When Is a Biological Father Really a Dad?

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I. INTRODUCTION

"There is a 'clear distinction between a mere biological relationship and an actual relationship of parental responsibility.'"1

In 1993, the nation watched in horror as news reports repeatedly showed Baby Jessica screaming as she was torn from the parents who raised her for nearly three years and given to her biological father.2 A Michigan court allowed Baby Jessica's transfer despite the fact that the experts who testified concluded that this disruption in her life would cause great psychological harm to her in the short term and possibly emotionally scar her for life.3 In rendering its decision, the court evalu-
ated the constitutional rights of the unwed biological father, yet ignored the rights and interests of the child.⁴

Unfortunately, this situation frequently occurs: a biological father of a child born out of wedlock and placed for adoption later asserts a parental right to his child.⁵ Subsequently, a legal battle ensues which leaves the child in a state of “prolonged limbo.”⁶

The physiological differences between women and men have naturally led to the granting of varying rights to biological mothers and biological fathers.⁷ While laws throughout the United States are relatively specific concerning the rights afforded to unwed biological mothers⁸ and to biological fathers married to biological mothers,⁹ the laws pertaining to the rights of unwed biological fathers are vague and uncertain.¹⁰ In

PENDS FOR EVERYTHING AND FOR THE CENTRAL UNDERSTANDING OF HERSELF AND OF THE WORLD ARE MISSING. THIS IS JUST THE BEGINNING FOR JESSICA. THE TERROR AND CONFUSION AS TO WHERE HER ‘PARENTS’ ARE AND WHY IT IS THAT THEY DON’T COME WILL NOT BE RESOLVED. THE YEARNING, THE FEAR AND THE SORROW ARE DREADFUL AND IT IS ONLY THE BEGINNING.

Id. at 47 n.5.

4. See DeBoer, 501 N.W.2d at 194.

5. See supra notes 2-4 and accompanying text. See generally Michael M. v. Giovanna F., 7 Cal. Rptr. 2d 460 (Ct. App. 1992) (exemplifying the potential difficulties involved when a father is not aware of the pregnancy until after the child is born); In re Kaliee "CC", 579 N.Y.S.2d 191 (N.Y. App. Div. 1992) (depicting the situation where a father fails to show an interest in parenting the child during the pregnancy); In re Adoption of Baby Boy D, 742 P.2d 1059 (Okl. 1987) (upholding the termination of a father's rights without notice or consent because he assumed no parental responsibilities and waited until the adoption decree was signed to assert a parental claim); Baby Girl K, 335 N.W.2d at 846 (representing the predicament arising when a father is incarcerated during the pregnancy).


7. Baby Girl K., 335 N.W.2d at 854-55 (“The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures.”).


9. Michael H. v. Gerald D., 491 U.S. 110, 129-30 (1989) (finding constitutional a statutory provision establishing a conclusive presumption that the mother's husband was the child’s father).

10. These statutes vary from state to state. Florida, Minnesota, and Wisconsin do not require an unwed biological father’s consent for an adoption if the court determines that he abandoned the child by failing to provide sufficient support. FLA. STAT. § 63.032(14) (1983); MINN. STAT. ANN. § 259.24 (West 1992); WIS. STAT. ANN. § 48.415 (West 1987). Washington allows the termination of the parental rights of an unwed biological father who was given notice of an adoption, but failed to appear to contest the adoption. WASH. REV. CODE § 26.33.120(3) (1992). California permits a court to terminate an unwed biological father's rights if he fails to provide financial assistance.
attempting to clarify the confusion in adoption laws, courts and legislators have sought to redefine the parental rights of unwed biological fathers. As a result, legislatures have created classes of parents with varying rights and responsibilities. Laws typically afford biological fathers not married to the biological mothers fewer rights than biological fathers married to the biological mothers. The legal dilemma discussed in this Comment arose from this distinctive treatment of unwed biological fathers.

Because the rights afforded to these fathers are evolving slowly, there are no clear guidelines establishing how courts should decide adoption cases involving fathers’ rights. This lack of predictability leads fathers to bring constitutional claims alleging violations of their due process and equal protection rights. Jurisdictions decide these underlying constitutional claims in varying ways, thereby jeopardizing the well-being of the children involved. In addition to legislative and judicial recognition of this problem, the harm inflicted on children by the uncertain results in these adoption situations has also led to public demand for reform. Hence, many groups have formed specifically to lobby for
the enactment of protective legislation that will require consideration of
the children's interests.17

This Comment focuses on the origin of recent legislative, judicial, and
public support for clarification in this area, particularly the impasse
arising when an unwed biological father attempts to block an adoption
and the effects on children of the lack of a uniform standard to deter-
mine a father's rights. Part II of this Comment discusses the historical
development of the problem, focusing specifically on the urgent need to
establish uniformity and predictability in determining a father's rights,
and the effect of the current confusion on the children involved.18 Part
III outlines the underlying constitutional claims emanating from these
cases because neither state statute nor judicial precedent addresses the
rights afforded to unwed biological fathers with any degree of uniform-
ity.19 Part IV proposes guidelines to provide predictability in light of the
constitutional issues, particularly the need for state enactment of cer-
tain sections of the Uniform Adoption Act, along with other specific
legislation, and the possibility of recognizing constitutionally protected
due process rights for children.20 Part V concludes that state ratifica-
tion of pertinent sections of the Uniform Adoption Act, or adoption of
similar specific guidelines, will provide the certainty necessary to pro-
tect the rights of all parties to an adoption—the biological parents, the
potential adoptive parents, and most importantly, the child.21 Part V
further concludes that consistent court recognition of constitutional due
process rights for children will serve as a safety net to protect the inter-
ests of children who may inevitably fall through the cracks of even the
most specifically drafted guidelines.22

II. HISTORICAL BACKGROUND

Historically, a grave stigma attached to an illegitimate child.23 Consequently, the law protected only legitimate children.24 Fathers had no
obligation to provide either support or inheritance opportunities to their
illegitimate children.25 In the late twentieth century, however, the stig-

17. See id.
18. See infra notes 23-52 and accompanying text.
19. See infra notes 53-167 and accompanying text.
20. See infra notes 168-220 and accompanying text.
21. See infra notes 221-25 and accompanying text.
22. See infra notes 221-25 and accompanying text.
23. Mary Kay Kisthardt, Of Fatherhood, Families and Fantasy: The Legacy of Mi-
children were unable to inherit property or obtain support from their parents. Id.
24. Id.
25. Id.
ma of illegitimacy began to diminish. In recognition of the changing attitudes towards illegitimacy, Texas, for example, recently deleted the word "illegitimate" from its statutes. The recent changes in attitudes toward children born out of wedlock work to extinguish the original rationale for differential treatment of their fathers, namely the previous lack of legal rights for children born out of wedlock. Consequently, courts now grant illegitimate children privileges that they were previously denied and impose responsibilities upon their biological fathers.

Similarly, courts now recognize that they should not deny a father the opportunity to care for a child solely because he is not married to the biological mother. Yet, great uncertainty exists as to when a father


27. In re J.W.T., 872 S.W.2d 189, 194 (Tex. 1994) (noting that because "more than one quarter of the children in this country are born to unmarried mothers," the negative connotations associated with the word "illegitimate" warranted replacement of the word in the statutes).


30. See Gomez, 409 U.S. at 538; see also Mary L. Shanley, Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy, 95 Colum. L. Rev. 60, 66-70 (1995) (presenting an overview of the common law's stance toward a father's rights and obligations to his illegitimate children).

has the right to block the adoption of his child. This uncertainty leads to heartache when a court reverses a lower court’s order and allows for a change in custody of a child now three or four years old. This situation must, therefore, be handled with urgency to minimize any resulting harm to the child involved.

A. Urgency of the Issue

Children are not static objects. They grow and develop, and their growth and development require more than day-to-day satisfaction of their physical needs. Their growth and development also require day-to-day satisfaction of their emotional needs, and a primary emotional need is for permanence and stability.

Children are not property for a court to award to the winner of a legal battle. Because of the complex nature of a child’s development, this area of the law needs clear resolution. While parents litigate the future placement of a child, the child passes through several developmental stages and forms attachments to caregivers. The early years are


33. In re Adoption of Baby Boy D, 742 P.2d 1059, 1067 (Okla. 1987) (terminating father’s parental rights because he did not demonstrate parental responsibility for his child before the child was placed for adoption).

34. Historically, however, children belonged to their fathers who “actually owned their children as if they held title to them.” Nancy Ellen Yaffe, A Fathers’ Rights Perspective on Custody Law in California: Would You Believe It if I Told You That the Law Is Fair to Fathers?, 4 S. CAL. INTERDISCIPLINARY L.J. 135, 137 (1996).

35. Children Aren’t Property to be Toyed with, BUFFALO NEWS, Nov. 18, 1993, at 2 (arguing that children are not owned by parents; rather, parents are given the “privilege” of sharing in the joy of the lives of their children).


Change of the caretaking person for infants and toddlers further affects the course of their emotional development. Their attachments, at these ages, are thoroughly upset by separations as they are effectively promoted by the constant, uninterrupted presence and attention of a familiar adult. When infants and young children find themselves abandoned by the parent, they not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustworthy. Where continuity of such relationships is interrupted more than once, as happens due to multiple placements in the early years, the children’s emotional attachments become increasingly shallow and indiscriminate.

Id.
a crucial time in the life of a child because they shape a child's entire existence. Thus, early stability is not only important, but mandatory, to a child's well-being. When there is a custody dispute it must be handled with great swiftness to avoid psychological damage to the child.

A custody dispute leading to the relocation of a child to a new home with new caregivers shakes the child's stability. This problem is heightened when the dispute is between an unwed biological father—who likely asserted his parental rights after the child was placed with caregivers—and the prospective adoptive parents. The litigation process of a custody dispute places a child in a state of flux that ultimately damages a child's development. The child must not be the one suffering as a result of any delay in determining placement. The courts must protect a child's constitutional right to a stable family life.

Additionally, many public policy reasons demand an early resolution of the rights of the parties involved in a child's life. First, an unwed biological mother faces many important decisions early in her pregnancy, including whether to terminate the pregnancy, plan for adoption, or keep her baby. Thus, it is important that the father immediately make his position regarding the child's future known to the mother so that she may use this information to make her decisions. Second, the mother

37. Id. at 32-34.
38. Id.
39. Id. at 43.
40. Sider v. Sider, 639 A.2d 1076, 1086 (Md. 1994) (recognizing the importance of considering "the possible emotional effect on the child of a change of custody").
41. See, e.g., Adoption of Michael H., 898 P.2d 891 (Cal. 1995) (exemplifying potential length of time involved in an adoption contested by an unwed biological father), cert. denied sub nom., Mark v. Johns, 116 S. Ct. 1272 (1996). In Michael H., an unwed biological father asserted his desire to care for his child after the child was placed with prospective adoptive parents. Id. at 893. The trial court terminated the father's rights; the court of appeal, however, reversed and determined that the father had a right to raise the child. Id. at 893-94. By the time the California Supreme Court ultimately reversed the lower court's decision and found that the father's interests were not worthy of constitutional protection, the child was four and one-half years old. Id. at 901.
42. See Painter v. Bannister, 140 N.W.2d 152, 158 (Iowa 1966) (awarding custody to adoptive parents because disrupting the child at a late stage in development would "gamble with [the] child's future").
43. GOLDSTEIN ET AL., supra note 36, at 45.
44. For an argument in favor of judicial recognition of a child's constitutional right to due process review prior to removal from the child's existing home, see infra notes 198-220 and accompanying text.
46. Id. This Comment does not specifically address the situation arising when an
needs medical, emotional, and financial support during her pregnancy.\textsuperscript{47} Therefore, it is essential that she know early in her pregnancy whether she will be able to rely on the father’s support.\textsuperscript{48} Finally, the risk of a father legally asserting his parental rights after the court places a child with adoptive parents will dissuade potential adoptive parents from adopting.\textsuperscript{49}

Hence, all parties involved in an adoption need to know as soon as possible what role an unwed biological father will take in his child’s life. All parties suffer tragically when a higher court overrules a lower court’s decision not to protect a father’s constitutional rights and reverses the lower court’s award of custody to adoptive parents.\textsuperscript{50} Thus, the very nature of this issue mandates the establishment of clear and distinct guidelines that specify the procedures and time limits involved in the adoption of a child. Such guidelines will provide the certainty necessary to protect children and provide the stability necessary for their development and growth.\textsuperscript{51} Furthermore, as a safety precaution above and beyond establishing clear guidelines, courts must recognize a child’s right to due process prior to removing the child from an existing home.\textsuperscript{52}

III. LEGAL ISSUES

The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in \textit{appropriate cases}.\textsuperscript{53}

While states generally regulate adoption, federal precedent is important because the unpredictability as to when a state court will terminate an unwed biological father’s rights usually leads to two constitutional claims: (1) violation of due process, and (2) violation of equal protection under the laws.\textsuperscript{54} In deciding these issues, courts generally draw a distinction between a protected constitutional interest and an interest that
is "merely inchoate" and therefore has not ripened into an interest worthy of constitutional protection. The United States Supreme Court has recognized that a father's constitutional right to raise his child is not absolute by holding that a father's relationship with his child is entitled to constitutional protection only after he establishes a substantial and committed relationship with his child. The Court has noted that "[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."

The due process and equal protection arguments are important to unwed biological fathers because they provide the usual grounds upon which these fathers challenge the unpredictable tests applied by state courts. The most standards frequently applied by state courts in determining whether they will terminate an unwed biological father's rights

55. There is a distinction between an inchoate, or incomplete right to parent a child, and the constitutional importance afforded to a fully developed parent-child relationship. John T. Wright, Comment, Caban v. Mohammed: Extending the Rights of Unwed Fathers, 46 BROOK. L. REV. 95, 115-16 (1979) ("[T]he unwed father's interest springs not from his biological tie with his illegitimate child, but rather, from the relationship he has established with and the responsibility he has shouldered for his child.").


57. See Lehr, 463 U.S. at 265 (finding that a father's due process rights were not violated when he was not given notice of the adoption proceedings because he had not established a substantial relationship with his child); Caban v. Mohammed, 441 U.S. 380, 394 (1979) (allowing a father to attempt to block adoption by third parties because he had an existing relationship with his child worthy of constitutional protection); see also In re Adoption of Baby E.A.W., 647 So. 2d 918, 923 (Fla. Dist. Ct. App. 1994) (holding that a father "must take some positive action to assume the responsibilities of parenthood before he becomes entitled to exercise the rights of parenthood"), aff'd, 658 So. 2d 961 (Fla. 1995), cert. denied sub nom., G.W.B. v. J.S.W., 116 S. Ct 719 (1996).

58. See, e.g., Lehr, 463 U.S. at 262 (noting that father did not "grasp[] [the] opportunity" to develop a relationship with his child because he waited until after the adoption petition was filed to attempt to assert his parental rights); Caban, 441 U.S. at 388, 393 (holding that father not only demonstrated a commitment to a relationship with his children, but also that a substantial relationship existed between the father and his children because he lived with the unwed biological mother and the children for several years).

59. Lehr, 463 U.S. at 260 (quoting Caban, 441 U.S. at 387 (Stewart, J., dissenting) (emphasis omitted)).

60. See infra notes 64-107 and accompanying text (discussing constitutional arguments raised by unwed biological fathers).
are: (1) whether his actions constitute abandonment of the child, 61 (2) whether it is in the best interests of the child that the father's parental rights be terminated, 62 and (3) whether the nature of the relationship between the father and his child is worthy of constitutional protection. 63

A. Due Process of Law

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. 64

Many fathers argue that the termination of their parental rights violates their constitutional right to due process. 65 Due process, however, does not mandate a hearing "in every conceivable case of government impairment of private interest"; 66 rather, the governmental interest advanced by regulation of the private interest must be balanced against the importance of the private interest. 67

Courts have consistently held that there is a presumptive preference for biological parents to assume the custody and care of children and

61. See infra notes 108-32 and accompanying text.
62. See infra notes 133-56 and accompanying text.
63. See infra notes 157-67 and accompanying text.
64. Lehr, 463 U.S. at 262.
65. The Fourteenth Amendment to the United States Constitution guarantees that a person will be free from governmental interference with fundamental constitutional rights absent some compelling reason for interference. U.S. CONST. amend. XIV. The Fourteenth Amendment further guarantees that no such compelling governmental interference will be allowed absent "due process." Id.

Due Process demands notice and an opportunity to be heard before a person may be denied a substantial interest. Lassiter v. Department of Soc. Servs., 452 U.S. 18, 25 (1981). Once a court identifies the private interest, it may determine whether or not the state has a substantial reason for denying the private interest. Morrissey v. Brewer, 408 U.S. 471, 481, 483 (1972). See generally Stanley v. Illinois, 405 U.S. 645 (1972) (finding father's due process rights violated when his children were taken from him without a hearing to determine his fitness as a parent); Michael M. v. Giovanna F., 7 Cal. Rptr. 2d 460 (Ct. App. 1992) (holding father's due process rights violated when court denied him standing to assert paternity); In re J.W.T., 872 S.W.2d 189 (Tex. 1994) (holding that statute barring an opportunity for a hearing to establish parental rights denied father due process).

66. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 894-95 (1961) (explaining that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation" and finding that "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action").
67. Lehr, 463 U.S. at 256.
that the state must show a sufficient cause for any intervention with this presumption. In the case of illegitimate children, states have an interest in placing children in stable homes while fathers have an interest in parenting their children. Federal and state laws have attempted to balance these competing interests, and courts have held that a state does not violate a father's right to due process if it shows a compelling reason to terminate his parental rights. In fact, the Supreme Court has ruled that a state must only afford a father due process protection of his interest in having contact with his child when he has "demonstrate[d] a full commitment to the responsibilities of parenthood."

The United States District Court for the Northern District of Illinois clearly articulated this standard in Pena v. Mattox. In Pena, the father (Ruben) argued that his due process rights were violated when his parental rights were terminated by the adoption of his child. The mother (Amanda) gave birth to the child while Ruben was in jail for statutory rape. As part of his sentence, the court ordered Ruben not to have any contact with Amanda or her family. Furthermore, Pena was not informed of the birth of the child and did not consent to the adoption of the child. The court nevertheless held that Ruben's due process rights were not violated when the child was adopted without his consent.

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69. Stanley, 405 U.S. at 651.
70. See id. at 650. In Stanley, the Court held that an Illinois statute presumptively declaring an unwed biological father an unfit parent violated the father's due process rights. Id. at 656.
71. Lehr, 463 U.S. at 261 (citing Caban v. Mohammed, 441 U.S. 380, 392 (1979)).
73. Id. at 570.
74. Id. at 569. Amanda was 15 years old, and Pena 19 years old, when Amanda became pregnant. Id.
75. Id.
76. Id.
77. Id. at 573-74. Pena provides an excellent illustration of the harsh results often reached in these cases. Ruben was in jail and the criminal court ordered him not to have any contact with the biological mother. Id. at 569. Nevertheless, the adoption court terminated Ruben's parental rights on the grounds that Ruben failed to establish a relationship with his child worthy of constitutional protection. Id. at 574. Under the guidelines of the Uniform Adoption Act, the basis for termination of Ruben's parental rights would probably have been stringent enough to protect Ruben's interests. See infra notes 173-91 and accompanying text (discussing guidelines provided by the Uniform Adoption Act).
The court reasoned that because Ruben failed to take advantage of steps available to him to form a relationship with his child, "he lost the wondrous opportunity and massive responsibilities of fatherhood." Thus, if a father fails to develop a substantial relationship with his child, due process does not demand a hearing prior to the termination of his parental rights. Absent from this due process analysis, however, is due process protection for the child involved. To fully provide constitutional protection, the courts must also recognize the due process rights of the child, who deserves protection from disruption in his or her life, liberty, and pursuit of happiness. In addition to due process, many fathers claim that termination of their parental rights results in a violation of their rights under the Equal Protection Clause.

B. Equal Protection Clause

"Gender-based distinctions 'must serve important governmental objectives and must be substantially related to achievement of those objectives' in order to withstand judicial scrutiny under the Equal Protection Clause." The Fourteenth Amendment's Equal Protection Clause establishes constitutionally protected categories by which a state may not distinguish parties absent a legitimate governmental objective. Furthermore,

78. Pena, 880 F. Supp. at 574. The court found that Ruben could have either (1) initiated a paternity suit as soon as he was aware of Amanda's pregnancy, or (2) initiated an action to obtain a judgment establishing his parental rights. Id. at 572.
79. Id. at 574.
80. See infra notes 198-220 and accompanying text (advocating adoption of proposals to protect children's due process rights).
81. The Fourteenth Amendment protects all persons from interference with their life, liberty, and pursuit of happiness absent a sufficient state interest for such intervention. U.S. CONSt. amend. XIV.
82. See infra notes 83-107 and accompanying text.
84. The Fourteenth Amendment to the United States Constitution requires that states afford similar treatment to persons similarly situated. U.S. CONSt. amend. XIV. See generally Lehr v. Robertson, 463 U.S. 248, 267-68 (1983) (holding that the Fourteenth Amendment is not violated when a father fails to establish a substantial relationship with children and is then denied notice of adoption); Caban, 441 U.S. at 394 (holding that sex-based distinction in adoption law violated Fourteenth Amendment).
85. See, e.g., Reed v. Reed, 404 U.S. 71, 76 (1971) (holding that statute favoring males over females in appointing estate administrators violated the Equal Protection Clause because the state had no substantial state interest in distinction); Loving v. Virginia, 388 U.S. 1, 2 (1967) (holding that a statute prohibiting interracial marriage was violative of equal protection because it drew distinctions based solely on race); Adoption of Kelsey S., 823 P.2d 1216, 1237 (Cal. 1992) (finding that statute providing for gender-based distinctions between a biological mother and an unwed biological
the means that the state employs to differentiate between parties must substantially serve the specified governmental objective. Because gender is one of the protected categories, unwed biological fathers argue that gender-based parental classifications that afford them fewer rights than unwed biological mothers violate the Equal Protection Clause because the classifications are based on irrelevant differences.

In the attempted adoption of an illegitimate child, the state's interest is "to promote the best interests of the child, to protect the rights of interested third parties, and to ensure promptness and finality." Consequently, state statutes generally entitle mothers of illegitimate children to always block a proposed adoption, but afford fathers of illegitimate children this opportunity only upon a showing of a substantial relationship between the father and the child. Courts allow application of these

86. See, e.g., Reed, 404 U.S. at 76; Loving, 388 U.S. at 11; Kelsey S., 823 P.2d at 1233.
87. Lehr, 463 U.S. at 255.
88. Id. at 266.
89. See UNIF. ADOPTION ACT § 2-401 (1994), 9 U.LA. 27 (Supp. 1996) (allowing unwed biological mothers to unconditionally withhold consent to an adoption, but allowing unwed biological fathers to only withhold consent when they have exhibited "parenting behavior").

Section 2-401 lists the persons whose consent is required in order to complete an adoption:

(1) The woman who gave birth to the minor and the man, if any, who:
   (i) is or has been married to the woman if the minor was born during the marriage or within 300 days after the marriage was terminated or a court issued a decree of separation;
   (ii) attempted to marry the woman before the minor's birth by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, if the minor was born during the attempted marriage or within 300 days after the attempted marriage was terminated;
   (iii) has been judicially determined to be the father of the minor, or has signed a document that has the effect of establishing his parentage of the minor, and:
      (A) has provided, in accordance with his financial means, reasonable and consistent payments for the support of the minor and has visited or communicated with the minor; or
      (B) after the minor's birth, but before the minor's placement for adoption, has married the woman who gave birth to the minor or attempted to marry her by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; or

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gender-based distinctions to fathers who do not accept the responsibility necessary to establish a relationship with their children.

For example, in *Lehr v. Robertson*, an unwed biological father (Lehr) claimed that New York's gender-based distinctions for parental classes denied him equal protection. Eight months after his child was born, the biological mother married another man. Two years later, the mother and her husband filed for adoption of the child. One month after the adoption proceeding began, Lehr filed a petition seeking visitation and paternal rights. The court dismissed the petition and ultimately granted the adoption. Lehr argued that he was denied equal protection because his consent was not required for the adoption whereas a similarly situated biological mother's consent would have been necessary. Reasoning that equal protection only applied to cases where the mother and father are "similarly situated with regard to their relationship with the child," the Supreme Court held that Lehr had no valid claim. Because the biological mother had an established relationship with the child but Lehr did not, the Court reasoned that the Equal Protection Clause did not prevent the state from affording varying rights to the two parents.

Conversely, in *Stanley v. Illinois* the Court found that an Illinois gender-based statute did violate a father's equal protection rights. The unwed biological father (Stanley) claimed that the state denied him equal protection because he was not afforded a hearing to determine his fit-

(iv) has received the minor into his home and openly held out the minor as his child;
(2) the minor's guardian if expressly authorized by a court to consent to the minor's adoption; or
(3) the current adoptive or other legally recognized mother and father of the minor.

Id.

91. Id. at 266. Sections 111 and 111a of the New York Domestic Relations Law contained gender-based distinctions and guaranteed certain parental classes the opportunity to block an adoption. Id. Although the laws did not restrict this opportunity for the biological mother, they granted the biological father the opportunity only in certain circumstances. Id.
92. Id. at 250.
93. Id.
94. Id. at 252.
95. Id. at 253.
96. Id. at 255.
97. Id. at 257 (emphasis added).
98. Id. at 257-58.
100. Id. at 667-68.

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ness as a parent before his parental rights were terminated. Stanley lived sporadically with the biological mother and their three children for eighteen years. When the biological mother died, the children became wards of the state pursuant to Illinois law. The Supreme Court held that the statute violated Stanley’s constitutional rights because his children were taken from him without a determination that he was an unfit parent. The Court reasoned that because Stanley established a substantial relationship with his children, the denial of his parental rights under a state statute that declared only those children of unmarried fathers wards of the state without affording the fathers any type of hearing directly violated Stanley’s equal protection rights.

Therefore, courts have typically allowed states to apply gender-based distinctions to classes of parents not similarly situated, particularly unwed biological fathers who have not established a relationship with their child (as in Lehr), but they have not allowed states to apply such distinctions to similarly situated individuals (as in Stanley).

In sum, the case law in this area establishes the principle that neither due process nor equal protection rights are violated when an unwed biological father loses his parental rights after he fails to commit to or establish a substantial relationship with his child. The determination of whether a father committed to or established a relationship with his

101. Id. at 646-47.
102. Id. at 646.
103. Id.
104. Id. at 657-58.
105. Id. at 658. The Court found that the state’s convenience in presuming an unwed biological father unfit was “insufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.” Id. The Court also found that “denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause.” Id. Furthermore, the Court held that termination of Stanley’s rights violated due process. Id. See supra notes 64-82 and accompanying text for a discussion of due process claims.
106. See generally Lehr v. Robinson, 463 U.S. 248, 267-68 (1983) (finding that father failed to take available steps to establish a relationship with his child); Caban v. Mohammed, 441 U.S. 380, 394 (1979) (holding that father’s rights were entitled to constitutional protection because he lived with the children as their father and contributed to their financial support); Quilloin v. Walcott, 434 U.S. 246, 255-56 (1978) (allowing the termination of father’s rights because he “never shouldered any significant responsibility for the child’s rearing”); Stanley, 405 U.S. at 657-58 (ruling that father’s rights were entitled to constitutional protection because he lived intermittently with his children for 18 years).
child worthy of constitutional protection is a fact-sensitive issue. Consequently, states vary greatly in the procedures they employ to make the initial determination of the rights afforded an unwed biological father, and these determinations ultimately lead to the due process and equal protection claims outlined above.107

C. State Procedures Determining the Rights of Unwed Fathers

1. Abandonment

Several states allow termination of an unwed biological father's rights upon a showing that the father has "abandoned" the child.108

In the seminal adoption case in Florida, Doe v. Roe,109 an unwed biological father (Richard) claimed that the court violated his constitutional rights when it permitted the adoption of his child without his consent.110 Upon learning of the mother's pregnancy, Richard urged the unwed biological mother (Mary) to have an abortion because he "was not ready to commit to marriage, felt financial pressure, and was troubled by the whole idea of marriage."111 After the child was born and two days after Mary signed the adoption agreement, Richard proposed marriage to Mary and explained that he wanted to keep the baby.112 The trial court applied a Florida statute and determined that Richard abandoned the child and therefore his consent to the adoption was not necessary.113 The Supreme Court of Florida upheld the trial court's decision and reiter-
ated that a court may examine a father's prebirth actions in determining whether he has abandoned the child. 114

Many courts have followed this same reasoning and have also broadened the language of abandonment statutes by looking at the prebirth conduct of the unwed biological father in determining whether there was an abandonment. 115 Courts generally will not permit termination of the rights of a father who "promptly comes forward and demonstrates a full commitment to his parental responsibilities"—emotional, financial, and otherwise. 116 Yet many courts, like that in Doe v. Roe, 117 hold that this commitment begins with a father's obligation to provide both financial and emotional support to an unwed biological mother prior to the birth of the child. 118 Consequently, in determining whether to terminate the father's rights, many courts consider the father's prebirth conduct. 119

In Adoption of Michael H., 120 the adoptive parents contended that the court of appeal erred in its application of this standard, known as the Kelsey S. standard when it upheld the unwed biological father's rights. 121 Upon learning of the pregnancy, the unwed biological father

114. Doe, 543 So. 2d at 746. Specifically, the court found that Richard's failure to provide prebirth financial and emotional assistance to Mary when he had the ability to do so constituted abandonment. Id. at 743, 749.
116. Adoption of Kelsey S., 823 P.2d 1216, 1236 (Cal. 1992). The standard applied in this case, commonly known as the Kelsey S. standard, takes into consideration the father's prebirth conduct. Id.
117. 543 So. 2d at 741; see supra notes 109-14 and accompanying text (discussing Doe case).
118. Doe, 543 So. 2d at 746 (holding that prebirth conduct is relevant to the issue of abandonment); see also In re Adoption of Baby E.A.W., 647 So. 2d 918, 923-24 (Fla. Dist. Ct. App. 1994) (finding abandonment when father verbally and emotionally abused the pregnant mother, failed to attend doctor's appointment made her move out of their apartment, and failed to provide any support to her during the pregnancy).
119. See Baby E.A.W., 647 So. 2d at 923-24; Baby Girl K. ex rel. L.K. v. B.B., 335 N.W.2d 846, 852 (Wis. 1983) (determining that father's assault of pregnant mother, attempts to convince expectant mother to smuggle marijuana, and failure to provide financial or emotional support to pregnant mother supported finding of abandonment). 120. 898 P.2d at 891.
121. Id. at 897; see supra note 116 and accompanying text (setting forth Kelsey S. standard). The trial court held that it was in the child's best interest to be adopted by the adoptive parents and consequently terminated Mark's parental rights. Michael H., 898 P.2d at 893-94. The court of appeal reversed, finding that, under Kelsey S.,
(Mark) suggested that the unwed biological mother (Stephanie) have an abortion. Stephanie refused to have the procedure and instead arranged for the adoption of her child. During the pregnancy, Mark was arrested for aggravated assault on Stephanie, and he attempted suicide, but he agreed to the planned adoption of the child. Yet, after the child was born, the adoptive parents and Stephanie learned that Mark had decided not to place the child up for adoption. The Supreme Court of California examined these actions and overruled the court of appeal's decision, stating that the court misinterpreted Kelsey S. In scrutinizing Mark's actions prior to the birth of the child, the court followed many other courts and broadened the scope of Kelsey S. to include prebirth conduct.

The variations among courts with respect to the termination of a father's parental rights upon a finding of abandonment is illustrative of the subjective nature of this issue. Some courts allow a finding of abandonment on the basis of a father's prebirth conduct, considering such factors as the father's attitude towards the pregnancy and towards any arrangements for the subsequent placement of the child. These factors are extremely arbitrary and often courts "are moved by natural sympathy in a case," which compels them to construe the facts in a light that will support the decision they wish to render. The unpredictabili-

Mark's parental rights could not be terminated unless the evidence proved he was an unfit parent. Id. at 894.

123. Id.
124. Id.
125. Id. Although Mark appeared to agree to the planned adoption, the evidence showed that he made arrangements to retain an attorney to seek custody of his child prior to the child's birth, but failed to inform any of the parties to the adoption of his change of intent. Id.
126. Id. at 901.
127. Id. The court specifically held that an unwed biological father has no constitutional right to block an adoption under Kelsey S. "unless he shows that he promptly came forward and demonstrated as full a commitment to his parental responsibilities as the biological mother allowed and the circumstances permitted within a short time after he learned or reasonably should have learned that the biological mother was pregnant with his child." Id. (emphasis added).
128. See, e.g., id.; Doe v. Roe, 543 So. 2d 741, 746 (Fla. 1989).
131. The Michael H. decision provides an excellent example of a court construing the facts in order to reach the desired decision. See Michael H., 888 P.2d at 901. In her concurring opinion, Justice Kennard argued that the majority artfully constructed its opinion in order to "justify" its outcome of not removing a four and one-half year old child from the only home he had ever known. Id. at 896-10 (Kennard, J., con-
ty stemming from the courts' application of the facts to the law of abandonment urgently needs resolution because of its effect on the children involved.132

2. Best Interests of the Child

The primary standard for a court's determination regarding custody of a child and whether to terminate an unwed biological father's rights was formerly "the best interests of the child" standard.133 Modernly, many jurisdictions continue to apply the best interests of the child standard to custody disputes.134 In fact, each state's adoption statutes prescribe that courts use the best interests of the child standard in some form when making adoption determinations.135

132. See supra notes 33-52 and accompanying text for a discussion of the urgent need to resolve this issue.
133. Painter v. Bannister, 140 N.W.2d 152, 156 (Iowa 1966). In Painter, the court allowed the child to stay with the maternal grandparents with whom he had lived for two years. Id. at 153. The court stated that "the primary consideration is the best interest of the child and if the return of custody to the father is likely to have a seriously disrupting and disturbing effect upon the child's development, this fact must prevail." Id. at 156; see also Kouris v. Lunn, 136 N.W.2d 502, 506 (Iowa 1965) (finding that a young child "would have a better chance in life and would have better rearing with his [great-aunt] than with his grandmother"); Carrere v. Prunty, 133 N.W.2d 692, 696 (Iowa 1965) (ruuling that 8est interests of the child demanded granting custody to grandparents because the child had become so "strongly attached to [the] grandparents' home"); Vanden Heuvel v. Vanden Heuvel, 121 N.W.2d 216, 222-23 (Iowa 1963) (holding that a child of "tender years" was best placed with the mother if custody with the father meant the father's parents would care for the child and the father would see the child only on weekends); In re Guardianship of Phucar, 72 N.W.2d 465, 460 (Iowa 1955) (finding that best interests of the child would be served by granting custody to the child's grandparents because the father left the child with the grandparents for eight and one-half years); Finken v. Porter, 72 N.W.2d 445, 449 (Iowa 1955) (allowing grandmother and her husband to retain custody of the child because they had provided excellent care over much of the child's life).
134. See, e.g., Sider v. Sider, 639 A.2d 1076, 1083 (Md. 1994) (stating that court should consider the best interests of the child in determining paternity petition); Tubwon v. Weisberg, 394 N.W.2d 601, 604 (Minn. Ct. App. 1986) (finding that lower court's use of best interests of the child standard was not an abuse of discretion); Paternity of "Adam", 903 P.2d 207, 211 (Mont. 1995) (stating that biological ties are a weighty, though not controlling, factor in the determination of the best interests of the child), cert. denied, 116 S. Ct. 1544 (1996).
Over the past twenty years, the book entitled *Beyond the Best Interests of the Child*\(^{136}\) has been instrumental in shaping a framework for child placement issues resting on the best interests of the child.\(^{137}\) The authors based this framework on three principles. First, children must have continuity in order to develop deep and stable emotional attachments.\(^{138}\) Second, children have different time perceptions than adults, and courts must take this into account when determining the time frame allowed for a change in custody in the life of a child.\(^{139}\) Finally, it is difficult to predict the effect on children caused by removing them from their stable and loving environments.\(^{140}\) Thus, the three fundamental principles involved in this framework mandate that a child's need for a speedy and permanent custody determination surpasses the interests of the competing adults involved in the adoption.\(^{141}\)

Many courts have cited *Beyond the Best Interests of the Child* in their determination of custody cases.\(^{142}\) The factors courts consider in analyzing what is in the best interests of the child are generally as follows:

1. The length of time the child has been away from the biological parent;
2. The age of the child when care was assumed by the third party;
3. The possible emotional effect on the child of a change of custody;
4. The period of time which elapsed before the parent sought to reclaim the child;
5. The nature and strength of the ties between the child and the third party custodian;
6. The intensity and genuineness of the parent's desire to have the child; and
7. The stability and certainty as to the child's future in the custody of the parent.\(^{143}\)

Some jurisdictions have limited the use of the best interests of the child standard to particular circumstances. For example, California courts developed this standard by considering whether the biological father presents a substantial risk of detriment to the child's well-being.\(^{144}\)

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136. GOLDSTEIN ET AL., supra note 36.

The three authors of [GOLDSTEIN] are authorities in their particular fields, though each has on previous occasions applied his specialized knowledge in collaborations with colleagues in adjacent fields. They are also representatives of three different institutions, the Yale Law School, the Hampstead Child-Therapy Clinic, London, and the Child Study Center, Yale University.

Id. at ix.
137. Id. at 53.
138. Id. at 32-33.
139. Id. at 41-42.
140. Id. at 51-52.
141. Id. at 62, 105-11.
142. As of October 2, 1996, 224 federal and state cases have cited BEYOND THE BEST INTERESTS OF THE CHILD, including decisions in 38 states plus the District of Columbia and two United States Supreme Court decisions. Search of WESTLAW, ALLCASES database (Oct. 2, 1996).
144. See Orange County Soc. Servs. v. Wendy H., 862 P.2d 751, 764-65 (Cal. 1993)
Within California, however, some courts have held that the best interests of the child standard should no longer be the primary consideration in the determination of whether the court should terminate an unwed biological father's rights. The discrepancy regarding the applicable standard even within the same jurisdiction exemplifies the unpredictability involved in these decisions.

In *Paternity of Adam*, the Montana Supreme Court used the best interests of the child standard to decide that the termination of an unwed biological father's (Bob) parental rights was proper. Bob and the unwed biological mother (Mary) ended their relationship before Mary realized she was pregnant. Mary subsequently married another man (John), and Mary and John requested that Bob relinquish his parental rights. Bob refused, but Mary listed John as the father on the birth certificate. The court looked to decisions of other state courts to determine whether the best interests of the child standard was applicable. The court contrasted the "stability of the family relationship of Mary and John" with "Bob's failure to show any commitment towards establishing a 'parental' as opposed to a biological role" and held that it was not in the best interests of the child to protect Bob's parental rights.

(considering biological father's incarceration, drug use, and lack of a plan to care for child in determining that the father posed substantial risk of detriment to child).


147. Id. at 211.

148. Id. at 208.

149. Id.

150. Id.

151. Id. at 210. The court noted that California courts have held "that even if a putative father establishes his biological paternity to a child conceived out of wedlock, but born after the mother married another man, the nature of his relationship to the child is governed by the best interest of the child." Id. The court further noted that Washington courts, on the other hand, have held that "[t]he best interest of the child standard does not entitle a court to presume that paternity determination is automatically in the child's best interest." Id. (quoting McDaniels v. Carlson, 738 P.2d 254, 261 (Wash. 1987)).

152. Id. at 211. The court found that "Bob ... had no contact with [the child] and [had] demonstrated no personal commitment to or responsibility for [the child]; nor [had] he taken steps to obtain suitable employment or housing or to establish a child support fund." Id.
Whether a jurisdiction continues to use the best interests of the child standard as the primary focus or applies a modified version of the standard, every jurisdiction implements the best interests of the child to some degree in rendering a decision in an adoption proceeding. The various best interests of the child standards and their varied application further demonstrate the great degree of uncertainty plaguing adoptions involving an unwed biological father and also illustrate the urgent need for resolution.

3. Nature of the Relationship Between Parent and Child

Many jurisdictions determine whether to terminate an unwed biological father’s rights by evaluating the nature of the existing parent-child relationship. Several jurisdictions protect a father’s rights if he has demonstrated a commitment to parent his child.

In In re J.W.T., an unwed biological father (Larry) argued that the court violated his constitutional rights by denying him the opportunity to establish his paternity. The biological mother (Judy) conceived a child while she lived with Larry. The couple planned to marry after

155. HOLLINGER ET AL., supra note 135, at § 1.01(2)(b).
156. See supra notes 33-52 and accompanying text (discussing urgent need to resolve this issue).
157. For example, Texas protects the rights of a father who “1) acknowledges responsibility for child support or other care and maintenance, and 2) makes serious and continuous efforts to establish a relationship with the child.” In re J.W.T., 872 S.W.2d 189, 195 (Tex. 1994). Oklahoma grants standing to assert parental rights to fathers who have actually committed themselves to establishing a relationship with their child, as evidenced by the father’s assumption of parental duties. Adoption of Baby Boy D, 742 P.2d 1059, 1068 (Okla. 1985) (holding that the father’s failure to provide emotional or financial support to the biological mother during her pregnancy demonstrated his lack of commitment toward parenthood). New York allows termination of the rights of a father who fails to establish a custodial relationship with his child. Robert O. v. Russell K., 173 A.D.2d 30, 35 (N.Y. 1992) (ruling that a father’s rights could be terminated although he did not know of the pregnancy until after his child was placed for adoption). Florida permits termination of the rights of a father who fails to assume the responsibilities of parenthood. In re Adoption of Baby E.A.W., 647 So. 2d 918, 923-24 (Fla. Dist. Ct. App. 1994) (considering father’s verbal and physical abuse of pregnant mother and failure to provide prebirth financial assistance or attend prebirth medical examinations with expectant mother as evidence of a lack of parental responsibility).
158. 872 S.W.2d at 189.
159. Id. at 191.
160. Id. at 189.
Judy's divorce from her husband was final. Larry and Judy arranged for prenatal care and Larry paid for several of Judy's medical expenses. Judy and her husband reconciled prior to the birth of the child, and Larry quickly filed suit declaring paternity and seeking visitation. The court held that Larry's constitutional rights were violated because he had been "arbitrarily prevented from attempting to establish any relationship with his natural child, after making early and unqualified acceptance of parental duties." This case exemplifies the use of the nature of the relationship between an unwed biological father and his child as an indication of whether the relationship is worthy of constitutional protection.

As discussed above, jurisdictions apply different standards to determine the nature of the rights afforded or denied an unwed biological father. Hence, it is difficult to predict the outcome when a court decides a child's custody placement in an adoption case, and fathers often rest their constitutional claims on that basis. Thus, states must consolidate these divergent approaches into one uniform regulation that ensures a certain result in each adoption proceeding.

IV. PROPOSALS FOR PROVIDING CERTAINTY TO THIS CRITICAL ISSUE

There are three important areas in which modification would provide certainty to the rights afforded to unwed biological fathers: (1) state ratification of pertinent sections of the Uniform Adoption Act, (2) state legislation creating strict guidelines and time constraints, and

161. Id.
162. Id.
163. Id.
164. Id. at 198. A Texas statute prevented Larry from asserting his paternity because it provided that ",if, when a child is born, the mother is married to someone other than the biological father, her husband is 'presumed' to be the child's actual father, and this 'marital presumption' may not be attacked by any party outside the marriage. . . ." Id. at 190.
165. See supra notes 108-64 and accompanying text (examining various jurisdictional approaches to this issue).
166. See supra notes 64-107 and accompanying text (analyzing constitutional claims made by unwed biological fathers).
167. See infra notes 168-220 and accompanying text (outlining proposals that will provide the uniformity necessary to protect the interests of children in adoption cases).
168. See infra notes 173-91 and accompanying text.
169. See infra notes 192-97 and accompanying text.
(3) recognition of due process rights for children. Adoption of either the Uniform Adoption Act or comparable state legislation would assure a predictable outcome in every adoption case. Recognition of a child's due process rights would ensure that in the unfortunate event the specificity of the new legislation nevertheless occasionally allowed a child to be caught in a legal limbo, the child would have a constitutional right to the protection of existing familial relationships.

A. Uniform Adoption Act

The National Conference of Commissioners of Uniform State Laws adopted the Revised Uniform Adoption Act (UAA) at their 1994 Annual Meeting. The UAA attempts to eliminate the confusion in adoption proceedings involving unwed biological fathers. The UAA weighs the importance of the interests of all the parties to an adoption and focuses primarily on the best interests of the child. The UAA creates certain guidelines by combining the two prevalent standards in adoption: (1) a showing of abandonment of the child, and (2) a showing that termination of the father's parental rights is in the best interests of the child.

Specifically, the UAA allows for termination of an unwed biological father's rights if (1) he fails to respond to a petition served upon him within twenty days, and (2) the court finds it is in the best interests of the child to terminate the relationship and he fails to comply with certain responsibilities imposed upon him. Furthermore, the UAA bars a fa-

170. See infra notes 198-220 and accompanying text.
171. See infra notes 173-97 and accompanying text.
172. See infra notes 198-220 and accompanying text.
174. See Images of Adoption, supra note 6, at B3 (explaining that the purpose of the UAA is to overcome the confusion and conflict among existing state laws).
176. The UAA specifies the precise actions which, if an unwed biological father fails to take, will constitute abandonment of the child. See infra note 178 (listing circumstances in which parental rights will be terminated under UAA). The current handling of abandonment varies from jurisdiction to jurisdiction. See supra notes 108-32 and accompanying text (discussing various state approaches to abandonment).
177. The UAA provides time constraints on the period in which a change of custody will be allowed in order to serve the best interests of the child by ensuring his psychological stability. See infra notes 178-87 and accompanying text (outlining the procedures specified in the UAA). The best interests of the child standard currently employed by courts differs vastly among jurisdictions. See supra notes 133-66 and accompanying text (examining various state approaches to the standard).
178. UNIF. ADOPTION ACT § 3-504, 9 U.L.A. 52.
ther from blocking an adoption when he knows of the biological mother's pregnancy but fails to demonstrate a substantial commitment to the child. If this occurs, the father has essentially abandoned the child. For example, the UAA unifies the various state abandonment statutes into one standard that allows the court to declare that a father abandoned his child if he (1) failed to pay for medical care for the expectant mother and newborn child, (2) did not provide reasonable and consistent financial support to the child, (3) failed to visit the child regularly, and (4) lacked the desire to physically take the child into his custody. The UAA also establishes firm procedures for the

Section 3-604 allows for termination of parental rights in the following instances:

(a) If the respondent is served with a petition to terminate under this part and the accompanying notice and does not respond and, in the case of an alleged father, file a claim of paternity within 20 days after the service unless a claim of paternity is pending, the court shall order the termination of any relationship of parent and child between the respondent and the minor unless the proceeding for adoption is dismissed.

(c) If the respondent responds and asserts parental rights, the court shall proceed with the hearing expeditiously. If the court finds, upon clear and convincing evidence, that one of the following grounds exists, and, by a preponderance of the evidence, that termination is in the best interest of the minor, the court shall terminate any relationship of parent and child between the respondent and the minor:

(1) in the case of a minor who has not attained six months of age at the time the petition for adoption is filed, unless the respondent proves by a preponderance of the evidence a compelling reason for not complying with this paragraph, the respondent has failed to:

(i) pay reasonable prenatal, natal, and postnatal expenses in accordance with the respondent's financial means;
(ii) make reasonable and consistent payments, in accordance with the respondent's financial means, for the support of the minor;
(iii) visit regularly with the minor; and
(iv) manifest an ability and willingness to assume legal and physical custody of the minor, if, during this time, the minor was not in the physical custody of the other parent.

Id.

Section 3-604 also makes special provisions for a child who has reached the age of six months. See id. § 3-504(c)(2).

179. Id. § 2-401, 9 U.L.A. 46.
180. Id.
181. Id. § 3-504(c)(1)(i), 9 U.L.A. 52.
182. Id. § 3-504(c)(1)(ii), 9 U.L.A. 52.
183. Id. § 3-504(c)(1)(iii), 9 U.L.A. 52.
184. Id. § 3-504(c)(1)(iv), 9 U.L.A. 52.
time allowed for demonstration of a commitment, specifications for the content of the consent, and requirements for attempting to set aside the consent.

Thus, the UAA delineates with relative certainty the rights and obligations of unwed biological fathers. Yet, to date, only eight states have specifically adopted the UAA. Adoption of the UAA is important because it would provide uniformity to the varying methods of weighing the interests of the parties involved in an adoption.

The UAA provides the swift determination of custody that the child needs to ensure stable development and, further, provides safeguards to protect the interests of the unwed biological fathers. State adoption of the UAA will produce predictable results in each adoption proceeding, and the greatest benefit of this uniformity will be the protection extended to a child by minimizing the amount of time allowed for a change of custody.

B. Other Legislation

While the UAA would provide certainty and structure, many states have already proposed or adopted their own original legislation in an attempt to bring certainty to this issue.

1. Proposals

Several states have pending legislation which purports to “prevent occurrences . . . of the ‘Baby Jessica’ case.” For example, in Arizona, the legislature proposed a bill that would require unwed biological mothers to list all potential fathers. Under this legislation, if the father fails to file an affidavit declaring whether he intends to assert parental rights within thirty days of notification of his potential paternity, he

185. Id. § 2-404, 9 U.L.A. 30 (limiting the time frame to 192 hours after birth).
186. Id. § 2-406, 9 U.L.A. 33.
187. Id. § 2-408, 9 U.L.A. 35 (allowing court to set aside consent only upon notice to the adoptive parents within 192 hours of the birth of the child).
188. These states include Alabama, Arkansas, California, Louisiana, Montana, North Dakota, Ohio, and Oklahoma.
189. HOLLINGER ET AL., supra note 135, § 1.01(1).
190. For example, the UAA does not allow parents to consent to an adoption prior to the birth of the child. UNIF. ADOPTION ACT § 2-404(a), 9 U.L.A. 30. Furthermore, the UAA allows parents to revoke consent at any time prior to the finalization of the adoption upon a showing of fraud or duress. Id. § 2-408(b)(1), 9 U.L.A. 35.
193. Id.
would lose the opportunity to block the adoption.\textsuperscript{194} Similarly, the California Assembly passed a bill that reduces the time period for birth parents to change their minds about an adoption from ninety to thirty days and reduces the time limit in which the birth parents may attack a finalized adoption to six months.\textsuperscript{195}

2. Enactments

In response to the uncertainty regarding the rights and responsibilities of unwed biological fathers, several states enacted legislation aimed specifically at clarifying these two issues. Iowa, for example, established a paternity registry for fathers that ensures they receive notice if their child is placed for adoption.\textsuperscript{196} Additionally, California passed legislation that specifies the particular instances when and the precise parties who may bring an action to determine whether a father and child relationship exists.\textsuperscript{197}

\textsuperscript{194} Id.
\textsuperscript{195} California Adoption Barrier Reform Package, Assembly Bill 2165 (Aug. 28, 1996).
\textsuperscript{196} IOWA CODE § 144.12A (Supp. 1996).
\textsuperscript{197} CAL. FAM. CODE § 7630 (West 1994).

Section 7630 provides:

\begin{enumerate}
\item[(a)] A child, the child's natural mother, or a man presumed to be the child's father under subdivision (a), (b), or (c) of Section 7611, may bring an action as follows:
\begin{enumerate}
\item[(1)] At any time for the purpose of declaring the existence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611.
\item[(2)] For the purpose of declaring the nonexistence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.
\end{enumerate}
\item[(b)] Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under subdivision (d) of Section 7611.
\item[(c)] An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 or whose presumed father is deceased may be brought by the child or personal representative of the child, the State Department of Social Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the
Although these state attempts to draft legislation to provide certainty to the decisions affecting a change in custody coincide with the provisions of the UAA, state ratification of the UAA would grant even more protection to the interested parties than the individual legislative attempts. The individual legislative attempts, however, are a viable alternative to adoption of the UAA.

C. Possible Constitutional Due Process Rights for Children

The recognition of constitutional due process rights for children, taken with the provisions of the UAA and other legislative enactments, would further protect the interests of children. "An important part of affording due process rights to children is to give them a voice in their own life decisions." Removal from the only home that a child has ever known is a life decision in which the child should certainly have a voice. Courts recognize that a child will suffer psychological harm when taken from a stable environment and placed in a new home. Yet, courts render their decisions based on the fathers' constitutional rights and ignore the impact that their decisions will have on the children. Children, however, must also be afforded a constitutional right to due process because of the psychological damage they may suffer as a result of a change in custody. Although the Supreme Court has never directly addressed this issue, it nevertheless warrants consideration.

Children are unable to speak for themselves, and as a result, they are unable to assert the legal rights and make the legal demands adults in the same situations would certainly claim. This problem generally

alleged father has died or is a minor.

Id.; see also id. § 7664 (defining specific situations in which a court may terminate an unwed biological father's parental rights).


200. Adoption of Kelsey S., 823 P.2d 1216, 1236 (Cal. 1991) (finding that the "child's well-being is presumptively best served by continuation of the father's parental relationship").

201. Scarnecchia, supra note 3, at 42.

202. Michael H. v. Gerald D., 491 U.S. 110, 130 (1989) ("We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here because, even assuming that such a right exists, [the child's] claim must fail."). In addition, state supreme courts have yet to address this issue. Adoption of Michael H., 888 P.2d 891, 893-94 (Cal. 1995), cert. denied sub nom., Mark v. Johns, 116 S. Ct. 1272 (1996). The Michael H. court did not consider the Fourteenth Amendment "interests of children in the stability and continuity of their family lives" because the consideration was not essential to its decision and the parties did not raise the issue at the trial level. Id.

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arises when a court orders the change of a child's custody after determining that an unwed biological father was denied his constitutional right to care for his child.204 The Due Process Clause established by the Fourteenth Amendment to the United States Constitution does not apply only to adults.205 Just as unwed biological fathers claim their parental rights should not be terminated absent a substantial state interest,206 children should also be able to claim that their relationships with their established families deserve constitutional protection and likewise should not be terminated without a substantial reason.207

Historically, courts have specifically afforded children many constitutional rights.208 For example, in *Plyler v. Doe*,209 Mexican children argued that a Texas statute denied them equal protection because it allowed schools to deny education to children who were not "legally admitted" into the country.210 The Court held that the statute violated the

Levin wrote:

If the danger confronting this child were physical injury, no one would question her right to invoke judicial process to protect herself against such injury. There is little difference, when viewed from the child's frame of reference, between a physical assault and a psychological assault... It is only because this child cannot speak for herself that adults can avert their eyes from the pain that she will suffer.

*Id.* (Levin, J., dissenting).

204. *See, e.g., In re B.G.C.*, 496 N.W.2d 230, 245-46 (Iowa 1992) (finding that the termination of parental rights requires more than regard for the best interests of the child).

205. The Due Process Clause guarantees that a person shall be free from governmental interference. U.S. Const. amend. XIV. (emphasis added); *see also* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (stating that "constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *In re Gault*, 387 U.S. 1, 13 (1967) (holding that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone").

206. *See supra* notes 53-107 and accompanying text (examining due process and equal protection claims of unwed biological fathers).

207. *See Scarnecchia, supra* note 3, at 54-55.


210. *Id.* at 205.
children's equal protection rights. The Court reasoned that the Mexican children were "persons" and therefore protected under the Equal Protection Clause which provides that "[n]o State shall . . . deny to any person within its jurisdiction equal protection of the laws." Applying Plyler's reasoning to the case of removing children from their stable homes, these children are also persons and therefore protected under the Due Process Clause. Just as the Court held that the Mexican children had a right to protect their "social, economic, intellectual, and psychological well-being," children who face damage to their psychological well-being because a court removes them from stable families also deserve constitutional protection.

In making such constitutional decisions on behalf of children facing removal from their homes, courts should consider the same factors previously widely recognized in best interest of the child determinations:

Those factors are:

(1) The length of time the child has been away from the biological parent; (2) the age of the child when care was assumed by the third party; (3) the possible emotional effect on the child of a change of custody; (4) the period of time which elapsed before the parent sought to reclaim the child; (5) the nature and strength of the ties between the child and the third party custodian; (6) the intensity and genuineness of the parent's desire to have the child; and (7) the stability and certainty as to the child's future in the custody of the parent.

Currently, although courts consider the father's constitutional claims, they only contemplate the impact on the child upon a determination that the father is an unfit parent. Yet, because children suffer serious psychological damage when a court removes them from the only caregivers they have ever known, courts must afford these children the same due process rights as unwed biological fathers in order to eliminate this disruption in the children's developmental growth.

211. Id. at 210.
212. Id. (quoting U.S. CONST. amend. XIV, § 1) (emphasis in original).
216. Id. (citing Ross v. Hoffman, 372 A.2d 582 (Mass. 1977)).
217. In re Adoption of Baby E.A.W., 647 So. 2d 918, 925 (Fla. Dist. Ct. App. 1994) (Pariente, J., concurring) (recognizing court's inability to consider impact on the child despite the fact that "the record in this case [indicates] that the child may possibly suffer serious psychological damage upon being removed from the only home she has ever known").
218. Goldstein et al., supra note 36, at 32-33.
The provisions of the UAA, the goals motivating states to draft and enact protective legislation, and the arguments favoring a recognition of constitutional due process rights for children all provide a means to the same end: protecting the child by minimizing the delay in permanent placement of the child in an adoption proceeding.220

V. CONCLUSION

"By uniformly implementing the proposed solution, courts will protect the rights of biological fathers, adoptive parents and especially the children caught in the middle of these disputes."221

The ambiguity regarding the rights bestowed upon unwed biological fathers is detrimental to all parties involved in an adoption. As a result of this uncertainty, Baby Jessica and many other children like her lose the stability of the only family they have ever known.222 Currently, each jurisdiction applies a different test to determine the rights of an unwed biological father, and this creates a legal dilemma223 with traumatic results for a child involved in a contested adoption proceeding.224

Scarnecchia presents a suggested argument to the United States Supreme Court on behalf of recognizing a child's due process rights. Id. at 48-61. The argument concludes:

The child should not be the prize granted to the winner of the litigation. He is a person with the right to have his personhood meaningfully considered by any court with the power to change his life forever. Therefore, [the child] respectfully requests remand to the trial court for a hearing to balance his rights against the rights and interests of his biological father to determine whether or not the adoption should be granted. If the adoption is denied, [the child] respectfully requests a hearing to determine legal custody (short of adoption), again balancing his rights and interests with those of his biological father.

Id. at 61.

220. See Selmann, supra note 175, at 857.
223. See supra notes 108-67 and accompanying text (discussing the jurisdictional variances in deciding the rights granted to unwed biological fathers).
224. GOLDSTEIN ET AL., supra note 36 and accompanying text (describing the psychological damage suffered by a child whose stable development is disrupted by a change in custody).
This Comment proposes that every state ratify the Uniform Adoption Act. The Uniform Adoption Act offers the best solution by furnishing the uniformity necessary to provide predictable and efficient results in adoption proceedings involving an unwed biological father. This predictability and efficiency is essential to the well-being of every child. Individual state legislative efforts have the correct goal in mind—specific guidelines for courts to follow in making decisions regarding an unwed biological father's role in the life of his child. Yet, the children's need for continuity remains the same regardless of the state in which they reside, and therefore, their interests must be uniformly protected throughout the nation. Granting children constitutional due process rights and having consistent state ratification of the Uniform Adoption Act will further protect children by constitutionally protecting their interest in retaining the stability of their current family and by shielding them from the unnecessary psychological harm that would ensue if they were removed from the only home they have ever known.

Uniformity is the key to providing the predictable results essential in the adoption of a child. Changes in the placement of a child are detrimental to a child's stability and must not be allowed arbitrarily. Therefore, each state must adopt the Uniform Adoption Act, and the courts must recognize a child's constitutionally protected right to a relationship with his established family. Not until certainty in the rights afforded to unwed biological fathers is provided will the horrors of children, like Baby Jessica, screaming as they are torn from their families, come to an end.

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225. Baby Jessica's situation provides an excellent example of how these reforms would furnish the necessary certainty. While the specific statutory language would not have applied to Jessica's father because he was unaware of the child's existence until one month after the mother relinquished custody of Jessica, judicial recognition of Jessica's due process rights would have afforded her a hearing to determine whether she should be removed from her stable home. Under such an analysis, the court would have likely decided that Jessica had a right to be protected from the psychological damage she ultimately suffered as a result of being removed from her home. See supra note 2 for a discussion of Baby Jessica's case.