Comments

EQUAL PROTECTION FOR ILLEGITIMATE CHILDREN CONCEIVED BY ARTIFICIAL INSEMINATION

The Uniform Parentage Act (UPA) guarantees equal treatment under the law for all children. Section 5 of the Act assures that a child whose mother was artificially inseminated by a donor will not be deprived of the right to a legal father. Under the provisions of the Act, the donor is insulated from legal-paternal responsibility only if the recipient is married and her husband consents to the insemination. The donor will not be shielded by the Act if the recipient is an unmarried woman. California has adopted a modified version of the UPA. In California, the donor's statutory immunity is significantly more broad; he is insulated from legal-paternal responsibility regardless of the woman's marital status [Cal. Civil Code § 7005(b)]. Ironically, the California version of the UPA actually contradicts the purpose of the Act. The statute does not uphold the rights of the illegitimate A.I.D. (artificial insemination by donor) child, since it completely severs the legal relationship between the child and his natural father. Because other illegitimate children enjoy the benefit of a legal-paternal relationship with their natural fathers, this Comment suggests that § 7005(b) violates the equal protection rights of illegitimate A.I.D. children and should be revised in conformance with UPA § 5(b).

INTRODUCTION

The emergence of artificial insemination as a popular[1] alternative means of conception has spawned a conflict between the rights and

1. It has been estimated that 10,000 children were conceived by artificial insemination prior to 1971. Comment, *Artificial Insemination and the Law*, 1982 B.Y.U. L. REV. 935, 938. Between 1978 and 1980 the estimates range from between 10,000 and 20,000 per year. Griffin, *Womb for Rent*, STUDENT LAW., April 1981, at 28, 29; Cohen, Luttrel & Shapiro, *Current Practice of Artificial Insemination by Donor in the United States*, 300 NEW ENGLAND J. MED. 585, 588. Today, sources estimate that 1.5 million

interests of A.I.D. (artificial insemination by donor) children and the rights and interests of their parents. The absence of adequate governmental regulation produces a host of real and potential problems for A.I.D. children.[2] Conversely, adults who turn to artificial insemination as a means of conception discover a system which is very supportive of their needs. The process is uncomplicated and inexpensive.[3] Additionally, in California, the legislature has constructed a legal barrier between sperm donors and A.I.D. children. Since donors are exempted from legal-paternal responsibilities and are compensated for their services, women are assured an adequate supply of "superior"[4] donor sperm. Although this Comment acknowledges the need for comprehensive regulation designed to protect the rights of

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more Americans will be born to artificially inseminated women by the year 2000. San Diego Union, Oct. 11, 1983, § D, at 1, col. 2.

2. This lack of regulation is the source of many potentially serious problems. Donors' records are kept poorly or not at all. The child will never know the number (one donor has fathered fifty children) or whereabouts of half siblings. Cohen, *supra* note 1, at 587. The existence of unknown siblings is a source of anxiety for adopted children. Comment, *Adoptee's Right to Identity: A Ninth Amendment Approach to Sealed Birth Certificates*, 27 S.D.L. REV. 122, 125 (1982). Half of the child's genetic history will be incomplete or unavailable. Cohen, *supra* note 1, at 588. The majority of doctors who perform A.I. do not test donors to detect whether donors are carriers of genetic diseases. *Id.* An A.I. child may not know until it is too late that she is a carrier or victim of a genetic disease.

The California legislature, in 1983, made an attempt to regulate sperm banks. Assembly Bill No. 1011 provides: CHAPTER 4.5. SPERM BANKS

> 1640. It is the intent of the Legislature in enacting this chapter to ensure the health and safety of the public by developing regulations for the operation of sperm banks.
> 1641. For the purposes of this chapter, "sperm bank" means any facility which maintains human sperm for the purpose of artificial insemination.
> 1642. No person shall operate a sperm bank unless the sperm bank complies with all the requirements of this chapter and the regulations adopted pursuant to Section 1643.
> 1643. The State Department of Health Services shall adopt such regulations as are necessary to carry out the provisions of this chapter.
> 1644. (a) Every person engaged in obtaining human sperm for use in a sperm bank shall keep sperm from different donors in separate containers.
> (b) Each container shall be labeled as follows:
> (1) Date of donation.
> (2) Name and age of donor.
> (3) The physical characteristics of the donor.
> (4) A complete medical history of the donor.
> (5) Any known genetic diseases in the donor's immediate family.

A.B. 1011 Cal. Leg. (1983-84 Sess.).

This bill died in January of 1984. CALIFORNIA LEGISLATURE, ASSEMBLY WEEKLY HISTORY, A.B. No. 1011, P 604 (Thursday, Feb. 2, 1984).

3. The cost for a specimen of sperm can be as little as forty dollars. San Diego Union, Oct. 11, 1983, § D, at 2, col. 4. The procedure is simple enough that a woman patient has successfully performed the process with only a general explanation from a medical doctor. C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Cumberland County Ct. 1977).

4. Most practitioners use the sperm of medical students or hospital residents. Cohen, *supra* note 7, at 586.

all A.I.D. children, it will focus solely on the inappropriateness of a California statute which severs the legal relationship between illegitimate A.I.D. children and their natural fathers.

The legitimacy of A.I.D. children is an issue courts have grappled with for years.[5] Notwithstanding the married status of the mother, some courts have held the child who is born to an artificially inseminated woman to be illegitimate.[6] There remains no universal agreement regarding the child's status.[7] Legislation has substantially resolved this issue in California. The California Civil Code provides that the child of a married woman, inseminated with her husband's permission, is treated as the legitimate child of that marital relationship.[8] A problem arises for the A.I.D. child of an unmarried woman.[9] Like the out of wedlock child conceived by sexual intercourse, the A.I.D. child of an unmarried woman is considered to be illegitimate.[10]

Contemporary legal treatment of illegitimate children has significantly improved. The common law has treated illegitimates quite severely, and many statutes depriving illegitimate children of rights enjoyed by legitimate children date back to early United States history.[11] More recently, the Warren and Burger Courts have found many of these laws unconstitutional.[12] Additionally, the rights of illegitimate children are enhanced by legislation such as the Uniform Parentage Act (UPA),[13] now adopted in eight states, which purports to assure equal legal treatment for all children.[14]

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5. Note, *Artificial Insemination and the Law*, 1982 B.Y.U. L. REV. 935, 966-73.
6. *Id.* at 973.
7. *Id.*
8. CAL. CIV. CODE § 7005 (West 1982).
9. In a 1977 survey of 471 physicians who practiced artificial insemination, 9.5 percent revealed they had inseminated unmarried women. Cohen, *supra* note 1, at 585.
10. Various definitions of illegitimacy include: a child born out of wedlock and not legitimated; a child conceived before marriage and born after its termination; a child born to a married mother in circumstances in which the husband could not have been the father. H. D. KRAUSE, ILLEGITIMACY, LAW AND SOCIAL POLICY 9-10 (1971).
11. Kellet, *The Burger Decade: More than Toothless Scrutiny for Laws Affecting Illegitimacy*, 57 U. DET. J. URB. L. 791, 792 (1980).
12. *See infra* text accompanying notes 37-87.
13. UPA, 9A U.L.A. 587 (1979). The full text of the UPA appears in the Appendix. State codes include: CAL. CIV. CODE §§ 7000-7018 (West Supp. 1983); COLO. REV. STAT. §§ 19-6-101 to 19-6-129 (1978); HAWAII REV. STAT. §§ 584-1 to 584-26 (1976 & Supp. 1982); MINN. STAT. ANN. §§ 257.51-257.74 (West 1982); MONT. CODE ANN. §§ 40-6-101 to 40-6-131 (1981); N.D. CENT. CODE §§ 14-17-01 to 14-17-26 (1981); WASH. REV. CODE ANN. §§ 26.26.010-26.26.905 (West Supp. 1983-84); WYO. STAT. §§ 14-2-101 to 14-2-120 (1977).
14. UPA Commissioner's prefatory note, 9A U.L.A. 581 (1979).

Section 5 of the UPA addresses artificial insemination. Subsection (a) assures legitimacy for the child when the married mother is inseminated with her husband's permission.[15] Subsection (b) absolves the donor from any responsibility for the child when his sperm is used to fertilize a "married woman."[16]

California has adopted the UPA into its Civil Code; however, *the legislature modified section 5(b).* This modification extends the donor's protection, absolving him from legal responsibility for the child whether the recipient of the sperm is married or not.[17] The legal connection between the illegitimate A.I.D. child and his natural father is completely severed by the statute. The statute creates a conflict between the equal protection rights of the illegitimate A.I.D. child and the right of his mother to procreate.

This Comment will explore the equal protection rights of illegitimate children born to artificially inseminated women. It will consider the conflict between those rights and the right of unmarried women to procreate. The Comment concludes that the California modification of UPA section 5(b) [California Civil Code § 7005(b)] is unconstitutional because it violates the equal protection rights of illegitimate children born to artificially inseminated women. In accordance with this conclusion, the Comment suggests that the California legislature amend this statute to conform with UPA section 5(b).

ARTIFICIAL INSEMINATION AND SECTION 5 OF THE UNIFORM PARENTAGE ACT

Depending on her husband's malady, a woman can choose to conceive through homologous artificial insemination (A.I.H.) or heterologous artificial insemination (A.I.D.).[18] A.I.H. allows the husband, who may be impotent but not sterile, to become the natural father of his wife's child, since his sperm is used in the insemination process.[19] A.I.D. involves insemination by the sperm of a stranger.[20] American

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15. UPA § 5(a), 9A U.L.A. 592 (1979).
16. UPA § 5(b), 9A U.L.A. 593 (1979).
17. CAL. CIV. CODE § 7005(b) (West 1982).
18. Generally two classes of artificial insemination are recognized:
(1) Artificial insemination homologous [hereinafter referred to as A.I.H.] utilizes the nonsterile husband's sperm. The inability to procreate by sexual intercourse is attributed to impotency or some other physical malady.
Note, *Artificial Insemination,* 30 BROOKLYN L. REV. 302, 303 (1964).
(2) Artificial insemination heterologous [hereinafter referred to as A.I.D.] requires a donor who is not the husband of the woman artificially inseminated.
Id.
19. *Id.* The child is a product of the marital relationship and is considered legitimate.
20. Cohen, *supra* note 1. Most doctors (91.8 percent) do not allow recipients to select their own donors. *Id.* at 586. Also, anonymity for the donors is carefully protected.

courts have questioned the legitimacy of the A.I.D. child in a marital relationship, and have come to no clear resolution.[21] The UPA, however, substantially resolves the question of legitimacy and identifies the rights and responsibilities of husbands and donors.

The UPA was developed to assure equal protection for all children.[22] The substance of section 5, which addresses the issue of artificial insemination, reflects this purpose. The married woman's child is assured legitimacy as well as a legal father.[23] The donor receives immunity from responsibility for the child if the woman is married; no such immunity, however, is granted if the woman is unmarried. Thus, the A.I.D. child of an unmarried woman is not prevented from asserting a paternity action against the donor.[24]

Section 5(a) of the Act addresses the issue of legitimacy. This subsection, in part, provides that if, under the supervision of a licensed physician, and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.[25] Since section 5(a) establishes a legal-paternal relationship between the wife's husband and the A.I.D. child, the donor can be exempted from any responsibility for the child. Accordingly, section 5(b) provides: [t]he donor of semen provided to a

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Id. at 589.

21. Note, *Artificial Insemination and the Law*, 1982 B.Y.U. L. REV. 935, 966-73.

22. The Act provides substantive legal equality for all children regardless of the marital status of their parents which, the drafters believe, only fulfills the mandate of the Constitution. 9A U.L.A. 581 (1979).

23. *See infra* text accompanying note 25.

24. At least one court has ruled that a sperm donor is the natural father of the child produced. C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (Juv. & Dom. Rev. Ct. 1977). The court said, "If a woman conceives a child by intercourse, the 'donor' who is not married to the mother is no less a father than the man who is married to the mother." 377 A.2d at 824. In California, a father who fails to support his children is in violation of the Penal Code. *See infra* text accompanying note 90.

25. The complete text of UPA section 5(a) provides:

> (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

UPA § 5(a), 9A U.L.A. 592 (1979).

licensed physician for use in artificial insemination of a *married woman* other than the donor's wife is treated by law as if he were not the natural father of a child thereby conceived."[26] This immunity, along with the attraction of compensation to the donor[27] for his services, assures married women a consistent supply of semen. However, the statute only provides the donor immunity if the woman is "married." A donor whose sperm is used to inseminate an unmarried woman will not be insulated from a potential paternity action. This effect is truly consistent with the purpose of the UPA. A grant of immunity to the donor would completely sever any legal relationship between him and his illegitimate child. Thus, the child would be foreclosed from any legal action against his natural father. Such foreclosure would contradict the Act's goal of assuring equal protection for all children.[28]

California Civil Code § 7005(b)

California adopted the UPA into the Civil Code in 1973.[29] The legislature, however, modified section 5(b) of the Act. California Civil Code § 7005(b) provides: "[t]he donor of semen provided to a licensed physician for the 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 the child thereby conceived."[30] The word "married," which appears before the word "woman" in the original UPA version, was deleted.[31] The donor therefore is assured immunity from parental responsibilities to the child whether or not the mother is married.[32]

This modification has an important effect on both the unmarried woman seeking to conceive by artificial insemination and the illegitimate A.I.D. child. Because the donor is absolved from all legal responsibility to the child, unmarried women are assured a supply of donor semen.[33] Unmarried women now may easily choose to conceive without engaging in sexual intercourse. However, the legal relationship between illegitimate A.I.D. children and their natural fathers has been completely severed.

Arguably, the California legislature did not fully understand the

26. UPA § 5(b), 9A U.L.A. 593 (1979) (emphasis added).
27. Cohen, *supra* note 9, at 587. The Currie-Cohen survey showed that virtually all respondents paid donors for their semen. The compensation ranged between twenty-five to one hundred dollars per ejaculate.
28. *See supra* text accompanying note 22.
29. CAL. CIV. CODE §§ 7000-7018 (West 1982).
30. CAL. CIV. CODE § 7005(b) (West 1982).
31. *Id.*
32. *See supra* text accompanying notes 26-27.
33. *See supra* text accompanying note 26.

implications of this modification. The purpose of the Act[34] and the effect of this section directly contradict one another. Ironically, the California legislature, consistent with the drafters, adopted the Act with the desire to eliminate distinctions between legitimate and illegitimate children and to provide a procedure to establish the parent-child relationship without distinctions based on legitimacy.[35] Severing the legal relationship between illegitimate children and their fathers does not serve this purpose. The statute not only contradicts the purpose of the Act, but also violates the illegitimate A.I.D. child's right to equal protection under the fourteenth amendment of the United States Constitution.[36]

EQUAL PROTECTION FOR ILLEGITIMATE CHILDREN

The state's power to establish, protect, and strengthen family life[37] and discourage the birth of children out of wedlock[38] justifies laws which deny illegitimate children rights otherwise afforded legitimate children.[39] The right of a state to promote these objectives has not been challenged. The United States Supreme Court, however, has invalidated, as irrational and unjust, laws which deny equal protection to the illegitimate child solely for the purpose of upholding these principles.[40] Today, a statute which denies illegitimate children equal protection will not survive Court scrutiny unless it has only a limited effect on those rights.[41]

Ironically, California Civil Code section 7005(b)[42] arguably encourages the breakdown of traditional family life since it facilitates out of wedlock births.[43] Additionally, the statute totally forecloses

34. *See supra* text accompanying note 22.
35. CALIFORNIA STATUTES AND AMENDMENTS TO THE CODE, DIGEST OF STATUTES ENACTED IN 1975, ch. 1244, at 344.
36. U.S. CONST. amend. XIV, § 1.
37. Labine v. Vincent, 401 U.S. 532, 536 (1970).
38. Kellet, *supra* note 11, at 794.
39. In Levy v. Louisiana, 391 U.S. 68 (1967), the statute assured legitimate children wrongful death benefits. *Id.* at 69 n.1.
40. *See infra* text accompanying notes 54-60. An Illinois statute which allowed illegitimate children to inherit by intestate succession only from their mothers was challenged before the U.S. Supreme Court in 1976. The Court said the statute could not be justified on the ground that it promotes legitimate family relationships, because actions of men and women cannot reasonably be influenced by imposing sanctions on their illegitimate children. Trimble v. Gordon, 430 U.S. 762, 769 (1976).
41. *See infra* text accompanying notes 94-102.
42. CAL. CIV. CODE § 7005(b) (West 1982).
43. Because donors are free from any responsibilities for their children, an adequate supply of "quality" semen exists for the single woman. The semen of high achievers and Nobel Prize winners is readily available. *See generally* San Diego Union,

any legal rights the illegitimate A.I.D. child may have against his natural father.[44] Beyond the apparent equal protection violation, section 7005(b) ostensibly conflicts with both the traditional values mentioned above and a well entrenched state policy favoring a father's responsibility for his child.[45]

Faced with a constitutional challenge, section 7005(b) will encounter cases which vigorously uphold equal protection for illegitimate children.[46] The equal protection clause of the fourteenth amendment[47] was first invoked to uphold the rights of illegitimate children in 1967.[48] Since then, the Court has consistently struck down statutes which create insurmountable barriers for the illegitimate child.[49] Additionally, the Court has invalidated statutes which do not totally foreclose rights but are unreasonably burdensome to the illegitimate child.[50] Moreover, the Court is intolerant of statutes which deprive the illegitimate child of the right to support from his natural father,[51] a right the Court considers to be absolute.[52] Furthermore, to survive court scrutiny, regulations which partially limit the equal protection rights of illegitimate children must serve a substantial state purpose.[53]

The United States Supreme Court has not encountered a statute, such as California Civil Code section 7005(b), which completely forecloses any legal relationship between a father and his illegitimate child. However, the Court did review a statute which completely excluded an illegitimate child from wrongful death benefits. In *Levy v. Louisiana*,[54] the appellant, on behalf of five illegitimate children, brought an action under a Louisiana statute for the wrongful death of his mother. The statute assured the right of "children" to wrongful death benefits.[55] The trial court dismissed the suit.[56] The court of appeal affirmed, holding "child" meant "legitimate child,"[57] and jus-

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Oct. 11, 1983, § D, at 1, col. 2.

44. *See infra* text accompanying notes 104-06.

45. *See infra* text accompanying notes 87-92.

46. *See generally* Kellet, *supra* note 11. This article tracks the evolution of equal protection rights for illegitimate children.

47. U.S. CONST. amend. XIV § 1.

48. Levy v. Louisiana, 391 U.S. 68 (1967); Glona v. American Guarantee Co., 391 U.S. 73 (1967).

49. *See infra* text accompanying notes 54-62, 71-84.

50. *See infra* text accompanying notes 54-62.

51. *See infra* text accompanying notes 69-84.

52. Gomez v. Perez, 409 U.S. 535 (1973). The Court held that there is no justifiable reason to deny illegitimate children the right to support when that right is otherwise assured other children.

53. *See infra* text accompanying notes 94-102.

54. 391 U.S. 68 (1967).

55. *Id.* at 69 n.1.

56. *Id.* at 70.

57. *Id.*

tified the decision based on morals and welfare and "because it discourages bringing children into the world out of wedlock."[58] The United States Supreme Court reversed. Justice Douglas, writing for the Court, distinguished this case from other equal protection cases, involving social and economic regulations, in which the Court customarily defers to the judgment of the legislature.[59] He explained that the Court is more sensitive when basic civil rights are being violated.[60] Douglas concluded that it is invidious to discriminate against a child when no action, conduct, or demeanor of his is possibly relevant to the harm done to his mother.[61] The statute in *Levy* was later characterized as one which was unacceptable because it erected an "unsurmountable barrier" between illegitimate children and rights which are otherwise afforded legitimate children.[62]

A statute may be invalidated though it does not present an insurmountable barrier to the illegitimate child. In *Weber v. Aetna Casualty & Surety Co.*,[63] a Louisiana workmen's compensation law relegated unacknowledged illegitimate children to a status of "other dependents" rather than the more favored "children" class. The Court held the relegation of these illegitimate children to an inferior class was violative of the equal protection clause of the fourteenth amendment.[64]

In *Weber*, the Court developed a two prong test to evaluate the constitutionality of statutes which allegedly violate equal protection rights of illegitimate children. The test first requires an evaluation of any legitimate state interest the classification promotes.[65] The second inquiry questions what fundamental personal rights the classification might endanger.[66]

Section 7005(b) is unjustifiable in light of the *Weber* test. This statute arguably facilitates the birth of children out of wedlock, which apparently contradicts traditional state interests.[67] Additionally, a very basic right—that of support—is proscribed by the statute. The United States Supreme Court recognizes the right of illegit-

58. *Id.*
59. *Id.* at 71.
60. *Id.*
61. *Id.* at 72.
62. Labine v. Vincent, 401 U.S. 532, 539 (1970).
63. 406 U.S. 164 (1971).
64. *Id.* at 165.
65. *Id.* at 173.
66. *Id.*
67. *See supra* text accompanying note 44.

imate children to support from their fathers.[68] In view of the significance of the rights denied the child and the apparent absence of a legitimate state interest promoted, section 7005(b) would probably fail the *Weber* test.

The Illegitimate Child's Right to Support

The Supreme Court is unanimous in its condemnation of state regulations which deny illegitimate children the right to support from their fathers when the state otherwise accords that right to other children.[69] The Court's position on this issue was first stated in 1973[70] and later unanimously affirmed in a 1981 decision.[71]

A common law rule absolving a father from a support obligation for his illegitimate children was challenged in *Gomez v. Perez*.[72] In Texas, both at common law and by statute, a father has a continuing duty to support his legitimate children.[73] Conversely, the Texas common law provides that illegitimate children have no legal right to support from their fathers.[74] The appellant argued[75] that a natural father has an obligation to support his legitimate children and that her child was being denied equal protection under the fourteenth amendment because of the child's illegitimate status.[76] The Court agreed[77] and reversed the Texas court. The majority added:

> A state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a state to do so is "illogical and unjust."[78]

The *Gomez* position was affirmed in 1981.[79] In response to *Gomez*, Texas enacted a statute, which required that paternity suits, initiated to obtain child support, must be filed before the child becomes a year old. This statute was challenged in *Mills v. Habluetzel*.[80] The appellant brought suit on behalf of her child to establish the appellee as

68. Gomez v. Perez, 409 U.S. 535, 538 (1973).
69. *Id.*
70. *Id.* at 537.
71. Mills v. Habluetzel, 456 U.S. 91, 97 (1982).
72. 409 U.S. 535 (1973).
73. *Id.* at 536.
74. *Id.* at 537.
75. The trial court held the natural father had no obligation to support his child. The Court of Civil Appeals affirmed, and the Texas Supreme Court refused application for writ of error. *Id.* at 536.
76. *Id.*
77. *Id.* at 538.
78. *Id.*
79. Mills v. Habluetzel, 456 U.S. 91, 94 (1982).
80. *Id.*

his natural father.[81] The appellee asserted that the action was barred by statute because the child was one year and seven months old when the suit was filed.[82] The trial court agreed with the appellee and dismissed the action; the Texas Court of Civil Appeals affirmed, and the Texas Supreme Court denied discretionary review.[83] The United States Supreme Court reversed. Justice Rehnquist, writing for the Court, stated, "It would hardly satisfy the demand of equal protection and the holding of *Gomez* to remove an 'impenetrable barrier' to support, only to replace it with an opportunity so truncated that few could utilize it effectively."[84]

Justice O'Connor further embellished the holding in a concurring opinion.[85] She dispelled any notion that a recent change in the statute from a one year to a four year limit was acceptable.[86] Additionally, she said the state has an interest not only to see that justice is done for the child but also to assure that the primary obligation for support of the illegitimate child falls on both natural parents rather than the state.[87]

The California courts agree with Justice O'Connor.[88] Furthermore, a policy affirming paternal support responsibility for all natural children, legitimate or illegitimate, is clearly endorsed in California. The state has adopted the UPA into its Civil Code.[89] Under the California Penal Code, it is a misdemeanor if a father fails to support his legitimate or illegitimate children.[90] Additionally, the state will not bind a child to any agreement made between his parents that compromises his right to support.[91] In a similar vein, a Califor-

81. *Id.* at 96.
82. *Id.*
83. *Id.*
84. *Id.* at 97.
85. *Id.* at 102. Chief Justice Burger, Justice Brennan, and Justice Blackmun joined with Justice O'Connor in her concurring opinion.
86. Although Justice Rehnquist held that a one year statute of limitations was unacceptable, he noted that Texas had increased the limit to four years. *Id.* at 100 n.7. Further, he stated legislatures should be free to set limitations without fear of violating the Constitution. *Id.* at 101 n.9. Justice O'Connor clarified that she did not read the Court's decision as prejudging the constitutionality of longer periods. *Id.* at 106.
87. *Id.* at 103 n.1.
88. A California court asserted that it is important to identify the parent of an illegitimate child so the father, rather than society, can be responsible for its support. Davis v. Stroud, 52 Cal. App. 2d 308, 315 (1942).
89. *See supra* text accompanying note 22.
90. CAL. PENAL CODE § 270 (West Supp. 1983).
91. A California court has held that parents cannot, by their conduct or agreement, impair a child's right to reasonable support. Ruddock v. Ohls, 91 Cal. App. 3d 271, 154 Cal. Rptr. 87 (1979).

nia Health and Welfare Report addressing the issue of unwed parents concludes, "The child is entitled to support from both parents."[92]

Although these factors represent a policy clearly favoring a natural father's support responsibilities toward his child, section 7005(b) only undermines that purpose. The statute completely removes all legal connection between natural fathers and illegitimate A.I.D. children,[93] depriving such children of the right to support. Because California otherwise assures this right of support to all children, section 7005(b) would probably be found unjustifiable under the holdings in *Gomez* and *Mills.*

Regulations That Survive Equal Protection Scrutiny

Regulations which deprive illegitimate children of equal protection and yet survive constitutional scrutiny share at least two common characteristics. First, the regulation does not place an insurmountable barrier between the illegitimate child and those rights afforded legitimate children; an opportunity to mitigate the discrimination is available.[94] Second, the legitimate state purpose served by the regulation goes significantly beyond strengthening family life.[95]

A Louisiana statute, which evidenced these characteristics, survived United States Supreme Court scrutiny in *Labine v. Vincent.*[96] The Court upheld an intestacy statute which limited the illegitimate child's right to inherit from his natural father. The holding was based on the state's interest in the prompt distribution of property.[97] Furthermore, the Court recognized that the child's ability to inherit

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92. A State Social Welfare Board study is highly critical of life styles which deprive the illegitimate child of a connection with his father. The study says in part:

> The child is entitled to the support of both parents. This right should not and cannot be compromised by either the unwillingness of the mother to identify the father, or an unwillingness on the part of the father to assume his full share of responsibility. There is long-standing legal and moral precedence to sustain the support right regardless of whether the child is aided by public assistance or not. Herein lies a basic conflict between the child's right and the claimed rights of the natural mother who pursues the "new life-style" to have and raise children without benefit of marriage. This conflict has nothing to do with the status of women or their respective rights. Whether the mother herself may be able to support the child now or in the future is not at issue. The plain fact is that a mother who, having given birth to a child out of wedlock, refuses to identify the father and to assist in efforts to enforce his responsibility to the child is, in fact, failing to meet her responsibilities to the child.

STATE SOCIAL WELFARE BOARD, UNPLANNED PARENTHOOD: A STUDY OF UNWED PARENTS AND THE POTENTIALLY ENDANGERED CHILD (State of California Health and Welfare Agency, p. 11, April 1974).

93. *See supra* text accompanying notes 33-34.

94. *See infra* text accompanying notes 95-102.

95. *Id.*

96. 401 U.S. 532 (1970).

97. *Id.* at 538.

was not completely barred by the statute.[98] A father could acknowledge his illegitimate children, making them eligible to inherit under the statute, or the father could leave the children property in his will.[99]

Similarly, a provision of the Social Security Act, possessing these characteristics, survived Court scrutiny in *Mathews v. Lucas*.[100] The regulation provided that children of an individual fully insured under the Act were entitled to benefits; however, illegitimate children were only allowed benefits if they could prove dependency.[101] The Court upheld the provision, reasoning that the truly dependent illegitimate children were entitled to support. The Court further stated that to hold otherwise would burden the people with an extraordinary governmental expense.[102]

The characteristics shared by *Labine* and *Mathews* are not readily evident in section 7005(b). First, as previously discussed, the statute arguably serves no legitimate state purpose.[103] Second, and most importantly, this statute irrevocably denies all of the child's rights, not just his right to inheritance,[104] support,[105] or statutory benefits.[106] Finally, anonymity[107] is ensured in virtually all A.I.D. cases; therefore, a father is constructively barred from voluntarily conferring benefits on the child. Because section 7005(b) neither serves any apparent state purpose nor affords an opportunity to mitigate the harm visited on the child, a court is unlikely to find justification for its discriminatory effect.

THE RIGHT TO PROCREATE

One may assert that the justification for California Civil Code section 7005(b) lies in its protection of a woman's right to procreate. Arguably, if donors could be held legally responsible, as fathers, they would not be interested in donating sperm for use by unmarried women. This right has been upheld by the United States Supreme Court. The Court reserves its strictest scrutiny for those cases which

98. *Id.* at 539.
99. *Id.*
100. 427 U.S. 495 (1976).
101. *Id.* at 499 n.2.
102. *Id.* at 509.
103. *See supra* text accompanying note 43.
104. *Labine*, 401 U.S. at 533.
105. 401 U.S. at 537.
106. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 165 (1971).
107. *See supra* note 20 and accompanying text.

directly affect the ability to marry and have a family.[108] However, when this right is only indirectly affected the regulation will be subjected to a rational basis test.

Strict scrutiny was applied to a statute which required mandatory sterilization for "habitual criminals" in *Skinner v. Oklahoma*.[109] The majority opinion noted that "marriage and procreation" are basic rights.[110] The holding, however, prescribed the application of strict scrutiny only for mandatory sterilization laws.[111]

Conversely, regulations which indirectly affect the right to procreate are subjected to a rational relation test. This test has been applied to a law which prohibited the distribution of contraceptives;[112] a rule requiring pregnant school teachers to take unpaid maternity leave;[113] and a statute which made pregnant women ineligible for unemployment benefits.[114]

If section 7005(b) were amended to conform with the UPA section 5(b), the unmarried woman would probably experience difficulty obtaining donor sperm.[115] This change may limit her conception options, but it would not absolutely foreclose her ability to procreate. Consequently, the statute, if challenged, would probably be put to a rational basis test. The essential inquiry is whether it would be rational to assure all illegitimate A.I.D. children a legal relationship with their natural fathers and simultaneously reduce an unmarried woman's potential access to artificial insemination. In light of Supreme Court holdings which protect the rights of illegitimate children[116] and traditional state attitudes disfavoring the birth of illegiti-

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108. Skinner v. Oklahoma, 316 U.S. 535 (1942). *See generally* Donovan, *The Uniform Parentage Act and Non-marital Motherhood-by-Choice*, 11 N.Y.U. REV. L. & SOC. CHANGE 193 (1982-83); Kritchvesky, *The Unmarried Woman's Right to Artificial Insemination: A Call for an Expanded Definition of Family*, 4 HARV. WOMEN'S L.J. 1 (1981).

109. 316 U.S. 535, 541 (1942).

110. *Id.*

111. *Id.*

112. Eisenstadt v. Baird, 405 U.S. 438 (1972). A Massachusetts law restricting the availability of contraceptive devices was challenged in this case. The Court concluded it was not rational to allow married people access to contraceptives and deny that access to unmarried people. *Id.* at 447.

113. Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974). A group of pregnant school teachers challenged a rule which required them to take a mandatory five month unpaid leave prior to the expected childbirth. The Court felt that the statute unreasonably burdened the basic rights of marriage and family life and struck the rule. *Id.* at 640.

114. Turner v. Dep't of Employment Security of Utah, 423 U.S. 44 (1975). Ms. Turner challenged the constitutionality of a provision of a Utah law that made pregnant women ineligible for unemployment benefits for a period extending from 12 weeks before the expected date of childbirth until six weeks after the childbirth. *Id.* at 44. The Court followed *La Fleur* and struck the law as unconstitutional. *Id.* at 46.

115. *See supra* text accompanying notes 24-27.

116. *See supra* text accompanying notes 37-87.

mate children,[117] a court would probably hold UPA section 5(b) rational.

CONCLUSION

California Civil Code section 7005(b) directly contradicts the rights guaranteed legitimate children by the equal protection clause of the fourteenth amendment and those rights intended to be preserved by the UPA drafters.[118] An application of the standards of review established to protect the rights of illegitimate children demonstrates that this statute is unconstitutional.[119]

The legal relationship between illegitimate A.I.D. children and their natural fathers has been completely severed by section 7005(b). Because anonymity is maintained among all the parties involved in artificial insemination, the natural father is constructively barred from any voluntary attempt to bestow benefits on his child. The barrier erected between father and child is insurmountable, and statutes which create these barriers are unacceptable under the fourteenth amendment.[120]

One may argue this statute is justified because it protects an unmarried woman's right to procreate. This argument must fail. A compelling reason exists to assure illegitimate children the right to support.[121] Consequently, an unmarried woman's potential access to artificial insemination must give way to assure this right.[122]

The statute does irrevocable harm to illegitimate A.I.D. children while serving no significant state interest. Conversely, UPA section 5(b) fulfills the constitutional equal protection mandate for illegitimate children.[123] The California legislature should amend section 7005(b) to conform with UPA section 5(b).

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117. *See supra* text accompanying notes 37-38.
118. *See supra* text accompanying note 22.
119. *See supra* text accompanying notes 37-87.
120. Labine v. Vincent, 401 U.S. 532, 538 (1970).
121. *Id.*
122. *Id.*
123. *See supra* text accompanying note 22.