Struggle for the Child: Preserving the Family in Adoption Disputes between Biological Parents and Third Parties

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The Struggle for the Child*: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties

On August 2, 1993, most of the country watched the dramatic transfer of a little girl screaming for her “mommy,” as Baby Jessica was taken from the only parents she had ever known and returned to the biological parents she had never met. As the event was broadcast throughout the nation, the plight of Baby Jessica and the couples who fought over her created a public outcry for reform of adoption law and greater recognition of children’s rights. Baby Jessica’s case has been called the “outrage of the decade” and the “Dred Scott of our time.” Children in situations like Jessica’s are now being called “Solomon’s children.”

In the past year, the rash of cases involving custody disputes between biological parents and third parties has prompted both sociologists and legal scholars to return to the nature-nurture debate and to question what constitutes a family. Should society, and thus the legal system, strive to preserve the biological family by preferring the rights of natural parents over those of anyone else? Should the goal be to protect third parties’ interests in the

* This struggle exists at several different levels. First, because children often do not have a voice in our legal system, parents and other adults are the ones responsible for protecting their interests. In custody disputes, however, the struggle often becomes one over the child, in what may be viewed as a legal tug-of-war. Additionally, the state, which has an interest in protecting the child, is in the precarious position of enacting laws designed to prevent or facilitate these battles. Finally, and most important, the struggle is that of the child, whose stability and welfare are inevitably affected.

2. Id.
3. There have been numerous legal and media references to the biblical story of King Solomon’s decision to award a child to a mother who, rather than see her child split in two, urged him to give the child to the other woman. See, e.g., Robert E. Shepherd Jr., Solomon’s Sword: Adjudication of Child Custody Questions, 8 U. RICH. L. REV. 151, 151 (1974); Note, Natural vs. Adoptive Parents: Divided Children and the Wisdom of Solomon, 57 IOWA L. REV. 171, 180, 193-98 (1971); Sally Johnson, Adoption’s Tangled Web, WASH. TIMES, Sept. 30, 1993, at A13; William Raspberry, Is It Really Wisdom When Babies—And Hearts—are Torn in Two?, ATLANTA J. & CONST., Aug. 6, 1993, at A10. In the biblical account, two women claimed to be the mother of a boy. When King Solomon proposed to divide the child with a sword and give each woman half, one woman agreed, while the other woman, whose “heart yearned for her son,” exclaimed, “Oh, my Lord, give her the living child, and by no means slay it.” King Solomon, with “the wisdom of God . . . to render justice,” then knew that this was the child’s real mother, and gave the child to her. 1 Kings 3:23-28. Custody disputes in today’s society, however, often make Solomon’s decision appear simple.
children they have raised? Or should the focus be primarily on the welfare of the child?

The highly publicized Baby Jessica case has drawn attention to other child custody cases involving disputes between biological parents and third parties, especially in the adoption context. Although media attention has created the impression that these cases are becoming rampant, experts urge that such situations do not arise frequently. For the families involved, however, even one such case is too many. Media accounts have struck fear into the hearts of adoptive parents, who are now afraid of losing their children to biological parents. The widespread attention has also moved children's rights into the legal forefront and sparked a movement for adoption reform. More specifically, these cases have shed light on the problems inherent in adoption and custody laws. Because each state has its own legislation relating to adoption, termination of parental rights, and custody disputes between biological parents and third parties, variations among

4. See infra notes 44-62 and accompanying text.


8. 2 Homer H. Clark, Jr., The Law of Domestic Relations in the United States § 21.4, at 600 (2d ed. 1988); Brooks, supra note 7, at 1134-35. Brooks observes:

American adoption law originated in the nineteenth century and was designed to meet the needs of parents looking to adopt healthy infants. State adoption laws dictated that adoptions be in the best interests of the child. However, this vague standard allowed individual judges broad discretion and resulted in a poorly developed adoption-law jurisprudence . . . . [T]he vagueness of state adoption laws prevents state courts from rectifying the inadequacies in the states’ systems . . . . The nineteenth-century attempt to codify adoption law failed to produce uniform standards or procedures governing adoption.

Id. at 1136. This Comment suggests that the twentieth-century response to these inadequacies should be to produce uniform standards and procedures that take into account the interests of all involved parties while focusing on the needs of the child. See infra notes 334-91 and accompanying text.

9. 2 Clark, supra note 8, § 21.4.

10. See infra notes 303-29 and accompanying text.
the states often contribute to the failure of the legal system to prevent situations like Baby Jessica's from occurring.

This Comment examines the rights of the parties involved in these disputes, analyzes the inconsistencies in the law that lead to such uneasy resolutions, and considers the possible solutions, or prevention, of the tragedies that occur when judges are faced with "Solomon's children." Following an examination of three recent, highly publicized custody decisions in the adoption context, Part II of the Comment traces the history of the constitutional protections afforded to children, parents, and the parent-child relationship. Part III then examines both the social and legal definition of family and the boundaries of the constitutionally protected family. Against this constitutional backdrop, Part IV explores the uncertain legal rights of those having a stake in the adoption process—adoptive parents, unwed fathers, and children. Part V then reviews the standards that states use in custody proceedings between biological parents and third parties. In Part VI, the Comment explores methods of reforming the system through uniform adoption laws and the modification of standards used in custody rulings. Finally, Part VII concludes that the legal system should strive to uphold traditional principles in light of current realities and recognize that children's family relationships, regardless of biology, deserve protection.

I. HIGHLIGHTING THE UNCERTAINTY IN PRIVATE ADOPTION: THREE RECENT CASES

A. Baby Jessica

The facts of the Baby Jessica case have become all too familiar. On February 8, 1991, Cara Clausen gave birth to Jessica in Iowa. Two days

11. See infra notes 229-302 and accompanying text.
12. See infra notes 303-29 and accompanying text.
13. See infra notes 334-95 and accompanying text.
14. See infra notes 63-96 and accompanying text.
15. See infra notes 97-228 and accompanying text.
16. See infra notes 229-66 and accompanying text.
17. See infra notes 267-88 and accompanying text.
18. See infra notes 289-302 and accompanying text.
19. See infra notes 303-29 and accompanying text.
20. See infra notes 330-73 and accompanying text.
21. See infra notes 374-91 and accompanying text.
22. See infra notes 392-95 and accompanying text.
23. The media has repeatedly told the story of the child whose mother lied about the identity of the child's biological father, who then fought the adoptive parents for custody of the child. See, e.g., Baby Jessica; Her Wrenching Custody Battle Tore the Hearts of Parents and Stepparents Alike as It Raised the Issue of Children's Rights—or Lack of Them, PEOPLE, Jan. 3, 1994, at 69, 69; Geoffrey Cowley et al., Who's Looking After the Interests of Children?, NEWSWEEK, Aug. 16, 1993, at 54, 54; Nancy Gibbs, In Whose Best Interest?: The Courts Viewed Jessica DeBoer More
later, Clausen signed a release-of-custody form relinquishing her parental rights. She named Scott Seefeldt as the father, and he also signed the forms relinquishing his rights. On February 25, Jan and Robbie DeBoer, Michigan residents, filed a petition in Iowa's juvenile court to adopt Jessica. At the hearing, the court terminated the parental rights of Clausen and Seefeldt and granted the DeBoers custody of Jessica. Less than one month after the hearing, Clausen changed her mind, attempted to revoke her release of custody, and filed an affidavit in juvenile court stating that she had knowingly named the wrong man as the father of her child. Dan Schmidt, Jessica's biological father, sought to intervene in the adoption proceeding, claiming that his parental rights had not been terminated because he had never consented to the adoption. Lacking subject matter jurisdiction, the juvenile court dismissed both Clausen's request to revoke her release of custody and Schmidt's attempt to claim custody.

In December 1991, the district court found that Schmidt was the biological father, that the DeBoers had failed to prove that he had abandoned Jessica, and that an analysis of the child's best interests was unwarranted. The district court ordered that Jessica be returned to her biological father, but the Iowa Supreme Court stayed the transfer, pending the DeBoers' appeal. The DeBoers refused to give Jessica to Schmidt and

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25. Id. at 194.
26. Id.
27. Id. Cara Clausen was given notice, but did not attend the hearing. Having been granted custody, the DeBoers took Jessica back to Michigan with them.
28. Id. Dan Schmidt, the biological father, filed an affidavit of paternity on March 12, 1991.
29. Id. at 194.
30. The court lacked subject matter jurisdiction because the adoption petition had already been filed.
31. Id. Abandonment is one of the grounds for the involuntary termination of parental rights in Iowa, as in many other states. See Iowa Code § 232.116 (1992); UNIF. ADOPTION ACT §§ 6, 19, 9 U.L.A. 26, 51 (1979).
32. DeBoer v. Schmidt (In re Clausen), 501 N.W.2d 193, 194 (Mich. 1993). Rejecting the DeBoers' argument that a best interests analysis governed a termination issue in an adoption proceeding, the Iowa Supreme Court agreed with the district court that the analysis is not appropriate until one of the grounds for termination of parental rights is found.
33. DeBoer, 501 N.W.2d at 194.
34. Id. at 195. On September 23, 1992, the Iowa Supreme Court affirmed both the court of appeals's decision to terminate Cara Clausen's parental rights and the district court's decision. Id. at 195. The Iowa Supreme Court agreed that Cara had not been denied her constitutional rights even though she had consented to the adoption only 40 hours after the baby was born, as opposed to the statutorily proscribed 72 hour waiting period in Iowa.
instead sought to modify the custody decree by filing a petition in a Michigan circuit court. After a best interests hearing, the Michigan court ruled that Jessica should remain with the DeBoers. Schmidt appealed to the Michigan Court of Appeals, which found that the circuit court lacked jurisdiction and that the DeBoers lacked standing to challenge the custody decree. The Supreme Court of Michigan affirmed the decision and ordered that Jessica be returned to the Schmidts. By the time the case reached the Michigan Supreme Court, Jessica had been living with the DeBoers for two and a half years.

In July 1993, the United States Supreme Court denied the DeBoers’ petition to stay the Michigan Supreme Court’s order to transfer Jessica to the Schmidts. In his dissent, Justice Blackmun echoed the reaction of so many who watched Jessica on her last day with the DeBoers: “This is a case,” he began, “that touches the raw nerves of life’s relationships.” Blackmun found that because of “the personal vulnerability of the child so much at risk . . . [and the] fundamental disagreement over the duty and authority of state courts to consider the best interests of a child when rendering a custody decree,” the Court should have granted the stay pending careful consideration of the petition for certiorari. By denying the stay, the Court allowed the Schmidts to take Baby Jessica from the DeBoers.

35. DeBoer, 501 N.W.2d at 195. The DeBoers filed the petition pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA), codified in Michigan as MICH. COMP. LAWS § 600.651-.673 (1992). Under the UCCJA, which has been adopted in all 50 states, a court has jurisdiction to modify an existing custody decree if it is the home state or a state in which the child has a significant connection and jurisdiction would be in the child’s best interests. See, e.g., id. The DeBoers alleged that Michigan met the home state requirements and that it would be in Jessica’s best interests for Michigan to have jurisdiction. DeBoer, 501 N.W.2d at 195. After the best interests hearing, the circuit court entered an ex parte order enjoining Schmidt from removing the child from Washtenaw County, Michigan. Id. at 196.

36. Id. at 196.

37. Id. The court held that the DeBoers, as former adoptive parents, lacked standing to initiate a custody action after the Iowa Supreme Court upheld the denial of the adoption petition and the district court terminated their rights as temporary guardians and custodians, even though the child had lived with them most of her life. Id. at 197. The court also noted that rights to legal custody cannot be based on the fact that a child resides or has resided with the third party; the Uniform Child Custody Jurisdiction Act does not give standing to third parties who do not possess substantive rights to the child’s custody. Id. The denial of standing to prospective adoptive parents is one of the main problems in cases like this. Without standing, a child’s “parents” will not be able to bring a custody action. For a discussion of whether prospective adoptive parents’ family relationships deserve constitutional protection, see infra notes 229-66 and accompanying text.


39. See id. at 669 (Levin, J., dissenting).


41. Id. (Blackmun, J., dissenting). Justice O’Connor joined in the dissent.

42. Id. at 11-12 (Blackmun, J., dissenting).

43. Id. at 12 (Blackmun, J., dissenting).
B. Baby Richard

While Baby Jessica was beginning a new life with her biological parents, a judge on the Illinois Court of Appeals ruled that two-and-a-half-year-old Baby Richard should remain in the custody of his adoptive parents.44 The facts were similar to those in the Baby Jessica case: The child’s unwed mother, Daniella Janikova, consented to placing her son for adoption four days after he was born.45 The child’s father, Otakar Kirchner,46 was told the child had died shortly after birth.47 He discovered, fifty-seven days after the baby was born, that the infant had been placed for adoption and contested the adoption on the grounds that he had never consented.48 The trial court found that Mr. Kirchner was an unfit parent, whose consent to the adoption was therefore unnecessary, and terminated his parental rights.49 The court then entered a judgment for adoption by the Does, with whom Richard had been living since he was four days old.50 The Illinois Appellate Court, stressing that the best interests of the child are the paramount issue,51 affirmed the lower court’s termination of Mr. Kirchner’s rights and judgment of adoption.52 The court found “clear and convincing evidence that there was no reasonable degree of interest indicated by . . . [the father] in the first thirty days of the life of this child.”53 Therefore, Mr. Kirchner was declared unfit, and his consent to the adoption was

45. Id. at *1-*5.
46. Id. at *1.
47. Id. at *6. Ms. Janikova refused to tell the father about the child because she suspected that he was cheating on her in Czechoslovakia, where he was visiting his ill grandmother. Id. at *3. Ms. Janikova moved out of her apartment and into a shelter for abused women and decided to give up the child for adoption. Id. She would not, however, disclose the father’s name to the proposed adoptive parents or their lawyer. Id. at *4. Meanwhile, she avoided Mr. Kirchner on all but two occasions. Id. at *4-*5. The two later reconciled and married on Sept. 12, 1991. Id. at *8.
48. Id. at *1.
49. Id. at *8.
50. Id. at *2, *5-*6.
51. Id. at *11. The court elaborated that “[i]n an adoption, custody or abuse case, . . . the child is the real party in interest. Since the child is the real party in interest, it is his best interest and corollary rights that come before anything else, including the interests and rights of biological and adoptive parents.” Id.
52. Id. at *2.
53. Id. at *9-*10. Under the Illinois statute, the unwed father must demonstrate “a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth.” Ill. Ann. Stat. ch. 750, para. 50/1(D)(l) (Smith-Hurd 1993).
not required. Applying a "best interests" test, the court found that Richard should remain with his adoptive parents.

C. Baby Pete

Both the Baby Jessica and Baby Richard cases have already affected child custody disputes between biological parents and third parties, as evidenced by the "unique" outcome of the Vermont case involving Baby Pete. In this case, as in the other two, the child's biological mother consented to the adoption of her child, who was placed with a couple one week after his birth. The mother named her boyfriend as the father, but the true biological father was her estranged husband, who claimed custody several months after the baby was born. Rather than embarking on a treacherous custody battle, the adoptive parents and biological father reached a settlement whereby the child's adoptive parents would maintain physical custody, while the father, whose name would appear on the birth certificate, would have visitation rights. The parties thus decided the best interests of the child without judicial intervention. As the biological father said, "Nobody lost, and the baby won."

55. For a discussion of the "best interests of the child" test and the other standards states use in custody proceedings, see infra notes 311-29 and accompanying text.
56. In re Doe, No. 1-92-1552, 1993 Ill. App. LEXIS 1271, at *18-*19 (Aug. 18, 1993), appeal granted, 624 N.E.2d 807 (Ill. 1993). In so ruling, the court stated: "Plainly, it would be contrary to the best interest of Richard to 'switch' parents at this stage in his life. . . . Courts are here to protect children, not victimize them." Id. The battle for Baby Richard is not over, however, as the Illinois Supreme Court has agreed to hear Kirchner's appeal. In re Doe, 624 N.E.2d 807 (Ill. 1993); Darlene Gavron Stevens, Adoption Reformers Target Baby Richard Case, Chi. Trib., Jan. 6, 1994, Chicagoland, at 1.
58. Id. at 1, 28.
59. Id. The case was complicated by the mother's contention that she had no interest in reconciling with her husband, who at the time was also fighting for custody of their two other children. Id. at 28.
60. Id. at 1.
61. For an example of a situation in which a prospective adoptive couple opted to relinquish the child to her biological father rather than subjecting her to a drawn-out interstate custody battle, see Bruce Vielmetti, Couple to Give Kara to Her Biological Dad, St. Petersburg Times, Sept. 16, 1993, at 1B, 5B.
62. Gaines, supra note 57, at 1. Although the Baby Richard case also has been praised for taking the child's best interests into consideration, the biological father has lost the opportunity to establish a relationship with his child. Although each of the cases described above deals with young children caught in the wake of custody disputes between biological fathers and couples who thought they had legally adopted their children, two cases involving older children also made headlines and invoked comparison with these cases. See, e.g., Cowley et al., supra note 23, at 54; Dispute Grows Over Rights of Children; Some See New Emphasis on Them as 'Highly Destructive' to Families, St. Louis Post-
II. THE RIGHTS OF CHILDREN AND THE PARENT-CHILD RELATIONSHIP

The recognition of children's rights is largely a twentieth-century development. Early Roman law and English common law viewed the child as property under the exclusive control of the father. In Rome, the father's rights were limitless; he had the power of life or death over his children. While English common law was less extreme, the father had a right to the "custody, labor, and services of his child which was superior to the mother's rights and in some instances was enforceable regardless of the child's welfare." It was not until the early nineteenth century that the father began to be regarded as the child's guardian, instead of owner, and the mother was considered the child's primary nurturing source.


In Florida, a judge ruled that 14-year-old Kimberly Mays had standing to terminate the rights of her biological parents and remain with the only father she has ever known. Dick Lehr, Fla. Judge Rules for Girl, 14; Lift Seen for Children's Rights, BOSTON GLOBE, Aug. 19, 1993, at 1. This case was an unfortunate switched-at-birth case. Kimberly's biological parents, whose daughter died in childhood, discovered Kimberly was their biological child when she was already 9; they subsequently sought visitation with her. See Mays v. Twigg, 543 So. 2d 241, 242 (Fla. App. 1989). Kimberly Mays fought to deny them visitation. Id. On August 18, 1993, Circuit Judge Stephen Dakan held that the man who had raised her, Robert Mays, was her legal father; however, he did not go so far as to say Kimberly had "divorced" her natural parents, even though ties with them were severed. See Lehr, supra, at 1, 15. "Family law specialists hailed the decision for promoting the rights of children, although the ruling's legal impact is limited." Id. at 1. Ironically, Kimberly Mays later had "personal difficulties" with her father and moved into the home of her biological parents. Ginia Bellafante, Back Track, TIME, Mar. 21, 1994, at 79, 79.

The attorney who represented Kimberly Mays was the same man who was trying to adopt Gregory K., his foster son who brought an action in his own behalf to "divorce" his natural mother and remain in the custody of his foster parents, who wished to adopt him. See Kingsley v. Kingsley, 623 So.2d 780, 782 (Fla. App. 1993), review denied, 1994 Fla. LEXIS 164 (Jan. 21, 1994). The Florida Court of Appeals upheld his "divorce" from his biological mother, but only because adults had made the request, not because the trial judge had granted him legal standing to sue. Id. at 790. The appellate court, however, dismissed the boy's adoption by his foster family. Id. at 789. This case, as well as the Mays case, has helped increase awareness of children's rights and has added to the debate over whether parenthood is a function of nature or nurture.


Francis B. McCarthy, The Confused Constitutional Status and Meaning of Parental Rights, 22 GA. L. REV. 975, 975 (1988); see also Lucy S. McGough & Lawrence M. Shindell, Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes, 27 EMORY L.J. 209, 209-10 (1978) ("By the seventeenth century parental autonomy was only slightly more limited. Murder was proscribed, but the parent-child relationship was otherwise free from societal intervention.").

COMMITTEE ON THE FAMILY OF THE GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, NEW TRENDS IN CHILD CUSTODY DETERMINATIONS 22-23 (1980) [hereinafter NEW TRENDS]. In Shelley v. Westbrooke, 37 Eng. Rep. 850 (Ch. 1817), poet Percy Bysshe Shelley lost custody of his children because the court found his atheistic beliefs immoral. After this case, a preference...
American law reflected this English common-law heritage until the turn of the century, when "a revolution in children's rights began." State courts started to recognize limited rights for children, particularly in abusive situations. In the Mary Ellen case, the New York Supreme Court protected a child's right not to be abused and "provided an impetus for enactment of the 'cruelty to children' criminal statutes." Shortly before this decision, a court had first referred to a state's parens patriae right to protect children in Ex parte Crouse. In this case, the court acknowledged that the state has an interest in "the virtue and knowledge of its members" that allows the state to act as the parent to protect the child's welfare.

In the 1920s, the United States Supreme Court began to recognize that children have constitutional rights. Ironically, this protection of children's rights grew out of cases recognizing the rights of parents in the parent-child relationship. In Meyer v. Nebraska and Pierce v. Society of Sisters, which both addressed the education of children, the Court strongly supported the interests of parents in making decisions concerning emerged for awarding custody to the mother if she was fit. New Trends, supra, at 22. This preference became known as the "tender years" doctrine, a rebuttable presumption that the mother should be granted custody of a young child. 2 Clark, supra note 8, at 477, 496. See generally Allan Roth, The Tender Years Presumption in Custody Disputes, 15 J. Fam. L. 423 (1976-77) (describing the history and application of the presumption).

70. See McGough & Shindell, supra note 66, at 210, 210-11 nn.7-8.
71. Literally, parens patriae means "parent of the country." Black's Law Dictionary 1114 (6th ed. 1990). The term "refers traditionally to the role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane;... and, in child custody determinations, when acting on behalf of the state to protect the interests of the child." Id.
72. 4 Whart. 9 (Pa. 1839). See McCarthy, supra note 66, at 975-76; McGough & Shindell, supra note 66, at 209 n.2. In 1899, Illinois established the first juvenile court; every other state soon followed. Id. at 211 & nn.9-10. For a review of the parens patriae doctrine and its origins, see Lawrence B. Custer, The Origins of the Doctrine of Parens Patriae, 27 Emory L.J. 195 (1978).
73. Crouse, 4 Whart. at 11.
74. The Constitution makes no reference to children, family, or the parent-child relationship. See Homer H. Clark, Jr., Children and the Constitution, 1992 Ill. L. Rev. 1, 1 (1992). Furthermore, family law has traditionally fallen within state court jurisdiction. Although federal courts have been reluctant to intervene in the area of domestic relations, they have become more involved as a result of the "promulgation by the federal government of comprehensive social welfare programs affecting the family... [and] the elaboration of constitutional law in the areas of due process, equal protection and the right to privacy." Eva R. Rubin, The Supreme Court and the American Family 12-13 (1986); see also Eric Stein, Uniformity and Diversity in a Divided-Power System: The United States' Experience, 61 Wash. L. Rev. 1081, 1092 (1986) (noting that as late as 1956 the Supreme Court emphasized the states' domain over domestic relations and stating that, although varied, state legislation has reflected, "on the whole, traditional family values").
75. 262 U.S. 390 (1923).
76. 268 U.S. 510 (1925).
their children’s futures. In Meyer, the Court pronounced that “the right[s] of the individual . . . to marry, establish a home and bring up children” were due process rights protected by the Fourteenth Amendment. Holding that a Nebraska statute prohibiting the teaching of foreign languages in public or private schools was unconstitutional, the Court affirmed the right of parents to direct their children’s education.

The Court again recognized constitutional protection of the parent-child relationship in Pierce v. Society of Sisters, in which it held unconstitutional an Oregon statute mandating public school attendance. Relying on Meyer, the Court ruled in favor of the parents’ right to choose another type of school for their children. The Court also indicated that parental authority extended beyond educational matters to upbringing. In support of protecting parents’ rights, the Court stated that “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”

The Court later acknowledged, however, that parental rights are not without limits. In Prince v. Massachusetts, the Court recognized the interests of the state in protecting children, even when those interests conflict

77. The Court later stated explicitly in Prince v. Massachusetts, 321 U.S. 158, 166 (1944), “It is cardinal with us that the custody, care, and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder.”

78. Meyer, 262 U.S. at 399. The Court held that a teacher’s right to teach a foreign language in a public school, as well as the “opportunities of pupils to acquire knowledge, and . . . the power of parents to control the education of their own,” outweighed the state’s interest in “Americanizing” its citizens. Id. at 401.

79. See Davis & Schwartz, supra note 63, at 52-53 (stating that the decision was “the only pronouncement on the meaning of due process of law in the family context” until Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding a statutory prohibition of a married couple’s use of contraceptives unconstitutional), and Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding a statutory ban on interracial marriage unconstitutional)).

80. The German teacher, not the parent, challenged the statute because it denied him the right to teach the foreign language. Meyer, 262 U.S. at 390. However, the Court based its decision not only on his liberty interest, but also on the interest of the parents. Id. at 401-02.

81. 268 U.S. 510 (1925).

82. Id. at 534-35.

83. Id. The parents were not the ones who challenged the statute, however; the private schools challenged its constitutionality because it affected their economic success.

84. Id.

85. Id. Commentators have discussed both Meyer and Pierce as parents’ rights cases, family rights cases, and precursors to children’s rights cases. See, e.g., Davis & Schwartz, supra note 63, at 52-54; Rubín, supra note 74, at 120-123; Suzette M. Haynie, Comment, Biological Parents v. Third Parties: Whose Right to Child Custody Is Constitutionally Protected?, 20 Ga. L. Rev. 705, 727 & nn.76-78 (1986); see also Clark, supra note 74, at 3 (noting that “the fact that lawyers do not think of [cases like] these . . . as essentially ‘children’s’ cases does not mean that they do not have significant consequences for children”).

86. 321 U.S. 158 (1944).
with the parents' wishes.\textsuperscript{87} The Court held that when the state's interest in the well-being of the child is compelling, the state, as \textit{parens patriae}, may properly restrict the parent's control over the child.\textsuperscript{88} Predicting which situations the Court considers compelling, however, is difficult.\textsuperscript{89}

Although cases like \textit{Meyer}, \textit{Pierce}, and \textit{Prince} touched on children's rights collaterally, the Court focused in those cases on the rights of parents to make decisions for their children.\textsuperscript{90} The first pure children's rights case was \textit{Tinker v. Des Moines Independent Community School District}.\textsuperscript{91} In \textit{Tinker}, the Court specifically addressed children's First Amendment rights when it held that the state's interest in controlling conduct in the schools does not outweigh a child's right to express himself in school by wearing a black armband in protest of the Vietnam War.\textsuperscript{92} Recognizing that children are "'persons' under our Constitution,"\textsuperscript{93} the Court found that "[t]hey are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."\textsuperscript{94} Although the Court has been unpredictable in its recognition of children's rights since

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\item \textsuperscript{87} Id. at 166-71. The Court upheld a statute forbidding a child to sell or offer to sell materials on a street or in a public place and punished any parent or guardian allowing or promoting such behavior. \textit{Id.} The Court found that the state's interest in protecting children from danger on the public streets was sufficient to justify restricting the child's or guardian's exercise of religion. \textit{Id.} at 169-70.
\item \textsuperscript{88} Id. at 166.
\item \textsuperscript{89} In \textit{Wisconsin v. Yoder}, 406 U.S. 205 (1972), the Court found the state failed to meet the \textit{Prince} test and barred the state from interfering with parents' rights to take their children out of school for religious purposes. \textit{Id.} at 213-19. The Court focused on the long history and tradition of the Amish in educating their children within the Amish community, \textit{Id.} at 216-19, and held that the Amish could choose not to send their children to public school past the eighth grade. \textit{Id.} at 228-29. The decision in \textit{Yoder} may be considered a vindication of the rights of parents, as opposed to the rights of children, because the children had no voice in the decision not to attend school past the eighth grade. \textit{See Davis & Schwartz, supra note 63}, at 58. Interestingly, Justice Douglas, in dissent, argued that children have a right to be heard in matters relating to their future. \textit{Yoder}, 406 U.S. at 244 (Douglas, J., dissenting). For an analysis of the \textit{Yoder} decision, see \textit{Rubin, supra note 74}, at 119-34.
\item \textsuperscript{90} \textit{See supra} notes 75-88 and accompanying text.
\item \textsuperscript{91} \textit{393 U.S. 503} (1969).
\item \textsuperscript{92} \textit{Id.} at 504, 509; \textit{cf. Bethel Sch. Dist. v. Fraser}, 478 U.S. 675, 685 (1986) (upholding a school district's action disciplining a student who used an extended sexual metaphor in his nomination speech for a candidate running for class office). The decision in \textit{Bethel} supports the argument that \textit{Tinker}'s holding is limited to the protection of political speech.
\item \textsuperscript{93} \textit{Tinker}, 393 U.S. at 511. The Court in \textit{Tinker} established the principle that children have First Amendment rights that are not "shed... at the schoolhouse gate." \textit{Id.} at 506.
\item \textsuperscript{94} \textit{Id.} at 511. This case may also be viewed as a parents' rights or family rights case because the children may actually have been mirroring the views of their parents by wearing the armbands. Had the children expressed views opposite to those of their parents and against their parent's wishes, the Court may not have been so liberal. \textit{See Davis & Schwartz, supra note 63}, at 59.
\end{itemize}
\end{footnotesize}
Tinker,95 the cases make clear that children are no longer under the exclusive control of their parents.96 At the same time, the Court has confirmed that the state may not interfere with the parent-child relationship absent a compelling interest in the child’s welfare.

III. CONSTITUTIONAL PROTECTION OF THE FAMILY: A BASIS FOR THE PROTECTION OF THE PARENT-CHILD RELATIONSHIP

A. Constitutional Recognition of Family Integrity

Although the Constitution does not explicitly afford protection to the “family,” the Supreme Court has extended constitutional protection to the family under the Fourteenth Amendment.97 The Court’s holdings concerning families’ rights have addressed both the definition of family98 and the

95. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2832 (1992) (upholding the principle that states may enact statutes requiring parental consent before a minor may obtain an abortion); New York v. Ferber, 458 U.S. 747, 773-74 (1982) (upholding a statute prohibiting the distribution of materials depicting sexual performances to children under 16); Parham v. J.R., 442 U.S. 584, 620 (1979) (upholding Georgia’s statutory scheme allowing parents voluntarily to commit their child to a mental institution); Ingraham v. Wright, 430 U.S. 651, 682-83 (1977) (upholding the use of corporal punishment in the schools); Goss v. Lopez, 419 U.S. 565, 574, 582 (1975) (holding that children have procedural due process rights and declaring unconstitutional an Ohio statute allowing for suspension of students without notice or hearing).

Although the law protects children in some areas (such as employment, the making of contracts, and medical decision-making in life-threatening situations), it grants children autonomy in others (such as the ability to decide about emancipation and, at least in some instances, abortion). Davis & Schwartz, supra note 63, at 201. “These disparate results stem from an inherent conflict in the law—a kind of schizophrenia—between the desire to accord children a greater degree of control over their lives and freedom of choice, and the need, on the other hand, to protect them from others, their surroundings, and, sometimes, from their own folly.” Id.

96. Children’s rights may be viewed in different ways. One commentator divides children’s rights into three categories: “(1) constitutional rights of children asserted directly against the state; (2) rights that are dependent upon levels of skill or maturity; and (3) rights granted to children by the state because they serve the interests of children as children.” McCarthy, supra note 66, at 1013.

Professor Michael Wald, another commentator, describes four different categories of children’s rights:

(A) generalized claims against the world . . . (B) the right to greater protection from abuse, neglect, or exploitation by adults; (C) the right to be treated in the same manner as an adult, with the same constitutional protections, in relationship to state actions; (D) the right to act independently of parental control and/or guidance.

Id. at n.145; see also Davis & Schwartz, supra note 63, at 72-73 (describing Professor Wald’s categorization of children’s rights).

97. See Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974) (“This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”). The Equal Protection Clause has also been implicated as affording protection for the family. See Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that the rights to marry and procreate are fundamental).

98. See infra notes 120-29 and accompanying text. However, this right is limited. See infra notes 130-47 and accompanying text.
family's right to make certain decisions. The Supreme Court has held that "freedom of personal choice in matters of family life is a fundamental liberty interest" and has extended protection to the family in areas such as marriage, procreation, contraception, abortion, and child-rearing. In granting such protection, the Court has respected the "sanctity of the family precisely because the institution of the family is deeply rooted in the Nation's history and tradition." The Court has emphasized the family's traditional function of furthering social and moral values and has especially focused on the parents' instrumental role in instilling these values in their children. The Court's recognition of the family's "sanctity" thus derives from and contributes to the emphasis placed on the importance of the parent-child relationship.

B. The Definition of Family and the Boundaries of Constitutional Protection

Although the Supreme Court has held that the Constitution protects various aspects of the family, as well as the parent-child relationship, determining what constitutes a "family" and who may be considered "parents" for purposes of such protection has proved difficult. The concept of the family has traditionally been that of the nuclear family—a husband, wife, and their biological children. While historically the nuclear family may have been the norm, the makeup of the family has changed over the past
The past few decades have marked a shift from the traditional nuclear family to an increasing number of nontraditional families—those with single parents, step-parents, foster children, other relatives, homosexual parents, and children born from new reproductive technologies or surrogates. Today, the nuclear family is more an ideal than a reality.


tant, involving a higher proportion of the population, than the nuclear family"). For examples of such alternative forms of organization, see id. at 133-34.

109. See Rubin, supra note 74, at 21. "There has been a rapid change in family life and in standards of personal behavior[,] . . . but as yet no consensus has been reached as to what is happening, where we are going or what we are ready to accept as the norm." Id. at 12.


111. See, e.g., Note, Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family, 104 HARV. L. REV. 1640 & n.3 (1991) (noting that between 1980 and 1985 the number of children living with a stepparent increased from 6,082,000 to 6,789,000).

112. See, e.g., Vincent S. Nadile, Promoting the Integrity of Foster Family Relationships: Needed Statutory Protections for Foster Parents, 62 NOTRE DAME L. REV 221, 221-22 & n.13 (1987) (noting that the number of children in foster care may be as high as 750,000).


Nonnuclear family arrangements now outnumber the 'traditional' American household by more than three to one. . . . The traditional nuclear family with the husband working to support his dependent wife and children has become the exception rather than the rule and is now typical of fewer than 10 percent of all households.
Although many commentators have urged the public to accept the legitimacy of such families, legal recognition has been slow to follow. History, tradition, the reluctance of courts to recognize liberty interests, and the often emotional nature of family law contribute to the law's difficulty in adapting to the changing family. Thus, those whom the public may consider as part of a family do not necessarily gain family status in the law.

The Supreme Court has acknowledged the difficulty in defining family—and parent—for purposes of the Fourteenth Amendment. Although the traditional definition and "usual understanding of 'family' imply biological relationships," the Court is aware that such relationships "are not exclusive determination[s] of the existence of a family." This recognition that biological ties are not conclusive has led the Court to consider not only that constitutional protection may not include certain classes of natural

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117. See, e.g., Bartlett, supra note 113, at 882-83; Nadile, supra note 112, at 221; Note, supra note 111, at 1643-44 & nn.22-23.
118. See Rubin, supra note 74, at 12. Rubin describes the effect these factors have on members of the Supreme Court who, aware that personal beliefs and prejudices influence decision-making, try to avoid reading their personal predilections into the law. But attitudes and emotions about this family realm are rooted in such unconscious layers of the mind that it has been particularly difficult for them to recognize their own hidden biases.
119. See Note, supra note 111, at 1643.

In recent years the legal definition of family has resulted in the denial of benefits to a growing number of individuals involved in many types of nontraditional relationships that do not possess the ties of blood, adoption, or marriage associated with the traditional nuclear family. . . . The current legal definition of family may also deny benefits to stepfamilies, foster families, grandparents, and parents of children born through reproductive technologies.

Id. That note, which focuses primarily on legitimizing homosexual family status, distinguishes between "formal" and "functional" judicial responses to challenges to the definition of "family." Id. at 1644-59. A court using the "formal" approach "defines family relationships according to the model of the traditional nuclear family unless it finds an historical or statutory basis for expanding the definition to nontraditional forms." Id. at 1645. Under the "functional" approach, a court focuses on whether the relationship exhibits the same essential characteristics and fulfills the same needs as the traditional family relationship. Id. Specific characteristics include "economic cooperation, participation in domestic responsibilities, and affection between the parties." Id. at 1646. Advocates who seek recognition for the rights of nontraditional families prefer the functionalist approach. Id. at 1651 n.64 (citing works by legal scholars such as Joseph Goldstein and Katherine Bartlett).

120. Cf. Smith v. Organization of Foster Families, 431 U.S. 816, 842-43 (1977) ("Although considerable difficulty has attended the task of defining 'family' for purposes of the Due Process Clause, we are not without guides to some of the elements that define the concept of 'family' and contribute to its place in our society." (citation omitted)); Rubin, supra note 74, at 14 ("The Court has never been reluctant to extend constitutional protections to the family; the problems have come in deciding what kind of creature this constitutionally protected family is.").
121. Smith, 431 U.S. at 843.
122. Id. The Court emphasizes that the marriage relationship, "the basic foundation of the family in our society," is not a blood relationship, but one that nonetheless has gained significant constitutional protection. Id.
parents, but also that such protection may extend to non-nuclear family relationships.

The Supreme Court first recognized that the non-nuclear family structure deserves protection when a plurality conferred rights on the extended family in Moore v. City of East Cleveland. In this case, a grandmother challenged the constitutionality of a zoning ordinance that restricted occupancy to single families. The definition of family in the ordinance excluded Moore's family, which consisted of her son and two grandsons, who were cousins. Applying a substantive due process analysis, a four justice plurality stated that the right of a family—even a non-nuclear family—to live together is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. The plurality concluded that while the state's interests in preventing overcrowding and traffic congestion and reducing the burden on the local public schools were legitimate, the ordinance bore "a tenuous relationship" to those ends. Emphasizing respect for family sanctity and the tradition of extended family members living in the same household, the Court struck down the ordinance and thereby extended familial constitutional protection beyond the scope of the nuclear family.

123. 431 U.S. 494, 504-06 (1977) (plurality opinion). Changes in the traditional family structure were mentioned for the first time in this "key 'family' case of the decade." Rubin, supra note 74, at 144.

124. Moore, 431 U.S. at 495-96 (plurality opinion).

125. The Housing Code of the city of East Cleveland, Ohio, limited the definition of family to: (1) the spouse of the nominal head of the household; (2) unmarried children of either the nominal head of the household or spouse, as long as the unmarried children had no dependent children residing with them; (3) parents of either the nominal head of the household or his or her spouse; and (4) "not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child." Id. at 496 n.2 (citing OHIO REV. CODE ANN. § 1341.08 (Anderson 1966)).

126. Moore, 431 U.S. at 496 (plurality opinion).

127. Id. at 499 (plurality opinion). The plurality emphasized that "[a]llurs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." Id. at 504 (plurality opinion). The plurality added that such arrangements were not uncommon. Id. at 505 (plurality opinion).

128. Id. at 500 (plurality opinion).

129. Id. at 503-04 (plurality opinion). Had history not revealed the prevalence and acceptance of the extended family, the plurality might have been more reluctant to extend them constitutional protection. See id. at 507-11 (Brennan, J., concurring) (agreeing with the Court's decision that East Cleveland's narrow definition of "family" represented only the type of family most prevalent in "White Suburbia" and excluded the tradition of extended families in the country). Justice Brennan stated, "The 'extended family' that provided generations of early Americans with social services and economic and emotional support in times of hardship, and was the beachhead for successive waves of immigrants ... remains ... a pervasive living pattern [in our country]...," Id. at 508 (Brennan, J., concurring). Justice Brennan also supported protecting the extended fam-
Despite its willingness to recognize constitutional protection of non-nuclear families in some contexts, the Court has been more reluctant to extend this protection beyond the nuclear family in child custody cases. In Smith v. Organization of Foster Families,130 foster parents, in conjunction with several foster parent organizations, challenged the constitutionality of New York’s regulatory scheme for removing foster children from their homes.131 The parents argued that they had a liberty interest in the preservation of their "psychological family"—which had formed after one year of living with their foster children132—and were therefore entitled to more procedural protection than the statute required.133 The Court indicated a willingness to expand its definition of family, recognizing that

the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children... as well as from the fact of blood relationship.

No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.134 The Smith Court, however, declined to decide whether the "loving" relationships between foster parents and foster children are liberty interests worthy of procedural due process under the Fourteenth Amendment.135

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131. Id. at 819-20.
132. See id. at 839.
133. Id. at 842. Under the statute, the agency that placed the child was required to notify the foster parents 10 days before removing the child from their care; the foster parents could request a conference with the Social Services Department to voice their opposition to removal. See id. at 829-30 (citing 18 NCRR § 450.10(a)-(b) (1976)). If the child were removed, the foster parents could appeal for a "fair hearing." Id. at 830. Furthermore, if the child were transferring to another foster family instead of to his natural parents, the foster parents could (under another regulation) request a full hearing before removal. Id. at 831. Finally, another safeguard provided that "[u]nder Soc. Serv. Law § 392, the Family Court ha[d] jurisdiction to review, on petition of the foster parent or the agency, the status of any child who ha[d] been in foster care for 18 months or longer." Id.
134. Id. at 844 (citation omitted).
135. Id. at 843, 846-47.
Writing for the majority, Justice Brennan emphasized that both substantive and procedural aspects of the Due Process Clause protect certain areas of family life from state intrusion. The Court also recognized the importance and existence of the emotional bonds that form in foster families and acknowledged that the foster family is not "a mere collection of unrelated individuals." However, the Court distinguished the foster family from the natural family in justifying its decision not to address whether the foster families did indeed have the liberty interest they claimed. First, the Court explained that foster parents gain their parental powers from the state. The contractual nature of the relationship removes the foster family bonds from the traditional recognition of family privacy as an "intrinsic human right[."

The Court's second reason for skirting the issue of whether foster parents have liberty interests in their relationships with foster children was based on the difficulty in reconciling such interests with the established liberty interests of the natural parents. Acknowledging liberty interests of the foster parents in this case, the Court recognized, would necessarily conflict with the absolute right of the natural parents to the return of their children. Without stating conclusively that liberty interests in foster families do not exist, the Court assumed arguendo that such rights do exist and applied a procedural due process analysis. Finding that the preremoval procedures were constitutionally adequate, the Court upheld the New York

136. Id.
137. See supra text accompanying note 134.
138. Smith, 431 U.S. at 844.
139. Id. at 845-46.
140. Id. at 845.
141. Id.
142. Id. at 845-46.
143. Id. at 823-24. But cf. id. at 835-36 (noting that many foster children often stay much longer than the system intends).
144. Id. at 846.
145. Id. The Court noted:

It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset.

Id.
statute. In so holding, the Court declined the opportunity to settle what was considered a "revolutionary" issue.

C. The Unwed Father Cases

Another area in which the Supreme Court has further expanded and contracted the constitutional boundaries of family rights involves the rights of unwed fathers. At common law, an unwed father's right to custody of his illegitimate child was not legally protected, as "[t]he law hardly considered the possibility that an unmarried father might seek to assert paternity rather than escape it." Instead, the presumption was that unwed fathers, whose identities were often uncertain, were "irresponsible and unconcerned about [their children]," and thus not entitled to any relationship with them.

146. Id. at 847. To determine what process was due under the Fourteenth Amendment, the Court evaluated the elements set out in Mathews v. Eldridge, 424 U.S. 319, 335 (1976):

[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Smith, 431 U.S. at 848-56.

147. See Rubin, supra note 74, at 170. The Seventh Circuit Court of Appeals, relying in part upon Smith, expressly denied foster parents recognition of a liberty interest in their familial relationship of several years with their foster child; the state was therefore not required to provide procedural due process for terminating the relationship and returning the child to her biological parents. See Procopio v. Johnson, 994 F.2d 325, 333 (7th Cir. 1993). For a description of facts of the case and exhaustive list of newspaper articles following each step of this case through 1991, see James G. O'Keefe, Note, The Need to Consider Children's Rights in Biological Parent v. Third Party Custody Disputes, 67 CHI.-KENT L. REV. 1077, 1079-80 & nn.8-27 (1991); see also James G. Sotos, Foster Parents Learn Bond of Blood is Stronger Than Their Love, CHI. DAILY L. BULL., Aug. 5, 1993, at 6 (describing the Seventh Circuit's decision).

148. For the consequences of the resulting ambiguity in the rights of unwed fathers, see infra notes 267-88 and accompanying text.


Various rationales have been proposed to validate the presumption that the mother warranted custodial rights to the exclusion of the putative father. Such reasons include the pragmatic notion that the mother can be easily identified and located and that a mother is socially recognized as being primarily responsible for the care and maintenance of her child. Still another rationale is premised on the natural love and affection that presumably exists between a mother and her child.

Hilderbran, supra, at 1220.


The rights of unwed fathers were first constitutionalized in 1972 in Stanley v. Illinois, the first of five Supreme Court cases addressing unwed fathers' rights. In Stanley, the Court considered the constitutionality of a statute that denied an unwed biological father custody of his children after their mother died. Because the statute did not include the unwed father in its definition of "parent," no showing of unfitness was required before a child became a ward of the state. Although Stanley was the biological father of the three children and had helped their biological mother raise them, he was not a "parent" under the statute because he was not, and had never been, married to the mother.

The Court evaluated Stanley's claim that the statute violated both his procedural due process and equal protection rights under the Fourteenth Amendment. First evaluating the procedural due process claim, the Court identified Stanley's private interest as "that of a man in the children he has sired and raised" and noted that such an interest is at least "cognizable and substantial." The Court held that while the state has a legitimate interest in protecting the welfare of children and strengthening family ties by removing the child from his parents only when the child's or the public's safety mandated removal, the presumption of unfitness was not "constitutionally defensible." The Court noted that if the father is fit, as Stanley was in this case, the state "spites its own articulated goals" with the presumption of unfitness. Furthermore, the Court rejected the argument that the presumption was defensible on administrative convenience grounds. Finally, a plurality held that denying Stanley a hearing prior to terminating his parental rights violated the Equal Protection Clause because other par-

152. 405 U.S. 645 (1972).
153. See infra notes 167-228 and accompanying text for a discussion of the other four cases.
154. 405 U.S. at 645.
155. Id. at 650. The Illinois statute defined "parents" as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child and . . . any adoptive parent." Id. (quoting ILL. REV. STAT., ch. 37, para. 701-14 (1967)).
156. Id. at 646.
157. Id. at 648.
158. Id. at 646.
159. Id.
160. Id. at 651.
161. Id. at 652. The Court added that "[t]he private interest here . . . undeniably warrants deference and, absent a powerful countervailing interest, protection." Id. at 651.
162. Id. at 653.
163. Id. The Court also noted that the state's interest would be "de minimis" if Stanley were a fit parent. Id. at 658-59.
164. Id. at 656-58. The Court reiterated that the state's interest in speed and efficiency would be undermined if Stanley were shown to be fit. Id. at 654-55.
ents were afforded such a hearing before their children were removed from their custody. Holding the statute unconstitutional, Stanley thus marked the Court's first recognition that the father of an illegitimate child has a constitutionally protected interest in his parent-child relationship.

The Court further expanded the rights of unwed fathers in Caban v. Mohammed, which declared unconstitutional a New York statute that did not require the biological father's consent before a child could be adopted by a stepparent. In Caban, the biological father's rights were terminated when the natural mother and her new husband adopted the two children Caban had fathered out of wedlock. Caban was identified on their birth certificates as the father, however, and "[had] lived with the children as their father" for more than four years. While Caban maintained contact with the children and had been granted visitation rights, those rights terminated when the stepfather adopted the children.

Under the challenged statute, a mother could freely block the adoption of her child, but the unwed biological father could do so only if he could show the adoption was not in the child's best interests. Such a gender-based distinction can survive scrutiny only if the distinction "serve[s] important governmental objectives" and is "substantially related to achievement of those objectives." The Court rejected the state's first argument that the distinction was justified by some "fundamental difference between maternal and paternal relations." The Court emphasized that while such a distinction may be valid when the child is born, the generalization would be less acceptable as the child grew older and the father had an opportunity

165. Id. at 658 (plurality opinion). Without so stating, the Court appeared to apply a mere rationality test in evaluating the equal protection challenge. Id. The dissent contended that the case presented only an equal protection issue. Finding Stanley to be an unusual father, the dissent stated that unwed fathers are justifiably treated differently than mothers, because unwed mothers are readily identifiable, have stronger bonds with their infants, and exhibit concern for their offspring until permanent placement or adoption. Id. at 665 (Burger, J., dissenting). Unwed fathers, on the other hand, are often unknown and difficult to locate, deny responsibility for or show little interest in the child, and, in many cases, "rarely burden the mother or the child with their attentions or loyalties." Id. at 665-66 (Burger, J., dissenting).

166. Id. at 648-51. For an extensive list of sources discussing the Stanley decision, see Kisthardt, supra note 149, at 597 n.92.


168. Id. at 381-82. Under the statute, the mother could "block the adoption of her child simply by withholding consent." Id. at 386.

169. Id. at 382.

170. Id.

171. Id. at 382-83.

172. Id. at 383-84.

173. Id. at 386-87.

174. Id. at 388 (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

175. Id. at 388.
to establish a relationship with her.\textsuperscript{176} The Court also rejected the alternative argument that the distinction is substantially related to the state’s interest in providing for the welfare of illegitimate children by facilitating adoption.\textsuperscript{177} According to the Court, unwed fathers are not necessarily more likely than unwed mothers to object to such adoptions.\textsuperscript{178} In response to the argument that unwed fathers are difficult to find, the Court stated that when the father has demonstrated a full commitment to the responsibilities of parenthood, his identity would be apparent and the justification for treating him differently than the mother would no longer stand.\textsuperscript{179} Emphasizing that the New York statute failed to differentiate between fathers who had not established a relationship with their children and those who had, the Court held that the statute’s gender-based distinction between biological mothers and fathers was not substantially related to the state’s interest in providing for the welfare of illegitimate children.\textsuperscript{180}

The decisions in both \textit{Stanley} and \textit{Caban} support the proposition that a biological relationship coupled with an actual relationship between an unwed father and his child warrants protection under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.\textsuperscript{181} The Court has been less willing to extend constitutional protection to those biological fa-

\begin{footnotes}
\item[176] \textit{Id.} at 389-91. The Court explained that a father who has established a relationship with his child can have a relationship comparable to that between the mother and child. \textit{Id.}
\item[177] \textit{Id.} The Court did, however, agree that this interest was “important.” \textit{Id.} at 391.
\item[178] \textit{Id.} at 392.
\item[179] \textit{Id.} at 393. The Court noted, however, that when “the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child.” \textit{Id.} at 392.
\item[180] \textit{Id.} at 391-93. The Court stated:
   We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home. . . . But the unquestioned right of the State to further these desirable ends by legislation is not in itself sufficient to justify the gender-based distinction . . . .
\item[181] \textit{Id.}
\end{footnotes}

In dissent, Justice Stewart distinguished \textit{Stanley}. \textit{Id.} at 396 (Stewart, J., dissenting). He focused on the best interests determination of the adoption proceeding and the importance of allowing children to be adopted:

Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring. . . . By tradition, the primary measure has been the legitimate familial relationship [the father] creates with the child by marriage with the mother. By definition, the question before us can arise only when no such marriage has taken place. \textit{Id.} at 397 (Stewart, J., dissenting). Echoing the dissent in \textit{Stanley}, Justice Stewart justified treating unwed mothers differently than unwed fathers by arguing that most unwed fathers were absent or uninterested. \textit{Id.} at 399 (Stewart, J., dissenting). Justice Stevens also focused on the inherent differences between men and women: “Both parents are equally responsible for the conception of the child out of wedlock. But from that point on through pregnancy and infancy, the differences between the male and female have an important impact on the child’s destiny.” \textit{Id.} at 404 (Stevens, J., dissenting).

\begin{footnotes}
\item[181] \textit{See supra} notes 152-80 and accompanying text.
\end{footnotes}
thers who have not formed such a relationship with the child.\textsuperscript{182} In another pair of cases, the Supreme Court denied unwed fathers protection of parental rights that would allow them to develop relationships with their children when they had not already done so. In \textit{Quilloin v. Walcott},\textsuperscript{183} decided one year before \textit{Caban},\textsuperscript{184} the Court attempted to answer a question left open in \textit{Stanley}: what to do when the state has a substantial, as opposed to de minimis, countervailing interest in the child's welfare.\textsuperscript{185} The Court responded by rejecting the biological father's claim to a constitutionally protected right to parenthood, even absent unfitness, and suggested that biology alone is insufficient to protect an unwed father's parental rights.\textsuperscript{186} Quilloin, an unwed father who wished to secure visitation rights with his child, challenged a Georgia statute that denied him the right to block the adoption of his illegitimate child.\textsuperscript{187} The statute granted such power to the mother and father of a legitimate child, even if the father was divorced or separated from the mother.\textsuperscript{188} When the mother of Quilloin's child consented to the child's adoption by the stepfather, the trial court found the adoption to be in the child's best interests.\textsuperscript{189} Quilloin contended that the statute as applied to him violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.\textsuperscript{190}

In analyzing Quilloin's claim that the "best interests of the child" standard violated his substantive due process rights, the Court focused on Quilloin's lack of interest in obtaining custody of his child and the positive effect of allowing the adoption by the child's stepfather.\textsuperscript{191} Because Quilloin had not established a strong relationship with his child and had never sought actual or legal custody, the Court held that the "best interests of the child" standard did not violate his due process rights.\textsuperscript{192} Instead, the application of the standard preserved an existing family, "a result desired by all, except [Quilloin]."\textsuperscript{193}

\begin{itemize}
  \item \textsuperscript{182} See infra notes 183-209 and accompanying text.
  \item \textsuperscript{183} 434 U.S. 246 (1978).
  \item \textsuperscript{184} 441 U.S. 380 (1979).
  \item \textsuperscript{185} \textit{Quilloin}, 434 U.S. at 248.
  \item \textsuperscript{186} \textit{Id.} at 256.
  \item \textsuperscript{187} \textit{Id.} at 248-49. Unless the father legitimated the child by marrying the mother or obtaining a court order, only the mother could veto the adoption. \textit{Id.} at 249.
  \item \textsuperscript{188} \textit{Id.} at 248-49.
  \item \textsuperscript{189} \textit{Id.} at 251. The trial court based its finding on the irregularity of Quilloin's visits, the disruptive effect the mother felt the visits had on the child and family, the wishes of the child to be adopted by his stepfather, and the "fitness" of the stepfather. \textit{Id.} at 251.
  \item \textsuperscript{190} \textit{Id.} at 252.
  \item \textsuperscript{191} \textit{Id.} at 255.
  \item \textsuperscript{192} \textit{Id.} at 254.
  \item \textsuperscript{193} \textit{Id.} at 255.
\end{itemize}
Furthermore, in evaluating Quilloin's equal protection claim, the Court found justification for the statute's distinction between divorced fathers and unwed fathers. Whereas divorced or separated fathers generally had established at least some relationship with their children, including taking some responsibility in their upbringing, Quilloin had "never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." Concluding that such unwed fathers were "readily distinguishable" from the fathers protected by the statute, the Court held that Quilloin had not been deprived of his equal protection rights.

Further supporting the implication that biology alone does not ensure protection of a father's interests in the parent-child relationship, the Court in Lehr v. Robertson held that an unwed father's procedural due process and equal protection rights were not violated even though he was not given notice and an opportunity to be heard with respect to his child's adoption by her natural mother and stepfather. As in Quilloin, the father in Lehr did not take adequate steps to legitimate his child; he did not list his name with the putative father registry, nor was his name on the child's birth certificate. He was therefore not entitled under the statute to either notice of the adoption proceeding or an opportunity to contest the adoption.

In its analysis of Lehr's due process challenge, the Court began by emphasizing that parental rights are inextricably linked to parental duties—that "the rights of parents are a counterpart of the responsibilities they have assumed." Distinguishing the fathers in Stanley and Caban, the Court noted the difference between actual and potential relationships and held that a father has a liberty interest in his relationship with his child only when he

194. Id. at 256. This distinction, unlike the gender-based distinction in the statute in Caban, warrants a lower standard of review—a rational relation to furthering the state's goals. The Court concluded, however, that "[u]nder any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child." Id. The Court noted that although Quilloin had previously raised the claim of a gender-based distinction in violation of the Equal Protection Clause, the Court did not address the claim because he did not present it in his jurisdictional statement. Id. at 253 n.13.

195. Id. at 256. The Court further noted that the stepfather had been part of the family unit, id. at 247, and that Quilloin had failed to take steps to legitimate his child for over 11 years, id. at 249.

196. Id.


198. Id. at 256-65.

199. Id. at 251-52. Listing his name with the registry and appearing on the child's birth certificate were two of seven ways an unwed father could ensure that he automatically would be entitled to prior notice of adoption proceedings. N.Y. DOM. REL. LAW § 111 (a)(2)-(3) (McKinney 1977 & Supp. 1982 & 1983). The statute also included, among others, those fathers who held themselves out as the child's father and lived openly with the mother. Id.

200. Lehr, 463 U.S. at 251-52.

201. Id. at 257-58.
"demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child.'" The Court stated that the biological relationship is significant only in that it provides the father the opportunity to come forward and establish such a relationship. The Court held that a father who has not come forward to usurp the opportunity interest is not entitled to procedural due process protection. Furthermore, the Court concluded that the opportunity interest itself was adequately protected by New York's statutory procedures, which gave fathers several options to establish paternity.

The Court also rejected Lehr's equal protection claim that the statute drew an arbitrary distinction between unwed mothers and unwed fathers in determining who was permitted to veto an adoption and who was entitled to notification of the proceedings. Although not all unwed fathers were entitled to notification or an opportunity to be heard, the mother had unquestioned authority to block the adoption. Citing Quilloin and distinguishing Caban, the Court emphasized that Lehr was not "similarly situated" with the mother because he had not established a relationship with his child. The Court concluded that the statute, by differentiating between those fathers who had shown parental responsibility toward their children and those who had not, bore a substantial relation to the governmental objectives of "promot[ing] the best interests of the child, ... protect[ing] the rights of interested third parties, and ... ensur[ing] promptness and finality." The Court thus upheld the constitutionality of the gender-based distinction.

These four unwed father cases, analyzed together, seem to stand for the proposition that while biology alone will not ensure recognition or pro-

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202. Id. at 261 (quoting Caban v. Mohammed, 441 U.S. 380, 392 (1979)). The Court noted that "the mere existence of a biological link does not merit equivalent constitutional protection." Id.

203. Id. at 262 ("If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."). For a discussion of whether this opportunity interest is worthy of constitutional protection, see Laurel J. Eveleigh, Comment, Certainly Not Child's Play: A Serious Game of Hide and Seek with the Rights of Unwed Fathers, 40 SYRACUSE L. REV. 1055, 1079-81 (1989).

204. Lehr, 463 U.S. at 262.

205. Id. at 264; see also supra note 199. The Court also rejected Lehr's claim that he was "nevertheless entitled to special notice because the court and the mother knew that he had filed an affiliation proceeding in another court." Id. at 264-65. The Court stated that "[t]he legitimate state interests in facilitating the adoption of young children and having the adoption proceeding completed expeditiously ... justify a ... determination to require all interested parties to adhere precisely to the procedural requirements of the statute." Id.

206. Id. at 255, 265-68.

207. Id. at 255, 266.

208. Id. at 267-68.

209. Id. at 266.
tection of parental rights, the interests of a biological father who has established a substantial relationship with his child deserve constitutional protection. However, in *Michael H. v. Gerald D.*, the most recent Supreme Court case addressing the rights of putative fathers, a plurality upheld a California statute that denied an unwed father who had a relationship with his child the opportunity to establish paternity. The challenged statute conclusively presumed the legitimacy of a child born to a woman cohabiting with her husband, as long as he was not impotent or sterile. Michael H., the father in this case, had an adulterous affair with the appellee’s wife and subsequently lived with the wife and the child he fathered for a number of years. He developed a “personal and emotional relationship” with his daughter, “who grew up calling him ‘Daddy.’” He also held her out “as his daughter and contributed to the child’s financial support.”

Rejecting Michael H.’s claim that the presumption which prevented him from establishing paternity violated his procedural due process rights, the Court explained that the presumption was actually a “substantive rule of law.” The Court thus focused on the substantive due process issues regarding Michael H.’s right to the paternal relationship. Relying on the Court’s reasoning in the four previous unwed father cases, Michael H. argued that his biological tie, coupled with his actual relationship with his daughter, invoked a constitutionally protected “liberty” interest. The plurality noted that in creating new constitutional rights, it was bound by its previous insistence “not merely that the interest denominated as a ‘liberty’ be ‘fundamental’ (a concept that, in isolation, is hard to objectify), but also that it be an interest traditionally protected by our society.”

211. Id. at 124 (plurality opinion).
212. Id. at 113, 117 (plurality opinion). See Cal. Evid. Code § 621 (West Supp. 1989). This presumption was developed at common law “to protect the child from the harsh results that flowed from a finding of illegitimacy and to stabilize family relationships.” Kisthardt, supra note 149, at 589. In England, the rule could be rebutted only by a showing of impotence at the time of conception and was otherwise conclusive if the mother’s husband was in the country when the child was conceived. Id. The evidentiary rule supporting the presumption was known as Lord Mansfield’s Rule, which precluded a man from establishing paternity of a child even if both the mother and her husband testified that he was the father. See Hill, supra note 115, at 373.
213. Michael H., 491 U.S. at 113-14 (plurality opinion).
214. Id. at 159 (White, J., dissenting).
215. Id. (White, J., dissenting); see also id. at 114 (plurality opinion) (describing Michael H.’s involvement in his daughter’s life).
216. Id. (White, J., dissenting).
217. Id. at 119-21 (plurality opinion).
218. Id. at 121-30 (plurality opinion).
219. Id. at 121-23 (plurality opinion).
220. Id. at 123 (plurality opinion).
221. Id. at 122 (plurality opinion).
then stated that Michael H.'s reading of the unwed father cases distorted the Court's rationale. The plurality explained that the decisions were based "upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." Emphasizing that history has protected the marital family, but not the familial relationship between Michael H. and his daughter, the Court stated that Michael H.'s interest in his relationship with his daughter was not a constitutionally protected liberty interest. The plurality thus held that the presumption does not infringe on the substantive due process rights of the biological father, even when the father has established a relationship with his child.

Victoria, Michael H.'s daughter, also advanced due process and equal protection arguments. The Court quickly rejected her due process claim that she had a right to maintain a parent-child relationship with both fathers, as "multiple fatherhood has no support in the history or traditions of this country." Furthermore, the Court applied a "rational relationship" test to her claim that she was denied equal protection because, unlike her mother and mother's husband, she was not able to rebut the presumption of legitimacy. The plurality held that the state's interest in preserving the integ-

222. Id. (plurality opinion).
223. Id. (plurality opinion).
224. Id. at 124-30 (plurality opinion). The Court found that Michael H. had not been denied an interest "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Id. at 122 (plurality opinion) (quoting Snyder v. Massachussetts, 291 U.S. 97, 105 (1934)). In addition, the plurality considered the importance of the policies behind the presumption of legitimacy—among them "an aversion to declaring children illegitimate" and "the interest in promoting the 'peace and tranquility of states and families.'" Id. at 124-25 (plurality opinion). The Court considered neither the relationship between father and child, nor the fact that severing such a longstanding relationship would emotionally and psychologically affect the child. The Court thus subrogated the interests of the child and the father to the interests of some traditional notion of "family."

In dissent, Justice Brennan criticized the Court's steadfast reliance on history and tradition in its determination that no liberty interest was at stake in this case:

Even if we can agree . . . that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, "liberty" must include the freedom not to conform. The plurality today squashes this freedom by requiring specific approval from history before protecting anything in the name of liberty.

Id. at 141 (Brennan, J., dissenting). The plurality responded to Justice Brennan's criticism by stating that "to provide protection to an adulterous natural father is to deny protection to a marital father, and vice versa." Id. at 130 (plurality opinion). Brennan also read the decisions in the four unwed father cases as standing for the proposition that "although an unwed father's biological link to his child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so." Id. at 142-43 (Brennan, J., dissenting).

225. Id. at 130 (plurality opinion).
226. Id. at 130-31 (plurality opinion).
227. Id. at 131 (plurality opinion).
rity of the family is a legitimate end rationally served by disallowing anyone other than the husband and wife to rebut the presumption.\textsuperscript{228}

Although the holding in Michael H. seemed to stray from earlier decisions protecting the rights of unwed fathers who had established relationships with their children, the plurality affirmed the notion that biology is not determinative and adhered to its traditional preference for the unitary family. The question of whose interests will be protected in the future, however, remains unanswered. The five unwed father cases, in addition to Moore and Smith, have left the Supreme Court, as well as state courts, with the ability to deny unwed fathers and other parental figures protection in their family relationships.

IV. Ramifications of Constitutionally Protected Family Interests in the Third Party Adoption Context

A. Do Prospective Adoptive Parents Have a Liberty Interest in the Protection of Their “Family”?

Under statutory authority, the process of adoption transfers legal rights and responsibilities from the natural parents to the adopting couple.\textsuperscript{229} In various situations, however, the adoptive parents may find themselves in “legal limbo”\textsuperscript{230}—the period when the adoptive parents have physical custody “but the newly formed family has not been granted permanent status.”\textsuperscript{231} In this “limbo” period, the prospective adoptive parents are neither part of a constitutionally protected family, nor are they strangers. They become family to the child, who often knows no other parents.

The Supreme Court has yet to decide whether prospective adoptive parents have a protected liberty interest in relationships with the children they have reared.\textsuperscript{232} By refusing to hear the Baby Jessica case, the Court

\begin{itemize}
  \item \textsuperscript{228} Id. (plurality opinion) (“When the husband or wife contests the legitimacy of their child, the stability of the marriage has already been shaken.... [A]llowing a claim of illegitimacy to be pressed by the child... may well disrupt an otherwise peaceful union.”).
  \item \textsuperscript{229} Hilderbran, supra note 149, at 1229.
  \item \textsuperscript{230} Id. at 1230. “Legal limbo” has also been described from the perspective of the child, who may find herself “in a state of psychological torture,” when the biological parents have abandoned her but have refused to give her up for adoption. Eckstein, supra note 7, at 379.
  \item \textsuperscript{231} Hilderbran, supra note 149, at 1230. This situation may arise after the natural parents have consented to the adoption and surrendered their parental rights. The prospective adoptive parents are in limbo during the period between the petition for adoption and the adoption decree. In other instances, such as the Baby Jessica case, the adoption decree cannot be granted, or is revoked, when the biological father contests the adoption on the grounds that his rights have not been terminated. See DeBoer v. Schmidt, 501 N.W.2d 193, 194 (Mich. App. 1993).
  \item \textsuperscript{232} Hilderbran, supra note 149, at 1229 (“While protection for the family realm is firmly embedded in our legal tradition, the boundaries of this sphere blur when we focus on the novel issue of what fundamental rights attach to the prospective adopting family.”). Because many states limit who may bring an action for custody or termination of parental rights to the exclusion...
avoided facing such a difficult determination.\textsuperscript{233} The Michigan Supreme Court quickly dismissed the DeBoers' argument, based upon the reasoning in the putative father cases, that they had a liberty interest in their relationship with Jessica.\textsuperscript{234} Although the Michigan court found that contention meritless,\textsuperscript{235} a closer examination of their argument is necessary to understand the plight of adoptive parents. The DeBoers based their argument upon the first four unwed father cases, in which the court protected the interests of only those biological fathers who had established an actual relationship with their children.\textsuperscript{236} The DeBoers claimed "that it is the relationship between the parent and child that triggers significant constitutional protection and that the mere existence of a biological link is not determinative."\textsuperscript{237} They argued that their relationship with Jessica therefore deserved such protection.\textsuperscript{238}

The argument that the reasoning in the putative father cases affords constitutional protection to prospective adoptive parents is limited. While consistently holding that biology is not the sole factor in triggering such protection,\textsuperscript{239} the Court has not insinuated that any of these men would have had constitutionally protected rights \textit{absent} any biological connection. In \textit{Stanley}, the Court for the first time recognized that an unwed father may have a protected liberty interest in his relationship with his child.\textsuperscript{240} While that right has its basis in biology, as reconfirmed in \textit{Lehr}, \textit{Caban}, and \textit{Quilfoo}, a liberty interest is not activated \textit{absent} the existence of an actual relationship.\textsuperscript{241}

Support for the prospective adoptive parents' liberty interest may be found, however, between the lines of \textit{Michael H. v. Gerald D.}\textsuperscript{242} The plurality's emphasis on respect for the sanctity of the "unitary family" led it to

\textsuperscript{233} See supra notes 40-43 and accompanying text.
\textsuperscript{234} In re Clausen, 502 N.W.2d 649, 663 (Mich. 1993).
\textsuperscript{235} Id.
\textsuperscript{236} See supra notes 152-209 and accompanying text.
\textsuperscript{237} In re Clausen, 502 N.W.2d at 663.
\textsuperscript{238} Id.
\textsuperscript{239} See, e.g., supra notes 202-04 and accompanying text.
\textsuperscript{240} See supra note 166 and accompanying text.
\textsuperscript{241} See, e.g., supra note 202 and accompanying text. The actual relationship thus was not the basis for the protection.
\textsuperscript{242} 491 U.S. 110 (1989).
deny Michael H., the child's natural father, visitation rights to his child. In the case of a prospective adoption in which the mother has eliminated the possibility of a unitary family by revoking her consent to the adoption, the adoptive family may then become the family deserving protection. At a minimum, the prospective adoptive parents' interests should be recognized such that they are not denied standing to participate in custody disputes involving nonconsenting biological fathers.

Another Supreme Court case, Smith v. Organization of Foster Families, further supports the argument that prospective adoptive parents who have established a relationship with the child have a liberty interest in that relationship. In Smith, the Court left open the question of whether foster parents have a fundamental liberty interest in their relationship with their foster children that would invoke Fourteenth Amendment protection. The Court's recognition that emotional ties forming the basis for the family may exist in relationships other than blood relationships is the premise upon which to start building an argument like the DeBoers'. As in the foster parent situation, prospective adoptive parents who have lived together for a significant period of time with the children they seek to adopt often develop strong emotional and psychological ties with "their" children—ties that can be as strong as those existing in blood relationships.

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243. Id. at 123-24. The plurality's holding was based on traditional principles—protecting children from the stigma of illegitimacy and preserving their stable home lives—that support recognizing the rights of prospective adoptive parents.

244. This Comment does not propose that in all circumstances the father's interest should not be protected, but rather suggests that adoptive parents who have established a relationship with their child deserve some protection. Furthermore, recognizing that prospective adoptive parents have a liberty interest in their familial relationships does not necessarily invite any temporary custodian or even a close family friend to assert these interests. The prospective adoptive family is special because it is intended to be a permanent family replacement.


246. Id. at 845-47.

247. Id. Other courts have relied on Smith in holding that foster parents do not have a liberty interest in their relationship with their foster children. See, e.g., Kyees v. County Dep't of Pub. Welfare, 600 F.2d 693, 699 (7th Cir. 1979); Drummond v. Fulton County Dep't of Family & Child Servs., 563 F.2d 1200, 1207 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978); Sherrard v. Owens, 484 F. Supp. 728, 741 (W.D. Mich. 1980), aff'd per curiam, 644 F.2d 1207, 1208 (5th Cir., cert. denied, 454 U.S. 828 (1981); cf. Gibson v. Merced County Dep't of Human Resources, 799 F.2d 582, 589 (9th Cir. 1986) (declining to decide whether foster parents have liberty interests and finding that the state's removal procedure was adequate to protect whatever liberty interest they might have).

248. See supra text accompanying note 131.


250. See Joseph Goldstein et al., Beyond the Best Interests of the Child 26 (new ed. 1979).
Because severing these ties can be devastating to the child, adoptive families deserve some degree of protection.

Although the Court may try to extend Smith's holding to adoptive parents, its reasons for declining to recognize a liberty interest in foster parents do not apply as well to prospective adoptive parents. First, although the state may have a role in the formation of both families, the contractual nature of the foster family is much more restrictive than that of the adoptive family. While the foster family is the state's temporary solution to what may be either a short-term or long-term inability of parents to care adequately for their children, the adoptive family is intended, by all of the parties, to be a permanent solution to the problem. A contract defines the rights and privileges of foster parents, who therefore know from the outset that placement is not permanent. In fact, foster parents are cautioned not to develop strong bonds with the children, and such attachment may be grounds for removal from a particular foster family. Adoptive parents, on the other hand, have an expectation of permanency that is more than reasonable. Once an adoption is legally finalized, the adoptive family gains all of the rights of a natural family.

At least one court has recognized the special nature of parents and children seeking to form a family through adoption. A Wisconsin district court held that the prospective adoptive parents had a limited, constitutionally protected liberty interest in their family unit during the six-month pre-adoption period when the child lived in their home. The court found that

251. Id. at 20. Proponents of attachment theory argue that a child who is separated from her primary caregiver may be psychologically traumatized, particularly if the separation occurs during the child's pre-school years. See O'Keefe, supra note 147, at 1102.


253. Once the decree is final, the adoptive parents are the legal parents, and the biological parents no longer have any rights to their children. 2 CLARK, supra note 8, at 606.

254. See Miller, supra note 7, at 796.

255. Cf. Smith v. Organization of Foster Families, 431 U.S. 816, 861 (1977) (Stewart, J., concurring in the judgment) (noting that emotional attachments formed between foster parents and foster children signify a failure of the foster care system); Drummond v. Fulton County Dep't of Family & Child Servs., 563 F.2d 1200, 1207 (5th Cir. 1977) (stating that "the only time potential parents could assert a liberty interest as psychological parents would be when they had developed precisely the relationship which state law warns against the [sic] the foster context"), cert. denied, 437 U.S. 910 (1978). The court in Drummond stated:

The very fact that the relationship... is a creature of state law, as well as the fact that it has never been recognized as equivalent to either the natural family or the adoptive family by any court, demonstrates that it is not a protected liberty interest, but an interest limited by the very laws which create it.

Id.

256. Smith, 431 U.S. at 824; see Miller, supra note 7, at 796-97.

257. 431 U.S. at 844 n.51.

258. Thelen v. Catholic Social Servs., 691 F. Supp. 1179, 1185 (E.D. Wis. 1988). The court distinguished the prospective adoptive parents from the foster parents in Kyes v. County Dep't of
"the very motive of the prospective adoptive parents, as well as the State, is to secure a life-long relationship between the adoptive parents and the child." As in Smith, however, the court found that the preremoval hearing afforded adequate process. Thus, the court held that the prospective adoptive parents enjoyed limited constitutional protection but were not entitled to a preremoval hearing during the first six months of placement if the state decided that removal was in the child’s best interests.

The Court’s second argument in Smith was that liberty interests of foster parents cannot coexist with the firmly established liberty interests of the natural parents. The natural parents’ liberty interest derives from “blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset.” In adoption proceedings, however, natural parents, upon consent, expressly give up such rights. The rights of prospective adoptive parents would not be pitted against those of natural parents who expected their child back, but would instead coexist with those of a parent who either never knew of his child’s existence or never assumed parental responsibility.

Closely related to the argument that the actual parent-child relationships that form in families intended to be permanent do, or should, trigger constitutional protection, is the contention that the status of prospective adoptive parents as “psychological parents” should be protected. The Court in Smith avoided considering the foster parents’ argument that their role as “psychological parents” deserved protection under the Fourteenth Amendment. Similarly, the Lehr Court declined to “take sides in the ongoing debate among family psychologists over the relative weight to be accorded biological ties and psychological ties, in ... recogniz[ing] that a natural father who has played a substantial role in rearing his child has a greater claim to constitutional protection than a mere biological parent.”

The Court did not address whether a psychological parent could have a

Pub. Welfare, 600 F.2d 693, 699 (7th Cir. 1979), in which the Seventh Circuit relied on Smith to deny foster parents a protected liberty interest in their relationship with their children. Id. at 1184.

259. Id. at 1184.

260. Id. at 1186.

261. See supra notes 144-45 and accompanying text.


264. See Smith, 431 U.S. at 844-45 n.52; cf. J. Hammond Muench & Martin R. Levy, Psychological Parentage: A Natural Right, 13 FAM. L.Q. 129, 181 (1979) (suggesting that the Supreme Court breached its responsibility by failing “to consider arguments of psychological parentage as a substantive due process right of foster children”).

greater claim to constitutional protection than an unwed biological father who had made no attempt to establish paternity or a relationship with his child. Recognizing liberty interests based on the psychological parent doctrine would require the Court to shift its focus from tradition and history to a recognition that the social sciences support a definition of family apart from a biologically created unit. While such a shift would leave the Court wading into new territory in a predominantly state-regulated area, an acknowledgement that the meaning of family has evolved and expanded would require states to broaden their definition of family as well.

B. The Undecided Status of Unwed Fathers

Until 1972, an unwed father's rights to receive notice of and consent to the adoption of his child were not afforded protection by the procedural due process component of the Fourteenth Amendment. States were free to terminate an unwed father's parental rights when the mother of the child consented to the adoption. After the Supreme Court's decision in Stanley v. Illinois, however, states enacting adoption statutes were unsure how to treat unwed fathers, because the case left unclear when notice and consent were necessary. Some states assumed that all biological fathers had to be notified before their parental rights were terminated, while others assumed that only those fathers who had established a relationship with their children were entitled to notice. Although the Court attempted in subsequent cases to clarify the extent to which unwed fathers' interests in their children are constitutionally protected, the decisions in

266. The Court's refusal to consider the psychological parent argument is consistent with its reluctance to stray from strict traditional concepts, especially when dealing with the emotion-laden area of family law.


268. DeMarco, supra note 267, at 297. Before Stanley v. Illinois, 405 U.S. 645 (1972), states were free to deny notice of adoption to all putative fathers. DeMarco, supra note 267, at 297. In addition, most adoption statutes did not require the putative father's consent to the adoption. Id. Rationales ranged from punishing the unwed father for his sins to protecting the welfare of the child by assuming that such fathers were unfit parents. Id.

269. 405 U.S. 645 (1972).

270. 2 CLARK, supra note 8, at 574-75.

271. Stanley, 405 U.S. 645; see also 2 CLARK, supra note 8, at 574 (noting the Court's inconsistencies in recognizing constitutional protection of an unwed father's parental rights only when he had established a relationship with his child, and then recommending service even to unknown fathers).


Quilloin, Caban, Lehr, and Michael H. leave these rights ambiguous.\textsuperscript{274} The states therefore have wide discretion to acknowledge or limit those rights in enacting and enforcing their statutes.\textsuperscript{275}

Further confusing the issue is that the Supreme Court has yet to consider the rights of unwed fathers in the third-party adoption context.\textsuperscript{276} Because the rights of unwed fathers remained unclear even in situations addressed by the Court,\textsuperscript{277} such status is less evident in novel situations, such as third-party adoption of infants with whom the father has had no opportunity to establish a relationship.\textsuperscript{278} The first four unwed father cases seem to stand for the proposition that while biological relationship alone is not sufficient to establish the father's constitutional rights, a biological tie coupled with a substantial relationship with the child results in a constitutionally protected liberty interest.\textsuperscript{279} An unwed father's equal protection

\textsuperscript{274} See Joan C. Sylvain, Note, Michael H. v. Gerald D.: \textit{The Presumption of Paternity}, 39 CATH. U. L. REV. 831, 832 & n.8 (1990); Daniel C. Zinman, Note, \textit{Father Knows Best: The Unwed Father's Right to Raise his Infant Surrendered for Adoption}, 60 FORDHAM L. REV. 971, 972 (1992). One commentator noted that "despite its many opportunities to establish solid legal principles which could be used to settle foreseeable legal issues in disputes involving children who have been born outside of marriage, the Supreme Court has failed to do so." Linda R. Crane, \textit{Family Values and the Supreme Court}, 25 CONN. L. REV. 427, 448-49 (1993).


\textsuperscript{276} The Court avoided this opportunity when it dismissed McNamara v. County of San Diego Dep't of Social Servs., 488 U.S. 152, 152 (1988), for lack of a federal question. In McNamara, the biological father challenged the constitutionality of a statute that allowed "a trial court to terminate his parental rights despite the court's findings that he would be a fit parent, and that he had manifested significant interest in obtaining custody upon learning of his child's birth." Stacy L. Hill, \textit{Putative Fathers and Parental Interests: A Search for Protection}, 65 Ind. L.J. 939, 939 (1990) (citing In re Baby Girl M, 688 P.2d 918, 920 (Cal. 1984), \textit{cert. dismissed} sub nom. McNamara v. County of San Diego Dep't of Social Servs., 488 U.S. 152 (1988)). For an analysis of the decisions in the different phases of the case, as well as California's statutory scheme, see Eveleigh, \textit{supra} note 203, at 1068-85.

\textsuperscript{277} See supra notes 152-228 and accompanying text.

\textsuperscript{278} See Zinman, \textit{supra} note 274, at 972, 974; \textit{see also} John R. Hamilton, Note, \textit{The Unwed Father and the Right to Know of His Child's Existence}, 76 KY. L.J. 949, 971 n.202 (1987-88) (noting the ages of the children in the unwed father cases). This issue was addressed in In re Raquel Marie X, 559 N.E.2d 418 (N.Y.), \textit{cert. denied}, 498 U.S. 984 (1990), in which the court held that an unwed father could block the adoption of his newborn if he promptly assumed parental responsibility, including a willingness to take custody of the infant. \textit{Id.} at 424-25. The court did not address the problem of reconciling the father's interests with the interests of the child who has already been in the custody of adoptive parents with whom she has established an emotional and psychological attachment. \textit{See} Zinman, \textit{supra} note 274, at 973.

\textsuperscript{279} See supra notes 152-209 and accompanying text. \textit{But cf.} Hill, \textit{supra} note 276, at 957-58 (suggesting that the biological bond between father and child should be considered an independent basis for constitutional protection).
argument thus depends on his ability to establish that he is the biological father and that he has developed a substantial relationship with the child. Although modern technology makes establishing paternity a fairly expeditious and accurate process,280 the “biology-plus”281 or substantial relationship test seems insurmountable in third-party adoptions of newborn infants.282

Presumably, an unwed father in this situation would never be considered “similarly situated” with the mother, because he would not have had an opportunity to establish a relationship with the child.283 An alternative interpretation of the substantial relationship test, however, suggests that a father could satisfy such a test by establishing a relationship with the mother or by expressing interest in his child before or at birth.284 A father who manifests the intention of taking responsibility for his child may be deserving of the “opportunity” interest described in *Lehr v. Robertson.*285

The unwed father’s procedural due process rights with respect to notice of his child’s adoption and the termination of his rights are also obscured by the substantial relationship test,286 because the father of a young

280. See Kisthardt, supra note 149, at 594; Sylvain, supra note 274, at 831 n.1.

281. Zinman, supra note 274, at 975-79.

282. See Hill, supra note 276, at 961 & n.173. “The problem with the ‘relationship’ standard is that it places putative fathers in an almost no-win situation in cases involving newborn children.” *Id.* at 961.

283. The Equal Protection Clause thus would not preclude a state from limiting such a father’s rights. See *Lehr v. Robertson,* 463 U.S. 248, 267-68 (1983) (“If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights.” (footnotes omitted)); see also *id.* at 392 (noting that “nothing in the Equal Protection Clause precludes the state from withholding from . . . [the father who has not come forward to assert parental responsibility] the privilege of vetoing the adoption of his child”).

284. These fathers would then deserve notice of the adoption and the opportunity to withhold consent, but only if they intended to assume custody. *Cf. id.* at 257 (“[T]he rights of the parents are a counterpart of the responsibilities they have assumed.”).

285. *Id.* at 262; *see also* Eveleigh, supra note 203, at 1079-81 (suggesting that the opportunity interest must be viewed as a constitutionally protected right). This opportunity interest deserves protection when the unwed father (1) is willing to take custody of the child, (2) manifests his commitment and intentions in a timely manner, and (3) “take[s] advantage of whatever statutory process the state afford[s] in order to protect his opportunity interest.” *Id.* at 1080. Although some courts have decided that the unwed father opportunity interest need not be protected, see, e.g., *In re* Steve B.D., 730 P.2d 942, 945 (Idaho 1986), others have held that it must be, see, e.g., *In re Baby Girl Eason,* 358 S.E.2d 459, 462 (Ga. 1987).


One commentator states that “[i]t can safely be assumed that the policies underlying the due process clause tend to favor affording an individual the opportunity to develop a liberty interest over denying such an opportunity to the individual.” See Hamilton, supra note 309, at 988. Ironically, in *Lehr* the Court upheld a statute denying the unwed father notice and opportunity to be heard at his child’s adoption proceeding even though he had attempted to assert responsibility for the child before and after the child’s birth, but was thwarted by the mother. *Lehr,* 436 U.S. at 268-76 (White, J., dissenting). The Court focused on the child’s existing family relationship, rather than the fault of either parent. See Bartlett, supra note 110, at 319 & nn.111-16.
infant will not have had the opportunity to establish such a relationship. In the easy case, the father is readily identifiable and has in some way established paternity. While the Due Process Clause seems to protect these fathers' rights, the issue becomes more complicated when the father is not aware of the infant's existence.\textsuperscript{287} Even further confusing this area is the question of fault—whether fathers who have been thwarted in their attempts to assert responsibility or who have been intentionally denied knowledge of their child's existence deserve more protection than those who are simply not interested.\textsuperscript{288} These unaddressed issues leave states guessing as to whose rights ultimately deserve protection.

C. Do Children Have a Constitutionally Protected Liberty Interest in Their Psychological Families?

Another question the Supreme Court has left unanswered is whether the child has a protected liberty interest in the adoptive family relationship.\textsuperscript{289} The Court has recognized that children, as well as parents, have substantive due process interests in certain aspects of their family life.\textsuperscript{290} Justice Rehnquist, writing for the dissent in \textit{Santosky v. Kramer},\textsuperscript{291} stated that a child has "an interest in a normal homelife,"\textsuperscript{292} as "[a] stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being."\textsuperscript{293} He expressed the view that children thus have countervailing

\textsuperscript{287} This situation raises the issue of whether an unwed father is constitutionally entitled to notification of his child's existence. \textit{See} Hamilton, \textit{supra} note 278, at 952. Arguments against protecting the unwed father's right to know of his child's existence focus on the right to privacy and the mother's fundamental right to make abortion decisions. \textit{Id.} at 988-91.

\textsuperscript{288} This Comment suggests which fathers should be notified, as well as whose consent should be required. \textit{See infra} notes 350-67 and accompanying text.

\textsuperscript{289} The Michigan Supreme Court denied that such a relationship deserves protection in \textit{In re Baby Girl Clausen}, 502 N.W.2d 649, 663 (Mich. 1993). Jessica's next friend asserted that Jessica had a liberty interest with the DeBoers which the Due Process and Equal Protection Clauses of the Fourteenth Amendment should protect. \textit{Id.} at 665. Her next friend based the argument on cases such as \textit{In re Gault}, 387 U.S. 1 (1967); Planned Parenthood v. Danforth, 428 U.S. 52 (1976); and \textit{Tinker v. Des Moines Indep. Community Sch. Dist.}, 393 U.S. 503 (1969), which support the proposition that children are "persons" under the Constitution. \textit{Id.}

\textsuperscript{290} \textit{See supra} notes 100-05 and accompanying text.

\textsuperscript{291} 455 U.S. 745 (1982).

\textsuperscript{292} \textit{Id.} at 790 (Rehnquist, J., dissenting).

\textsuperscript{293} \textit{Id.} at 788-89 (Rehnquist, J., dissenting).
interests in termination of parental rights proceedings. Furthermore, the Court in Smith v. Organization of Foster Families recognized that

[At] least where the child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions as a natural family.

The same is true of a prospective adoptive family unit. Prospective adopting parents who have lived with their children for a significant amount of time fulfill the same role as biological parents in their "custody, care, and nurture." But while recognizing that children may form emotional and psychological bonds with individuals other than their biological parents, the Court has been reluctant to recognize liberty interests outside of the traditional unitary family.

Ironically, this steadfast adherence to the tradition of the nuclear family has even led the Court to sever the psychological tie between a child and her biological father. In Michael H. v. Gerald D., the Court emphasized limitations on the rights of minors independently to assert their interests regarding their custody and care. The Court declined to decide whether the child had a liberty interest in maintaining a filial relationship with either her putative father, or with both her putative father and her mother's husband. The Court found that even if such an interest were assumed, the State had no obligation to recognize a right—the right of multiple fatherhood—which lacked support in history or tradition.

What the Court seems to ignore is that the state, as parens patriae, has traditionally protected children from abuse and neglect. The Court does

294. Id. at 788 (Rehnquist, J., dissenting).
296. Id. at 844.
298. See, e.g., supra notes 193, 225 and accompanying text.
300. Id. at 130.
301. Id. at 130-31; see Kisthardt, supra note 149, at 612-13.
302. See Davis & Schwartz, supra note 63, at 189; cf. Goldstein et al., supra note 250, at 4 (stating that while the law has "recognized the necessity of protecting a child's physical well-being[,] ... [decision-makers] have been slow to understand and to acknowledge the necessity of safeguarding a child's psychological well-being"). A child's liberty interest in maintaining familial bonds with prospective adoptive parents is not tantamount to an interest in choosing one family
not seem ready, however, to protect the child from the psychological abuse that accompanies being severed from the individuals she knows as family. Rather than entering new territory, the Court clings to the principles of parenthood originally used to favor biology over other forms of attachment, and favoring the unitary family when it includes at least one biological parent. By failing to recognize a liberty interest in children’s relationships with parents other than biological parents, courts easily may deny children standing in proceedings directly affecting their lives. If the courts would recognize a child’s right to family privacy or autonomy as being separate from the rights of the child’s parents, the child’s interests would never be ignored.

V. Standards for Determining Custody in Disputes Between Biological Parents and Third Parties

With the nature of the rights of parents in the third-party adoption context unclear, a child’s fate often depends upon the state’s interpretation of constitutional doctrine in enacting custody statutes. In custody disputes between natural parents, courts almost always base their decisions on the welfare of the child. Historical preferences for either the mother or the father have given way to an emphasis on placing the child with the parent who will best serve the child’s interests. In custody disputes involving biological parents and third parties, however, states are divided on the standard to apply. Many courts give almost decisive weight to the natural parent’s interest. This emphasis on the natural parent’s right to custody over another. This Comment does not suggest that children should have a right to opt out of their biological families simply because they are unhappy with the arrangement.


304. See supra note 67; see also Melissa M. Wyer et al., The Legal Context of Child Custody Evaluations, in PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 8 (Lois A. Weithorn ed., 1987) (stating that the doctrine has declined, although the maternal preference may be considered as a “tie breaker” or as a factor in the decision).

305. See supra note 66 and accompanying text.

306. Wyer et al., supra note 304, at 8-9. “Generally neither parent is now presumed to have a superior right to the child. Rather, the prevalent standard requires a determination of what will most effectively enhance the growth and development of the child from a physical, emotional, and moral standpoint.” Id. at 8. In determining what is in the child’s best interests, courts may consider a variety of factors, but most state statutes fail either to provide specific criteria or to specify how to evaluate or weigh each criterion. Id. at 8-9. Section 402 of the Uniform Marriage and Divorce Act, which has served as a guideline for many courts, states that the court shall consider relevant factors such as the wishes of the parents, wishes of the child, and interaction and interrelationship with parents and siblings. UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 35 (1987). One of the most detailed statutes describing criteria for determining best interests is Michigan’s. See Mich. Comp. Laws Ann. §§ 722.22-.27 (West 1992).

307. 2 CLARK, supra note 8, at 527; see also infra notes 311-20 and accompanying text. Another consideration in biological parent-third party custody disputes is whether or not the third
is predicated on the constitutional protection of the parent-child relationship,\textsuperscript{308} which is rooted not only in natural law, but also in traditional notions that natural parents are more successful in caring for their children than third parties and that the emotional ties between natural parents and their children deserve respect.\textsuperscript{309} Translating these assumptions into legal standards has led to diversity in courts' treatment of such custody disputes.\textsuperscript{310}

party has standing under the statute. Without standing, the third party cannot bring the custody action or intervene in it. State statutes vary as to when third parties have standing; some statutes exclude even those who have a relationship with the child or significant interest in the child's welfare. \textit{2 CLARK, supra} note 8, at 526-27; \textit{see UNIF. MARRIAGE AND DIVORCE ACT § 401(d), 9A U.L.A. 549-50 (1987)}.

\textsuperscript{308} See \textit{2 CLARK, supra} note 8, at 532 ("The parental right doctrine has acquired rigidity from the dubious and amorphous principle that the natural parent has some sort of constitutional 'right' to the custody of his child."); \textit{see also supra} notes 74-90 and accompanying text. Clark also notes that the parental rights doctrine antedated the Supreme Court cases that based the right on constitutional grounds. \textit{2 CLARK, supra} note 8, at 527.

\textsuperscript{309} \textit{Cf.} Sheila Rush Okpaku, \textit{Psychology: Impediment or Aid in Child Custody Cases?}, \textit{29 Rutgers L. Rev.} 1117, 1124 n.28 (1976) (stating that "[t]he assumptions underlying the parental right doctrine are not always clear, as some decisions appear to demonstrate a belief that none can love the child as well as the natural parent, while others seem to adopt the old view that children are the property of their parents"). \textit{But see GOLDSTEIN et al., supra} note 250, at 17 (noting that while "[b]iological parents are credited with an invariable, instinctively based positive tie" to their children, they are often the child's source of abuse or neglect).

\textsuperscript{310} \textit{2 CLARK, supra} note 8, at 529. Generally, the courts are split between a parental rights standard and a best interests of the child standard; however, the variations in these standards form a continuum, as opposed to a dividing line, between the two standards. \textit{See Sandra R. Blair, Jurisdiction, Standing, and Decisional Standards in Parent-Nonparent Custody Disputes, 58 Wash. L. Rev.} 111, 115 (1982). Determining which standards each state uses is beyond the scope of this Comment. The courts' differing approaches to the statutory language make it difficult to discern what a statute actually means. \textit{See McGough & Shindell, supra} note 66, at 214-15 n.24: An accurate evaluation of the total number of jurisdictions subscribing to each standard is . . . difficult to achieve. A definitive count would require a full tracking of the custody law of every jurisdiction . . . . A lesser inquiry would be inadequate and possibly misleading since some courts have never been presented with the case which forces a choice between the two standards; other courts have been presented the case too infrequently to indicate a prevailing view . . . . Some jurisdictions have so defined the standards that there is really little distinction between them; some have discussed the cases in terms of the best interests of a child while actually applying the parental rights doctrine; still others have vacillated between the standards. \textit{Id.} (citations omitted); \textit{see also O'Keefe, supra} note 147, at 1091-92 (exemplifying the discrepancies even within states). One commentator examines the history of the parental rights standard in Arkansas, for example, and finds that courts have relied on past decisions using the standard rather than articulating a reason for its use. \textit{Id.} at 1091-93. He notes that one of the oldest primarily cited cases dates to 1881 and, although the court used parental rights language, the decision was in favor of the third party based on exceptional circumstances, or child welfare grounds. \textit{Id.} (citing Verser v. Ford, 37 Ark. 27 (1881)).

Some commentators have undertaken the task of categorizing the states by standard. \textit{See}, e.g., Haynie, \textit{supra} note 85, at 706-26 (discussing presumption standards, a parental rights standard, and a best interests standard); Stephanie H. Smith, Note, \textit{Psychological Parents vs. Biological Parents: The Courts' Response to New Directions in Child Custody Dispute Resolution}, 17 J.
In parental rights jurisdictions, courts rely on the traditional notion that biological parents have natural rights concerning their children and will act in the child’s best interests.\(^{311}\) The parental rights standard requires that, absent a showing of unfitness, the biological parent be awarded custody over a third party.\(^{312}\) Only if the natural parents are found unfit will the courts consider the best interests of the child before entering a custody order. Because the standard of proof for showing unfitness is stringent,\(^{313}\) the natural parents in these jurisdictions usually win custody of the child regardless of whether the arrangement is in the child’s best interests.\(^{314}\)

While several jurisdictions apply a pure parental rights standard,\(^{315}\) others use some variation of the standard, based on presumptions of parental preference.\(^{316}\) Some of these jurisdictions defer to natural parents’...
rights by establishing a rebuttable presumption that the biological parent will best serve the child's welfare.\textsuperscript{317} Others hold that the natural parents should prevail, barring a detrimental effect on the child\textsuperscript{318} or "extraordinary circumstances"\textsuperscript{319} that require awarding custody to a third party.\textsuperscript{320}

In contrast to this presumptive framework, other jurisdictions apply a more discretionary standard—the "best interests of the child" standard.\textsuperscript{321} In pure "best interests" jurisdictions, the child's welfare is paramount to any other consideration.\textsuperscript{322} The best interests standard allows the court to consider a number of factors, including the physical, emotional, and psychological well-being of the child.\textsuperscript{323} Jurisdictions that apply the best interests standard often place considerable weight on the "psychological parent" doctrine in adjudicating custody disputes between biological parents and third

\begin{footnotesize}
\begin{enumerate}
  \item See 2 CLARK, supra note 8, at 531 n.44 (listing cases applying the presumption).
  \item See, e.g., CAL. FAMILY CODE § 3040(a) (West Supp. 1994) (requiring custody to be granted "according to the best interest of the child," with preference given to the natural parents above all other persons).
  \item Among the factors courts consider are:
    - why parent and child were separated, how long they were separated, whether a substitute relationship developed, and why the parent now seeks resumption of the original relationship. In situations where a parent has voluntarily surrendered custody, where there has been prolonged separation, and where "an entirely new" parent-child relationship has been created, intermediate jurisdictions are far more reluctant to disturb the child's status quo.
    - Smith, supra note 310, at 550; see also Bennett v. Jeffreys, 356 N.E.2d 277, 284 (N.Y. 1976) (holding that the child's eight-year period of living with an unrelated, older woman and separation from parents constituted "extraordinary circumstances"); Blair, supra note 310, at 117 (also describing circumstances courts consider "extraordinary").
    - Compare Haynie, supra note 85, at 721 (stating that there are 10 states that apply this standard) with Smith, supra note 310, at 550-551 (stating that eight jurisdictions are child-focused). See also 2 CLARK, supra note 8, at 530 n.39 (listing cases in jurisdictions applying a best interests standard).
    - 2 CLARK, supra note 8, at 530-32. "[T]he best interests standard is based on the recognition that there is no analogy between a custody award and a decision concerning the title to property." Id. at 532.
    - See McGough & Shindell, supra note 66, at 213; see also McGaffin v. Roberts, 479 A.2d 176, 182-85 (Conn. 1984) (awarding custody to the child's maternal grandmother when a substantial emotional relationship was shown), cert. denied, 470 U.S. 1050 (1985).
\end{enumerate}
\end{footnotesize}
parties.\textsuperscript{324} As articulated in \textit{Beyond the Best Interests of the Child},\textsuperscript{325} a leading work on psychological parentage, the psychological parent is the adult who, "on a continuing day-to-day basis through interaction, companionship, interplay and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs."\textsuperscript{326} The psychological parent theory is based on the social sciences,\textsuperscript{327} which focus on the child's needs and the damaging effect of separation from the parental figure, regardless of any biological connection.\textsuperscript{328} Even before this theory gained acceptance, courts had used the idea of psychological parentage in custody determinations.\textsuperscript{329} The application of this doctrine is inconsistent, however, and further widens the disparity among states in making custody decisions.


\textsuperscript{325} \textit{Goldstein et al.}, \textit{supra} note 250.

\textsuperscript{326} \textit{Id.} at 98.

\textsuperscript{327} Some commentators have criticized the use of such data in custody determinations. \textit{See}, e.g., Phoebe Ellsworth & Robert Levy, \textit{Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies}, 4 \textit{Law & Soc'y Rev.} 167, 198-99 (1969) (finding that "psychological research that can be considered both relevant and useful to the problems of custody adjudication is minimal. . . . [and that] judgments based upon the psychological tests of either the parents or the child are not likely to be well founded"); Okpaku, \textit{supra} note 309, at 1144-45 (stating that "psychological hypotheses are sufficiently elastic to be pressed into the service of virtually any opinion or prediction," and thus should not be used). Others, however, have strongly supported the use of psychological and social science data in this area. \textit{See}, e.g., Rohman et al., \textit{supra} note 303, at 59, 59-61 (stating that the use of social sciences, psychology in particular, in child custody determinations is valuable because (1) direct studies show their usefulness, (2) judges will be prevented from misusing the data by practical and procedural rules, and (3) the speculative nature of the data may be acknowledged).

\textsuperscript{328} \textit{See Goldstein et al.}, \textit{supra} note 250, at 12 ("Unlike adults, children have no psychological conception of relationship by blood-tie until quite late in their development.").

\textsuperscript{329} \textit{New Trends}, \textit{supra} note 67, at 27; \textit{see}, e.g., \textit{In re Catherine S.} and Darlene S., 74 Misc. 2d 154, 158-59 (Fam. Ct. 1973); \textit{In re Mittenthal}, 37 Misc. 2d 502, 509 (Fam. Ct. 1962). In Mittenthal, the court denied a mother custody of a 16-year-old, even though she had been deemed competent after spending four years in a mental hospital. \textit{Id.} at 502-03. The son, during this period, had thrived in foster care and showed improvement in school and in his social adjustment. \textit{Id.} at 509. The case is significant because, at the time of the decision, there was no clear statutory basis for withholding custody from the mother, and because the court held that, upon her recovery, she was not an unfit parent in the usual sense. \textit{Id.} at 511-12. Instead, the mental health of the son and his psychological best interests were the basis for the decision. \textit{Id.} at 509. If the jurisdiction had been a parental-rights doctrine jurisdiction, the court would have reached the opposite result.

VI. ADDRESSING THE PROBLEMS AND INCONSISTENCIES IN ADOPTION AND CUSTODY LAW

In light of different adoption statutes, various standards for custody determinations, and the uncertain constitutional status of some of the parties, courts are deciding similar issues in inconsistent ways. As a result, adoptive parents are scared, and children are again being treated like property. Although children are most often the real parties in interest, they are incapable of fighting for their rights or expressing their preferences. The adults are thus the ones who fight for the child. The struggle, however, inevitably becomes one over who deserves the child, or who has the "rights" to this human being. Ultimately, the child, whose interests are often ignored, is the one who suffers the most. To ensure that the child is not treated as property, states should enact laws that encourage responsibility, rather than those that focus primarily on who has a right to the child.

A. Uniform Changes in Adoption Laws

The publicity surrounding recent custody decisions involving biological parents and third parties has sparked a demand for adoption reform at the state level. Some state legislatures have already begun modifying their adoption laws to avoid conflicts like Baby Jessica's. Because the federal government is reluctant to legislate on intimate family issues, each state has the freedom to enact adoption statutes that reflect its individual public policy. Consequently, adoption laws vary across state lines. This diversity leads to confusion and often works against the child's best inter-

330. See supra note 8.
331. See supra notes 307-29 and accompanying text.
332. See supra notes 232-301 and accompanying text.
333. See supra notes 23-56 and accompanying text.
334. See Nancy E. Roman, Jessica Case Prompts Adoption-Reform Rush, WASH. TIMES, Aug. 7, 1993, at A1. Commentators have also urged that reforms are necessary at both the state and federal level in other areas, such as access to records and race-matching statutes. See, e.g., Miller, supra note 7, at 797-807.
335. See, e.g., Gibbs, supra note 23 ("The Michigan legislature, having come under increasing pressure with each ruling against the DeBoers, is considering altering state laws to weigh children's interests more heavily."); House Panel Endorses Measure to Prevent 'Baby Jessica' Cases, ARIZ. REPUBLIC, Feb. 3, 1994, at B2 (discussing a bill that would require birth mothers to list all potential birth fathers and would give unwed fathers 30 days to respond to notice of the adoption); Nancy Weaver, Adoptive Families Fear Losing Kids Despite Reform Plans, SACRAMENTO BEE, Sept. 17, 1993, at B1 (discussing adoption reforms in progress in California).
336. For example, while some states require the mother to wait at least 72 hours after the child's birth before signing papers relinquishing her parental rights, see, e.g., ARIZ. REV. STAT. ANN. § 8-107 (1989); D.C. CODE ANN. § 32-1007(b) (1993); NEV. REV. STAT. ANN. § 127.070(1) (Michie 1993); OHIO REV. CODE ANN. § 3107.08 (Anderson 1989), other states require at least 5 days, see, e.g., KY. REV. STAT. ANN. § 199.500(5) (Michie/Bobbs-Merrill 1991). Some states do not have any restrictions on when consent may be given. See, e.g., ALA. CODE § 26-10A-13 (1992) (at any time); IDAHO CODE § 16-1504 (Supp. 1993) (does not specify); N.C. GEN STAT.
ests. One possible solution to this inconsistency is the adoption of uniform laws. A carefully designed uniform act that considers the interests of the biological parents, the adoptive parents, and, above all, the child would not only lead to clearer, more systematic laws across state lines, but would also clarify the parties' rights and responsibilities. A uniform act may thus have "as its consequence an advancement of individual freedom." In response to the problems faced in adoption contests, the National Conference of Commissioners on Uniform State Laws is drafting such an act—a new Uniform Adoption Act (the Proposed Act)—which proposes to clarify the rights of the parties, streamline procedures, and protect the child's interests at each stage of the adoption.

The initial step in creating uniform adoption laws is to modify existing laws to promote the state's compelling interest in protecting the welfare of the child. The states' first concern in the adoption process is the mother's decision to surrender her child. Because of the importance of this decision and its emotional impact on the mother, states have an interest

§ 48-7 (1991) (same); see also NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK 76-85 (1985) (listing all 50 states and their various adoption requirements).

337. "By its nature, a uniform act, if accepted substantially intact by all states, would eliminate most of the legal conflicts that so often plague adoption proceedings across state lines." Images of Adoption—and of Confusion, L.A. TIMES, Dec. 25, 1993, at B3. For an in-depth discussion of the positive effect of uniform laws, especially in the family law context, see Stein, supra note 74, at 1102.

338. Stein, supra note 74, at 1102.

339. UNIF. ADOPTION ACT (Proposed Draft 1993). This Comment uses the draft of the Act that was released "for discussion only."

340. The National Conference of Commissioners on Uniform State Laws "is a body of some approximately 300 lawyers, judges, and law professors representing the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands." James H. Andrews, Clarifying the Babel of Adoption Laws, CHRISTIAN SC. MONITOR, Aug. 16, 1993, at 13. During the past century, they have drafted more than 200 proposed statutes on a wide range of legal matters. Id. The committee working on the adoption act includes three judges, lawyers with family law experience, and other lawyers with experience in legislative drafting. Id. The Act, which was initially drafted in 1951, is expected to be completed in August of 1994. Id. This Comment presents relevant parts of the Proposed Act and makes further suggestions.


342. Cf. Vicki C. Jackson, Baby M and the Question of Parenthood, 76 GEO. L.J. 1811, 1818-19 & n.19 (1988) (describing the emotional trauma that leads surrogate mothers to break their contracts). Jackson notes that giving up a child can be, for some birth mothers, a far more painful and terrible event than they might have reasonably foreseen prior to conception—a severing of an emotional bond whose power and force cannot be recognized fully before the coming into being of the child as a person.

Id. at 1819 n.19.
in regulating the time and manner in which a mother may relinquish her parental rights. Statutes must strike a balance between the need to ensure that the mother has made an informed and voluntary choice and the need to place the child as soon as possible. The Proposed Act suggests that the birth mother should not sign the consent forms until after the baby is born and that she should be notified of the availability of legal and personal counseling prior to her decision. These provisions aim to prepare the mother for the emotional impact of giving birth and relinquishing the child while safeguarding both mother and child from hasty decisions. An even stronger protection is to require that the mother have counseling before giving up the child. With mandatory legal and psychological counseling, birth mothers would be better prepared both to make the decision and to understand the emotional and legal consequences of relinquishing a child for adoption.

States must also limit the length of time during which a mother may revoke her consent. The Proposed Act provides that she be allowed to revoke her consent within 120 hours of the child's birth if she executes such consent within that same period. This scheme gives the mother enough time to recover from delivery and to be as certain as possible that the adoption is in her and the child's best interests. This time limit for revoking consent or relinquishment is short enough that risk of harm to the child is minimal, even if the child is placed the day after birth.

343. See supra note 336.
344. The earlier the placement, the more easily the child will adapt to the new family and the separation from the biological mother.
345. UNIF. ADOPTION ACT § 2-404(a) (Proposed Draft 1993).
346. Id. § 2-404(e).
347. An inherent problem with this suggestion is the feasibility and enforcement of such a requirement.
348. UNIF. ADOPTION ACT § 2-404(a) (Proposed Draft 1993). This gives the mother approximately five days after the birth to change her mind. Consent given after this time would presumably be irrevocable under the Act. See id. While some state statutes give the mother a certain number of days to change her mind, see, e.g., N.C. GEN. STAT. § 48-11(a)(3) (Michie 1993) (30 days from time of giving consent), limiting the time in hours is more efficient and leaves less room for confusion. In addition, states that give birth mothers long periods of time to revoke their consent, see, e.g., ALASKA STAT. § 25.23.070(b) (1993) (any time before entering of adoption decree), leave mothers to contemplate their decision on a daily basis, or feel increased guilt or remorse if they do not.

The Proposed Act also requires that the mother (or other parent or guardian) give consent or relinquish her parental rights in front of a judge, UNIF. ADOPTION ACT § 2-405(a)(1) (Proposed Draft 1993), public officer appointed by a judge, id. § 2-405(a)(2), or lawyer not representing the prospective adoptive parent, id. § 2-405(a)(4), to avoid undue pressure, as well as appreciate the finality of the decision.

349. Unfortunately, this does not compensate the prospective adoptive parents for their disappointment in not keeping the child.
A more difficult reform in adoption law involves how to treat the unwed father and, more specifically, whether courts should give notice to or require consent from unwed fathers who either (1) do not know of their child’s existence, (2) did not know of their child’s existence until birth, or (3) were thwarted by the mother in their efforts to establish a relationship with the child. The Proposed Act requires courts to notify those unwed fathers who have either acknowledged paternity, or who have been judicially determined to be the father and have shown responsibility for and interest in the child. The Act also places a limit of thirty days on the father’s time to respond to notice of the adoption proceeding. These proposals ensure that fathers who have at least acknowledged some responsibility for their children will be afforded limited due process.

The Proposed Act further suggests that when the father’s location is unknown, the court should make a good faith inquiry into his whereabouts. If these efforts are unsuccessful, the court should attempt to notify him of the proceedings by publishing or posting such notice, whichever is most likely to lead to actual notice. While some who propose adoption law reform urge that mothers be required to name possible fathers, others suggest that she not be compelled, but rather “advised that the proceeding for adoption may be delayed or dismissed if a possible father is not given notice.”

350 Section 2-401(a)(1)(i) does not address the father who is married to the mother or was married to the mother at the time of the child’s birth, as he, like the mother, is clearly required to give his consent to the adoption. Biological fathers who have legitimated their children by marrying the mother have established protected liberty interests in these relationships.

351. UNIF. ADOPTION ACT § 2-401(a)(1)(iii)(A) (Proposed Draft 1993). This section suggests that the father must have provided, “in accordance with his financial means, reasonable and consistent payments for the support of the minor and [have] regularly visited or communicated with the minor.” Id.; see also Bartlett, supra note 110, at 325 (supporting such a rule and noting that such rules “should be based upon society’s understanding of relationship and responsibility, rather than on what seems fair to the parents”); DeMarco, supra note 267, at 293-94 (proposing that adoption and custody statutes “be drafted to protect only those putative fathers entitled to constitutional safeguards by virtue of their psychological parenthood status”).

352. UNIF. ADOPTION ACT § 2-402(a)(7) (Proposed Draft 1993). Although such time limits may appear arbitrary, this limit seems reasonably calculated to afford the father due process without jeopardizing the child’s welfare. A father who is truly interested in blocking the adoption or obtaining custody should not need more time to decide. The 30-day limit is actually an extension of the nine-month period he already had to contemplate his paternity. A 30-day limit has already gained support. See In re Doe, No. 1-92-1552, 1993 Ill. App. LEXIS 1271, at *55 (Aug. 18, 1993) (Tully, J., dissenting), appeal granted, 624 N.E.2d 807 (Ill. 1993); House Panel Endorses Measure to Prevent ‘Baby Jessica’ Cases, supra note 338, at B2.

353. UNIF. ADOPTION ACT § 3-404 (Proposed Draft 1993).

354. Id. § 3-404(d); see also Hill, supra note 276, at 958-60 (stating that publishing notice in a discrete manner would minimize the infringement on the mother’s privacy).

355. See, e.g., Hill, supra note 276, at 958-59. One commentator proposes that state statutes should place the burden of identifying the father on the mother and recommends that “statutes . . . go beyond current Supreme Court doctrine and include provisions which strengthen the putative father’s position in hearings held to terminate his parental rights.” Id. at 962.
notice of the proceeding.” Some states have gone so far as to establish putative father registries, which require a man who suspects he has impregnated a woman to register his name with the state to ensure notification of adoption proceedings. Because privacy and practicality issues may preclude the effectiveness of both putative father registries and compelled disclosure, state statutes should require that mothers be encouraged to disclose the names of possible fathers and be warned of the consequences of failing to notify them of the proceedings.

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State statutes must also consider which unwed fathers must consent to an adoption. Clearly, those fathers who have established paternity within the given time limit and who have formed a substantial relationship with the child should have to consent to the proceeding that terminates their parental rights.

Unwed fathers who know of the mother’s pregnancy and, upon learning of the adoption, attempt to assert paternity rights, but show no significant signs of responsibility toward the child, should not be required

356. UNIF. ADOPTION ACT § 3-404(e) (Proposed Draft 1993).
358. See Hamilton, supra note 278, at 999; Bartlett, supra note 110, at 320-21. Mothers may have different reasons for refusing to disclose the father’s name. While some mothers consider the welfare of the child paramount and fear that the child will be harmed by living with the father, others base their decisions on more self-serving reasons and withhold the father’s name for more spiteful purposes. Bartlett, supra note 110, at 323-24. Bartlett suggests that courts should consider the mother’s reasons, as well as the father’s, for seeking to block the adoption. Id. at 324-25. She proposes a standard that would allow courts to presume that the mother’s relationship with the child makes her decision to place the child for adoption responsible and requires the father to overcome the presumption “with evidence that his plan to keep the child is more responsible.” Id. at 325. She adds that “[c]onvincing and realistic plans for providing adequately for the child would be relevant evidence, as would evidence about his attitude toward the mother’s pregnancy.”

359. A mother should be advised that failure to disclose the father’s name may result in harm to the child if he later appears to contest the adoption. A mother who is concerned about opposition from a man she assumes is unfit to raise her child would still have to rely on the courts to determine the best placement for the child. Generally, for any of the proposals to be effective, all of the parties will have to act responsibly. For an insightful evaluation of competing claims between parents in the adoption context and the need for responsibility-based standards for reconciling them, see Bartlett, supra note 110, at 315-26.
360. The Proposed Act protects fathers, and encourages responsibility on their part, by requiring consent from those unwed fathers who (1) have acknowledged paternity (or have been judicially determined to be the father) and have provided “regular and consistent payments for support of the minor” to the best of their ability, or (2) have received the child into their home and openly held the child out to be their own. UNIF. ADOPTION ACT § 2-401(a)(iii)-(iv) (Proposed Draft 1993).
The Proposed Act makes strong suggestions for when the parental rights of these unwed fathers should be terminated in the first six months of an infant’s life. The Act proposes that courts should terminate the parental rights of fathers who, without good cause and with reason to know of the birth or expected birth, failed to (1) provide “reasonable prenatal, natal, and postnatal expenses in accordance with his . . . financial means,” (2) “make reasonable and consistent payments . . . for the support of the minor,” (3) “visit with the minor,” and (4) “manifest an ability and willingness to assume legal and physical custody of the minor.” This suggestion also ensures that a father who has shown a commitment to fatherhood even before the child’s birth will be protected.

The Act also makes detailed and insightful proposals for addressing the termination—or preservation—of parental rights of a father who has, for good cause, failed promptly to respond to notice. Courts should terminate his parental rights only if there is clear and convincing evidence that: (1) the father is unwilling or unable to seek custody and support the child; (2) he is unwilling or unable to maintain contact with the child and provide support; (3) placing the child in his “legal and physical custody would pose a risk of substantial harm to the physical or psychological well-being of the minor . . . ; or (4) failure to terminate would be detrimental to the minor.” Factors the court “shall” consider in determining whether failure to terminate would be detrimental to the child include:

- the respondent’s efforts to obtain or maintain legal and physical custody of the minor, the respondent’s ability to pay for the minor’s support, the age of the minor, the quality of any previous relationship between the respondent and the minor and between the respondent and any other minor children, the duration and suitability of the minor’s present custodial environment, the effect of a change of physical custody on the minor, and any recommendation of the minor’s guardian ad litem.

This comprehensive list of factors presents courts with a well-articulated set of guidelines to follow when deciding the fate of the father, prospective adoptive parents, and the child. By focusing on protecting the child from physical or psychological harm, courts would avoid some of the discretionary problems inherent in determining the child’s “best interests.” At the
same time, courts would not be permitted to ignore the psychological effects of taking a child from a loving family.

As a final consideration to unwed fathers and their children, states must determine how to treat the absent father. The court should terminate the parental rights of the unknown father or the father who fails to appear after having been served notice. If the father can show that he has not received notice because of fraud or bad faith, however, courts should consider the totality of the circumstances in making a decision that would cause the least harm to the child.

Another necessary reform involves expediting the procedures for resolving adoption proceedings and custody disputes. Often the proceedings, which can take years, exacerbate the problem by allowing a child to remain with prospective adoptive parents long enough to establish a psychological bond. Although the Proposed Act states that the prospective adoptive parents are entitled to custody pending the final decree of adoption “unless the court orders otherwise to protect the welfare of the minor,” other commentators propose that courts should grant custody to a biological father who has manifested some responsibility toward his child while his rights are being adjudicated. Statutes should grant custody to the prospective adoptive parents, who otherwise may never be able to gain custody of the child. Either way, the longer the child lives with any parental figure, the more dangerous the separation will be to the child. States should therefore limit the time for filing and hearing an appeal to a decree of adoption. The goals of providing stability for children and protecting their well being require expedient adjudication in adoption (and custody) pro-

366. Id. § 3-704(c).
367. Cf. Hill, supra note 276, at 960:
If it is brought to the court’s attention shortly after placement, rescission of the petition may be the best solution. However, it is more likely that despite fraud, the adoption should remain final given the state’s interest in securing permanent placements and in protecting the emotional and psychological well-being of the child. This decision should be based on an ad-hoc analysis of the facts surrounding each individual case so as to achieve the best balance between the competing interests.

Another suggestion is that states allow the father to assert an affirmative defense for not establishing his rights within the prescribed period. In re Doe, No. 1-92-1552, 1993 Ill. App. LEXIS 1271, at *55 (Aug. 18, 1993) (Tully, J., dissenting), appeal granted, 624 N.E.2d 807 (Ill. 1993). This grace period would not extend past 120 days under any circumstance. Id. (Tully, J., dissenting).

368. See Zinman, supra note 274, at 998-1000.
370. See, e.g., Zinman, supra note 274, at 996-998.
371. See GOLDBEIN ET AL., supra note 250, at 40-42. “Three months may not be a long time for an adult decisionmaker. For a young child it may be forever.” Id. at 43.
372. The Act proposes that an appeal from an adoption decree “must be filed within [20] days after the decree . . . is entered, and the appeal must be heard expeditiously.” UNIF. ADOPTION ACT § 3-807 (Proposed Draft 1993).
ceedings. These same goals support the adoption of uniform laws that not only protect the rights of the parties, but also encourage responsibility in establishing families for children.

B. Change in Custody Law

Although enacting uniform adoption statutes may help prevent problems from arising, even these reforms would not cover every fact situation. When adoption petitions are dismissed, the state courts bear the burden of determining, pursuant to state statutes, who will receive custody of the child. Courts apply different standards in custody disputes, however. Consequently, custody determinations are inconsistent across state lines and may also be prolonged by concurrent adjudications.

Because courts often give the biological parent unwarranted preference, scholars have criticized the parental rights standard as anachronistic, unrealistic, psychologically unsound, and unconstitutional. This preference fails to consider the needs, interests, and welfare of the child; it also fails to consider that the definition of who may be a parent is


It is surely imperative that the judiciary have enough judges and proper judicial case management in place at both the trial and appellate levels so that "time" does not become a factor in the decisional process of a case. Every effort must be made to see that we do not have any more cases ... where it takes two years and five months to determine the lawful parentage of a young child. Moreover, the judiciary must come to grips with the fact that the psyche of our society can ill afford cases where children are "switched" parents after the first 18 months of life.

374. See supra notes 307-29 and accompanying text.

375. See supra notes 228-39 and accompanying text. One alternative states may consider is the establishment of a statutory scheme requiring mediation between the parties before going to court. A neutral mediator would help the parties understand the consequences of their actions and help them agree on a workable solution. Only after failing to resolve the dispute in mediation would the parties seek legal action. The problem with this scheme, however, is that such a process may actually exacerbate the problem by prolonging the custody decision.

376. McGough & Shindell, supra note 66, at 243 ("The parental rights doctrine has become an anachronism in light of current psychological knowledge. Since it appears that blood may not necessarily be 'thicker than water,' the assumption that a child's best interests will be served by his parents becomes meaningless.").

377. O'Keefe, supra note 147, at 1081. "Defining parenthood in terms of biology is no longer practical or feasible. It would seem to make more sense to define parent in terms of the actual relationship with a child." Id. at 1100.

378. McGough & Shindell, supra note 66, at 244.

379. Id. at 244 (stating that the doctrine "may be unconstitutional in light of th[e] language in Smith"); see also Haynie, supra note 85, at 736-42. Haynie states that in light of the Supreme Court's decisions in the unwed father cases, as well as in Moore and Smith, "all standards that emphasize biology as the guiding principle for resolving third-party custody disputes are unconstitutional," id. at 736, and "[o]nly a true best interests standard survives constitutional scrutiny," id. at 742.
In light of the changes in the modern family, courts must consider the child's welfare and the psychological effects of custody decisions; the best interests standard is thus the better standard for courts to use. Under the best interests approach, courts may consider any factors relevant to a determination of what will best protect the child's welfare. Because the standard is vague, however, it often gives judges almost complete discretion "to make decisions that reflect their own subjective values." A clearer enunciation of the factors judges should consider would strengthen the effectiveness of the standard in preserving the child's welfare.

The authors of Beyond the Best Interests of the Child propose a modification of the best interest standard based on the psychological parent doctrine. They suggest that courts apply a "least detrimental alternative" standard in custody determinations. This standard is founded on three premises: Courts should always consider the child's need for permanency, the child's sense of time, and the general inability to make long-range predictions about the child's welfare.

Courts should focus on the factors supporting the "least detrimental alternative" standard, as well as those commonly considered "extraordinary circumstances." These factors should include the child's sense of time, which differs with age, the child's attachment to the psychological parents, the emotional trauma attributed to separation from such parents, and the court's inability to predict what will ultimately be best for the child. Courts need to recognize that the child's world is different from the adult's and then evaluate the child's sense of attachment, time, and stability in light of this difference. They should not base custody decisions on the notion of who deserves the child, but rather on what the child deserves.

Furthermore, state courts should recognize that even if an appellate court upholds the dismissal of an adoption petition because termination of a parent's rights is not warranted, the court should make a custody decision in

380. See supra notes 109-16 and accompanying text.
381. Laura A. Foggan, Note, Parents' Selection of Children's Surnames, 51 GEO. WASH. L. REV. 583, 595 n.89 (1983) (noting that the Supreme Court has criticized the possibility of overbroad interpretation by judges). Thus, judges who agree that living with biological parents is always best for a child undermine the standard.
382. Goldstein et al., supra note 250, at 53.
383. Id. at 31-34.
384. Id. at 40-42.
385. Id. at 49-52.
386. See supra note 319 and accompanying text.
387. See supra text accompanying note 365 for a more comprehensive list of factors that courts should consider.
light of the child's present situation.\textsuperscript{388} Parents whose rights have not been terminated should not automatically receive custody of the child.\textsuperscript{389} Again, the court should consider any "extraordinary circumstances" in determining which placement would cause the least harm to the child. At the same time, courts should also consider visitation rights. If the child remains with the prospective adoptive parents and the father's rights are not terminated, he may still have visitation rights and thus some ability to maintain a relationship with the child.\textsuperscript{390} At the same time, if the father gains custody of the child, courts should consider granting the prospective adoptive parents visitation rights to ease the transition.\textsuperscript{391} If all states consider the same factors and emphasize children's rights and well-being, uniformity in custody laws would complement a carefully designed adoption scheme.

\section{VII. Conclusion}

The judge who ruled that Baby Richard should remain with the family that raised him remarked:

Fortunately, the time has long past when children in our society were considered the property of their parents. Slowly, but finally, when it comes to children even the law has rid itself of the Dred Scott mentality that a human being can be considered a piece of property "belonging" to another human being.\textsuperscript{392} Yet two weeks before this decision, Baby Jessica was taken from her family and transferred to the biological parents who were strangers to her. Ironically, in January of 1994, the Illinois Supreme Court granted Mr. Kirchner's appeal,\textsuperscript{393} which may ultimately disrupt Baby Richard's family and change his life.

Although the law recognizes that children have constitutionally protected rights in the family context, their rights are limited by the courts' often steadfast reliance on history and tradition. Courts must, however,

\textsuperscript{388} See Joan Heifetz Hollinger, \textit{A Failed System is Tearing Kids Apart}, NAT'L L.J., Aug. 9, 1993, at 17.

\textsuperscript{389} A child is "not a misaddressed parcel that, once the error is discovered, should be shipped to the correct recipient." \textit{Id.}

\textsuperscript{390} See Bartlett, \textit{supra} note 110, at 955-63. Bartlett supports allowing visitation rights by noting that "[t]he availability of adoption without termination of parental rights could have helped the children in both \textit{Quilloin v. Walcott} and \textit{Caban v. Mohammed}.” \textit{Id.} at 957. See \textit{supra} notes 57-62 and accompanying text for an example of a situation in which the prospective adoptive parents and biological father reached such an agreement without resorting to the courts.


\textsuperscript{393} See \textit{supra} note 56.
evaluate their respect for tradition in light of changing societal values and norms and balance such respect with the rights of those who will be affected. In the family context, the law is capable of reflecting current practices while upholding traditional principles. The legal system needs to realize that the "sanctity" of the family derives from the notion of the family as "a continuing relationship of love and care, and an assumption of responsibility for some other person." Courts should thus focus on what leads to the tradition—the role of the family in the "custody, care, and nurture" of its members. In today's society, parenthood is no longer solely a function of biology.

Only by recognizing and accepting the prevalence and importance of nontraditional family relationships will the law be adequately prepared to protect children's rights and welfare. Especially in the adoption context, which purports to provide children with stable, loving home lives, states should modify their laws so that they consistently foster parental responsibility and emphasize children's rights. Birth mothers, biological fathers, and prospective adoptive parents, as well as the states, should realize that as they struggle over a decision, so does the child. A legal response to the problems inherent in the adoption scheme may encourage biological and psychological parents to act responsibly—perhaps even to provide for their children without entangling them in a quagmire of judicial proceedings. Only then will "Solomon's children" and the people who care for them be able to rest more easily.

Kirsten Korn
