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THE UNWED FATHER'S PARENTAL RIGHTS AND OBLIGATIONS AFTER *S.P.B.*: A RETREAT IN CONSTITUTIONAL PROTECTION

INTRODUCTION

A child, S.P.B., was born during the summer of 1979. The father, P.D.G., admitted paternity, but denied any obligation to support the child. The father and the child's mother, C.F.B., were both college students at the time of the birth. They never married and were not living together at the time of trial. The father claimed that when the mother told him she was pregnant, he indicated his desire that the pregnancy be terminated and offered to pay for an abortion. The father asserted that this discussion took place within the first trimester of pregnancy. The mother did not consent to an abortion, gave birth to S.P.B., and subsequently filed a lawsuit against the father for child support. The mother has had custody of the child since birth.[1]

At trial the father argued that due process requires that he have an opportunity to rebut the irrebuttable presumption of section 19-6-116 of the Colorado Uniform Parentage Act (UPA),[2] which states that a father should share in the support of his child. The father also contended that he was denied equal protection as a result of the state's use of a gender-based classification. The state, on behalf of the minor child S.P.B., argued in favor of the El Paso County District Court's award of both child support and half the birth expense.

The Colorado Supreme Court affirmed the father's child support obligation, finding the father's due process and equal protection arguments to be without merit.[3] In so deciding, the Colorado Supreme Court rejected the father's argument that the nexus, or rational relationship, between sexual intercourse and birth is broken. Instead the court relied on *Roe v. Wade*[4] and subsequent cases[5] which hold that the father's desire that the fetus be

1. *In re* S.P.B., 651 P.2d 1213, 1214 (Colo. 1982); Brief for Respondent-Appellant, *In re* S.P.B., 651 P.2d 1213 (Colo. 1982) [hereinafter cited as Brief for Respondent-Appellant].

2. COLO. REV. STAT. §§ 19-6-101 to -129 (1978 & Supp. 1982).

3. This case was transferred by the court of appeals to the Colorado Supreme Court under COLO. REV. STAT. § 13-4-110(1)(a)(1973) because of the constitutional question involved.

4. 410 U.S. 113 (1973) (holding state criminal abortion statutes unconstitutional). In *Roe* the Court did not base its reasoning on the permissibility of the gender-based classification, but rather on the woman's fundamental right to privacy. The Court held that the decision whether to bear a child or have an abortion lies solely with the mother and her physician.

5. *See generally* Maher v. Roe, 432 U.S. 464 (1977); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). The *Maher* Court stated that the constitutional freedom recognized in *Roe v. Wade* and its progeny did not prevent Connecticut from making a value judgment favoring childbirth over abortion. Consequently, the Court upheld a welfare regulation under which Medicaid recipients received payments for childbirth expenses but not for medical services related to abortions.

The Supreme Court in *Danforth* struck down a Missouri statute requiring prior written consent of the spouse of a woman seeking an abortion during the first twelve weeks of pregnancy

aborted or carried to term is irrelevant and neither state legislatures nor the courts, on behalf of the father, may interfere with the mother's decision whether to give birth.

Before *Roe*, simple reproductive biology and the illegality and unavailability of abortion were thought to produce the required nexus between sexual intercourse and birth.[6] In the years since that decision, however, some legal scholars have argued that the woman's essentially unilateral decision to bear or to abort serves as an intervening factor and replaces the act of intercourse as the proximate cause of birth.[7] The *S.P.B.* court gave no credence to that argument, and reaffirmed the United States Supreme Court's recognition of the legally mandated equality between illegitimate and legitimate children.[8] At the same time, however, it would appear that the court's holding may infringe on the constitutional protection afforded the father through a serious procedural flaw that denies his due process of law.[9]

This comment traces the evolution of illegitimacy and child support, the apparent conclusion of a trend by the Colorado Supreme Court to recognize unwed fathers' rights, and the current status of gender-based classifications in Colorado. In addition, the comment discusses the rationale behind the *S.P.B.* court's decision and the potential social ramifications of this opinion, which strikes a precarious balance between the competing interests of the state and the individual.

I. BACKGROUND

A. *Illegitimacy and Child Support*

1. Development at Common Law

Illegitimacy, a social problem for the last two centuries, often has been viewed as an index of the moral state of the community.[10] At common law the parents of an illegitimate child had no duty to support him, since he was considered "filius nullius," a child of no one.[11] Various arguments have been advanced in support of this proposition. It has been said that the unwed father could not be made to support his illegitimate child because of the uncertainty of the child's paternity.[12] It also has been argued that the policy of discrimination between illegitimate and legitimate children encourages

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unless the abortion was certified to be necessary to preserve the life of the mother. The Court said that the state cannot " 'delegate to a spouse a veto power which the state itself is absolutely and totally prohibited from exercising during the first trimester of pregnancy.' " 428 U.S. at 69 (citation omitted).

6. Brief for Respondent-Appellant, *supra* note 1, at 3.

7. Swan, *Abortion on Maternal Demand: Paternal Support Liability Implications*, 9 VAL. U.L. REV. 243 (1975).

8. *See* Gomez v. Perez, 409 U.S. 535 (1973). The terms "illegitimate" and "legitimate" should be avoided, because of the stigma associated with bastardy. *See infra* note 31 and accompanying text.

9. *See infra* note 123 and accompanying text.

10. P. LASLETT, BASTARDY AND ITS COMPARATIVE HISTORY 1 (1980).

11. H. KRAUSE, CHILD SUPPORT IN AMERICA 3 (1981).

12. *See* Comment, *Domestic Relations-Illegitimates-Father's Duty to Support*, 28 N.C.L. REV. 119, 122 (1949).

marriage, and serves as a deterrent to illicit cohabitation.[13] Most twentieth century commentators find this argument uncivilized because it seeks to punish innocent children on the unreasonable hope that their suffering will promote marriage.[14]

By 1576, enforcement of the English Poor Law[15] provided a quasi-criminal procedure for obtaining support from the natural father of an illegitimate child. The Poor Law was designed to relieve the state of the burden of supporting such children, who were thought of as sin turned into flesh.[16]

Although many years ago the common law ceased legitimacy-based discrimination in mother-child relationships,[17] as recently as 1953 the New Jersey Supreme Court strained to find a paternal child support obligation in the common law.[18] Failing in this attempt, the court found it necessary to fashion this obligation from equitable principles, natural law and reference to the laws of "civilized European countries."[19]

Recently, the trend has been to impose an equal support obligation on mothers and fathers, either by statute or by judicial decisions. Courts sometimes base this obligation on state equal rights amendments or on the equal protection clause of the United States Constitution.[20]

2. United States Supreme Court Decisions

More than a dozen Supreme Court cases since 1968, decided on the basis of the equal protection clause, have mandated full equality for the illegitimate child.[21] As a result, many state statutes discriminating against illegitimate children have been held unconstitutional.[22]

Citing the fourteenth amendment, the Court has demanded equal legal treatment of legitimate and illegitimate children over a broad range of substantive areas.[23] Even so, in 1976 the Court refused to declare illegitimacy

13. *Id.*

14. *Id.*

15. An Act for Setting the Poor on Work, 1576, 18 Eliz. 1, c.3 § 7, *cited in* H. KRAUSE, CHILD SUPPORT IN AMERICA 3 (1981).

16. FATHERS, HUSBANDS AND LOVERS 6 (S. Katz & M. Inker eds. 1979).

17. Dalton v. State, 6 Blackf. 357 (Ind. 1842), *cited in* J. O'DONNELL & D. JONES, THE LAW OF MARRIAGE AND MARRIAGE ALTERNATIVES 97 n.29 (1982).

18. Greenspan v. Slate, 12 N.J. 426, 97 A.2d 390 (1953).

19. *Id.*

20. "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

21. *See, e.g.*, Gomez v. Perez, 409 U.S. 535 (1973) (illegitimates are not to be denied their right to support from their natural father); Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972) (illegitimates should share equally with other children who recover workmen's compensation benefits for the death of a parent); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (statutes granting causes of action for wrongful death cannot deny a right to recovery to the parent of an illegitimate child); Levy v. Louisiana, 391 U.S. 68 (1968) (a state may not create a right of action in children for the wrongful death of a parent which excludes illegitimate children).

22. *See generally* H. KRAUSE, CHILD SUPPORT IN AMERICA (1971) (discussing child support laws which were written when illegitimate paternity had only limited legal consequences).

23. The equal protection and due process afforded an illegitimate child have been the focus of the United States Supreme Court in a number of cases. *See* cases cited *supra* note 21.

per se sufficiently suspect to compel strict judicial scrutiny.[24] Recent United States Supreme Court cases dealing with illegitimacy, which have applied varying levels of scrutiny, illustrate the Court's difficulty in arriving at a consistent method of analysis.[25]

Justice Powell, principal architect of the Burger Court's position on illegitimacy under the equal protection clause,[26] stated that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[27]

In *Gomez v. Perez*[28] the Court found no constitutional justification for denying support to a child simply because the parents were not married. This decision illustrates the Court's progression toward broadening the rights of illegitimate children.

3. Development of Colorado Law

Colorado's UPA[29] provides the statutory framework for child support. The roots of this part of the UPA can be found in a Texas law review article written by Harry Krause in 1966, which was considered revolutionary at the time it was written.[30] In effect since July 1977, the Colorado UPA allows the parent-child relationship to be established or acknowledged, regardless of the parents' marital status. The act attempts to abolish the stigma attached to bastardy by avoiding the labels of "illegitimacy" and "legitimacy."[31]

Parental child support for illegitimate children, as provided for by the Colorado UPA, is not new to Colorado. As early as 1918, in *Wamsley v. People*,[32] a father was convicted under Colorado's nonsupport statute of 1911 for failure to support his illegitimate child. Over fifty years later in *Munn v. Munn*,[33] the court held that the father's support obligation to his illegitimate child could not differ substantially from that owed to his legitimate child. Colorado Supreme Court Chief Justice Pringle, in his 1972 dissent in *In Re L.B.*, wrote: "We have, it seems to me, now passed the time when we distin-

24. The Supreme Court traditionally gave only minimal scrutiny to gender-based classifications. Goesaert v. Cleary, 335 U.S. 464 (1948) (statute upheld which permitted only the wife or daughter of a male owner of a liquor establishment to bartend). *Goesaert* was later overruled by Craig v. Boren, 429 U.S. 190 (1976) (finding gender-based classification in drinking age law to be unconstitutional).

25. *See, e.g.*, Parham v. Hughes, 441 U.S. 347 (1979) (applying a rational relationship test); Trimble v. Gordon, 430 U.S. 762 (1977) (applying intermediate-level scrutiny).

26. He wrote not only the majority opinion in Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972), but also three other majority opinions, two concurring opinions and one plurality opinion.

27. Weber v. Aetna Cas. & Sur. Co., 406 U.S. at 175-76.

28. 409 U.S. 535 (1973).

29. COLO. REV. STAT. §§ 19-6-101 to -129 (1978 & Supp. 1982).

30. Krause, *Bringing the Bastard into the Great Society: A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829 (1966).

31. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 22 (1971) (noting the danger that a legislature, overconcerned with nomenclature, may think it has solved an unpleasant problem by outlawing an unpleasant word).

32. 64 Colo. 521, 173 P. 425 (1918).

33. 168 Colo. 76, 450 P.2d 68 (1969).

guish between so-called 'illegitimate' children and 'legitimate' children."[34]

B. *Parental Rights of Unwed Fathers*

1. The United States Supreme Court and Gender-Based Classifications

Because the father owed no legal duty to his illegitimate child at common law, it naturally followed that he should have no rights concerning the child. Responding to the need to reduce welfare rolls, the laws eventually changed and support duties were imposed upon the father.[35] Unlike most obligations, this duty came with no rights as courts have often failed to recognize the unwed father's right to visitation and custody.[36]

During the last ten years, the judicial trend has been to broaden the parental rights of unwed fathers and more closely scrutinize some of the disabilities under which unwed fathers traditionally have been placed with respect to their children.[37] Some of this expansion of rights has been based on procedural due process requirements, as illustrated in *Stanley v. Illinois*.[38] In *Stanley*, the Court held that the Illinois statute in question created an unconstitutional irrebuttable presumption that all unmarried fathers are unsuitable parents.[39] The Court recognized the due process right of a biological father to maintain a parental relationship with his children, unless he is found to be unfit.[40]

Many of the United States Supreme Court decisions broadening the rights of unwed fathers, like those broadening the rights of illegitimate children, have been based on the fourteenth amendment.[41] These cases are best understood by reviewing the Court's complicated equal protection approach to gender-based classifications.[42] Until 1971, the United States Supreme Court employed a two-tier test to judge the validity of a statute under constitutional attack based on the equal protection clause of the fourteenth amendment. Under the minimal scrutiny required by the traditional "lower tier," most statutes were upheld since they were only required to show a "rational relationship" to a legitimate state end.[43] The "upper tier test," requiring a "compelling state interest," was applied to statutes restricting fundamental rights and creating suspect classes such as race.[44]

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34. 179 Colo. 11, 19, 498 P.2d 1157, 1161-62 (1972).

35. *See* H. KRAUSE, *supra* note 22.

36. *See generally* W. WADLINGTON & M. PAULSEN, DOMESTIC RELATIONS § 8 (3d ed. 1978) (discussing the lack of attendant rights of unwed fathers).

37. Comment, *Equal Protection and the Putative Father: An Analysis of* Parham v. Hughes *and* Caban v. Mohammed, 34 Sw. L.J. 717 (1980).

38. 405 U.S. 645 (1972).

39. *Id.* at 656-57.

40. *Id.* at 649.

41. *See supra* note 21.

42. Discrimination against the unwed father involves three separate judicial classifications: gender, marital status, and illegitimacy. *See* Note, R. McG. & C.W. v. J.W. & W.W.: *The Putative Father's Right to Standing to Rebut the Marital Presumption of Paternity*, 76 NW. U.L. REV. 669, 674 (1981).

43. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961). For a more recent decision based on the rational basis test, see City of New Orleans v. Dukes, 427 U.S. 297 (1976).

44. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Harper v. Virginia Bd.

The Court's dislike for the two-tier test surfaced in 1971 when it developed an intermediate level of scrutiny in *Reed v. Reed*.[45] Writing for a unanimous Court, Chief Justice Burger applied a "heightened scrutiny" test to invalidate a statute which favored men over women as administrators of decedents' estates. The new test required that a classification have "a fair and substantial relation to the object of the legislation."[46] In *Frontiero v. Richardson*,[47] decided two years later, four justices supported the elevation of gender to the level of a suspect class, but the idea did not receive majority support.

In *Craig v. Boren*[48] the Court clarified its equal protection test for gender discrimination cases by taking an activist stand and invalidating a statute that discriminated against males. The Court stated that: "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[49]

In *Caban v. Mohammed*[50] the Court applied its intermediate scrutiny test to the rights of unwed fathers and invalidated a New York statute allowing unmarried mothers, but not unmarried fathers, to prevent the adoption of their children by withholding consent. The Court held that the statute was violative of equal protection because it created a gender-based distinction between unwed parents bearing no substantial relationship to the state's asserted interests.[51] The Court refused to accept the state's argument that maternal and paternal relations are fundamentally different.

The Court's five-four split in *Caban* vividly illustrates the difficulty of defining unwed fathers' rights in the equal protection context. This lack of agreement indicates a judicial reluctance to further broaden rights in this area. Consequently, it would appear that *Caban* represents the current culmination in the development of the unwed father's rights.

2. Colorado Supreme Court

In 1981 the Colorado Supreme Court in *R. McG. v. J.W.*[52] seriously weakened a longstanding legal presumption that the husband of the mother

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of Elections, 383 U.S. 663 (1966) (right to vote); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy); Loving v. Virginia, 388 U.S. 1 (1962) (race).

45. 404 U.S. 71 (1971).

46. *Id.* at 76.

47. 411 U.S. 677, 685-86 n.17 (1973). The plurality enunciated three criteria which characterize a suspect class: 1) the class suffers from an immutable characteristic determined solely by accident of birth and bearing no relation to the ability to contribute in society; 2) the class suffers historic vilification; and 3) the class lacks effective political power and redress.

48. 429 U.S. 190 (1976) (invalidating a statute prohibiting beer sales to males under 21 and females under 18).

49. *Id.* at 197. The Court in Parham v. Hughes, 441 U.S. 347 (1979) showed its hesitancy to implement the intermediate scrutiny test laid out in *Craig*. In *Parham* the plurality actively avoided characterizing the statute as gender-based. Instead, they justified their decision on comparatively trivial differences in circumstance.

50. 441 U.S. 380 (1979). *Caban* was the first unwed father case to directly face the equal protection issues.

51. *Id.* at 393-94.

52. 615 P.2d 666 (Colo. 1980). For an indepth analysis of this case, see *Bastardizing the Legitimate Child: The Colorado Supreme Court Invalidates the Uniform Parentage Act Presumption of Legitimacy in* R. McG. v. J.W., 59 DEN. L.J. 157 (1981).

of a child born during marriage is the father of that child.[53] The court held that R. McG., the alleged biological father, must be given standing to rebut such a presumption and an opportunity to establish the existence of a parent-child relationship with C.W., his alleged minor child,[54] even though the child's mother was married to another at the time of conception and had remained married at the time of trial.

The Colorado court relied on Supreme Court precedents, including *Stanley* and *Caban*, in finding this gender-based distinction unconstitutional.[55] The court held that the UPA statute[56] violated equal protection by granting biological mothers judicial access while denying putative biological fathers standing. Such a distinction, the court said, was not substantially related to an important governmental interest.[57]

Although the intermediate level of scrutiny does not require a statute to fit the state's interest exactly, the court noted that the statute must, at least, substantially mesh with the classification's purpose;[58] such was not the case in *R. McG.*[59] The court further held that the denial of standing to R. McG. violated the equal rights amendment of the Colorado Constitution, which forbids the denial of equal rights on the basis of sex.[60]

The justices in *R. McG.* also found fatal flaws under procedural due process analysis. They stated that although the drafters of the UPA claimed that the act created presumptions rebuttable by clear and convincing evidence,[61] the UPA was actually irrebuttable because it denied an unwed father standing to rebut.[62] The court eyed the presumption with apprehension in light of the recent judicial trend away from irrebuttable presumptions, noting the similarity between the statutory framework of the UPA and the presumption held violative in *Stanley*.[63] Several commentators believe this controversial decision will have far-reaching effects especially in this time of rapidly changing reproductive techniques.[64]

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53. Historically, this presumption, *pater est quem nuptiae demonstrat*, could be conquered only by strong proof of the husband's absence or impotency. In England the rule was that any children born to a man's wife were irrebuttably presumed to be his issue, if the husband was anywhere within the "four seas." Note, *supra* note 42, at 669. *See*, 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 398-99 (2d ed. 1903), *cited in* Note, *supra* note 42, at 699.

54. Test results showed a 98.89% probability that R. McG. was the child's father. 615 P.2d at 668.

55. 615 P.2d at 671.

56. COLO. REV. STAT. §§ 19-6-105 to -107 (1978).

57. 615 P.2d at 670.

58. *Id.* at 671.

59. *Id.*

60. *Id.* at 670. "Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex." COLO. CONST. art. II, § 29.

61. COLO. REV. STAT. § 19-6-105(2) (1978).

62. 615 P.2d at 671.

63. The *Stanley* Court said that procedure by presumption was permissible, but "when . . . [that] procedure forecloses the determinative issues . . . [and] explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parents and child." 405 U.S. at 657.

64. *See* Note, *supra* note 42, at 705-66. *See also* Wadlington, *Artificial Insemination: The Dan-*

II. *IN RE S.P.B.*

Judicially mandated, *In re S.P.B.* leaves no doubt that the constitutional principles articulated ten years ago by the United States Supreme Court in a series of highly controversial decisions[65] are still arousing debate in Colorado. Through its affirmation of the district court opinion, the Colorado Supreme Court gave no credence to either the equal protection or due process arguments advanced by the unwed father.

The court held that the father, P.D.G., could not escape his obligation to provide child support. This decision was perhaps made inevitable in light of the constitutional mandate set forth a decade ago in *Gomez*,[66] which required equal support for illegitimate and legitimate children.

Although controversy over the continuing enforcement of child support duties against unwed fathers[67] undoubtedly will continue, in this era in which the courts have, in essence, said that women have a choice not to be burdened with unwanted children but that men have no choice;[68] the court's finding of a paternal support obligation in *S.P.B.* is not surprising. Moreover, this decision furthers the state's objective of protecting the best interests of the child.

A. *The Father's Position*

Although the father admitted paternity, he advanced several arguments in denial of a child support obligation. He argued that the UPA, through its statutory imposition of the duty of child support upon both parents without granting the father the right to decide whether to terminate the pregnancy, violates the father's right to equal protection of the laws under both the United States Constitution[69] and the state constitution.[70]

The father also claimed that the UPA creates an irrebuttable presumption that a father must share in child support. According to the father, this presumption is no longer valid because the availability of legal abortions breaks the required nexus between intercourse and birth. He contended that he should at least be given an opportunity to demonstrate that this nexus had been broken.[71]

The father reasoned that the wide-spread availability of legalized abortions, together with the mother's unilateral decision to have the child against his wishes, served as an "intervening factor" breaking the nexus between the

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ger of a Poorly Kept Secret, 64 NW. U.L. REV. 777 (1970) (discussing the current judicial dilemma concerning artificial insemination).

65. *See supra* notes 4-5.

66. 409 U.S. 535 (1973).

67. *See* Comment, *Child Support: Implications of Abortion on the Relative Parental Duties*, 28 U. FLA. L. REV. 988 (1976).

68. Swan, *Paternal Child-Support Tort Parallels for the Abortion on Maternal Demand Era: The Work of Regan, Levy, and Duncan*, 3 GLENDALE L. REV. 249, 250 (1978-79).

69. *See supra* note 20.

70. "No person shall be deprived of life, liberty or property, without due process of law." COLO. CONST. art. II, § 25. This clause has been interpreted to include equal protection of laws. *See* Vanderhoof v. People, 152 Colo. 147, 380 P.2d 903 (1963).

71. Brief for Respondent-Appellant, *supra* note 1, at 1.

act of intercourse and the birth.[72] Specifically, the father advanced his belief that the sex-based distinction found in the UPA was unconstitutional under the Supreme Court's intermediate scrutiny test.[73]

In addition, the father argued that *Roe*, in making alternatives to birth available, removed the inevitability of an implied contract between the parties in which they agree that the father will meet his support obligation if conception occurs.[74] At most, the father contended, the parties impliedly contract to share the expense of the immediate consequences of their act—the expense of the pregnancy or the abortion. The father noted that if a court were to find that the parties did enter into an implied contract to support the child, this would result in paternal rights to the fetus, a right the Supreme Court has emphatically denied.[75]

The father also contended that *Roe* destroys any tort basis for imposing support liability on the biological father.[76] Under the tort theory, the "negligence" of the father arises in the performance of an act that potentially requires parental liability. This liability is not imposed, however, unless the act is the proximate cause of the injury. The mother's unilateral decision to bear a child or to abort acts as an intervening force and removes the act of intercourse as the proximate cause of birth.[77]

Additionally, the father proposed that the mother indemnify him for his child support expenses since she had the last clear chance to avoid birth, and her inaction was more responsible for the damages (birth) than his action. The father maintained that every plaintiff in Colorado has a duty to mitigate the damages sustained. The mother failed in this duty, and as a result the father's liability should be limited to the cost of an abortion or childbirth and should not extend to the aggravated damage of child support.[78]

Finally, the father argued that traditional concepts of American law require that obligations imposed upon an individual be offset by the enjoyment of corresponding rights. According to the father, these rights were foreclosed and the fair consequence would be placing the burden of financial responsibility on the mother for her unilateral decision.[79] The father likened his role to that of an artificial insemination donor. Under Colorado law, these fathers are non-liable, even though they are aware that their donation will possibly result in child support needs.[80]

B. *The State's Position*

The state reasoned that the father's duty to the child is no greater than the obligation imposed on the mother, and that such a duty is mandated on

72. *Id.* at 3.
73. *See supra* note 42.
74. Brief for Respondent-Appellant, *supra* note 1, at 4-5.
75. *Id.* at 5-6. Planned Parenthood v. Danforth, 428 U.S. 52, 69 (1976).
76. Brief for Respondent-Appellant, *supra* note 1, at 6-7.
77. *Id.* at 6.
78. *Id.* at 6-8.
79. *Id.* at 10.
80. *Id.* at 9. COLO. REV. STAT. § 19-6-106 (1978).

equal protection grounds by *Gomez*.[81] The state claimed that the best interests of the child are served by the statutory provisions of the UPA,[82] which presume a shared parental support obligation; moreover, it was asserted that the child's equal protection rights would be violated unless the father's duty to support was affirmed. The state strengthened this argument by comparing the total innocence of the child with the father's relative lack of innocence.[83]

The state reiterated the United States Supreme Court's position that the right to privacy requires freedom from governmental intrusion into areas as intimate as the decision to bear or abort a child.[84] Noting that it was the father's conscious decision to engage in sexual intercourse with the possible consequence of conception, the state asserted that the father's desire to preclude this natural result could not be forced upon the mother or enforced by the state as this would constitute impermissible governmental intrusion.[85]

The state also observed that other jurisdictions have ruled against unwed fathers making similar arguments.[86] With facts precisely on point to *S.P.B.*, the Alabama Supreme Court in *Harris v. State*,[87] rejected the father's offer to pay for an abortion as a legitimate escape from his child support obligation. The Alabama justices rejected the father's argument that because he was denied any decision as to the birth of the child, he should be released from any child maintenance obligation. Furthermore, the court held that the state's paternity statutes did not deny the father equal protection of the laws.[88]

The Maryland Court of Appeals in *Dorsey v. English*[89] found no merit to a father's theory that the nexus between intercourse and birth is broken by the woman's right to abortion. The court discounted the father's claim that his role in the birth of the child had become so attenuated that his circumstance was dissimilar from the mother, and that the Maryland statute treated him unequally.[90]

C. *The Colorado Supreme Court's Holding*

The court's holding was significantly influenced by Colorado's interest in promoting the welfare of its children.[91] The court validated the statutory presumption requiring parents who have participated in an act resulting in conception to be jointly responsible for their actions and this presumption

81. Brief for Petitioner-Appellee at 6, *In re* S.P.B. 651 P.2d 1213 (Colo. 1982) [hereinafter cited as Brief for Petitioner-Appellee]; Gomez v. Perez, 409 U.S. at 538.

82. COLO. REV. STAT. § 19-6-102 (1978).

83. Brief for Petitioner-Appellee, *supra* note 81, at 7.

84. *See* Roe v. Wade, 410 U.S. 113, 153 (1973).

85. Brief for Petitioner-Appellee, *supra* note 81, at 8-9.

86. *Id.* at 9.

87. 356 So. 2d 623 (Ala. 1978).

88. *Id.* at 624.

89. 283 Md. 522, 390 A.2d 1133 (1978).

90. A case with similar facts in the Texas Civil Appeals Court arrived at the same conclusion. D.W.L. v. M.J.B.C., 601 S.W.2d 475 (Tex. Civ. App. 1980).

91. 651 P.2d at 1217.

was found to reflect the "well-considered judgment" of the legislature.[92] The court emphasized, however, that the state has little room for error on its constitutional catwalk toward protecting the best interests of the child, due to the proscription from interference with the woman's "fundamental right" to make decisions regarding her pregnancy.[93]

Although the justices recognized the existence of a sex-based classification they, nonetheless, upheld the statute by finding that the father's right to be free from these classifications is outweighed by the state's substantial, competing interest. Additionally, the court, applying heightened judicial scrutiny, found that an important governmental objective is served by the classification and that it is substantially related to the achievement of that objective.[94]

Recognizing the disfavor with which irrebuttable presumptions have been viewed in light of the due process clause,[95] the court applied the *Vlandis v. Kline* two-pronged test.[96] The *S.P.B.* court found the father incapable of meeting the second prong of the test, which requires a challenger to demonstrate that the state has reasonable alternative means of making its determination without applying an irrebuttable presumption. Therefore, the court never reached the first prong of the test,[97] which provides that a statutory presumption can be invalidated only when it is not necessarily or universally true.

The father's request for a case-by-case determination[98] of the existence of the nexus was swiftly rejected on the basis of three critical interests served by the presumption. The court found that the presumption of a shared parental support obligation protects the interests of the child, the interests of the state in preventing children from becoming its wards, and the parents' privacy interests.[99]

III. ANALYSIS

Almost one-third of the births in this country are the result of non-legalized relationships.[100] The rights of these children have evolved over centuries to a current judicial policy,[101] which requires that such children receive care, maintenance, and education equivalent to children born of a legalized

92. *Id.*

93. *Id.* at 1216. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (decision whether to bear a child is fundamental); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

94. 651 P.2d at 1215.

95. The Supreme Court emasculated irrebuttable presumptions in a series of decisions stretching from the early 1940's to the late 1960's. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 631 (1969) (presumption that new residents exploited welfare system condemned); Carrington v. Rash, 380 U.S. 89, 96 (1965) (presumption denying voting by military struck down); Skinner v. Oklahoma, 316 U.S. 535 (1942) (injustice of automatic sterilization). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1092-93 (1978).

96. 412 U.S. 441, 452 (1973).

97. 651 P.2d at 1217.

98. Vlandis v. Kline, 412 U.S. 441, 452 (1973).

99. 651 P.2d at 1217.

100. FATHERS, HUSBANDS AND LOVERS 95 (S. Katz & M. Inker eds. 1979).

101. *See supra* text accompanying notes 11-20.

relationship.[102]

In an effort to prevent the state from suffering economically for the so-called "sins of the fathers," several states have enacted parental support statutes.[103] Although such statutes are fair in some respects, they are contrary to basic American judicial traditions in their imposition of obligations without the granting of concurring rights.[104] This analysis will discuss the unwed father's support obligation, the underlying social policies, and the court's procedure in implementing this obligation.

A. *The Question of the Nexus*

Although paternal support statutes have been in effect for many years, few scholars questioned their constitutionality until *Roe*. Under *Roe*, the decision whether to abort rests solely with the mother and her physician,[105] allowing the mother to make a unilateral decision completely unaffected by the desires or direction of the father. The mother's unilateral decision-making capability raises questions concerning the proximate cause of birth. Is conception still the cause, as was the accepted view when abortions were illegal and unavailable, or does the woman's decision regarding the pregnancy intervene as the cause of birth and place responsibility for the support of the child solely upon her?

If the mother's decision is considered the proximate cause of birth, then the father's rights under the equal protection clause are violated when he is forced to support the child, because the mother's action breaks the required nexus between intercourse and birth. One scholar, examining this nexus, strongly argued that it is broken under the rationale in *Roe* and that all paternal support statutes are invalid, because their underlying premise has been removed.[106] This argument is supported by reference to such cases as *Doe v. Doe*[107] and *Jones v. Smith*.[108]

Indeed, it seems illogical that the same act that cannot commit the female partner to motherhood can commit the male partner to fatherhood and twenty-one years of child support. Because the Supreme Court has declared that a woman's right to privacy guarantees that she should not be burdened with unwanted children,[109] proponents of the broken nexus theory believe it

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102. *See generally* H. KRAUSE, CHILD SUPPORT IN AMERICA (1981).

103. Nine states including Colorado have adopted legislation conforming to the Uniform Parentage Act. CAL. CIV. CODE §§ 7000-7021 (West Supp. 1983); COLO. REV. STAT. §§ 19-6-101 to -129 (1978 & Supp. 1982); HAWAII REV. STAT. §§ 584-1 to -26 (1976 Supp. 1982); MINN. STAT. ANN. §§ 257.51 to -.74 (West Supp. 1982); MONT. CODE ANN. §§ 40-6-101 to -135 (1981); NEV. REV. STAT. §§ 126.011- to -.391 (1981); N.D. CENT. CODE §§ 14-17-01 to -26 (1981); WASH. REV. CODE ANN. §§ 26.26.010 to .905 (Supp. 1980); WYO. STAT. §§ 14-2-101 to -120 (1977).

104. The unwed natural father is only now gaining rights with respect to his child. *See supra* text accompanying notes 37-41.

105. 410 U.S. at 163.

106. *See supra* note 7.

107. 365 Mass. 556, 314 N.E.2d 128 (1974) (a husband has no constitutional or statutory right to determine whether or not his child should be aborted).

108. 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974) (a potential putative father does not have the right to restrain the natural mother from terminating her pregnancy).

109. Roe v. Wade, 410 U.S. 113, 153 (1973).

is inequitable for the father to be so burdened.[110]

Directly countering this argument is the view currently expressed by the majority of commentators, who suggest that the nexus is not broken under the *Roe* rationale.[111] Under this theory, the mother's decision to bear the child, even in light of the abortion option, is insufficient to shift the burden of support solely to her. The foundation for this theory is based on the argument that the father, as a person of ordinary intelligence and prudence, can foresee conception and the subsequent birth of the child as a possible consequence of intercourse. Two commentators, Levy and Duncan,[112] disagree that the proximate cause of birth should be imputed to the mother alone, because such a theory is based on the untenable implication that the mother's unilateral decision not to abort could have caused the birth independently of the original act of intercourse.

Moreover, if the mother has a duty to avoid the natural consequences of intercourse, an implied contract to abort would result. This type of contract, as well as any other contract for sexual relations, is in violation of public policy,[113] and damages for its breach will not be imposed.[114] Consequently, the father's act of intercourse places him in the position of one jointly responsible for the pregnancy. A chain of causation is created between his actions and the birth; the mother's unilateral action or inaction serves as a weak link, though insufficiently weak to break the causal chain.

With the causal connection even feebly intact, any challenge to the validity of paternal support statutes using the broken nexus approach will fail. Several theories remain, however, to challenge the support obligation imposed on the unwed father.

B. *An Obligation Without Rights?*

One theory, an equal protection argument distinct from the broken nexus rationale, was advanced in *S.P.B.* and dismissed by the Colorado court. The father argued that his right to equal protection was violated by the statutory imposition of a child support obligation on both parents,[115] without giving him a role in the decision of whether to terminate the pregnancy.[116] Under the so called "abortion cases,"[117] however, equal protection arguments are subservient to the fundamental privacy rights recognized as an implicit liberty guarantee in the fourteenth amendment.[118] The court

110. *See, e.g.*, *supra* note 7.

111. Levy & Duncan, *The Impact of* Roe v. Wade *on Paternal Support Statutes: A Constitutional Analysis*, 10 FAM. L.Q. 179, 193 (1976).

112. *Id.*

113. Early Colorado law suggests that a contract for sexual relations is void. *See* Baker v. Couch, 74 Colo. 380, 221 P. 1089 (1923).

114. *Cf.* J. SONENBLICK, LEGALITY OF LOVE 154 (1981) (no damages will be imposed for breach of an agreement not to bear children).

115. 651 P.2d at 1215.

116. *Id.* at 1214.

117. *See supra* notes 4 and 5.

118. *See, e.g.*, Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (invalidating a law which prohibited distribution of nonprescription contraceptives to adults except by licensed pharmacists and to persons under sixteen who do not have the approval of a licensed physician); Eisenstadt v. Baird, 405 U.S. 438 (1972) (decision to bear children is a privacy right belonging to a

in *S.P.B.*, therefore, properly dismissed this argument.

The statutory imposition of the duty of child support upon both parents will inevitably pass the intermediate standard of review employed by the Supreme Court in cases of gender classifications.[119] The classification present in the parental support statutes serves the important governmental objectives of ensuring the woman's right to privacy and the best interest of the child, and is substantially related to achievement of those objectives.

The statute also passes the standard of review mandated at the state level, since the Colorado Equal Rights Amendment[120] exempts from scrutiny a narrow class of cases in which the classification of the sexes is based on physiological differences.[121] Undoubtedly, this exemption includes the capability of women to carry and bear children.[122] Even the most skeptical critics of the imposition of child support obligations on the unwed father have been forced to agree that the sexes are not similarly situated with respect to childbirth. Consequently, the inevitable conclusion surfaces: absolute equal treatment is not mandated by the constitution. The only requirement is that the classification meet the intermediate scrutiny standard.

C. *The Irrebuttable Presumption*

The court, zealous in pursuing its goal to protect the best interests of the child, also found the father's procedural due process argument to be without merit.[123] The *S.P.B.* court held that the father's suggestion of a case-by-case determination of the existence of a child support obligation, rather than utilization of the irrebuttable presumption, failed to meet the second prong of the *Vlandis* test,[124] because such an *ad hoc* determination is an unreasonable alternative for the state.[125]

The court reasoned that a case-by-case determination would constitute "unconscionable governmental interference with privacy rights which the Supreme Court has deemed inviolate."[126] This privacy argument is inadequate for several reasons.

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single person as well as a married person); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a law which made it a crime to use contraceptives).

119. *See supra* notes 45-47 and accompanying text.

120. COLO. CONST. art. II, § 29.

121. G. DOUTHWAITE, UNMARRIED COUPLES AND THE LAW 302 (1979).

122. People v. Green, 183 Colo. 25, 514 P.2d 769 (1973). As a consequence of such exemption, a Colorado rape statute, COLO. REV. STAT. § 40-3-401 (1963), punishing only male offenders was found constitutional in *People v. Salinas*, 191 Colo. 171, 551 P.2d 703 (1976). The *Salinas* court stated that the Equal Rights Amendment "does not prohibit differential treatment among the sexes when, as here, that treatment is reasonably and genuinely based on physical characteristics unique to just one sex. . . . In such a case, the sexes are not similarly situated and thus, equal treatment is not required." *Id.* at 174, 551 P.2d at 706. Note, however, that COLO. REV. STAT. § 18-3-401 (1973) now punishes both male and female offenders.

123. 651 P.2d at 1214.

124. Under *Vlandis* an irrebuttable statutory presumption can be invalidated only when a two-pronged test is met: when the presumption is not necessarily or universally true, and when the state has reasonable alternative means of making the crucial determination. 412 U.S. at 452.

125. 651 P.2d at 1217.

126. *Id.*

In most previous cases involving the penumbra-based constitutional right to privacy, a statute was found invalid when individuals challenged that statute because they believed it violated their privacy.[127] In these cases the challenged statutes were found invalid because they created unwarranted intrusions into intimate and private spheres. Although the father in *S.P.B.* was willing to waive his right to privacy, the court would not allow the mother's right to privacy, inseparable from the father's under these circumstances, to be violated. The result is an interesting and questionable twist in judicial interpretation of who can assert a privacy interest and when it can be asserted.

The court cloaked itself with a privacy rationale and did not articulate the true reasons behind the denial of the case-by-case method: public policy considerations and administrative convenience.[128] Apparently uncomfortable with basing their decision explicitly upon these reasons, the court resorted to a "parade of horribles" argument which climaxed when the court said it should not be burdened with a judicial inquiry into "any of a multitude of legal theories which ingenious litigants and their lawyers might advance."[129] The court stated that such an inquiry would represent an unconscionable governmental interference with privacy rights.[130] Although it may legitimately be argued that such a procedure would be a difficult task, case-by-case determination is a traditional role of the courts and administrative convenience alone is not a valid reason to uphold an irrebuttable presumption.[131]

The irony behind the court's use of privacy to prevent rebuttal of the presumption becomes clear when one realizes that one year earlier, in *R. McG. v. J. W.*,[132] the Colorado Supreme Court explicitly rejected a very powerful privacy argument advanced by a woman and her husband. Indeed, *R. McG.* paves the way for a serious intrusion into the private, intimate sphere of marriage.

The court in *R. McG.* allowed an alleged biological father to rebut a long standing legal presumption.[133] The unwed father in *S.P.B.*, however, was not allowed to rebut the presumption of the father's duty to share in child support. Such a difference is difficult to reconcile. Undoubtedly, the court noted that *R. McG.* dealt with the denial of the parent-child relationship, while in *S.P.B.* only a monetary property interest was at issue.[134]

Putting all other theories aside, the unwed father should prevail in his

127. *See supra* note 118.

128. Dorsey v. English, 283 Md. 522, 526, 390 A.2d 1133, 1138 (1978). The court in *Dorsey* listed the simplification of procedures as one reason for upholding a similar statute.

129. 651 P.2d at 1217.

130. *Id.*

131. The *Stanley* Court said that although "efficacious procedures to achieve legitimate state ends [are] a proper state interest . . . the Constitution recognizes higher values than speed and efficiency. . . . Procedure by presumption is always cheaper and easier than individualized determination." 405 U.S. at 656-57.

132. 615 P.2d 666. The mother and her husband argued that their constitutional right to privacy was violated by the court's grant of standing to the putative father, R. McG. *Id.* at 672.

133. *See supra* note 53.

134. *See* Swan, *supra* note 7, at 257.

effort to submit evidence to rebut the presumption simply because such a presumption is contrary to due process, which requires an opportunity to be heard in protection of a property interest.[135] In order to determine whether or not the unwed father should be provided an opportunity to rebut the presumption of the shared parental obligation of child support, due process demands that the competing private and state interests be weighed.[136] In *S.P.B.* the unwed father's property interest, the cost of twenty-one years of child support plus half the expense of birth, should be weighed against the state's legitimate interests, which are the best interests of the child and the state's economic interest in preventing the child from becoming its ward.[137]

As noted by Justice Marshall: "Where the private interests affected are very important, and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure," the Constitution "requires the government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices."[138] Because the father has a constitutionally cognizable property interest, such a weighing process leads to the logical conclusion that he be given an opportunity to be heard.

Although it may be argued that unwed fathers will seldom be successful in rebutting the presumption of their child support duties and that Colorado need not undergo the administrative inconvenience of such inquiry, the due process clause was designed to protect such fragile individual rights from the often overbearing governmental concern for efficiency.[139] In light of these due process considerations, unwed fathers should be allowed to submit evidence to rebut the presumption of responsibility for child support.

IV. CONCLUSION

The Colorado Supreme Court's decision in *S.P.B.* reaffirms the slow and sometimes painful evolution of the legal status of illegitimate children from second-class citizens to equal participants in society. The decision recognizes the unwed mother's constitutional right to privacy, and right to unilaterally choose to abort or bear a child while not foregoing the possibility of child support from the father. The court in *S.P.B.* affirms the interest of the state minimizing its welfare roles while ensuring adequate support of its children. The decision, however, fails to recognize the unwed father's constitutional right to procedural due process by upholding an irrebuttable presumption of mutual, parental child support obligations.

135. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (due process consists of those procedural safeguards designed to accord to the individual the right to be heard before being condemned to suffer grievous loss of any kind).

136. Board of Regents v. Roth, 408 U.S. 564, 570 (1972).

137. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (discussing constitutional adequacy of state's procedures). In *S.P.B.*, the risk of erroneous deprivation of the father's interest was high while the value of a hearing, as an additional procedural safeguard, was not unduly burdensome.

138. United States Dep't of Agriculture v. Murry, 413 U.S. 508, 518 (1973) (Marshall, J., concurring).

139. Stanley v. Illinois, 405 U.S. at 656.

While the court's dismissal of the father's equal protection claim is justified, dismissal of his due process argument is flawed. Through this denial of due process, the court strikes a needlessly dangerous balance between competing state and private interests. This problem could have been avoided effectively by permitting the father to rebut the presumption of his child support obligation and by requiring the court to reach the merits of his case. Procedure by presumption is seldom justified,[140] and it is not justified here. Although case-by-case determination may present complications for the court, such complications are surmountable.[141]

S.P.B. not only represents the end of the trend in Colorado toward broadening the rights of an unwed father, it represents a judicial step backward in the area of an unwed father's rights to procedural due process.

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140. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1092 (1978).

141. The Supreme Court has found that interests similar to the one at stake in *S.P.B.* were important enough to trigger the admission of rebuttal evidence. Cleveland School Bd. v. LaFleur, 414 U.S. 632 (1974) (fitness of pregnant teachers); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (food stamps); Vlandis v. Kline, 412 U.S. 441 (1973) (reduced college tuition); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father's competency to raise his children); Bell v. Burson, 402 U.S. 535 (1971) (suspension of a driver's license).