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ESTABLISHING THE BIOLOGICAL RIGHTS DOCTRINE TO PROTECT UNWED FATHERS IN CONTESTED ADOPTIONS

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I. INTRODUCTION

The United States Supreme Court has recognized that an unwed biological father has a liberty interest in establishing a parental re-

* This Comment is the culmination of a research project that I began in 1994 and is why I practice family law and advocate for fathers' rights today. I thank my family for being supportive and loving while we endured the years of schooling; without them, I could not have finished that endeavor or this project. I thank Professor Barbara Busharis for unwittingly planting the seed that inspired me to begin this project, for patiently listening to me while my thoughts matured regarding the issues, and for the time it took her to review and discuss at least four drafts throughout the years. I thank Professor Jean Sternlight for her guidance and encouragement while I worked on the project as a directed individual study.

lationship with his child.[1] If the unwed father assumes responsibility for his child, his interest acquires substantial constitutional protection.[2] The Court has not, however, addressed the issues presented by recent contested at-birth third-party adoptions. Specifically, the Court has not determined whether a biological connection alone is sufficiently fundamental to trigger full constitutional protection when, through no fault of his own, an unwed biological father has had no opportunity to take responsibility for his newborn child. This issue arises in two categories of cases: those involving a father who finds out about the birth and adoption of his child after adoption proceedings are filed, and those involving a father who knows the mother is pregnant with his child and attempts to assume parental responsibilities during the prenatal period.

When the birth father has been unable to assume his parenting responsibilities because the child has been placed at-birth with prospective adoptive parents, the biological connection and the father's asserted willingness to assume his parenting role should be sufficient to trigger full constitutional protection of his inchoate interest. Furthermore, Florida should institute the biological rights doctrine as a rule in contested at-birth adoptions and tailor a statutory adoption scheme that fully protects the inchoate rights of unwed fathers.[3]

In re Adoption of Baby E.A.W.,[4] a recent Florida case involving a father's thwarted effort to contest an adoption, illustrates the issues with contested at-birth adoptions. Gary Bjorklund and Linda, the biological mother, were unmarried and had lived together for almost eight months when they conceived Baby Emily.[5] Before, and for six months during the pregnancy, Gary contributed more than half of the family's household expenses, including supporting Linda's two-

1. See Lehr v. Robertson, 463 U.S. 248, 262-63 (1983).

2. See id. at 261.

3. It has long been recognized that states are the arbiters of family law. See Ankenbrandt v. Richards, 504 U.S. 689, 693-703 (1992) (explaining the domestic relations exception to federal court jurisdiction); Barry v. Mercein, 46 U.S. 103, 120 (1847) (disavowing federal jurisdiction over custody matters because they are not reducible to pecuniary value, thus leaving such matters to state jurisdiction). Recently, the Supreme Court has seemed satisfied that states are controlling domestic matters because it has denied certiorari to several at-birth adoption cases. See In re Adoption of Baby E.A.W., 658 So. 2d 961 (Fla. 1995), cert. denied 116 S. Ct. 719 (1996); In re Kirchner, 649 N.E.2d 324 (Ill. 1995), cert. denied 515 U.S. 1152 (1995); In re Adoption of J.J.B., 894 P.2d 994 (N.M. 1995), cert. denied 116 S. Ct. 168 (1995). Therefore, it is appropriate for Florida to revise its statutory scheme to protect an unwed father's inchoate rights and to grant him greater protection than that afforded by the federal Constitution. See Beagle v. Beagle, 678 So. 2d 1271, 1275 (Fla. 1996) (holding that the fundamental liberty interest in parenting is specifically protected by Florida's express constitutional right to privacy and that such right is a "guarantee of greater protection than is afforded by the federal [C]onstitution").

4. 658 So. 2d 961 (Fla. 1995), aff'g 647 So. 2d 918 (Fla. 4th DCA 1994).

5. See In re Adoption of Baby E.A.W., 647 So. 2d 918, 941 (Fla. 4th DCA 1994) (Farmer, J., dissenting).

year-old son from a previous relationship.[6] However, Gary and Linda's relationship deteriorated about two months before Emily's birth.[7] Linda unilaterally planned to place the unborn child for adoption and moved from the couple's home.[8] Although Gary's attempts to contact Linda during the last months of the pregnancy were rejected,[9] Linda did allow Gary to accompany her to a sonogram appointment.[10] He was proud of the baby and showed the sonogram picture to his friends before taping it to his refrigerator.[11] Shortly after that doctor's appointment, however, Gary received notice of the impending adoption.[12] He immediately phoned Linda's intermediary to tell her that he would contest the adoption.[13] Thereafter, he sought legal assistance and filed an acknowledgment of paternity with HRS.[14]

Sixteen days before Baby Emily was born, the trial court entered an ex parte order waiving Gary's consent of the adoption, stating that Gary had abandoned Linda and the unborn baby.[15] Baby Emily was born on August 28, 1992, and three days later, she was placed with the prospective adoptive parents.[16] After four evidentiary hearings, the appointment of an attorney ad litem, and a year's passing, the trial court held that Gary "did not exhibit sufficient financial or emotional support to the natural mother during the course of the pregnancy to sustain the position that he did not 'abandon' either the natural mother or the unborn child."[17] An en banc panel affirmed the trial court's evidentiary findings by a vote of

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6. See id. at 920, 941.
7. See id. at 941.
8. See id. at 941-42.
9. See E.A.W., 658 So. 2d at 969 (stating that the mother felt that the father's phone calls were only made to aggravate her); E.A.W., 647 So. 2d at 943 (Farmer, J., concurring) (stating that after the mother moved out, she tried to avoid the father).
10. See E.A.W., 647 So. 2d at 942 (Farmer, J., concurring).
11. See id.
12. See id. at 943.
13. See id.
14. See id.
15. See id.
16. See E.A.W., 658 So. 2d 961, 963 (Fla. 1995), aff'g 647 So. 2d 918 (Fla. 4th DCA 1994).
17. E.A.W., 647 So. 2d at 943-44 (Farmer, J., concurring). On September 3, Gary filed a motion to set aside the ex parte order. See id. at 944. Two weeks later, the trial judge set aside the ex parte order and scheduled an evidentiary hearing on whether Gary's consent should be waived. See id. At the hearing, the trial court decided that Gary had not abandoned the child and refused to waive his consent. See id. The next day, Gary filed a habeas corpus petition seeking custody of three-month-old Baby Emily. See id. However, the intermediary also sought a rehearing on the abandonment issue. See id. The rehearing was not scheduled until February 1993. See id. Then, after listening to most of the evidence, the judge set a new date to resume the testimony; the hearing finally resumed on August 3, 1993. See id. at 945. At that hearing, the trial judge held that Gary's prebirth conduct was proof that he had abandoned Baby Emily. See id.

six-to-five and certified the question to the Florida Supreme Court.[18] The panel asked whether consideration of the unwed father's emotional support of the mother during pregnancy was permissible when determining if the father had abandoned the child.[19] After three years of trial and appellate litigation, the Florida Supreme Court held that Gary's emotional and financial support of Linda while she was pregnant was relevant in determining abandonment.[20] This holding is now the law for contested adoptions in Florida. This Comment will explain how this rule of law violates the Due Process Clause of the Federal Constitution. Further, this Comment will argue that the rule harms the interests of preserving family ties as a matter of policy and that the Legislature should modify the standard adopted by the Florida Supreme Court.

To avoid the result reached in E.A.W., an unwed biological father should be presumed fit to take custody of his newborn child when he withholds consent to a third-party adoption of the child.[21] His efforts to assume parental responsibility of the child should negate any interests the prospective adoptive parents may have, and his fitness should be rebutted only by clear and convincing evidence that obtaining custody of the child would be seriously detrimental to the child's best interests. Florida should protect the unwed father's opportunity interest by initiating this presumptive right as soon as the father has made any effort to assume responsibility for the unborn or newborn child. His emotional support of the mother should be irrelevant. He is not seeking to establish a relationship with the mother. Thus, he should not be held responsible for nurturing a relationship with the mother when he is not compatible with her.

Florida should institute the biological rights doctrine to eliminate ambiguous statutory terms that allow the judiciary to waive the biological father's consent based on his prenatal conduct towards the mother. In addition, the state should establish adequate notice procedures that hold the birth mother responsible for naming, searching for, and contacting the natural father, and make her a party to the consent-termination proceedings. The interests of adoptive parents should not be considered unless the biological father's rights have been terminated.

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18. See id.

19. See id.

20. See E.A.W., 658 So. 2d at 967.

21. This Comment does not pertain to unwed fathers who merely wish to block the adoption of their child by third parties but are not willing to assume full custody of the child. See Lehr v. Robertson, 463 U.S. 248, 253 (1983) (finding that a putative father could not block adoption when he only sought a paternity determination, a support order, and visitation); Quilloin v. Walcott, 434 U.S. 246, 249 (1978) (calling the father's efforts to establish paternity and visitation, but not to gain custody, an attempt to acquire "veto authority").

Part II of this Comment distinguishes at-birth adoption cases from other unwed father cases. Part III explains the biological rights doctrine and its underlying policies. Part IV reviews the historical and modern treatment of the rights of biological parents. Part V reviews several competing interests that have diminished the biological rights doctrine. Part VI reviews chapter 63, Florida Statutes, in the context of the three types of contested at-birth adoption cases to demonstrate that the current law is unconstitutional. Part VII makes recommendations for revising chapter 63, Florida Statutes. Part VIII compares past legislative efforts to these recommendations. This Comment concludes that legislating a preference for biological fathers over adoptive parents is one way to ensure due process protection for fathers and to provide appropriate constitutional guidelines in an area that the United States Supreme Court has not yet addressed.

II. DISTINGUISHING CONTESTED AT-BIRTH ADOPTION CASES

Contested at-birth adoption cases are best distinguished by contrasting the various interests involved in these cases with the interests involved in prior family law cases decided by the United States Supreme Court. This comparison makes it clear that an unwed father's liberty interest in a relationship with his newborn child deserves full constitutional protection because there is no prevailing interest involved in a contested at-birth adoption.

A. Parents' Rights

In Meyer v. Nebraska,[22] the Court began creating a framework for constitutionally protecting the interests of married biological[23] parents in established, intact family units.[24] The Court held that the federal Constitution gives parents the right to "marry, establish a home and bring up children,"[25] educate their children,[26] and make

22. 262 U.S. 390 (1923).

23. These opinions relate only to biological parents. The Court did not review constitutional protection afforded to "psychological" parental relationships until 1977. See Smith v. Organization of Foster Families, 431 U.S. 816, 845-46 (1977). In Smith, the Court recognized that any relationship formed between a foster parent and foster child was subordinate to the interests of biological parents and not deserving of constitutional protection because it was only a contractual relationship created by the state. See id. at 845-47.

24. See Carolyn Wilkes Kaas, Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases, 37 WM. & MARY L. REV. 1045, 1071-72 (1996). Kaas argues that the federal Constitution protects two types of family interests. The first is the interest of the family unit in protection from outside intervention; the second is the interest each individual parent has in establishing and protecting his parental relationship with his children. See id.

25. Meyer, 262 U.S. at 399 (recognizing the historical significance of family relationships).

procreation decisions.[27] Through the 1970s, the Court expanded those protections to include family decisions made by unmarried individuals.[28] The Court recognized that the Fourteenth Amendment protects all biological parents' fundamental liberty interests in the care, custody, and management of their children[29] and an unmarried woman's privacy interest in procreation decisions.[30] Since the 1980s, the Court has fine-tuned its parents' rights jurisprudence by examining a handful of cases that involve state interference with parental authority,[31] and a few cases pitting unwed fathers against their children's biological mothers.[32] When analyzed, these cases indicate two premises: first, the Constitution protects, foremost, the biological connection between a mother and her child; and second, the Constitution only protects the father's biological connection with his child when he has assumed responsibility for the child and when there is no prevailing state interest to encumber his rights.[33]

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26. See e.g., Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972) (holding unconstitutional Wisconsin's compulsory school attendance statute when applied to Amish children educated at home); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (holding unconstitutional a statute requiring parents to send their children to public schools). But see Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1066 (6th Cir. 1987) (holding that a requirement that children read certain materials in public schools was not unconstitutional although against the parents' religious training).

27. See e.g., Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding unconstitutional a Connecticut statute that forbade the use of contraceptives by married persons); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding unconstitutional a statute requiring sterilization of certain convicted felons).

28. See e.g., Roe v. Wade, 410 U.S. 113, 153 (1973) (holding that the right of personal privacy encompasses a woman's qualified right to decide whether or not to have an abortion); Eisenstadt v. Baird, 405 U.S. 438, 445-46 (1972) (relying on Griswold to hold unconstitutional a statutory ban on the distribution of contraceptives to unmarried persons); Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding unconstitutional an Illinois statute that conclusively presumed that an unmarried father was unfit to have custody of his child).

29. See Caban v. Mohammed, 441 U.S. 380, 393 (1979) (holding unconstitutional a New York adoption statute that did not require an unwed father's consent to adoption); Stanley, 405 U.S. at 649.

30. See Roe, 410 U.S. at 153; see also infra notes 34-39 and accompanying text.

31. See M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (involving procedural due process rights in the termination of a mother's parental rights); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (qualifying a mother's substantive due process rights in a procreation decision); Rivera v. Minnich, 483 U.S. 574 (1987) (involving an unwed father's substantive due process rights in a paternity determination); Santosky v. Kramer, 455 U.S. 745 (1982) (incorporating a married parents' substantive due process rights in termination proceedings); Little v. Streater, 452 U.S. 1 (1981) (determining an unwed father's procedural due process rights in a paternity determination).

32. See Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (holding constitutional a Georgia adoption statute that applied the "best interests of the child" standard).

33. See Kaas, supra note 24, at 1076. Such interests include the state's protection of the welfare of the child and its preference that children be raised in a traditional, two-parent family setting. See infra Part II.C.

A biological mother's rights are based on her unique traditional, biological, and social relationship with the child.[34] That relationship alone mandates significant constitutional protection.[35] A woman has the constitutional right to determine whether she will abort a fetus, carry a fetus to term, or place a newborn for adoption.[36] Once she decides to give birth,[37] her privacy rights mature into due process rights that receive full constitutional protection.[38] As a result, a married mother's right to determine what happens to the fetus, and the unmarried mother's right to determine what happens to the fetus and the newborn, are far superior to any protected legal interests fathers may have in the welfare of their children.[39]

For the unwed father, the "mere existence of a biological link" between himself and his child does not receive full constitutional pro-

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34. See Casey, 505 U.S. at 853; Lehr, 463 U.S. at 260 n.16 ("The mother carries and bears the child, and in this sense her parental relationship is clear.") (quoting Caban, 441 U.S. at 397 (Stewart, J., dissenting)); Smith v. Organization of Foster Families, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring); Mary L. Shanley, Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy, 95 COLUM. L. REV. 60, 81-85 (1995).

35. See Casey, 505 U.S. at 852. The Court explained a woman's liberty interest in her child:

> The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture.

Id. See also Caban, 441 U.S. at 397 (Stewart, J., dissenting) ("The mother carries and bears the child[;] in this sense her parental relationship is clear."); In re Adoption of Doe, 543 So. 2d 741, 749 (Fla. 1989) (Barkett, J., concurring) ("I believe that we have correctly construed and applied 'abandonment' . . . [h]owever, the precedent set by this case cannot carry over into those situations involving the prenatal responsibilities of mothers.").

36. See Casey, 505 U.S. at 852.

37. See id. at 879 (reaffirming the holding in Roe v. Wade, 410 U.S. 113, 164-65 (1973), that subsequent to viability, a state may regulate and even proscribe abortion).

38. See M.L.B. v. S.L.J., 117 S. Ct. 555, 564 (1996) (discussing a mother's interest in associational rights with her child); Casey, 505 U.S. at 895 (holding invalid a statutory provision that required consent to an abortion by the husband of the woman seeking the procedure).

39. The Casey Court made it clear that as between the married father and married mother, the mother's decisions regarding the treatment of the fetus are untempered. See Casey, 505 U.S. at 898. The Court stated:

> If a husband's interest in the potential life of the child outweighs a wife's liberty, the State could require a married woman to notify her husband before she uses a post-fertilization contraceptive . . . before engaging in conduct causing risks to the fetus . . . before drinking alcohol or smoking. Perhaps married women should notify their husbands before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband's interest in his wife's reproductive organs.

Id. During the short period of time past viability and before birth, the state's interest in the fetus overcomes the mother's authority to choose abortion, see Casey, 505 U.S. at 870, but she can plan to place the child for adoption.

tection. Instead, he must promptly and proactively assume responsibility for his child to gain any constitutional protection.[40] If the biological father is married to the natural mother or has been legally established as the father, he is deemed to have assumed adequate responsibility for the child and he receives full protection under the Due Process and Equal Protection Clauses.[41] However, an unwed and unestablished biological father has a lesser right—only an opportunity interest—regarding the establishment of a relationship with his child.[42] His parental opportunity springs from his unique biological connection to the child and offers him a chance to establish a parental relationship, but his rights are not absolute.[43] States are thus required by the Due Process and Equal Protection Clauses to protect the unwed father's liberty interest in assuming his parental role, but in doing so, states may specify exactly what conduct by the father is necessary to prove his willingness to assume his parental role.[44] Cases reviewed by the Court have set the general parameters

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40. See Lehr v. Robertson, 463 U.S. 248, 261 (1983). But see Michael H. v. Gerald D., 491 U.S. 110, 123 (1989) (indicating that an unwed father's biological connection and his assumption of responsibility will not overcome the state's interest in legitimating a child and providing a child with an intact family unit).

41. See Michael H., 491 U.S. at 129 (holding that a California statute utilizing an irrebuttable presumption of legitimacy barring paternity proceedings by a putative father does not violate the putative father's procedural or substantive due process rights or the Equal Protection Clause when the child is born into a marital union); Lehr, 463 U.S. at 263 ("The most effective protection of the putative father's opportunity to develop a relationship with his child is provided by the laws that authorize formal marriage and govern its consequences."); id. at 265 (holding that a biological father's due process and equal protection rights were not violated when a New York statute did not allow him to veto adoption by the biological mother's husband when he had not married the mother or legally sought to protect his parental rights by filing with the putative father registry); see also In re Adoption of Baby E.A.W., 658 So. 2d 961, 971 (Fla. 1995) (Kogan, J., concurring in part, dissenting in part) (stating that Florida law "presumes that a man married to the biological mother is in fact the legal father of the child, based in part on the child's interest in legitimacy"); Department of HRS v. Privette, 617 So. 2d 305, 308 (Fla. 1993) (explaining that when a child is born during a marriage, the presumption of legitimacy is so "weighty that [it] can defeat even the claim of a man proven beyond all doubt to be the biological father"); Brown v. Bray, 300 So. 2d 668, 670 (Fla. 1974) (comparing custody rights of presumed and putative fathers during divorce and paternity actions and construing as constitutional Florida's paternity statute because, under the statute, a court could award custody to an unwed father who proved himself fit to take custody).

42. See Lehr, 463 U.S. at 262.

43. See id.

44. See id. at 256 (explaining that a father's opportunity interest in a relationship with his child is constitutionally protected and that state law determines the final outcome of legal problems arising in familial relationships); Caban v. Mohammed, 441 U.S. 380, 394 (1979) (holding that not requiring an unwed father's consent to adoption when he had formed a relationship with his children violated the Equal Protection Clause); Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that the presumption of an unwed father's unfitness violated the Due Process and Equal Protection Clauses); see also Adoption of Michael H., 898 P.2d 891, 894-95, 901 (Cal. 1995) (explaining the relationship between the Fourteenth Amendment and a California law and holding that because the father had not taken adequate steps to transform his inchoate interest into a constitutional right that he was not required to consent to the at-birth adoption of his child).

of an unwed father's constitutional rights; however, none of those cases addressed what protection should be given to a father who, through no fault of his own, has been unable or has had no "opportunity" to assume responsibility for his newborn child.

B. Separating Unwed Fathers From Other Parents

In Stanley v. Illinois,[45] Illinois presumed all unwed fathers were unfit to take or retain custody of their children.[46] The Court held that such a presumption violated the Due Process Clause because it afforded him no opportunity to be heard.[47] It also violated the Equal Protection Clause because it treated unwed fathers differently than married and divorced parents and unmarried mothers.[48] In Caban v. Mohammed,[49] New York's adoption laws required the unwed mother's consent to the adoption of a child but not the unwed father's consent.[50] The Court held that such a distinction violated the Equal Protection Clause because it treated unwed fathers who had an established relationship with their children differently than similarly situated unwed mothers.[51]

The Court has also addressed unwed fathers' attempts to establish paternity and gain visitation with their children. In Quilloin v. Walcott,[52] the father claimed that the application of the state's "best interests standard" in an adoption proceeding commenced by the biological mother's husband violated his substantive due process rights.[53] The unwed father was named on the child's birth certificate, had often visited with the child, and had provided gifts and other support for the child.[54] After receiving notice of the adoption, he filed for legitimation and visitation rights.[55] The trial court found that Quilloin lacked standing to contest the adoption because he had not officially legitimated the child in the eleven years prior to the adoption.[56] The court denied his legitimation and visitation petitions and found that it was in the child's best interests to grant the adoption.[57]

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45. 405 U.S. 645 (1972).
46. See id. at 650.
47. See id. at 657.
48. See id. at 658.
49. 441 U.S. 380 (1979).
50. See id. at 385.
51. See id. at 387.
52. 434 U.S. 246 (1978).
53. See id. at 254. Quilloin did not challenge his procedural due process rights because he received notice of the proceedings and was heard on his petitions. See id. at 253.
54. See id. at 248-49, 250. Under the Georgia statute at issue, an unwed father's consent to adoption was not required unless he had married the mother, acknowledged the child as his own, or obtained a court order declaring the child legitimate. See id.
55. See id. at 253-54.
56. See id. at 251-52.
57. See id.

The Supreme Court held that in Quilloin's case the application of the best interests standard did not violate his equal protection rights, and hinged its decision on the fact that Quilloin had never sought an official custodial relationship with his child.[58]

In Lehr v. Robertson,[59] the father claimed that New York's adoption scheme violated his equal protection rights by establishing a gender-based distinction between unwed mothers and fathers.[60] He also asserted that his due process rights were violated because the Court did not provide him with prior notice and an opportunity to be heard.[61] A month after the biological mother's husband commenced adoption proceedings, Lehr filed for legitimation and visitation.[62] He did not, however, file his name with New York's putative fathers' registry.[63] Again hinging its decision on their assertion that Lehr had only minimally attempted to assume responsibility for his child,[64] the Supreme Court agreed with the New York courts that in Lehr's case neither his due process or equal protection rights were violated.[65]

In Michael H. v. Gerald D.,[66] the Court addressed whether California's conclusive presumption of legitimacy violated an unwed father's procedural or substantive due process rights in maintaining an established relationship with his child.[67] The Court reasoned that Michael's relationship with his daughter had not been "treated as a protected family unit under the historic practices of our society" and that there was no other basis for special protection of his interests

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58. See id. at 255-56.

59. 463 U.S. 248 (1983).

60. See id. at 254.

61. See id. He further argued that New York's favoritism toward mothers in the classification of parents required to consent to an adoption discriminated against unwed fathers. See id. at 266. Lehr argued that because he had filed for a paternity determination and visitation that he should have been given notice of the impending final adoption hearing. See id. at 252.

62. See id. at 252.

63. See id. at 253-54.

64. Lehr did not have a "significant custodial, personal, or financial relationship" with his child and had not established legal ties to her until she was two years old. Id. at 262.

65. See id. at 268.

66. 491 U.S. 110 (1989).

67. See id. at 119-20. The California statutory provision provided that only the married father and the mother could rebut their child's presumption of legitimacy. See id. at 115. Michael H.'s daughter was conceived while the biological mother was married to another man, Gerald D., but paternity tests proved with a 98.07% probability that Michael was the child's father. See id. at 114. When the daughter, Victoria, was 18 months old, Michael filed a paternity action and sought to establish his visitation rights. See id. Michael was able to visit with Victoria once before filing the paternity action. See id. The mother often traveled and lived with three different men, including Michael, her husband, and another man, in various "quasi-family units" during the child's life. See id. at 114-15. After the paternity action was filed, the mother and Victoria lived with Michael until the mother reconciled with her husband. See id. at 115.

because his paternity arose during the mother's marriage to another man.[68] Therefore, the Court held that Michael's interest in maintaining a relationship with Victoria had no constitutional dimensions, was limited by tradition, and relegated to the states as a matter of state law.[69]

These decisions leave the unwed father in a precarious position. He has a fundamental right to establish a relationship with his child.[70] However, that right is controlled not only by his own conduct,[71] but also by his legal ties to the biological mother[72] and any prevailing interests asserted by the state.[73] While the mother's interests in aborting or birthing a child is paramount to the interests of the biological father, over the past fifty years there have been few other prevailing interests that may displace the constitutional rights of unwed fathers who contest the at-birth adoption of their newborn. Nevertheless, states have tried in various ways to use these interests to overcome a father's fundamental right to parent his child.

C. The State's Interests

The Meyer line of cases established that a state's interest in standardizing the family[74] is not significantly substantial to burden married parents' fundamental liberty and privacy interests in parental decision-making.[75] However, the Court has recognized that the state, as parens patriae, may restrict parental authority in an effort to "guard the general interest in a youth's well being."[76]

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68. Id. at 124, 127.

69. See id. at 130.

70. See supra notes 38-44 and accompanying text.

71. See supra notes 45-65 and accompanying text.

72. See Michael H., 491 U.S. at 128-29 (citing Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting) (asserting that a legal tie to the biological mother may "appropriately place a limit on whatever substantive constitutional claims might otherwise exist").

73. See Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

74. See Wisconsin v. Yoder, 406 U.S. 205, 231-32 (1972) (rejecting standardization through compulsory education until 16 years old regardless of a family's religious convictions); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (rejecting standardization through not allowing married couples to decide whether to forego having children); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (rejecting standardization through requiring the flag salute in public school when the parents objected on grounds of being Jehovah's Witnesses); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (rejecting standardization through requiring public education rather than private); Meyer, 262 U.S. at 402 (rejecting standardization through forbidding the teaching of any language other than English).

75. See Meyer, 262 U.S. at 401 ("[T]he State may do much . . . to improve the quality of its citizens, . . . but the individual has certain fundamental rights which must be respected.").

76. 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 in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

In the 1970s, states recognized the latitude of their interests in protecting the welfare of children and attempted to restrict family decision-making by unwed fathers in several ways. For example, in Stanley v. Illinois,[77] the state asserted its interest in protecting "the moral, emotional, mental, and physical welfare of the minor and the best interests of the community."[78] Illinois claimed that presuming unwed fathers unfit to take custody of their children would further that interest.[79] However, the Stanley Court reasoned that the state's interest in protecting the welfare of children was also served by allowing a fit, unwed father to take custody of his children.[80] The Court held that the state's irrebuttable presumption of an unwed father's unfitness violated Stanley's due process rights.[81]

Likewise, in Caban, the state justified requiring a mother's consent to an adoption while not requiring the unwed father's consent by claiming that natural mothers possess a closer relationship with their children.[82] The State asserted that the requirement promoted the adoption of illegitimate children.[83] The Court held that the statute violated the Equal Protection Clause because neither reason was sufficient to justify the "inflexible gender-based distinction" in the statute.[84]

States have asserted that they have a valid interest in assuring that children are raised in traditional two-parent family settings. Quilloin, Lehr, and Michael H. all involved a biological mother in a family unit with another man.[85] This rationale, though, would not seem to extend to prospective adoptive parents. In Smith v. Organization of Foster Families,[86] the Court stated that if there was a constitutional protection for the relationship between foster parents and their foster child,[87] it waned in the face of a federal constitutional

77. 405 U.S. 645 (1972). This case concerned an unwed father's due process right to a dependency hearing regarding parental fitness before terminating his rights to custody of his dependent children whose natural mother had died. See id.

78. Id. at 652.

79. See id. at 652, 656-57. The State argued that men are not naturally inclined to rear children and that putative fathers are generally disinterested in their children. See id. at 654, nn.5, 6.

80. See id. at 652-53.

81. See id. The Court also reasoned that the administrative and pecuniary burden of requiring individualized hearings would be slight because "[i]f unwed fathers, in the main, do not care about the disposition of their children, they will not appear to demand hearings." Id. at 657 n.9.

82. See Caban v. Mohammed, 441 U.S. 380, 388 (1979).

83. See id. at 391-92.

84. Id. at 392.

85. See Quilloin v. Walcott, 434 U.S. 246, 256 (1978); Lehr v. Robertson, 463 U.S. 248, 267-68 (1983); Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

86. 431 U.S. 816 (1977).

87. See id. at 845. The foster parent relationship is a matter of positive state law and any expectations and entitlements inherent in that relationship are derived only from state statutes. See id. at 845-46.

liberty interest founded in a "blood relationship" and "basic human right."[88] Like foster parent contracts, adoptions are creatures of state law. Any interest asserted by adoptive parents should be no greater than those gained by foster parents. Both interests should be considered secondary to an interest claimed by a biological parent.

The United States Supreme Court's unwed father cases leave the following general rule: an unwed father has a constitutionally protected right to establish a relationship with his child if the biological mother decides to give birth to the child and is not married to another man, and if he does not delay assuming his parental role. This rule supports the premise that an unwed father who promptly asserts his interest in his newborn child when the biological mother is attempting to place his child for adoption at-birth, should be granted similar constitutional protection to establish a relationship with that child. The biological rights doctrine would best assure unwed fathers such constitutional protection.

III. THE BIOLOGICAL RIGHTS DOCTRINE AND ITS UNDERLYING POLICIES

The biological rights doctrine is one of several standards used across the nation to decide custody cases.[89] It provides the most protection of the rights of biological parents because it presumes that a child's welfare is best served under the care and control of a fit biological parent.[90] Because of that underlying presumption, courts are required to award custody to the biological parent rather than to a

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88. Id. at 846.

89. See In re Adoption of Baby E.A.W., 658 So. 2d 961, 972 (Fla. 1995) (Kogan, J., concurring in part, dissenting in part) (reviewing the three types of "approaches"); Kaas, supra note 24, at 1064 (explaining "parental rights," best interests, and the "hybrid" standards). The "biological rights" doctrine is also called the "parental rights" doctrine, but is different than the "parental preference" doctrine. See id.; Alexandra Dylan Lowe, Parents and Strangers: The Uniform Adoption Act Revisits the Parental Rights Doctrine, 30 FAM. L.Q. 379, 379-80 (1987) (stating that an "overwhelming majority" of jurisdictions utilize the biological rights doctrine); infra Part V.B. (discussing the "best interests" standard).

90. See Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); Turner v. Pannick, 540 P.2d 1051, 1055 (Alaska 1975) (stating that parental custody is preferable and will only be refused when it is clearly detrimental to the child); In re Adoption of Doe, 543 So. 2d. 741, 751 (Fla. 1989) (McDonald, J., dissenting) ("[H]istory has demonstrated that, unless unfit, the best interests of the child lies with the natural parents."); Shorty v. Scott, 535 P.2d 1341, 1344 (N.M. 1975) ("Parents have a natural and legal right to custody of their children. This right is prima facie and not an absolute right.") (quoting Roberts v. Staples, 442 P.2d 788 (N.M. 1968)); United States v. Green, 26 F. Cas. 30, 31 (No. 15,256) (D. R.I. 1824) (stating that the right of the father to have custody of his infant child is valid, "[b]ut this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education").

third-party who may assert other interests in the child.[91] The court cannot consider whether a different custodial arrangement would benefit the child until the biological parent is proven unfit[92] and the court terminates his or her parental rights. Because of its certainty, the biological rights doctrine serves several constitutional and policy interests when applied in contested at-birth adoption cases.

A. The Federal Constitution Requires the Biological Rights Doctrine in Contested At-Birth Adoptions

When an unwed father contests the at-birth adoption of his child, the federal Constitution requires application of the biological rights doctrine. This conclusion follows from analysis of United States Supreme Court cases that have held the Fourteenth Amendment protects parents' significant interests in a relationship with their children,[93] third parties have no liberty interest in a relationship with a child not biologically connected to them,[94] and that the "best interests of the child" is not a proper standard to determine whether to terminate a biological parent's rights.[95] Cases involving contested at-

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91. See Kaas, supra note 24, at 1065; Lowe, supra note 89, at 380.

92. See DeBoer v. DeBoer, 509 U.S. 1301, 1302 (1993) ("Neither [state] law . . . nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education."); In re Doe, 638 N.E.2d 181, 182 (Ill. 1994) (stating that Illinois adoption laws "are designed to protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child"); William Weston, Putative Fathers' Rights to Custody—A Rocky Road at Best, 10 WHITTIER L. REV. 683, 685 (1989); see also Harden v. Thomas, 329 So. 2d 389, 390 (Fla. 1st DCA 1976) (recognizing that courts have consistently held that a natural parent cannot be deprived of custody unless proven unfit); In re Adoption of J.J.B., 894 P.2d 994, 1002 (N.M. 1995) (explaining New Mexico's presumptive abandonment statute that requires a finding of unfitness before allowing a nonparent to take custody of a child) (citing Shorty v. Scott, 535 P.2d 1341, 1344 (N.M. 1975)).

93. See M.L.B. v. S.L.J., 117 S. Ct. 555, 564 (1996) (determining that a biological mother has a fundamental right to take custody of her child and that she cannot be denied an appeal of termination of her parental rights when she cannot pay for the filing and copying costs of the appeal); Santosky v. Kramer, 455 U.S. 745, 774 (1982) ("[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment."); 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 in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (stating that the rights to conceive and raise children are "basic civil rights of man"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (deeming the rights to conceive and to raise one's children essential).

94. See Smith v. Organization of Foster Families, 431 U.S. 816, 844-46 (1977) (explaining that a foster parent's relationship with a foster child is a state-created, contractual relationship, and if such a relationship created any liberty interest, such interest would still have to give way to the biological parents' rights that are derived "from blood relationship, state-law sanction, and basic human right[s]").

95. See Reno v. Flores, 507 U.S. 292, 303-04 (1993) (reviewing a facial challenge to an Immigration and Naturalization Service regulation governing the release of detained

birth adoptions are analogous to the case of Stanley v. Illinois.[96] In Stanley, the only countervailing state interest was the state's desire to protect the welfare of children.[97] As the Stanley Court opined, the state's interest would be served, rather than hampered, by awarding a fit, unwed biological father custody of his children.[98] Thus, the federal Constitution requires adherence to the biological rights doctrine in contested at-birth adoption cases because the unwed father has a fundamental right in his parental relationship, and the state has no substantial interest that would justify burdening that right.

B. The Biological Rights Doctrine Furthers State Social, Economic, and Administrative Interests

In addition to being required by the Federal Constitution, the biological rights doctrine serves certain state social, economic, and administrative interests. First, the biological rights doctrine prevents the state from social engineering, which is inherent in making a "best interests" judgment.[99] Generally, prospective adoptive par-

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alien juveniles); Lassiter v. Department of Soc. Servs., 452 U.S. 18, 45 n.13 (1981) ("[The] Court more than once has adverted to the fact that the 'best interests of the child' standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Smith, 431 U.S. at 862-63 (Stewart, J., concurring).

The Reno court addressed whether the juvenile detainees had a right to an individualized hearing on whether private custodial arrangements would be in the child's best interests. See Reno, 507 U.S. at 303. The Court flatly stated that the best interests of the child is a proper standard for making a custody decision between two parents but that it is not the "sole criterion—much less the sole constitutional criterion—for other, less narrowly channeled judgments involving children." Id. at 304. The Court opined: "Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately." Id. The Quilloin Court stated:

> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."

Quillion, 434 U.S. at 255 (quoting Smith, 431 U.S. at 862-63 (Stewart, J., concurring)).

96. 405 U.S. 645 (1972).

97. See id. at 652.

98. See id. at 652-53.

99. See In re Doe, 638 N.E.2d 181, 182-83 (Ill. 1994) ("If best interests of the child were a sufficient qualification to determine child custody, anyone with superior income, intelligence, education, etc., might challenge and deprive the parents of their right to their own children."); In re B.G.C., 496 N.W.2d 239, 241 (Iowa 1992) ("[W]ithout established procedures to guide courts in such matters, they would 'be engaged in uncontrolled social engineering.' This is not permitted under our law; '[c]ourts are not free to take children from parents simply by deciding another home offers more advantages.'") (citing In re Burney, 259 N.W.2d 322, 324 (Iowa 1977)); Nale v. Robertson, 871 S.W.2d 674, 678 (Tenn. 1994) ("Biological bonds should not be so lightly brushed aside, and the courts should not be given a license to engage in social engineering by invoking the 'best interests of the child.'").

ents are in a higher social class than the birth parents,[100] and courts may tend to make parental rights termination decisions based on what the adoptive parents can offer the child compared to what the biological parents can provide.[101] The Supreme Court has consistently recognized that a state's interest in attempting to standardize its families to conform to some "state-designed ideal"[102] is really no interest at all.[103]

Further, third-party adoptions may have ill effects on the children subjected to them. At some point in their lives, adoptees face the issue that their biological parents gave them up for adoption. The child may suffer psychological problems as a result of the adoption and separation from her biological parents.[104] These difficult issues are not always resolved[105] and may be more difficult when the adoptee knows that a court forced a biological parent to surrender his pa-

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100. See Susan A. Munson, Independent Adoption: In Whose Best Interest?, 26 SETON HALL L. REV. 803, 812 (1996) (discussing the rise in independent adoptions and partially attributing the rise to fact that, under the New Jersey adoption statute, adoptive parents provide financial assistance to the birth parent, such as medical and hospital costs, food, clothing, and shelter expenses, and payment of vocational, religious, or psychological counseling). See also Smith, 431 U.S. at 833 ("From the standpoint of natural parents . . . foster care has been condemned as a class-based intrusion into the family life of the poor.").

Both the federal and state laws governing an adoption require an evaluation of the prospective adoptive parents' financial status. See UNIF. ADOPTION ACT § 2-203 (amended 1994), 9 U.L.A. 21-22 (Supp. 1997) (requiring a preplacement evaluation of adoptive parents' educational and employment history, property and income, credit report or financial statement, and the quality of the environment in the home); FLA. STAT. § 63.092 (2)(c)-(d) (1997) (requiring a preliminary home study that includes "[a]n assessment of the physical environment of the home" and "a determination of the financial security of the intended adoptive parents").

101. See In re Adoption of Baby E.A.W., 658 So. 2d 961, 979 (Fla. 1995) (Kogan, J., concurring in part, dissenting in part) (criticizing the majority's acceptance of the "lack of emotional support" standard because it will lead to discrimination against the less fortunate); In re B.G.C., 496 N.W.2d at 241 ("[C]ourts are not free to take children from parents simply by deciding another home offers more advantages.").

102. Hodgson v. Minnesota, 497 U.S. 417, 452 (1990) (holding unconstitutional a Minnesota abortion statute that required parental consent from both parents before a minor could obtain an abortion). The Hodgson court added that "a state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designed ideal, is not a legitimate state interest at all." Id.

103. See discussion supra Part II.C.

104. See, e.g., Adoption: Assistance Information Support (visited Nov. 14, 1997) <http://www.adopting.org/commonis.html>. Adoptees may not feel like they belong to the adoptive family and may have problems in identity development, may be ambivalent toward their adoptive parents, may suffer from low self-esteem and learning disabilities, may have feelings of rejection, shame, guilt, and unresolved grief, may have problems in acclimatizing to the culture of their adoptive family, and may tend to fantasize about their past and reunion prospects. See id.

105. Many of the psychological problems are unresolved through the life of the adoptee, while some progress may be made resolving other issues. See id. For example, most states make adoption records accessible to the adoptee so that the adoptee can at least have relevant health histories.

rental rights.[106] Adherence to the biological rights doctrine would allow adoptions only in those cases where both biological parents knowingly and voluntarily relinquished their rights, extracting the state from the social engineering process.

Second, the biological rights doctrine confirms that the rights of biological parents are firmly rooted in natural law, religion,[107] and social dictates.[108] Natural law places the child under the authority of his biological parents for protection, education, and socialization.[109] As one court has noted, "it would be repugnant to the natural law to deprive a parent of the right to rear his children, except for the most grave reasons."[110] The biological connection deserves considerable autonomy because it is "one of the oldest institutions known to mankind and forms the basic unit of our society."[111] The Legislature should mandate that the child's welfare is best guarded by leaving the child where natural law and society found her—with her biological parents.

Third, presuming that a biological parent is fit brings adoption contests to finality by simplifying termination proceedings. The state has an interest in promoting the finality of adoptions and relieving the fiscal burden of litigation.[112] If the biological father knows about the pregnancy, promptly contests the adoption, and is presumed fit to take custody, the adoption contest could end at the initial waiver of consent hearing. The presumption would allow the trial judge to focus on whether the father took any steps to contest the adoption after he became aware of the proceedings. Such actions as filing a paternity acknowledgment,[113] requesting a paternity test,[114] phoning in-

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106. See E.A.W., 658 So. 2d at 979 (Kogan, J., concurring in part, dissenting in part) (stating that the unwed father's rights were never appropriately terminated); In re Adoption of Baby E.A.W., 647 So. 2d 918, 957 (Fla. 4th DCA 1994) (Stevenson, J., dissenting) ("It is but a matter of time before this child will learn of his adoption and wonder why. All that can be said to him is that, even though your [father] wanted you, the adoptive parents and the courts would not let [him] have you . . . .").

107. See infra notes 135-136.

108. See Turner v. Pannick, 540 P.2d 1051, 1055 (Alaska 1975) (justifying the court's acceptance of the biological rights doctrine because of natural law).

109. See id. at 1055 (Dimond, J., concurring) (stating that the guiding principle behind Alaska following the biological rights doctrine is "the fundamental natural right of parents to nurture and direct the destiny of their children").

110. Id.; see Shorty v. Scott, 535 P.2d 1341, 1344 (N.M. 1975) ("Parents have a natural and legal right to custody of their children.").

111. Turner, 540 P.2d at 1055-56.

112. See Lehr v. Robertson, 463 U.S. 248, 264-65 (1983) (discussing and recognizing New York's interest in facilitating adoption of children and expeditiously completing proceedings); Joan Hiefetz Hollinger, The Uniform Adoption Act: Reporter's Ruminations, 30 FAM. L.Q. 345, 365 n.62 (1996) (discussing the reasons why the Uniform Adoption Act (UAA) limits the time period for appeals or other challenges and stating that the state has an interest in promoting the finality of adoptions).

113. See Scott A. Resnik, Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions, 20 SETON HALL LEGIS. J. 363, 424 (1996) (advocating

termediaries to express refusal to consent,[115] and informing the birth mother or adoptive parents of his refusal to consent[116] would trigger the father's custodial rights. If there is no evidence to rebut the father's parental fitness, the proceeding would end, and the father would take custody of the child.[117]

Fourth, the biological rights doctrine encourages individual responsibility by allowing the birth father to assume the burden of caring for, nurturing, and supporting his child. Recently, the "responsible fatherhood" movement[118] has formed to rebut national criticism[119] of fathers as "dead-beats"[120] or "absent fathers."[121] Increasingly, unwed fathers are demanding to be recognized as valued care givers rather than just financial supporters of their children. The biological rights doctrine, adhered to over a series of cases and

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for a putative father registry to protect unwed father's interest); Swayne v. L.D.S. Soc. Servs., 795 P.2d 637, 639-40 (Utah 1990) (holding constitutional Utah's paternity registration statute and affirming the termination of the unwed father's rights because he did not file with the registry within four days of the child's birth).

114. See T.J.B. v. E.C., 652 A.2d 936, 940 (Pa. Super. Ct. 1995) (concerning a father's doubt that a child was his until testing confirmed his paternity).

115. See In re Adoption of Baby E.A.W., 647 So. 2d 918, 943 (Fla. 4th DCA 1994) (Farmer, J., concurring) (noting that the father called an intermediary and told the biological mother that he would not consent to the adoption).

116. See id.; T.J.B., 652 A.2d at 940 (noting that after the paternity determination, the father wrote a letter to the prospective adoptive parents, informing them that he would not consent to the adoption).

117. See In re Kirchner, 649 N.E.2d 324, 339 (Ill. 1995) (issuing a writ of habeas corpus and ordering the child delivered to his unwed father); In re B.G.C., 496 N.W.2d 239, 241 (Iowa 1992) (ordering custody of the baby to be transferred to the father).

118. See Stephanie Goldberg, Make Room for Daddy, A.B.A. J., Feb. 1997, at 48 (discussing changes in the fathers' movement such as joining forces with second wives, grandparents, and noncustodial mothers that have made it more mainstream); National Fatherhood Initiative (visited Nov. 13, 1997) <http://www.register.com/father>; Center for Successful Fathering, Promoting the Benefits of Involved Fathers (visited Nov. 13, 1997) <http://www.fathering.org>.

119. Some of this criticism has come from feminists. See Nancy D. Polikoff, The Deliberate Construction of Families Without Fathers: Is It An Option for Lesbian and Heterosexual Mothers?, 36 SANTA CLARA L. REV. 375, 376 (1996). For example, Polikoff states:

> Contrary to the ideology that simultaneously glorifies fathers and vilifies mothers, I want women to have the option to form families in which their children have no fathers. This is a hard position to develop without acknowledging a larger social context of male indifference to the consequences of sexual intercourse and male irresponsibility for the economic well-being of the children they sire.

Id.

120. Department of HHS, The Clinton Record on Child Support (visited Nov. 13, 1997) <http://www.acf.dhhs.gov/programs/CSE/new/fswrcse.html> (discussing President Clinton's program to collect child support).

121. DAVID BLACKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995) (concluding that if current trends continue, unwed parenthood will become the nation's principal cause of fatherlessness); Marty Dart, Statistics About Deadbeat Dads and the Effects of Absent Fathers (visited Nov. 13, 1997) <http:/www.vix.com/pub
/men/nofather/dart.html>.

strengthened by a United States Supreme Court decision, would send a message to unwed fathers that if they "step up"[122] and assume any responsibility for their children they will be recognized as fit custodians.

Finally, the biological rights doctrine places the father on a more level playing field with the mother.[123] Knowing that the father may obtain custody, the mother may be honest about the pregnancy, put the matter in the open rather than obscuring her plans, and try to work through the issue with the father without resorting to adoption.

IV. THE CURRENT STATE OF THE BIOLOGICAL RIGHTS DOCTRINE

A. Historical Treatment of Biological Rights

At English common law, statutory adoption was nonexistent.[124] Custody litigation was rare and children were considered nothing more than economic resources and chattel.[125] Children were to be "born, raised, schooled in religion, and, as soon as they were productive, put to useful labor."[126] Married fathers had broad authority over their children, their rights to them were preeminent,[127] and they were expected to financially support, maintain, train, and control them.[128] Society and the law expected married mothers to care for and comfort the children but afforded them no legal rights to the children.[129] On the other hand, illegitimate children were considered

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122. John E. Fennelly, Step Up or Step Out: Unwed Fathers' Parental Rights Post-Doe and E.A.W., 8 ST. THOMAS L. REV. 259, 296, 310-11 (1996) (characterizing decisions made in recent national adoption contests as a newly forming policy of requiring unwed fathers to "step up or step out").

123. Cf. Daniel Amneus, Ph.D., MacKinnon, Dworkin, The New Victorians (visited Nov. 13, 1997) <http://www.vix.com/pub/men/nofather/articles/amneus.html> ("The biological weakness of the father's role is not a reason for throwing fathers out of the family but a reason for strengthening their role within it.").

124. See In re Adoption of Palmer, 129 Fla. 630, 633, 176 So. 537, 538 (1937); Harden v. Thomas, 329 So. 2d 389, 390 (Fla. 1st DCA 1976).

125. See The Etna, 8 F. Cas. 803, 804 (No. 4542) (D.C. Me. 1838) (discussing the history of paternal power over children); Weston, supra note 92, at 685 (stating that the courts resolved custody disputes only when there was provable and serious harm to the safety of the child).

126. Judith T. Younger, Responsible Parents and Good Children, 14 LAW & INEQ. 489, 496 (1996).

127. See, e.g., Bonsack v. Campbell, 134 Fla. 809, 811-12, 184 So. 332, 333 (1938); In re Weaver v. Hamans, 118 Fla. 230, 231, 159 So. 31, 32 (1935); Miller v. Miller, 38 Fla. 227, 231, 20 So. 989, 990 (1896); Ex parte Devine, 398 So. 2d 686, 688 (Ala. 1981).

128. See Respublica v. Keppele, 2 U.S. 197, 198 (Pa. 1793) (holding that a child could be apprenticed to a master for education but could not be sold into slavery by his father); United States v. Bainbridge, 24 F. Cas. 946, 946 (No. 14,497) (D. Mass. 1816); Etna, 8 F. Cas. at 804; United States v. Green, 26 F. Cas. 30, 31 (No. 15,256) (D. R.I. 1824); Younger, supra note 126, at 496; Carol Sanger, Separating from Children, 96 COLUM. L. REV. 375, 398 (1996).

129. See Younger, supra note 126, at 496; Weston, supra note 92, at 686.

the children of no one, made charges of the community, and often apprenticed to masters.[130] Mothers and fathers of illegitimate children were prosecuted for fornication.[131]

Only some of these ideas were accepted in the new America.[132] American law recognized the needs of children and shifted away from the concept of children as property.[133] While the biological rights doctrine was recognized under the common law,[134] natural law,[135] and religion,[136] American courts relied upon the states' sovereign power and their own equity power to make custody decisions contrary to absolute parental authority.[137] The "child's best interests" became the American rule in custody disputes between biological parents of legitimate and illegitimate children.[138] By the early nine-

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130. See Bainbridge, 24 F. Cas. at 946; Younger, supra note 126, at 496; Sanger, supra note 128, at 397-99. Legitimate children were also apprenticed during colonial times. See Sanger, supra note 128, at 397. Most parents apprenticed children for economic reasons, but wealthy parents placed their children to teach them the value of work. See id. Apprenticing, in fact, was a form of common law adoption. See id. Mothers transferred custody of their illegitimate children to others whom they felt could better educate and train them. See id.

131. See Younger, supra note 126, at 496.

132. See Etna, 8 F. Cas. at 804 (comparing savage and Roman law to the American rules of a father's authority over his children).

133. See id. at 806 (noting that a child does not become the property of his parents based on the child's birth, but "becomes a member of the human family, . . . invested with all the rights of humanity").

134. See Bainbridge, 24 F. Cas. at 949:

> By the common law, the father has a right to the custody of his children during their infancy. In whatever principle this right is founded, whether it result from the very nature of parental duties, or from that authority, which devolves upon him, by reason of the guardianship by nature, or nurture, technically speaking, its existence cannot now be brought into controversy.

Id.

135. See Etna, 8 F. Cas. at 806; Mauro v. Ritchie, 16 F. Cas. 1171, 1172 (No. 9312) (D. D.C. 1827).

> Nature has placed [the child] under the tutelage of the parent, because this tutelage is necessary for his protection and well-being, and has implanted in the bosom of the parent the instinct of parental love as a pledge and security for the faithful and pious execution of the trust . . . .

Id.

136. See Etna, 8 F. Cas. at 806 ("We find traces of this paternal power in the pictures which the Bible gives of the simple manners of the primitive and patriarchal ages of the world."); Deuteronomy 21:18-21 (giving parents the authority to have stubborn sons stoned).

137. The equity jurisdiction of the American courts stemmed from the king's prerogative under parens patriae to protect his subjects, which dates to seventeenth century England. See Weston, supra note 92, at 688 (citing H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 786 (1988)). Parens patriae means "parent of the country." BLACK'S LAW DICTIONARY 114 (6th ed. 1990). The term "was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interests and the person of the child." United States v. Green, 26 F. Cas. 30, 32 (No. 15,256) (D. R.I. 1824) (explaining why the English courts, exercising the power of the king, were allowed to remove children from the custody of their father).

138. See, e.g., Green, 26 F. Cas. at 31 (stating that the right of the father to have custody of his infant child is true, "[b]ut this is not on account of any absolute right of the fa-

teenth century, state courts began to recognize the significance of the biological connection.[139] As to legitimate children, the biological preference was recognized for both parents as against third parties, and the tender years doctrine arose to settle custody disputes over young children between equally fit parents.[140] The courts also used fault to determine which of two divorcing parents should take custody of a child and, in their decision, considered any neglect, cruelty, or abandonment by either parent as reasons to award custody to one parent over the other.[141]

For illegitimate children, the mother's biological connection meant that she was the child's natural guardian and had an absolute right to custody over the putative father and third parties.[142] The mother, though, could be deprived of custody for egregious conduct,[143] or she could voluntarily relinquish custody of her child to someone who promised to care for him.[144] A biological father, on the other hand, had no custodial rights to his illegitimate child, nor a duty to support him, until it was proven that he was the child's father.[145] A

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ther, but for the benefit of the infant, the law presuming it to be for his interest to be under the nurture and care of his natural protector, both for maintenance and education").

139. See Hadley v. City of Tallahassee, 67 Fla. 436, 439, 65 So. 545, 546 (1914) (holding that the mother of an illegitimate child has a right to sue for the wrongful death of her illegitimate child under Florida's 1899 wrongful death act); Adams v. Sneed, 41 Fla. 151, 161-62, 25 So. 893, 895 (1899) (construing Florida's 1829 inheritance statute and holding that illegitimate children of slave mothers can inherit from their mother).

140. See Jones v. Jones, 156 Fla. 524, 527, 23 So. 2d 623, 625 (1945); Fields v. Fields, 143 Fla. 886, 890, 197 So. 530, 531 (1940); Miller v. Miller, 38 Fla. 227, 230, 20 So. 989, 990 (1896); Anderson v. Anderson, 289 So. 2d 463, 464 (Fla. 3d DCA 1974) (stating that the evolution of law over several centuries indicated that everything else being equal, mothers of infants in tender years should receive custody). But see FLA. STAT. § 61.13(2)(b)(1) (1997) ("[T]he father of the child shall be given the same consideration as the mother in determining the primary residence of a child irrespective of the age or sex of the child.").

141. See, e.g., Howard v. Department of HRS, 651 So. 2d 201, 201 (Fla. 5th DCA 1995); Miller, 38 Fla. at 230, 20 So. at 990 (reversing a custody award of children to the mother because the mother abandoned the marital home and the father had not been proven unfit); State ex rel. Meredith v. Meredith, 69 N.Y.S.2d 462, 470 (N.Y. Sup. Ct. 1947) (granting custody of an illegitimate child to the father because the mother was a convicted bigamist and had abandoned the child).

142. See Marshall v. Reams, 32 Fla. 499, 501, 14 So. 95, 96 (1893) ("The mother has the superior legal right over all others to the custody and control of her minor, illegitimate child."); State v. Nestaval, 75 N.W. 725, 725 (Minn. 1898) ("[A]s against the mother of a bastard child, the putative father has no legal right to its custody, but the mother, as its natural guardian, is entitled to its control, and is bound to maintain it."); Bustamento v. Analla, 1 N.M. 255, 261 (N.M. 1857) ("[T]he mother is natural guardian of her illegitimate children, and she is bound to maintain them."); Burns v. Commonwealth, 18 A. 756, 757 (Pa. 1889) ("[T]he mother of such a[n] [illegitimate] child has the paramount right to the custody of it.").

143. See, e.g., Meredith, 69 N.Y.S.2d at 470.

144. See Marshall, 32 Fla. at 501, 14 So. at 96 (noting that the mother transferred the custody of her 16-year-old child from the child's uncle to a local doctor).

145. See Nestaval, 75 N.W. at 725 ("At common law the putative father is under no legal liability to support his illegitimate offspring."); Bustamento, 1 N.M. at 255. See also In

mother or a state actor could bring bastardy proceedings to determine paternity and force the father to support and maintain the illegitimate child.[146] What began as criminal punishment for fornication became a civil proceeding "to impose the onus of supporting a child upon its natural parent to prevent the child from becoming a dependent upon society."[147] States recognized that such proceedings relieved them and the community from providing financial aid to the child and used the proceedings well into the 1900s.[148]

By the beginning of the 1900s, almost all states had enacted adoption statutes.[149] Those statutes supported the mother's autonomy over her illegitimate children because it was believed that she alone could determine which custodial arrangement best served the interests of the child.[150] The laws presumed that a father was unfit to take custody of his child and did not require his consent to, or notice to him, of custody or adoption proceedings.[151] A father could guaran-

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re Remske, 160 N.Y.S. 715, 716 (N.Y. 1916) (finding that the mother's husband was not a guardian of the child and, thus, did not have a duty to support the child).

146. See, e.g., Nestaval, 75 N.W. at 726; Ex parte Hayes, 25 Fla. 279, 281-82, 6 So. 64, 64 (1889).

147. Minnesota v. Carmena, 189 N.W.2d 191, 193 (Minn. 1971) (deciding jurisdictional requirement for bastardy proceeding); see Weston, supra note 92, at 690. Although states claimed that bastardy proceedings were civil and not criminal, the results were basically the same. See Nestaval, 75 N.W. at 726; Hayes, 25 Fla. at 282, 6 So. at 64 (proceeding is "quasi-criminal"). Florida's bastardy statute required the mother to file a complaint with the justice of the peace accusing a named person of being the father. See Hayes, 25 Fla. at 281, 6 So. at 64. If the justice of the peace found that there was sufficient evidence, he issued an order for the arrest of the accused. See id. at 281-82, 6 So. at 64. Upon first appearance, the putative father could make bond and be released until the arraignment. See id. at 282, 6 So. at 64. If found guilty, the court ordered the father to pay a set sum for a period of time. See id., 6 So. at 64. In Hayes, the father was found guilty and ordered to pay $25 a year for 10 years, until the child was 12. See id., 6 So. at 64. The father was taken into custody until he secured a bond to secure that sum. See id., 6 So. at 64. Upon the father's writ of habeas corpus, the Florida Supreme Court held that the trial court lacked jurisdiction over the case because the mother's petition did not allege that she was not a married woman when the baby was born. See id. at 283, 6 So. at 65.

148. See, e.g., Nestaval, 75 N.W. at 725 ("[T]he [paternity] statute makes the putative father one in law for a particular purpose, viz. for the indemnity of society against the expense of the support of the child . . . .").

149. See Younger, supra note 126, at 497. Massachusetts passed the first adoption statute in 1851. See id. Prior to that time, families had taken care of children other than their own but there was no legal mechanism for making them an official, legal family member. See id.

150. See supra note 142.

151. See Clements v. Banks, 159 So. 2d 892, 893 (Fla. 1st DCA 1964) (stating that the fact that the father voluntarily supported his illegitimate child gave him no standing to prevent the adoption); In re Remske, 160 N.Y.S. 715, 715 (N.Y. Sup. Ct. 1916) (holding that the wife could take custody of her illegitimate child because her husband was not legally obligated to support the child and was not his custodian); Nestaval, 75 N.W. at 725 (finding the father had no legal right to custody of the bastard child).

tee his rights to his children only by marrying the birth mother or having paternity established in a bastardy proceeding.[152]

B. Modern Treatment of Biological Rights and Case Law Supporting the Biological Rights Doctrine

Only in the past twenty-five years have unwed biological fathers enjoyed any constitutional protection of their parental rights.[153] The development of those rights, like other social transformations, has been slow and arduous. Although the diversity and inconsistency of recent case law makes it difficult to generalize about the present state of unwed fathers' rights,[154] there are several contested at-birth adoption decisions that have applied the biological rights doctrine.[155] In those cases, the biological father was presumed fit and awarded custody of his child.[156] The fathers had never been provided an opportunity to assume parental responsibility for their children because the mothers lied to them either about the paternity or the placement of the child.[157] These contesting fathers gained custody of their children,[158] and the courts seemed comfortable with the result because it was the mothers' bad deeds, not the fathers' inaction, that deprived the fathers of the opportunity to develop a parental relationship.[159]

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152. See Hayes v. Strauss, 144 S.E. 432, 434 (Va. 1928) ("On legitimation, the child is subject to the custody and control of the father to the same extent as in the case of a legitimate child.").

153. See Stanley v. Illinois, 405 U.S. 645, 645 (1972) (requiring a fitness hearing before a biological father's rights were terminated).

154. See Kaas, supra note 24, at 1064 n.70 (stating that it is not feasible to determine a standard by which each state must decide custody issues).

155. See In re Kirchner, 649 N.E.2d 324, 339 (Ill. 1995) (following the biological rights doctrine when the mother had told the father that the child died); In re B.G.C., 496 N.W.2d 239, 241 (Iowa 1992) (following the biological rights doctrine to award the child to the natural father when the mother had named another man as the child's father); In re Raquel Marie X., 559 N.E. 2d 418, 428 (N.Y. 1990) (remitting the case to the trial court for determination of whether the unwed father had manifested sufficient parental responsibility to satisfy the biological rights doctrine); Nale v. Robertson, 871 S.W.2d 674, 680 (Tenn. 1994) (following the biological rights doctrine when the father filed with the registry but did not receive notice of the adoption proceedings).

156. See supra note 155.

157. See, e.g., In re Doe, 638 N.E.2d 181, 182 (Ill. 1994) (noting that the mother told the father that the baby had died rather than admitting that she surrendered the child for adoption); B.G.C., 496 N.W.2d at 240-41 (noting that the mother identified a different man as the father and that man had erroneously signed a consent to the adoption); Nale, 871 S.W.2d at 675 (noting that the mother lied to the father and surrendered the child without the father's knowledge).

158. See, e.g., Doe, 638 N.E.2d at 182; B.G.C., 496 N.W.2d at 241; Nale, 871 S.W.2d at 680.

159. See Kirchner, 649 N.E.2d at 333 (writ of habeas corpus) (noting that unwed fathers who, "through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity and do develop this relationship").

V. COMPETING INTERESTS TO THE BIOLOGICAL RIGHTS DOCTRINE

Unfortunately, the biological rights doctrine has not been applied in a majority of recent cases. Instead, courts have used another standard by which to judge unwed father contested adoption cases—the best interests standard. As previously discussed, the best interests standard is not constitutional when applied to contested at-birth adoptions because it is a subjective standard that deprives the unwed father of his opportunity interest before giving him the chance to pursue it.[160] Nonetheless, the current trend seems to be toward the best interests standard,[161] and there are two sociological factors that are widening acceptance of that standard.

A. Sociological Factors

First, the social recognition of a mother's autonomy in pregnancy decisions has been a detriment to the rights of biological fathers.[162] Mothers have held a special, exalted status in our society for centuries, and their unique ability to give birth is revered in society, religion, and the law.[163] Holding women in such an exalted status perpetuates stereotypes that men are inadequate care givers and minimizes their parental role and decision-making power.[164] This

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160. See supra Part II.

161. See UNIF. ADOPTION ACT Prefatory Note (amended 1994), 9 U.L.A. 2 (Supp. 1997) ("The Act . . . promotes the interest of minor children in being raised by individuals who are committed to, and capable of, caring for them."); Kaas, supra note 24, at 1065-66. This current label, though, confuses the types of cases that should be decided under the best interests standard. The standard first emerged, and is currently the standard used, to settle custody decisions between parents. See, e.g., United States v. Green, 26 F. Cas. 30, 31 (No. 15,256) (D. R.I. 1824) ("When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant . . . ."). It is not necessarily an appropriate standard to use when deciding between a biological parent and a third party.

Commentators also claim that there is a third standard used by some states—the "parental preference" standard. See Kaas, supra note 24, at 1064-67 (categorizing three standards and explaining the burden of proof in each); In re Adoption of Baby E.A.W., 658 So. 2d 961, 972-73 (Fla. 1995) (Kogan, J., concurring in part, dissenting in part) (discussing three approaches to deciding contested adoption cases and categorizing the UAA as a variation of the best interests and biological rights standards).

162. See Shanley, supra note 34, at 62-63.

163. See supra notes 107-11 and accompanying text; Weston, supra note 92, at 690 ("Even though today, the mater[nal] preference rule and its alter ego, the tender years doctrine, have been largely abolished, the abolition of the emotional dedication of judges to its application has not been so easily eradicated.").

164. If the rights of a mother and father are compared, it becomes evident that it is often more difficult to terminate a biological mother's rights than a biological father's rights. A third-party petitioner against a mother must prove her severely unfit. See, e.g., Murphy v. Markham-Crawford, 665 So. 2d 1093, 1095 (Fla. 5th DCA 1995) (holding that a mother who relinquished custody of her six-year-old daughter to the paternal grandmother for six years was not proven unfit); In re Adoption of M.A.H., 411 So. 2d 1380, 1384 (Fla. 4th DCA 1982) (holding that a mother, whom HRS found to be unfit, could contest an adoption

reverence is evident in various statutory provisions for notice, consent, and termination of the father's rights, and in the way Florida courts have interpreted abandonment.[165]

The second major obstacle has been the courts' implicit and explicit reliance on their personal beliefs about who should raise children.[166] A judge makes decisions based on a natural thought process in which he relies on "beliefs (though they are not in evidence) which he reasonably thinks he shares with other intelligent persons as to the general nature of things—the meanings of ordinary words, typical modes of human behavior, causal relations between commonplace events, and the like."[167] In the contested adoption context, such a process colors judicial decisions regarding whether a biological father's rights should be terminated by preferring the adoptive, or "psychological," parents because they are better off financially than the birth parents and, to the judicial mind, have more to offer the child.

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by the paternal grandparents who had "temporary" custody for five years); Foster v. Sharpe, 114 So. 2d 373, 376 (Fla. 3d DCA 1959) (reversing the trial court's order of custody with the paternal aunt in favor of the mother, after the mother had left her 11-year-old daughter with the paternal aunt for six years).

165. See supra text accompanying note 20.

166. See generally Peggy C. Davis, "There is a Book Out . . ." An Analysis of Judicial Absorption of Legislative Facts, 100 HARV. L. REV. 1539, 1548 (1987). Davis conducted an empirical study on the effects of "judicial absorption" of the "psychological best interest" theory. See id. at 1546-47. The psychological best interest theory was first espoused in 1963 and argued that disrupting the psychological relationship a child has with an adult is destructive to the emotional health of the child. See id. at 1544. The study revealed that judicial fact determinations and statutory construction determinations were influenced by judges' acceptance of the theory. See id. at 1547-48, 1569-70.

167. Id. at 1548. For a good example of judicial reliance on extraneous, subjective facts see Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833, 887-95 (1992). In Casey, the Court relied on trial testimony of expert witnesses regarding the broad subject of domestic violence, see id. at 888-90, its own general research on domestic violence, see id. at 890-95, and "common sense," id. at 892, to hold invalid a Pennsylvania statutory provision that required the husband's consent to an abortion. See id. at 895. The Court's reliance on that information seems misplaced when the Court admits that the information regarding the specific issue of "notifying one's husband about an abortion" is "too small to be representative," id. at 892, and that, in fact, the provision affects fewer than one percent of women seeking abortions. See id. at 894. It seems the Court, or at least three of the justices, simply took the opportunity to voice their opinion on domestic violence rather than address the issue of whether a husband has a right to consent to his wife's abortion. Compare id. (opinion of O'Connor, Kennedy, and Souter, J.J.) (reviewing extraneous material to arrive at decision), with id. at 972-73 (opinion of Rehnquist, C.J., Scalia, Thomas, and White, J.J., concurring in part, dissenting in part) (criticizing the joint opinion for concentrating on domestic violence situations with no "hard evidence" to support their assumptions); see also Scott C. Idleman, The Role of Religious Values in Judicial Decision Making, 68 IND. L.J. 433 (1993).

B. The "Best Interests" Standard

The "best interests standard"[168] is a subjective evaluation of the advantages offered to the child by competing custodial arrangements. In modern case law, this standard has supported the adoptive parents in contested adoptions.[169] The standard is unconstitutional in contested at-birth adoptions.[170] Although an adoption cannot be finalized unless the biological parents consent or have their rights terminated, courts applying a best interests standard find ways to hold that the biological father has "forfeited" his right to contest the adoption of his child.[171] This judicial practice provides no

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168. California's best interests standard is a good example. In John S. v. Mark K., 898 P.2d 891, 895 (Cal. 1995), cert. denied 116 S. Ct. 1272 (1996) the court noted:

> If the court finds in such a proceeding that "it is in the best interest of the child that the father retain his parental rights," it must enter an order providing that his consent is necessary for an adoption. In making this determination, the court "may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement on the child." If, however, the court finds that it is in the best interest of the child to be adopted by the prospective adoptive parents, it must enter an order stating that the father's consent is not required. This order also "terminates all [the father's] parental rights and responsibilities with respect to the child."

Id. (citations omitted) (emphasis added). See also Hollinger, supra note 112, at 355 (stating that under the best interests standard, the deciding factor in any adoption or other adoption-related proceeding is whether the child's best interests will be served by granting the adoption).

169. See Lassiter v. Department of Soc. Servs., 452 U.S. 18, 45 n.13 (1981) ("[T]he 'best interests of the child' standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values."); Davis, supra note 166, at 1542-43:

> In recent years, custody disputes between biological parents (and between nonparents) have been determined in accordance with the best interests of the child. Prior to dissemination within legal circles of psychological parent theories, however, child placement law reflected skepticism within and without the mental health professions that the best interests of children could be determined by reliance on rules of thumb drawn from theories of child development. The law contained no rigid formulae for determining the best interests of children, but rather permitted consideration of the broadest variety of factors that might affect their welfare.

Id.; see also Hollinger, supra note 112, at 355. Hollinger explains that the UAA drafting committee members agreed that the UAA should have an express rule of construction stating that the child's welfare or best interests would be the paramount consideration for adoption proceedings. See id. Committee members also agreed that the traditional rule that adoption statutes be strictly construed because they were "in derogation of common law" was too narrow to achieve the policy promoting the best interests of the child.See id. However, the National Conference of Commissioners of Uniform State Laws (NCCUSL) Style Committee refused the provisions because they were too general and susceptible to ideologically motivated interpretation. See id. at 355-56.

170. See supra Part III.A.

171. See Davis, supra note 166, at 1569-70 (discussing the judiciary's tendency to interpret statutory language to permit the application of the psychological best interest standard).

substantive due process for the biological father and achieves inconsistent results.[172]

In cases following the "best interests standard," the birth fathers have assumed some responsibility for their children, but the courts do not consider their efforts sufficient.[173] The courts focus on broad policy statements within the statutes which state that adoptions are for the child's best interests, but the courts more or less ignore spe-

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172. See supra notes 170-71 and accompanying text.

173. See John S., 898 P.2d at 901; Robert O. v. Russell K., 578 N.Y.S.2d 594, 597 (N.Y. Sup. Ct. 1992); Swayne v. L.D.S. Soc. Servs., 795 P.2d 637, 642 (Utah 1990).

In John S., Mark, the birth father, was 20 and Stephanie, the birth mother, was 15 when she became pregnant. Mark wanted to get married, but Stephanie refused because she wanted to finish school. See John S., 898 P.2d at 893. They were undecided about what to do about the pregnancy. See id. However, Mark bought a trailer for them to live in and went to a yard sale with Stephanie to buy baby apparel. See id. They began attending birth classes together, enrolled in prenatal nutrition classes, and applied for Medicaid. See id. at 904 (Kennard, J., concurring in part, dissenting in part). Mark went to medical appointments with Stephanie and paid to have a sonogram. See id. About four months before the baby was born, Mark and Stephanie's relationship began to deteriorate. See id. Stephanie testified that she began to feel smothered by Mark's increasing attention toward her. See id. The two argued, Stephanie rushed at Mark with a pen, Mark pushed Stephanie down on a chair, bruising her arm, and Stephanie had Mark arrested. See id. At some point, Mark attempted suicide because of the deterioration of his relationship with Stephanie, but then admitted himself into a rehabilitation hospital. See id. at 893. When Mark found out that she planned to place the baby for adoption, he contacted various politicians, media personalities, legal aid, and private attorneys in an attempt to stop the adoption plans. See id. at 905. Finally, he drafted his own petition asserting paternity and seeking custody of the yet unborn child. See id. Nonetheless, the court found that Mark's efforts did not demonstrate that he was fully committed to his parental responsibilities, denied his paternity petition, and granted the adoption. See id. at 901.

In Robert O. v. Russell K., 578 N.Y.S.2d 594 (N.Y. App. Div. 1992), the couple was engaged but could not agree as to when they should get married. See id. at 595. When Carol found out she was pregnant, she did not want Robert to believe she had conceived simply to make him marry her, so she broke off the engagement. See id. Robert moved away, and Carol began the adoption proceedings. See id. Throughout the proceedings, Carol was not asked to identify the father of her child, and she never volunteered Robert's name. See id. Almost a year after the adoption was finalized, Robert and Carol reconciled and became engaged again. See id. When Carol finally told Robert about the adoption, he "went nuts" and immediately took action to get custody of the baby. Id. However, the court refused to vacate the adoption because Robert had not established a "custodial relationship" with the baby, although the mother had prevented him from doing so. Id.

In Swayne v. L.D.S. Social Services, 795 P.2d 637 (Utah 1990), Steve and Penny were dating when she became pregnant. See id. at 639. After finding out that Penny was pregnant, Steve and his family held a baby shower for her, and Steve contributed to her doctors' bills. See id. Penny lived with Steve's mother for some time, and his sister offered to care for the baby after its birth. See id. When Penny told Steve that she was thinking about relinquishing the baby for adoption, Steve protested and told her he wanted to raise the child. See id. When the baby was born, Penny did not tell Steve that she had placed the child for adoption. See id. at 640 n.2. Instead, she told him she was taking it to California, and then called Steve's family from California and told them the baby had died. See id. The adoption was, nonetheless, upheld. See id. at 644. The Utah Supreme Court reaffirmed the constitutional validity of its statutory scheme. See id. They did so even though that scheme allowed termination of parental rights simply because the father did not file a notice of acknowledgment of paternity, even when he was unaware the baby was placed for adoption or was told that baby died. See id. at 640.

cific waiver or termination requirements.[174] Courts claim that the unwed biological father has only an opportunity interest and that whatever efforts he has taken do not rise to the level of assuming parental responsibility.[175] The contesting fathers lose to the adoptive parents, and, more disturbingly, the courts ignore the fact that state action has manufactured the psychological parents, whom the court now believes can better serve the child's best interests.[176]

VI. FLORIDA'S TREATMENT OF BIOLOGICAL RIGHTS OF UNWED FATHERS IN ADOPTION PROCEDURES

Historically, Florida has treated biological parents' rights in much the same manner as the rest of the nation.[177] However, the current state of the law in Florida, as set forth in In re Adoption of Baby E.A.W.,[178] goes further than any other law or judicial decision in the nation. Under the E.A.W. decision, an unwed biological father may have his parental rights severed if he does not form and carry on a psychological relationship with the pregnant mother, regardless of whether she wants such a relationship.[179]

A. Adoption in Florida

Florida has recognized adoption since at least 1891[180] and has had an adoption statute since 1924.[181] Chapter 63, Florida Statutes, was originally enacted in 1943.[182] In 1973, the Legislature revised the statute to state when an unwed father's consent to his child's adoption was required, and when that consent could be waived.[183] The current statute is substantially the same as the 1973 version.[184]

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174. See Davis, supra note 166, at 1569-70; Swayne, 795 P.2d at 642 (stating that it was not "impossible" for Steve to file acknowledgment simply because Penny had lied to him).

175. See Swayne, 795 P.2d at 643 (listing all the efforts the father made, but then deciding that because he had not assumed his "legal obligation" of filing the paternity acknowledgment, his due process rights were not violated).

176. See supra note 94 and accompanying text.

177. See supra Part IV.

178. 658 So. 2d 961 (Fla. 1995).

179. See id. at 963.

180. See Jones v. Harmon, 27 Fla. 238, 242, 9 So. 245, 246 (1891) (granting adoption to a third party when the natural mother had relinquished the child to the third party and the maternal aunt contested the adoption proceeding).

181. See State ex rel. Airston v. Bollinger, 88 Fla. 123, 131, 101 So. 282, 285 (1924) (striking down laws that allowed a parent to part with a child by methods other than the adoption statute).

182. See Act effective May 18, 1943, ch. 21759, § 1, 1943 Fla. Laws 181 (current version at FLA. STAT. § 63.022 (1997)).

183. See Act effective Oct. 1, 1973, ch. 73-159, § 2, 1973 Fla. Laws 312 (amending FLA. STAT. § 63.022 (Supp. 1972)).

184. Chapter 63 governs the adoption process through state agencies, (see FLA. STAT. § 63.202 (1997)), private agencies, (see id.), and independent agencies, (see id. §§ 63.085-

There are four provisions within chapter 63 that have recently caused problems for unwed biological fathers due to judicial interpretation: section 63.022, which states the legislative intent for the chapter; section 63.032(14), which defines abandonment; section 63.062, which tells whose consent is required; and section 63.072, which defines the waiver of consent.[185] After years of appropriately strictly construing chapter 63,[186] Florida courts have recently interpreted these provisions as justifying depriving unwed biological fathers of their opportunity interest.

The Florida Legislature intended for chapter 63 to "protect and promote the well-being of persons being adopted and their birth and adoptive parents and to provide to all children who can benefit by it a permanent family life."[187] Chapter 63 also outlines "basic safeguards intended to be provided" by the statute.[188] These safeguards include that the child be legally free for adoption,[189] and that required persons consent to the adoption or that the court terminate the parent-child relationship.[190] The section concludes by stating

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.092). Generally, the biological mother contacts an agency or intermediary to arrange the adoption. See E.A.W., 658 So. 2d at 964; In re Adoption of Doe, 543 So. 2d 741, 743 (Fla. 1989); Henriquez v. Adoption Centre, 641 So. 2d 84, 89 (Fla. 5th DCA 1993). The agency or intermediary counsels the mother about her decision. See FLA. STAT. § 63.022(1)(k) (1997). It gathers information from her. See id. § 63.082(3)(a)-(b). After the birth of the child, the mother consents to the adoption and, thus, to termination of her parental rights. See id. §§ 63.062(1)(b), 63.082(4). By the time the child is born, prospective adoptive parents have been located and the Department of Children and Family Services has completed a placement study. See id. § 63.092(2). If the study is favorable, the child can be placed in the prospective adoptive home. See id. § 63.092(2). If an intermediary is handling the adoption, the intermediary must file a petition for adoption within 30 days of placement. See id. § 63.102(3). The adoptive parents are petitioners in the proceedings, while the natural parents are not parties. See id. § 63.112. The petition must include the required consent or a request for waiver of an unavailable consent. See id. § 63.112(2)(a). The petitioners are required to exercise good faith and diligent efforts to locate and obtain required consent, usually the natural father's, within 60 days after filing the petition. See id. § 63.062(3). However, cases prove that petitioners are limited by the actions of and information given by the natural mother to the agency or intermediary. See E.A.W., 658 So. 2d at 964; Doe, 543 So. 2d at 743; Henriquez, 641 So. 2d at 85. Ninety days after placement in the adoptive home, the court simultaneously can hear the adoption petition, waive consents if necessary, terminate parental rights, and grant the adoption. See FLA. STAT. §§ 63.082, .085, .092, .112, .122, .142 (1997).

185. See id. §§ 63.022, .032(14), .062, 072.

186. See In re Adoption of Baby E.A.W., 647 So. 2d 918, 938 (Fla. 4th DCA 1994) (Farmer, J., dissenting) (citing In re Miller, 227 So. 2d 73 (Fla. 4th DCA 1969), and Tsilidis v. Pedakis, 132 So. 2d 9 (Fla. 1st DCA 1961), to confirm that adoption statutes are "in derogation of the common law and must be strictly construed.").

187. FLA. STAT. § 63.022(1) (1997).

188. Id. § 63.022(2).

189. See id. § 63.022(2)(a).

190. See id. § 63.022(2)(b). The safeguards further provide that in adoptions handled by private intermediaries, the birth parents, adoptive parents, and the child are to receive the same or similar safeguards, guidance, counseling, and supervision as they would under an agency adoption. See id. § 63.022(2)(k).

that a court is to enter orders "it deems necessary and suitable to promote and protect the best interests of the person to be adopted."[191]

Effective in 1973, only the consent of the natural mother was required to legally free a child for adoption.[192] Biological fathers had no right to children born out of wedlock,[193] and their consent could be ignored when a mother simply denied knowing the identity or the location of the biological father.[194] Currently, a child is not available for adoption unless there is consent by the biological mother and by the biological father who has been legally declared the father, filed acknowledgment, or supported the child.[195]

A court can waive consent from any parent who has deserted or abandoned a child, previously had their parental rights terminated, or been declared incompetent.[196] Between 1960 and 1989, chapter 63 did not have a definition of "abandoned." Instead, courts relied on the definition in Florida's dependency statute. According to the statutory definition of abandonment,[197] Florida courts had inter-

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191. Id. § 63.022(2)(l).

192. See FLA. STAT. § 63.062 (1973). The relevant portion of the previous section stated:

> No consent is required from the father of a child born out of wedlock when the mother of the child does not know the identity of the father and a reasonable search would not reveal his identity. In this event, the mother shall execute an affidavit under oath that she does not know either the [identity] or location of the father.

Id.

193. See Clements v. Banks, 159 So. 2d 892, 893 (Fla. 3d DCA 1964) (holding that the putative father had no right to the illegitimate child and that his consent was not required, although he had provided voluntary support to the child).

194. See id.

195. See FLA. STAT. § 63.062(1) (1997). The statute states:

> (1) Unless consent is excused by the court, a petition to adopt a minor may be granted only if written consent has been executed after the birth of the minor by:
>
> (a) The mother of the minor.
>
> (b) The father of the minor, if:
>
> 1. The minor was conceived or born while the father was married to the mother.
>
> 2. The minor is his child by adoption.
>
> 3. The minor has been established by court proceeding to be his child.
>
> 4. He has acknowledged in writing, signed in the presence of a competent witness, that he is the father of the minor and has filed such acknowledgment with the Office of Vital Statistics of the Department of Health.
>
> 5. He has provided the child with support in a repetitive, customary manner.

Id. Also, within 60 days of filing the petition, the adoption petitioners must exercise "good faith and diligent efforts" to notify and obtain consent from any parent whose consent is required but who has not consented. Id. § 63.062(3) (outlining the efforts to include conducting interviews and searches of vehicle registrations and correction records, and verifying residential, employment, and Armed Forces service information).

196. See id. § 63.072(1)-(3). The court may also waive consent from a legal guardian or custodian of the child, other than a parent, who has failed to respond within 60 days to a request for consent or who is withholding consent unreasonably. See id. § 63.072(4).

197. See id. § 39.01(1). In 1989, when the Doe court began tinkering with the definition, this section stated:

preted "abandoned" to mean that a biological parent had totally relinquished responsibility for his or her child.[198] The courts also required that the child be born before he could be abandoned.[199] In 1989, still relying on the chapter 39 definition,[200] the Florida Supreme Court redefined "abandoned" in adoption proceedings to include consideration of a father's actions constituting less than total relinquishment and occurring during the prenatal period.[201]

In In re Adoption of Doe[202] the court acknowledged that a child must be born before it can be abandoned, but concluded that evidence of a natural father's prenatal conduct would be relevant to the issue of abandonment.[203] The court based its conclusion on the belief that "[s]ocietal norms, and chapters 39 and 63 of Florida Statutes, contemplate that the natural parents will provide for the well-being of the child."[204] The court then declared, "[w]hen either or both fail to do so, the best interests of the child, and of society, require that society intercede, as in for example, abandonment or adoption proceed-

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> "Abandoned" means a situation in which the parent or legal custodian of a child or, in the absence of a parent or legal custodian, the person responsible for the child's welfare, while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If the efforts of such parent or legal custodian, or person primarily responsible for the child's welfare to support and communicate with the child are, in the opinion of the court, only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned. The failure by any such person to appear in response to actual or constructive service in a dependency proceeding shall give rise to a rebuttable presumption of such person's ability to provide for and communicate with the child.

Id.; see also In re Adoption of Doe, 543 So. 2d 741, 745 (Fla. 1989).

198. See Doe, 543 So. 2d at 750 (McDonald, J., dissenting) ("Florida has heretofore properly taken a narrow view as to what constitutes abandonment. Abandonment must be proven by clear and convincing evidence and must be complete.") (footnotes omitted).

199. See Wylie v. Botos, 416 So. 2d 1253, 1256 (Fla. 4th DCA 1982) (Anstead, J.) ("We simply cannot determine with certainty whether the legislature intended to cut off the rights of a natural father, who, although on notice of his paternity of a child and the pendency of adoption activities, files no acknowledgment of paternity before the legal adoption proceedings are commenced.").

200. See Doe, 543 So. 2d at 749.

201. See id. at 745-46. The court concluded that "prebirth conduct does tend to prove or disprove material facts bearing on abandonment and may be properly introduced and used as a basis for finding abandonment" under chapter 63. Id. at 746.

It is noteworthy that the court's opinion is practically devoid of citations to previous state case law but replete with citation to findings made by the United States Congress. See id. at 741-47 (citing only to In re I.B.J., 497 So. 2d. 1265, 1266 (Fla. 5th DCA 1986) regarding the revocability of the mother's consent and disapproving of that decision).

202. 543 So. 2d 741 (Fla. 1989).

203. See id. at 745. The court masks the definition of abandonment in the circular reasoning that, "[a]ssuming for the moment that prebirth conduct is relevant to material facts bearing on abandonment, . . . [w]e conclude that prebirth conduct does tend to prove or disprove material facts bearing on abandonment." Id. at 745-46.

204. Id. at 746.

ings."[205] The court found "no constitutional or statutory provisions that would preclude the state from embracing such a policy," and held that a father's prenatal support is relevant to the determination of abandonment.[206]

In 1992, the Legislature revised chapter 63, Florida Statutes, to include the court's expanded definition of "abandoned."[207] The definition tracks the language in section 39.01(1) except for the last sentence stating that "the court may consider the conduct of a father towards the child's mother during her pregnancy."[208] Until 1994, that last sentence was construed to mean that a natural father's lack of financial support could be "conduct" considered when determining whether the father had abandoned the child.[209] Then, in E.A.W., the Florida Supreme Court again expanded the meaning of "conduct" to allow a court to "consider the lack of emotional support and/or emotional abuse by the father of the mother during her pregnancy."[210]

B. Critique of Chapter 63 in the Context of Contested At-Birth Adoption Cases

Chapter 63's provisions should be safeguards for an unwed biological father who wants to assume responsibility for his child.[211] However, a review of the statute as interpreted in two types of contested at-birth adoption cases demonstrates that the current interpretation deprives unwed fathers of their constitutional rights. The first case occurs when a father has no knowledge that he is a father. This father lacks knowledge of his fatherhood because the birth mother has lied about the child's paternity or her pregnancy alto-

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205. Id.; see also id. at 749 (Barkett, J., concurring).

206. Id. at 749.

207. See Act effective July 1, 1992, ch. 92-96, § 3, 1992 Fla. Laws 852 (adding subsection 63.032(14), defining "abandoned"). The current chapter 63 definition of "abandoned" is:

> [A] situation in which the parent or legal custodian of a child, while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations. If, in the opinion of the court, the efforts of such parent or legal custodian to support and communicate with the child are only marginal efforts that do not evince a settled purpose to assume all parental duties, the court may declare the child to be abandoned. In making this decision, the court may consider the conduct of a father towards the child's mother during her pregnancy.

FLA. STAT. § 63.032(14) (1997).

208. In re Adoption of Baby E.A.W., 658 So. 2d 961, 966 (Fla. 1995) (emphasis added).

209. See In re Adoption of Baby E.A.W., 647 So. 2d 918, 937-38 (Fla. 4th DCA 1994) (Farmer, J., dissenting)).

210. E.A.W., 658 So. 2d at 965.

211. See FLA. STAT. § 63.022(2)(a) (1997) (stating that child must be legally free to be adopted); E.A.W., 658 So. 2d at 966 ("[The] best interests evidence was not relevant unless Baby E.A.W. was available for adoption and that she was not available for adoption without a finding that she had been abandoned.").

gether.[212] As a result of his lack of knowledge, the father does not assume any prenatal or postnatal responsibility for his child.[213] However, as soon as he does know he has fathered the child, he asserts his legal rights.[214] In these cases, section 63.062 would unconstitutionally deny fathers standing to contest an adoption.[215] Biological fathers have a fundamental right to an opportunity to establish a relationship with their children. If the father is denied standing to contest the adoption because, through no fault of his own, he did not know he was a father, his due process rights are violated. The father cannot exercise his constitutional right to establish a relationship with his child if he has no opportunity to do so.[216]

The second type of case is where the father knows about the pregnancy and takes some responsibility for the impending child during the pregnancy. This father, like Gary Bjorklund, is deprived of his opportunity interest by the court's determination that, although he took some measures to assume parenthood, he had not taken the appropriate measures. In these cases the unwed father has been deprived of his substantive due process rights.

Section 63.072's definition of "abandoned" is the catch-all to allow courts to waive the father's consent to the adoption. The new, broader definition of "abandoned" affords biological fathers little or no substantive protection for their opportunity to establish a parental relationship.[217] It raises a significant issue about waiving a natural father's consent to an adoption.[218] Specifically, upon what evidence should a court rely when determining whether a putative father has assumed enough responsibility for a child that is not yet

212. See, e.g., In re B.G.C., 496 N.W.2d 239, 240-41 (Iowa 1992) (noting that the mother lied about the paternity of the child); Robert O. v. Russell K., 578 N.Y.S.2d 594, 595 (N.Y. 1992) (stating that the mother broke off the engagement and the relationship with the father after she found out that she was pregnant and never told the father of the pregnancy).

213. See B.G.C., 469 N.W.2d at 241; Robert O., 578 N.Y.S.2d at 595.

214. See B.G.C., 469 N.W.2d at 241; Robert O., 578 N.Y.S.2d at 595.

215. See O'Bryan v. Doe, 572 So. 2d 986, 987 (Fla. 1st DCA 1990) (reversing the trial court's finding that the biological father's consent was not required, even though the child was born while the mother was married to another man, because the father had bought baby supplies for the child, signed an apartment lease and lived with the mother during her pregnancy, and had his name entered on the birth certificate); In re Adoption of Mullenix, 359 So. 2d 65, 69 (Fla. 1st DCA 1978) (holding that the father's consent was not required when the pregnant mother had left the state and he had no opportunity to provide support for her); Department of HRS v. Herzog, 317 So. 2d 865, 868 (Fla. 2d DCA 1975) (affirming the trial court's order denying the department's motion to "ferret out" the natural father).

216. See E.A.W., 658 So. 2d at 965.

217. See id. at 981 (Anstead, J., dissenting); In re Adoption of Doe, 543 So. 2d 741, 751 (Fla. 1989).

218. See E.A.W., 658 So. 2d at 961; Doe, 543 So. 2d at 741.

born? Such evidentiary standards should be objective and legislatively mandated to ensure consistency among the judicial districts.[219]

VII. RECOMMENDING THE BIOLOGICAL RIGHTS DOCTRINE

Despite some consideration of biological fathers' rights, our courts have yet to decide the crucial issue presented in newborn adoptions: what constitutional protection should be afforded to an unwed biological father when, through no fault of his own, he has had little to no opportunity to take responsibility for his newborn child. Past Supreme Court cases involving unwed biological fathers are distinguishable from the more recent state cases across the nation. These distinguishing characteristics demonstrate that previous decisions are helpful but leave many unresolved issues for states to address. The central issues are whether a presumption should be given to the unwed father based on his biological connection with his child and his nonconsent to the adoption, and whether that presumption should preclude claims by third parties.

Because adoptions are statutorily created and controlled, the Legislature can provide adequate procedures that protect the interests of unwed fathers. The Legislature should expressly state that chapter 63 is to be strictly construed to protect foremost the rights of biological parents. This pronouncement would require courts to adhere to the statutory provisions regarding notice, consent requirements, and waiver provisions. However, to aid the courts, the Legislature should ensure that new language is specific enough to prevent judicial deviation when determining whether an unwed father has assumed his parental responsibilities.

Under chapter 63, determining who receives notice of the adoption depends on who is required to consent to the adoption.[220] Therefore, the classification of fathers whose consent is required should be as broad as the classification for mothers.[221] Simply put, consent should be required from all biological fathers,[222] and the prospective father in every case should be served with notice of the proceeding. The biological father must know that he is a father and that the birth mother expects to place the child for adoption. This requires

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219. See In re Adoption of Baby E.A.W., 647 So. 2d 918, 939 (Fla. 4th DCA 1994) (Farmer, J., dissenting) ("When something affecting a constitutionally protected right must be proved with clear and convincing evidence, I do not believe it is possible to carry the day with facts that are susceptible to differing inferences, one probative and the other not.").

220. See FLA. STAT. § 63.062(1)(b) (1997).

221. See id. § 63.062(1)(a).

222. Cf. id. § 63.062(1)(b)(1)-(4).

notice to him by the mother during the pregnancy, and by an intermediary at the initiation of adoption proceedings.[223]

Initially, the biological mother should be required to identify and serve notice on the biological father (or them if there is more than one prospective biological father) of her intent to place the child for adoption.[224] Once the father has been served with notice, he should have a certain amount of time to assert his intent not to consent to the adoption and to seek custody of the child. If he comes forward, the court should presume that he is fit to take custody of the child, order him to pay a portion of the prenatal and birth expenses, and grant him custody upon the child's birth.[225]

This provision would address the fathers in both types of at-birth adoption scenarios but would most protect those who have been deceived by the mother. Currently, the prospective adoptive parents are responsible for noticing the birth father if his consent has not been obtained, and there are diligent search requirements in the statute.[226] However, if the birth mother lies about the identity of the father, those procedures are useless. Requiring that she be the formal party to notice the biological father is appropriate because she is the only party with the intimate knowledge that she is pregnant and of the probable date of conception.

Next, the Legislature should devise a specific set of circumstances under which a father's consent can be waived.[227] The waiver provisions should provide substantive protection for biological fathers. If the father refuses to consent, the biological rights doctrine would prevent the court from waiving his consent unless there is clear and convincing evidence that he is unfit. A claim that the father is unfit may arise at two points in the proceedings—before the child's birth and after the child's birth. If the father asserts his rights during the prenatal period, the biological mother would have the burden of re-

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223. In some cases this is by an intermediary's request for consent to the father rather than the mother notifying him.

224. See E.A.W., 647 So. 2d at 931 (Pariente, J., concurring) (suggesting that legislation could require the mother to notice the father of her intent to place the child for adoption). Because the goal is to be reasonably certain that the father did receive notice, actual service should be required and constructive notice used only when the revised diligent search inquiry has failed to locate the father. The intermediary could represent the birth mother in this portion of the proceeding, and these costs could be part of the allowable expenses for the adoption. The court will determine who is the true biological father through the mother's testimony or paternity testing.

225. If, after the father asserts his interest, the mother also asserts her interest in keeping the child rather than placing the child for adoption, the statute could refer the court to the custody and support provisions in chapter 61, Florida Statutes, and the case would proceed as a paternity suit. See FLA. STAT. §§ 61.13, .30, 742.011-.17 (1997).

226. See id. § 63.0620.

227. For example, the definition of "abandoned" could be deleted from section 63.032 and references to it deleted from section 63.072(1). See supra notes 202-10 and accompanying text.

butting the father's presumption of fitness. Requiring the mother to be a party to the fitness hearing would be an extension of her desire to do what is best for her child and of her duty to notify the father of his paternity. If the father asserts his interest after the child's birth, the prospective adoptive parents would have the burden of proving his unfitness. In either case, only clear and convincing evidence of the failure to attempt to provide financial support in accordance with his means should be evidence of unfitness.

Another waiver circumstance would address the unlocated father. If the mother claims that the biological father cannot be identified, located, or served, the court should conduct a strict inquiry as to the diligent search efforts of the mother.[228] If the court is reasonably satisfied that the father cannot be identified, located, or served, then it can waive the requirement for the father's consent. However, this scenario poses the problem of when the biological father's rights should be superseded by the best interests of the child. To answer this dilemma, the statute should contain a "window of opportunity," to begin after the biological father gains knowledge of the pregnancy or subsequent adoption, in which he can assume parental responsibility and contest the adoption.[229] If the father appears during ongoing proceedings, he should have standing to contest the adoption and assume custody of the child. If he does not gain knowledge of the adoption until after it is finalized, the current one-year limitation to attack adoption orders would prevail, unless he can defend his inaction by a lack of knowledge.

VIII. CURRENT LEGISLATIVE PROPOSALS

Over the past few years, several legislative proposals have attempted to address the various issues surrounding contested adoptions. In Florida alone, at least ten bills have been introduced since 1994 to revise chapter 63.[230] The number of issues that arise in adoption proceedings and the diversity of opinion about how to address those issues may explain why these bills have failed. Nonethe-

228. The diligent search requirement should include an inquiry into the mother's prebirth living and support circumstances, see id. § 63.072(3), and should exhaust avenues of identifying a biological father whom the mother refused to, or could not, identify. Cf. UNIF. ADOPTION ACT, § 3-401 (amended 1994), 9 U.L.A. 46-47 (Supp. 1997); FLA. STAT. § 39.4051, (1997) (dependency proceedings); id. § 39.4625 (termination of parental rights proceedings); Fla. SB 3026 (1996); Fla. HB 227 (1996). The Legislature could ensure the integrity of these search efforts by allowing a civil penalty against any woman who misinformed the court regarding the birth father. Cf. UNIF. ADOPTION ACT § 3-404, 9 U.L.A. at 49.

229. Cf. FLA. STAT. § 63.182 (1997) (allowing one year to appeal a final order of adoption).

230. See, e.g., Fla. SB 1762 (1997); Fla. HB 1257 (1997); Fla. SB 3026 (1996); Fla. SB 178 (1996); Fla. HB 1837 (1996); Fla. HB 227 (1996); Fla. HB 65 (1996); Fla. SB 2378 (1994); Fla. HB 2819 (1994); Fla. HB 2491 (1994).

less, legislators must continue working toward a consensus and eventually resolve these difficult issues. An evaluation of the various provisions to revise legislative intent, consent, and waiver of consent in recent bills[231] and other legislative proposals in the context of the two types of at-birth adoption cases, focuses the debate.

A. Proposals That Are Too Far Off

1. The Uniform Adoption Act

In 1994, the Revised Uniform Adoption Act (UAA) was proposed to the states.[232] In 1995, it was introduced in the Florida Legislature as House Bill 65, but did not proceed past that introduction.[233] The UAA does not address legislative intent;[234] any interpretation of the intent behind the statute would be discerned from extraneous material, such as the prefatory material and comments.[235] The UAA's section 109 subparts are intended to support the best interests of the child, and to grant to the trial court broad discretion when determining adoption matters.[236]

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231. This discussion concerns bills that sought to significantly alter chapter 63; it is not exhaustive of all attempts at revision. For example, other bills provided for the administration of "Andrew" rights to the birth mother. See Fla. SB 178 (1996); Fla. SB 2322 (1995). Essentially, "Andrew" rights are a listing of rights given to mothers in the state of Florida who may choose to give their child up for adoption. See Fla. SB 178 (1996); Fla. SB 2322 (1995). Other bills sought to add that a prospective adoptee may be removed from an unsuitable adoptive home prior to adoption finalization. See Fla. SB 752 (1995); Fla. HB 349 (1995).

232. In 1996, Vermont became the first state to enact the UAA. See P.A. 161, § 136, Laws of Vermont (1996) (codified at VT. STAT. ANN. tit. 15A (1996)).

233. See Fla. HB 65 (1995). This bill incorporated the UAA without modification; therefore, this analysis of the UAA is applicable also to House Bill 65.

234. See Hollinger, supra note 112, at 355-56 (explaining that the NCCUSL committee would not allow an intent section because the best interests standard was too subjective and did not fit within the parameters of objective law guidelines suited for uniform provisions).

235. See Fla. HB 65 (1995). The prefatory note states:

> The guiding principle of the Uniform Adoption Act is a desire to promote the welfare of children, and particularly to facilitate the placement of minor children whose biological parents cannot raise them, by permanently placing them in stable homes with adoptive parents who are willing to assume all parental rights and responsibilities for them. This chapter is premised on the belief that adoption offers significant legal, economic, social and psychological benefits, not only for children who might otherwise be without a family, but also for parents who are unable to care for their children, prospective parents who want children to nurture and support, and the state government that is ultimately responsible for the well-being of children.

Id.; see UNIF. ADOPTION ACT Prefatory Note (amended 1994), 9 U.L.A. 2 (Supp. 1997); see also Fla. SB 2378 (1994); Fla. HB 2819 (1994). Both used the prefatory material as legislative intent.

236. See Hollinger, supra note 112, at 357 ("[T]he UAA is replete with specific provisions, including the ultimate judicial decision to grant or deny an adoption, in which the determinative factor is best interests, avoidance of detriment, or promotion of the child's welfare.").

Determining who receives notice of the adoption depends on who must consent to the proceeding. The UAA categorizes certain fathers who have "functioned" as parents and requires that they receive notice.[237] If the mother claims not to know who is the biological father of her child, the UAA requires the court to inquire into attempts to identify the father.[238]

Once identified, the UAA requires the consent of several categories of biological fathers who have "functioned" as their children's parents. An unwed and unestablished biological father must consent to the adoption when he has acknowledged[239] his paternity and provided financial support for, visited, and communicated with the child,[240] or received the child into his home and held out the minor as his child.[241] Fathers falling into either of these categories are presumed fit and cannot have their parental rights involuntarily terminated except on proof of specified grounds by clear and convincing evidence.[242] The UAA contemplates termination of a biological father's rights only when his conduct manifests "serious failures to perform parental responsibilities" and the evidence is sufficient to overcome the presumption of fitness.[243]

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237. See UNIF. ADOPTION ACT § 1-101(10), 9 U.L.A. at 6. "Parent" is expressly defined in the Act to be "an individual who is legally recognized as a mother or father or whose consent to the adoption of a minor is required." Id. Any man named by the mother as the child's father must also receive notice of the adoption proceedings. See id. § 3-401(a)(3), 9 U.L.A. at 46.

238. See id. § 3-404(a), 9 U.L.A. at 48. The Act also provides that if the mother intentionally misidentifies the father, she is subject to a civil fine of not more than $5000. See id. § 7-105(f), 9 U.L.A. at 88. Vermont modified section seven of the UAA to avoid any direct implication of a devious mother; instead, Vermont's statute has one general enforcement provision that allows a penalty for any violation of the provisions of the Act rather than a specific section addressing the mother. See VT. STAT. ANN. tit. 15A, § 7-101 (1996).

239. See UNIF. ADOPTION ACT § 2-401(a)(1)(iii), 9 U.L.A. at 27 (noting that a father acknowledges this paternity by signing "a document which has the effect of establishing his parentage of the minor").

240. See id. §§ 2-401(a)(1)(iii)(A), 3-504, 9 U.L.A. at 27, 53-54. The Act provides that if a child is under six months of age, the father must pay reasonable prenatal, natal, and postnatal expenses, and support payments according to his financial means, visit the child, and manifest an ability and willingness to assume legal and physical custody of the child. See id. § 3-504, 9 U.L.A. at 53-54. If the child is over six months old, the father must provide financial support according to his means for the six months prior to filing of the termination petition, communicate regularly with the child, and manifest an ability to assume custody of the child. See id.

241. See id. § 2-401(a)(1)(iv), 9 U.L.A. at 27.

242. See id. § 3-504(c) & cmt, 9 U.L.A. at 53-55. The UAA enumerates the various ways in which an unwed father's rights may be terminated and expressly establishes the burden of proof for termination under the specific grounds. See id. § 3-504, 9 U.L.A. at 53-54. If the father fails to respond to the notice, his parental rights can be terminated by the court. If the father responds and asserts his parental rights, the court can terminate his rights if he has failed to provide financial support during the prenatal, natal, and postnatal periods. See id. § 3-504(c)(1)(i), 9 U.L.A. at 53.

243. Id. § 3-504 & cmt, 9 U.L.A. at 53-55. See also Santosky v. Kramer, 455 U.S. 745, 745 (1982) (establishing that grounds for termination of parental rights must be proven by clear and convincing evidence).

The UAA encourages social engineering by utilizing the best interests of the child standard. Under the UAA, judges are encouraged to subjectively evaluate which custodial arrangement is better suited to the child's welfare and may ignore the biological parent's rights if denying the adoption would be detrimental to the child's best interests.[244] Termination proceedings may not be fair because they do not provide substantive protection for the biological father who, through no fault of his own, was prevented from assuming his parental responsibilities.[245] Under the termination provisions,[246] the thwarted father can defend his inaction by proving, by a preponderance of the evidence, that he had a compelling reason for not providing financial support or visiting with the child.[247] For fathers like Gary Bjorklund, however, that defense is negated by judicial consideration of the father's behavior during the mother's pregnancy, particularly where the mother has rejected his offers of support.[248]

Further, the Act appears to be difficult to administer and may achieve inconsistent results. Although the UAA requires expeditious handling of all adoption proceedings, the number of possible evidentiary hearings available under the UAA could delay finality of an adoption decision. Theoretically, a court could determine in one

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244. See Hollinger, supra note 112, at 359, 361. While Hollinger claims that the UAA is "front-loaded with due process protections," she misses the point that even with those protections there is no substantive due process when a judge can decide a biological parent's rights based on his subjective determination of the child's best interest.

245. See Lowe, supra note 89, at 400 ("[T]he grounds for the termination of parental rights under the Act are considerably broader than those available under most states' child protection laws [and] the Act seeks to redress the imbalance inherent in the parental rights doctrine.").

246. See UNIF. ADOPTION ACT § 3-504(c)(3), 9 U.L.A. at 53. Section 3-504(d) gives several reasons for termination. Those reasons include the circumstances of the minor's conception, the parent's behavior during the pregnancy or since birth or toward another minor, detriment to the minor, the parent's efforts to assume physical and legal custody, the quality of the parent/child relationship, the suitability of the child's present custodial environment, and the effect of a custody change on the minor. See id., 9 U.L.A. at 53-54.

247. See id.

248. See id. § 3-504(e)(4)(c), 9 U.L.A. at 54. The Commission relied in part on In re Adoption of Doe, 543 So. 2d 741 (Fla. 1989), to say that it is constitutional to consider the prebirth conduct of a father. See id. The commission also relied on In re Baby Girl K., 335 N.W.2d 846 (Wis. 1983), and Doe v. Attorney W., 210 So. 2d 1312 (Miss. 1982), to come to this conclusion. However, those cases are distinguishable because they involved fathers who knew about the pregnancies and births but took no action to assert their interest until well after the adoption was begun or finalized.

Likewise, the Commission did not express any intent that courts should consider the father's emotional support of the mother during the prebirth period. In fact, the UAA's provisions are so laden with requirements for the father to assume financial responsibility and maintain a relationship with the child that they may preclude consideration of emotional support. See, e.g., UNIF. ADOPTION ACT § 2-401(a), 9 U.L.A. at 27 (requiring consent from a father who has financially supported the child or established a relationship with the child); id. § 3-504(c)(1)(i), (ii), (iii), (iv) 9 U.L.A. at 53 (allowing termination of parental rights if the father has not provided financial support or attempted to establish a relationship with his child who is less than six months old).

hearing whether the father could be identified, whether his consent was necessary, whether his rights should be terminated, and whether the custodial arrangement would serve the child's best interests. But recent cases prove that one hearing to determine all those issues is impractical and highly unlikely. Therefore, the adoption process and challenges to it could be drawn out.[249]

2. Best Interests Bills

Over the past few years, several best interests bills have been introduced in the Florida Legislature.[250] The most recent best interests bills, Senate Bill 1762 and House Bill 1257 (1997 bills), were introduced in 1997 and were companion bills with the same text and revisions.[251] Under these 1997 bills, the state's chief concern was the best interests of the child;[252] that intent was clarified in a definition of the "best interest of the person to be adopted."[253] The definition listed the factors to be considered when determining what is in the best interests of the child, which were taken from Florida's dependency statute.[254]

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249. See In re Adoption of Baby E.A.W., 658 So. 2d 961, 973 (Fla. 1995) (Kogan, J., concurring in part, dissenting in part) (stating that the UAA relied on In re Adoption of Doe, 543 So. 2d 741 (Fla. 1989), as authority). Justice Kogan questioned the constitutionality of the Doe decision because it cuts off the birth father's opportunity interest based on his relationship with the birth mother and not the child. See id. at 972, 975.

250. See Fla. SB 1762 (1997); Fla. HB 1257 (1997); Fla. SB 1876 (1996); Fla. HB 1837 (1996); Fla. SB 752 (1995); Fla. HB 349 (1995); Fla. SB 264 (1994).

251. See Fla. SB 1762 (1997); Fla. HB 1257 (1997).

252. See Fla. SB 1762 (1997); Fla. HB 1257 (1997). The 1997 bills were somewhat watered down when compared to past best interests bills. E.g., compare Fla. SB 1876 (1996) and Fla. HB 1837 (1996), with Fla. SB 752 (1995) and Fla. HB 349 (1995).

253. See Fla. SB 1762 (1997); Fla. HB 1257 (1997). That definition states:

> "Best interest of the person to be adopted" means that the adoption will protect and promote the health, safety, physical, and psychological well-being of the prospective adoptee. This consideration shall not include a comparison between the attributes of the parents and those of any persons providing a present or potential placement for the child. For the purpose of determining the manifest best interests of the child, the court shall consider and evaluate all relevant factors.

Fla. SB 1762 (1997); Fla. HB 1257 (1997).

254. See Fla. SB 1762 (1997); Fla. HB 1257 (1997). Those considerations are:

> (5)(a) The ability and disposition of the parent or parents to provide the child with food, clothing, medical care, or other remedial care recognized and permitted under state law instead of medical care and other material needs of the child.
>
> (b) The capacity of the parent or parents to care for the child to the extent that the child's health and well-being will not be endangered upon the child's return home.
>
> (c) The present mental and physical health needs of the child and such future needs of the child to the extent that such future needs can be ascertained based on the present condition of the child.
>
> (d) The love, affection, and other emotional ties existing between the child and the child's parent or parents, siblings, and other relatives, and the degree

The 1997 bills included various notice provisions. First, under the consent provision, the bills retained the current diligent search requirement.[255] However, the petitioners' diligent search time was reduced to thirty days.[256] The 1997 bills also proposed a new notice section to cover fathers who cannot be identified or located through diligent search efforts.[257] Finally, any "prospective male parent is deemed to have notice at the time of sexual intercourse and a lack of knowledge shall not be a defense to contesting the adoption of a child conceived."[258]

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of harm to the child that would arise from the termination of parental rights and duties.

(e) The child's ability to form a significant relationship with a parental substitute and the likelihood that the child will enter into a more stable and permanent family relationship as a result of permanent termination of parental rights and duties.

(f) The length of time that the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity.

(g) The depth of the relationship existing between the child and the present custodian.

(h) The reasonable preferences and wishes of the child, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.

(i) The recommendations for the child provided by the child's guardian, attorney ad litem, or legal representative.

Fla. SB 1762 (1997); Fla. HB 1257 (1997). Cf. FLA. STAT. § 39.4612 (1997).

255. See Fla. SB 1762 (1997); Fla. HB 1257 (1997).

256. See Fla. SB 1762 (1997); Fla. HB 1257 (1997). Currently, the diligent search requirement is 60 days. See FLA. STAT. § 63.062(3) (1997).

257. See Fla. SB 1762 (1997); Fla. HB 1257 (1997). Relevant portions of proposed section 63.063, Florida Statutes, read:

63.063 Notice of adoption.—

(1) Any person whose consent to the adoption is required by this chapter who has not consented.

(2) The mother of the minor, unless her parental rights have been terminated or she has executed a voluntary consent which contains a written waiver of notice of the adoption proceedings.

(3) Any man, who:

(a) Is or has been married to the mother of the minor and the child was conceived or born during the marriage or born during the marriage and he is the biological father of the child or has filed a paternity action pursuant to section 742.091;

(b) Adopted the minor;

(c) Has been established by court proceeding to be the father of the child; or

(d) Has provided the minor and the minor's mother during pregnancy with support in a repetitive, customary manner taking into consideration the needs of the mother.

(4) Any party who is attempting to revoke consent on the ground that it was obtained by fraud or duress.

(5) Any individual who claims to be or is named as the father or possible father of the adoptee or a person who the birth mother has reason to believe may be the father of the child.

Id.

258. Fla. SB 1762 (1997); Fla. HB 1257 (1997); see also Fla. SB 1876 (1996); Fla. HB 1837 (1996); Fla. SB 752 (1995); Fla. HB 349 (1995). Previous bills have also proposed this notice section. Senate Bill 752 and House Bill 349 (companion bills) placed this statement

The 1997 bills required consent from both the father who is married to the mother and the unwed biological father, if they have both filed a paternity action and responded to the notice of the adoption.[259] The bills also contained provisions that allow the court to waive consent from fathers who have abandoned the child,[260] have not filed a paternity action or provided the mother with financial and emotional support, or are found unfit to take custody of the child.[261] Additionally, the 1997 bills created a new (and questionable) "implied consent" provision.[262] Consent could be implied if a birth father failed to provide support, failed to respond to the notice of adoption, or failed to file a paternity suit.[263]

The premises of the best interests bills are unconstitutional. Although the 1997 bills provided adequate notice and consent procedures, there was no substantive protection for fathers in either of the two types of cases. Under the waiver of consent provision, the court can waive consent from a parent if the court finds that parent unfit, but the bills offered no explanation of "unfit." In time, the waiver of consent provision could have become even more encompassing than the current catch-all, "abandoned." The 1997 bills offered no definition or elements that would have guided the courts when deciding whether a parent is unfit, leaving the judiciary in the same subjective position they are in now. Aside from determining whether a biological father has provided the mother with enough financial and emotional support, the court could simply find the father unfit. This procedure is inadequate to protect the unwed biological father's opportunity to establish a relationship with his child. An unguided fitness determination is not a necessary means to accomplish the state's interest in protecting the welfare of children or parental rights to parent one's own children.

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in the legislative intent section: "It is the further intent of the Legislature that a man is on notice that a child may have been conceived when he has sexual intercourse, whether or not contraception was used." Fla. SB 752 (1995); Fla. HB 349 (1995). Under either proposal, this point of demarcation—at the time of intercourse—is much too early. A man should not be on notice that he may be a father, much less that any gamete will possibly become a zygote which will become a child who will be placed for adoption, unless he has some indication that a woman is pregnant. These notice-of-adoption-at-time-of-sex proposals are unjust because, theoretically, they mean that a man must file a paternity suit or start financially and emotionally supporting the mother in a customary and repetitive manner the day after he has sex with her because he has notice that she will place his prospective child for adoption.

259. See Fla. SB 1762 (1997); Fla. HB 1257 (1997).

260. See Fla. SB 1762 (1997); Fla. HB 1257 (1997). The bills kept the current definition of "abandoned" but added to it that incarceration of a parent will not preclude a finding of abandonment. See id.

261. See Fla. SB 1762 (1997); Fla. HB 1257 (1997).

262. See Fla. SB 1762 (1997); Fla. HB 1257 (1997).

263. See Fla. SB 1762 (1997); Fla. HB 1257 (1997). This provision is questionable because it assumes the father had notice and that his inaction was his own decision.

B. Proposals That Are Close, But Not Good Enough

1. 1996 Florida Bills

Senate Bill 3026 and House Bill 227, both introduced in 1996, proposed a completely different system based on two very questionable principles. First, the 1996 bills revised legislative intent to state that "termination of parental rights other than by consent or waiver shall be governed by chapter 39."[264] Then, they created a new section to outline diligent search requirements[265] and required that notice of the adoption be served on the mother, any one whose consent is required but has not consented, and any man who has filed an action to establish paternity in the particular paternity action at issue.[266]

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264. Fla. SB 3026 (1996); Fla. HB 227 (1996). The revised section 63.022(2)(l), Florida Statutes, reads:

> In all matters coming before the court pursuant to this act, the court shall enter such orders as it deems necessary and suitable to promote and protect the best interests of the person to be adopted.

Id.

265. See Fla. SB 3026 (1996); Fla. HB 227 (1996). The new section was:

> 63.063 Due Diligence; consent and notification; cooperation.—
>
> (1) The petitioner must make good faith and diligent efforts to identify, locate, notify, and obtain written consent from the persons required to consent to adoption within 60 days after filing the petition. These efforts shall include conducting interviews and record searches to locate those persons, including verifying information related to location of residence, employment, service in the Armed Forces, vehicle registration in this state, and corrections records.
>
> (2) In attempting to identify and locate the father, inquiry shall be made as to whether:
>
> (a) The woman who gave birth to the minor adoptee was married at the probable time of conception of the minor, or at a later time.
>
> (b) The woman was cohabiting with a man at the probable time of conception of the minor.
>
> (c) The woman has received payments or promises of support, other than from a governmental agency, with respect to the minor or because of her pregnancy.
>
> (d) The woman has named any individual as the father on the birth certificate of the minor or in connection with applying for or receiving public assistance.
>
> (e) Any individual has formally or informally acknowledged or claimed paternity of the minor in a jurisdiction in which the woman resided during or since her pregnancy, or in which the minor resided or resides, at the time of the inquiry.

Fla. SB 3026 (1996); Fla. HB 227 (1996).

266. See Fla. SB 3026 (1996); Fla. HB 227 (1996). The proposed new section 63.117, Florida Statutes, was:

> 63.117 Notice of adoption petition.—
>
> Notice of the adoption proceeding, along with a copy of the petition, must be served by the petitioner on:
>
> (1) Any person whose consent is required, who has not consented.
>
> (2) The mother of the minor, unless her parental rights have been terminated.
>
> (3) Any man who has filed an action to establish paternity.
>
> (4) Any person who is seeking to revoke a consent.

The 1996 bills also deleted the definition of "abandoned" and greatly revised the consent requirements.[267] Under these proposals, consent was required only from the fathers who filed an acknowledgment of paternity.[268] The court could waive consent from a father who was not married to the mother, or who received actual notice prior to birth that he is or may be the father of the child and "thereafter, fails to pay any of the living, medical, parental, or birth expenses of the mother or fails to take any action to assert his parental rights prior to the birth or within 60 days after the birth of the child."[269] Finally, the 1996 bills attempted to clarify termination procedures by proposing separate proceedings for termination of parental rights.[270]

Though they did clarify notice and termination proceedings, the 1996 bills failed to adequately protect the rights of several types of unwed fathers. Specifically, the bills based an unwed father's parental rights on whether he legally assumed his parental responsibilities, and then based termination of those parental rights on whether his relationship with his child is detrimental to the child. The proposed use of chapter 39 termination proceedings was misplaced.[271] Use of chapter 39 would begin the termination inquiry from the perspective that there has been a parental relationship and that the relationship has been detrimental to the child.[272] This perspective is

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Fla. SB 3026 (1996); Fla. HB 227 (1996). The bills also created a new section requiring notice of the adoption hearing. See Fla. SB 3026 (1996); Fla. HB 227 (1996). Those proposed changes tracked the notice requirements in the proposed section 63.117 but added the requirement that any man who has filed an action to establish paternity must receive notice of the adoption hearing. See Fla. SB 3026 (1996); Fla. HB 227 (1996) (proposed § 63.122(e)).

267. See Fla. SB 3026 (1996); Fla. HB 227 (1996).

268. See Fla. SB 3026 (1996); Fla. HB 227 (1996).

269. Fla. SB 3026 (1996); Fla. HB 227 (1996).

270. See Fla. SB 3026 (1996); Fla. HB 227 (1996). That proposal stated:

> 63.124 Separate proceeding for termination of parental rights.—
>
> (1) Any proceeding to terminate parental rights of either birth parent must be filed pursuant to and in accordance with chapter 39, and must be filed separately from the petition for adoption. The final hearing on any such proceeding to terminate parental rights must occur prior to the final hearing on the adoption petition.

Fla. SB 3026 (1996); Fla. HB 227 (1996).

271. See FLA. STAT. § 39.462 (1997). Chapter 39 provides further notice requirements and diligent search efforts before terminating parental rights. See id. § 39.462 (requiring notice of termination proceedings); id. § 39.4625 (requiring a diligent search when the parent subject to termination proceedings is unidentified and unlocated).

272. Assuming that the termination petition would have to state grounds for termination under section 39.464, subsection (c) would be a likely ground for termination in pursuit of adoption. See id. § 39.464(1)(c). This ground for termination is:

> When the parent or parents engaged in conduct toward the child or toward other children that demonstrates that the continuing involvement of the parent or parents in the parent-child relationship threatens the life or well-being of the child irrespective of the provision of services. Provision of services is evidenced by proof that services were provided through a previous plan or offered as a case plan from a child welfare agency.

wrong because in the unwed father cases the child is placed at-birth and the father has been unable to develop any relationship with his child, let alone a detrimental relationship. In unwed father cases, the focus of the inquiry should be on whether the unwed father has given some indicia of his intent to assume his parental responsibilities. The use of chapter 39 is not an appropriate means for determining the unwed father's intentions toward his newborn child.

Additionally, the 1996 bills were underinclusive. Only fathers who had filed acknowledgments of paternity were required to consent to the adoption. This means that fathers who were unaware of the filing system but had supported the mother or were willing to assume custody of the child would not have had standing to contest the adoptions. However, even when a father does file an acknowledgment, there is no guarantee that his rights will not be terminated.[273] Usually, an unwed father only knows about the acknowledgment system because he has consulted an attorney. Then, when he appears in court, the current animosity toward fathers who "rush to the Legal Aid Society . . . in an effort to get a free lawyer to start fighting for some supposed legal right"[274] works against them. A father who takes actual responsibility for his child should not be precluded from contesting an adoption simply because he did not file an acknowledgment. The exclusion of some unwed fathers because they did not file an acknowledgment, although they may have fully assumed other responsibilities, is not a necessary means to accomplish the state's goal of protecting the welfare of children.

Id. That subsection's use of the term "conduct" would invite analogy to interpretation of chapter 63's definition of abandoned. Such an analogy would interpret chapter 39's terminology to mean that evidence of the father's lack of prenatal financial and emotional support of the natural mother would be conduct demonstrative of the detriment to the child's well-being.

273. See Swayne v. L.D.S. Soc. Servs., 795 P.2d 637, 643 (Utah 1990). In Swayne, the unwed biological father did not want to marry the mother, knew she was pregnant, and made living arrangements for her. See id. at 639. When the mother told him she was considering placing the child for adoption, he told her that he wanted the child. See id. Nonetheless, before the birth of the child, the mother covertly planned to place the child for adoption, and upon the child's birth, she relinquished the child to social services. See id. Instead of telling the father about the placement, she lied to him and said that the baby had died. See id., at 639 n.2. The mother soon told the father about her deception and the next day the father filed the acknowledgment. See id. at 640. Within three months, he had also filed a paternity suit and both he and the mother had filed notices to contest the adoption. See id. The Utah Supreme Court held that its acknowledgment statute did not violate the Equal Protection or Due Process Clauses and denied the father standing to contest the adoption. See id.

274. In re Adoption of Baby E.A.W., 647 So. 2d 918, 922 (Fla. 4th DCA 1994).

2. Statute Clarifying the Rights of Unwed Fathers in Newborn Adoptions

Recently, another suggestion for legislative reform has also supported a "filed-fathers only" system.[275] The Statute Clarifying the Rights of Unwed Fathers in Newborn Adoptions (SCRUFNA) states that it intends to balance the interests involved in the adoption process while providing "clear, objective guidelines" for adjudication of these cases and restoring efficiency and permanence to the adoption system.[276] To preserve his parental interest, the unwed father must register with a putative father registry.[277] SCRUFNA suggests making the filing of paternity notice more simplified by establishing a nationwide telephone or mail registration system.[278] Filing with the registry "vests" the father with a rebuttable presumption of parental rights that entitles him to custody of the child.[279] However, if a prospective unwed biological father fails to register within thirty days after the birth of the child or before the day the child is surrendered for adoption, whichever is later, a court can find that he has abandoned the child and forfeited his parental rights.[280] The adoptive parents can then attempt to overcome the presumption by proving a ground for termination of the natural father's parental rights.[281] SCRUFNA proposes that such grounds would include "incompetence, physical abuse of the mother during her pregnancy, conviction for a violent felony within the last ten years, and spurning a birth mother's pleas for assistance during pregnancy."[282]

This proposal has two serious flaws. First, the biological father has the initial burden of discovering the pregnancy and the subsequent surrender of the child for adoption.[283] Considering the overwhelming autonomy a pregnant mother has, a biological father should not carry that burden. Only the mother has the choice of aborting the child or placing the child for adoption. It is overburdensome to require "men who are concerned that they may have impregnated a woman and are interested in taking responsibility for their potential offspring, to take . . . affirmative action" by filing.[284] An unwed father has a fundamental right to establish a relationship with his child. Requiring the father to register every time there is a

275. See Resnik, supra note 113, at 422.
276. Id.
277. See id. at 424.
278. See id.
279. See id.
280. See id. at 423.
281. See id.
282. Id. at 426.
283. See id.
284. Id. at 424.

chance that he may be a father when he has no knowledge that a woman is even pregnant, much less that he may be the father, is not a necessary means to achieve the state's interests.

Additionally, SCRUFNA, like Senate Bill 3026 and House Bill 227, is underinclusive. Filing should not be the only means by which an unwed father has standing to contest an adoption. This filed-fathers only approach would not grant standing to the man who has assumed actual responsibility for the pregnancy and expects to have equitable rights to raise his child.

IX. CONCLUSION

The issue of how much responsibility an unwed father should assume before gaining full constitutional protection to establish a relationship with his newborn is not easy to resolve. States vary greatly in their approaches to deciding which fathers should be recognized as fathers and how much protection their interests deserve. An unwed biological father's genetic link to his child and his asserted intent and willingness to assume a parenting role for his newborn should be sufficient to trigger full constitutional protection of his inchoate interests. That constitutional protection should be recognized and implemented by establishing a biological rights doctrine. When an unwed biological father contests the at-birth adoption of his newborn child, he should be presumed fit to take custody of that child. His parental rights should negate any interest the prospective adoptive parents may have, and the presumption of his fitness should be rebutted only by clear and convincing evidence. Only the father's demonstrated intent to assume custody of the child should be considered. His emotional relationship with the mother should be irrelevant. The courts are not protecting his opportunity interest in a relationship with the mother, but the prospective relationship he seeks with his child.

The state should begin instituting the biological rights doctrine by clarifying legislative intent and eliminating ambiguous statutory terms that allow the judiciary to waive the biological father's consent based on his prenatal conduct towards the mother. In addition, the state should establish adequate notice procedures that hold the birth mother responsible for naming, searching for, and noticing the biological father, and make her a party to the consent-termination proceedings. All biological fathers should be required to consent to an adoption before the state is permitted to terminate their parental rights. The court should waive that consent only if there is clear and convincing evidence that the father's custody will be detrimental to the child. "Detriment to the child" would be met by proof of the father's failure to provide (or attempt to provide) financial support in

accordance with his means. Finally, if the biological father gains knowledge of the adoption late in the proceedings, he should have a specific period of time in which to assert his parental interest and gain custody of the child.

These recommendations would make the rights of biological mothers and fathers more equitable, encourage responsible fathers, deter social engineering by the courts, protect the interests of children subjected to adoption, and help to relieve the administrative burden of the adoption process. Few things in life are as certain as the biological link between a parent and child, and even fewer rights deserve as much protection. States only do more harm when they fail to recognize these facts.