant pays out more in health care benefits to women than to men in the 20-54 age group. *Kirsh* 233 Cal. App. 3d 88, 284 Cal. Rptr 262-3

41. *Id.* at 89, Cal. Rptr. at 263.

42. If defendant had shown that the actuary tables on which premium decisions were made did not include in its variables the frequency and cost of claims related to pregnancy and childbirth defendant's argument would have been strong. If however, the defendant had included frequency and cost of claims for pregnancy and childbirth among the variables in its actuary tables, clearly their pricing policy would be discriminatory. Not only would they be charging women more than men, but they would be charging women more based on the frequency and cost of conditions for which they refused to cover women absent an additional policy or rider.

43. *Id.* at 92, 284 Cal. Rptr at 265.

44. *Id.* at 90-1, 284 Cal. Rptr at 264.

45. Colorado Civil Rights Com. v. Traveler's Ins. Co. 759 P.2d 1358 (Colo. 1988).

46. *Id.* at 1361

childbirth based on its effect on pregnant women versus non-pregnant people.[47] By primarily referring to *Colorado Civil Rights Com. v. Traveler's* and citing two other cases which also reject such a formulation[48] the California Court of Appeal has joined those states who have unequivocally stated that pregnancy *is* an issue which is framed by gender.[49]

However, what appears to be a bold step is merely an empty gesture. The court stated that pregnancy is an issue framed by gender, but with the same breath gave insurance companies a green light to arbitrarily discriminate against women when determining the premiums for policies issued to women. While mandating that insurance companies insure women for pregnancy and childbirth, the court still refuses to protect women from potentially discriminatory pricing policies. Failure to determine whether defendant's practices constitute arbitrary or non-arbitrary discrimination gives insurance companies no guidelines by which they may determine the premiums they charge. For example, may insurance companies base their premium for a policy without coverage for pregnancy and childbirth (if a woman agrees that she does not wish to be covered for these conditions) on an actuary table which includes the frequency and cost of covering insureds for those very conditions? The court's failure here to investigate just how pricing decisions are reached may open the floodgates to unjustifiably higher rates charged to women than to men. Consider that if the plaintiff had accepted the pregnancy rider the full amount of her insurance per year would have amounted to $2,395.20 as opposed to $689.80 for a man similarly situated.

Perhaps as a result of Kirsh the cost of policies issued to women will be grossly disproportionate as compared to policies issued to men. Before Kirsh they were only slightly disproportionate.

*Jessica Rudin**

47. *Id.* at 1361

48. Quaker Oats Co. v. Cedar Rapids Human Rights Com. 268 N.W. 2d 862 (Iowa 1978); Massachusetts Electric Co. v. Massachusetts Commission Against Discrimination 375 Mass. 160, 375 N.E. 2d 1192 (1978)

49. *Kirsh*, 233 Cal. App. 3d at 91, 284 Cal. Rptr. at 264

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