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Men Deserve More: Applying the Biological Rights Doctrine to Adoption Law

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I. Introduction

253. The relationship between parents and their children is constitutionally protected.[2] However, biological fathers are not automatically recognized by law to be the parent of a child born out of wedlock.[3] Instead, multiple steps must be taken for these fathers, hereafter called "putative fathers," to even be recognized as a parent.[4] Putative fathers have far less rights relating to their child than a father married to the child's mother would possess as a result. It is even possible that a father could be completely oblivious of the existence of his child.[5]

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2 E.g., *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

3 E.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979).

4 *Simmonds v. Perkins*, 247 So. 3d 397, 398 (Fla. 2018).

5 See, e.g., *Matter of Adoption of SJB*, 745 S.W. 2d 606 (Ark. 1988); *Matter of Karen AB*, 513 A.2d 770 (Del. 1986).

254. The United States Supreme Court has previously heard five cases regarding the rights of unwed fathers to consent to the adoption of their children[6] and the issue is still largely unresolved. The Court has been hesitant to be explicit in its decisions about what rights an unwed biological father should have regarding his unborn or newborn baby. Furthermore, state legislatures have largely avoided the issue. Most adoption law statutes are dated or ambiguous as to this point. The standard currently used in most contested adoption law cases is the "best interest of the child," which judges often use to disregard an unwed biological father's rights and wishes.[7] Because of this excessive discretion, the few rights that putative fathers are ignored, and putative fathers are suffering.

255. Studies show that unwed birth fathers are more interested in being involved with their potential offspring than has been recognized, but in most states a child can be placed for adoption without the biological father even knowing the child exists.[8] An examination into the rights and lack thereof of unwed fathers will prompt a discussion about the necessary balance between a woman's right to make decisions about the life of the child she is carrying, the biological father's right to know about and be involved with his child, and the best interests of the child. With the use of the biological rights doctrine, also called the superior parental rights doctrine, the rights of the parents and interests of the child can be adequately balanced, and the father is placed on a more even level with the mother, especially in contested adoption cases.

256. This paper will discuss the limited rights that putative fathers currently have to their children in regard to contested adoptions. Part II will discuss the five United States Supreme Court cases which have discussed the constitutional rights of putative fathers, the current rights and lack of rights that putative fathers have, and the possibility of change in those rights due to recent progressive changes in individual freedoms and liberties and, more specifically, in the area of family law. Part III will then explain what the biological rights doctrine is, why it should be applied to uncontested adoption law cases, and the many benefits that would come from its application in those cases.

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6 *Michael H. v. Gerald D.*, 491 U.S. 110; *Lehr v. Robertson*, 463 U.S. 248; *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

7 Melissa Holtzman, *Judicial Decision Making in Contested Adoptions: The Influence of Children's Best Interests Arguments*, 42 CAO. U.L. REV. 407 (2014).

8 Bogart R. Leashore, *Human Services and the Unmarried Father: The "Forgotten Half"*, 28 THE FAMILY COORDINATOR 529–34 (1979).

II. Overview of Rights

257. It has been stated that the right of parents to care for, have custody of, and control their children is the oldest of all fundamental liberty interests.[9] However, this statement only seems to apply to married parents and mothers, not to unmarried fathers.[10] At common law, a child born to an intact marriage is presumed to be the child of the wife's husband, even if there is no biological link. This is called the "presumption of legitimacy."[11] Since the 1800s when putative fathers were practically ignored, there unfortunately has not been a drastic change in the law. Putative fathers are still considered legal strangers to their children, and in order for a father to have any rights to his child, there must be more than just biology linking him to his child.

258. Prior to the five "unwed father" United States Supreme Court cases, these parents were ignored by the law.[12] Though they acknowledged these putative fathers, they did not all advance their rights. The first of these cases was Stanley v. Illinois. Here, after the death of their mother, several illegitimate children were declared wards of the state even though they had a living father who could raise them. The children were all placed with court-appointed guardians and their father argued that he was deprived of Due Process under the Fourteenth Amendment because he was never shown to be an unfit parent and other classes of parents could not be deprived of their children by law without such a determination. The Court agreed and held that even as an unwed father, he was entitled to a hearing to determine fitness to raise his children.

259. Notably, Justice White stated that "[i]t may be . . . that most unmarried fathers are unsuitable and neglectful parents . . . [b]ut all unmarried fathers are not in this category; some are wholly suited to have custody of their children."[13] Read broadly, the language in this case supports the idea that the relationship between any class of father and his child is a fundamental one.[14] This was arguably the first time that the courts gave any rights to putative fathers in regard to raising their children. *Stanley v. Illinois*[15] also set the essential groundwork for the use of the biological rights doctrine, which will be discussed in-depth in Part III of this paper.

9 *D.M.T. v. T.M.H.*, 129 So. 3d 320, 336 (Fla. 2013).

10 E.g., *Glona v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

11 *Simmonds v. Perkins*, 247 So. 3d 397, 398 (Fla. 2018).

12 CYNTHIA HAWKINS DEBOSE, MASTERING ADOPTION LAW AND POLICY 47 (2015).

13 *Stanley v. Illinois*, 405 U.S. 645, 645.

14 *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972).

15 *Stanley v. Illinois*, 405 U.S. 645 (1972).

260. *Quilloin v. Walcott*[16] used the "best interest of the child" standard to determine whether a father's rights were violated in an adoption proceeding. Here, the father of an illegitimate child was not given the opportunity to block the adoption of his child. As the lone recognized parent, only the mother's consent of the was required. The father argued that the Due Process and Equal Protections clauses gave him the same right as married fathers to veto an adoption of his children, but the Court disagreed. It instead held that the father's rights were not violated because he had not sought to legitimize his relationship with his child for eleven years. The Court also stated that it is fair to deprive putative fathers of the veto power married fathers have because putative fathers have no actual or legal responsibility to the child.[17]

261. The Court then decided *Caban v. Mohammed* a year later, where a step-father filed to adopt his wife's children. Under New York state law, in the absence of the mother's consent, an adoption cannot be completed. However, an adoption action by the unwed mother would not be prevented unless the biological father could show that the adoption would not be in the child's best interest. The Court used immediate scrutiny and determined that the law was not justified, meaning that the statute violated the Equal Protection Clause. Justice Powell stated that "maternal and paternal roles are not invariably different in importance."[18]

262. *Lehr v. Robertson* followed, where the Court held that "[a]n to the responsibilities of parenthood by 'coming forward to participate in the rearing of the child.'"[19] Finally, *Michael H. v. Gerald D.*, was decided, stating that "[t]he presumption of legitimacy was a fundamental principle of the common law [and could be] rebutted only by proof that a husband was incapable of procreation or had no access to his wife during the relevant period."[20] These two decisions reinforced the idea that putative fathers need biology plus some other action in order to be given any rights at all to their children.

263. Now, many putative fathers will not be recognized as legal parents unless they register with the state's putative father registry. Failure to register his existence or intent to claim rights to his child within a state-mandated time frame results in the loss of an opportunity to parent his children. Most states require that the father file a notice of intent to claim paternity before or immediately after the birth of the child. However, no state requires a mother to inform her sexual partners that she

16 *Quilloin v. Walcott,* 434 U.S. 246 (1978).

17 *Quilloin v. Walcott,* 434 U.S. 246–56 (1978).

18 441 U.S. 380–89 (1979).

19 463 U.S. 248, 261 (1983).

20 491 U.S. 110, 124.

is pregnant.[21] This means that a father could be completely unaware that he has a biological child.[22] This is a sad reality. Plainly stated, "[t]he putative father [should have] a right to know his child and the child his father."[23]

264. In most of the country, a putative father has no right to even seek paternal rights to his child if the child was born to an intact marriage and the married mother and her husband object.[24] However, Florida has made a substantial change regarding the rights afforded to putative fathers in the last year. Through *Simmonds v. Perkins*, the Florida Supreme Court has given putative fathers standing to rebut the presumption of legitimacy — that is, that the mother's husband is the legal father. He can do so if shows "a substantial and continuing concern for the welfare of the child."[25] The putative father would then be given parental rights to his child if he shows that there is a clear and compelling reason for him to have those rights based on the child's best interests.[26] This case has the potential to provide a drastic and necessary change to the practice of family law regarding unwed fathers in Florida.

265. Mississippi and New York have also made recent advances specifically regarding consent to third party adoption. In most of the country, only the mother's consent is needed for a child to be adopted by a third party.[27] Because of this, children can be born and either permanently hidden by the mother or adopted by a third-party without the biological father knowing. In Mississippi, and New York, though, a constitutionally protected right for putative fathers, who have a meaningful and financially supportive relationship with their child, to be notified of, or to withhold consent to, the adoption of his child is now recognized.[28]

266. These cases provide some relief for putative fathers but much more must still be done. Once a putative father has been deemed responsible and deserving of rights to his child, the court then applies the best interest of the child standard.[29] This standard holds that the person who is awarded custody should be the best

21 Shirley Darby Howell, A*doption: When Psychology and Law Collide*, 28 HAMLINE L. REV. 29, 53 (2005).

22 See, e.g., *In re the Adoption of SJB*, 745 S.W. 2d 606 (Ark. 1988); *Matter of Karen AB*, 513 A.2d 770 (Del. 1986).

23 D. Lasok, *The Legal Status of the Putative Father*, 17 INT'L. & COMP. L.Q. 634–50 (1968).

24 *Johnson v. Ruby,* 771 So. 2d 1275 (Fla. Dist. Ct. App. 2000).

25 *Simmonds v. Perkins*, 247 So. 3d 397, 398–401 (Fla. 2018).

26 *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

27 *Smith v. Malouf,* 722 So. 2d 490 (Miss. 1998); *In re Raquel Marie X*, 76 N.Y.2d 387 (1990).

28 Shirley Darby Howell, *Adoption: When Psychology and Law Collide*, 28 HAMLINE L. REV. 29, 54–55 (2005).

29 Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971 (1992).

person able to meet the needs of the child.[30] By doing this, the court can still deprive the father of those rights if the judge determines that a child may have developed a connection with another parental figure during litigation; that the child would be benefit from being raised in a two-parent household instead of with a single male; or that middle-class adoptive parents can give the child more opportunities.[31] A uniform change must be made across the United States which will eliminate this unnecessary application of discretion.

267. Based off of some recent progression of family-related law, it is easy to conclude that this country will see more positive changes in the coming years. Since the mid 1960s, the United States Supreme Court has substantially advanced personal freedoms and liberties. The first notable case to do so was *Griswold v. Connecticut*, which established the right for married couples to use contraceptives. In doing so, it also established the overarching implied right to marital privacy.[32] Two years later, the Court allowed interracial marriage across the country in *Loving v. Virginia*.[33]

268. Next, the right to a safe and legal abortion during the first trimester was afforded to all woman in the United States through *Roe v. Wade*.[34] Finally, *Obergefell v. Hodges* was decided, allowing gay marriage through its holding that same-sex couples are guaranteed the fundamental right to marry afforded by the Constitution.[35] Because it is no longer as taboo for unwed parents to raise children, it is likely that a case brought by a putative father fighting for rights to his child will be brought to the U.S. Supreme Court in the next decade.

269. The Court may be beginning to look at gender classifications more seriously under the Equal Protections Clause, and the laws disfavoring putative fathers that are not based on gender-specific characteristics. Both men and women can be bad parents.[36] The outcome of such a case will possibly be a favorable one based upon this suggestion and the current progression of rights. Until then, every State in the country should adopt strong uniform standards and afford these putative fathers the rights they deserve.

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30 Melissa Holtzman, *Judicial Decision Making in Contested Adoptions: The Influence of Children's Best Interests Arguments*, 42 CAO. U.L. REV. 406 (2014).

31 Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60 (1995).

32 *Griswold v. Connecticut,* 381 U.S. 479 (1965).

33 *Loving v. Virginia,* 388 U.S. 1 (1967).

34 *Roe v. Wade*, 410 U.S. 113 (1973).

35 *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015).

36 Michigan Law Review, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581 (1972).

III. The Biological Rights Doctrine

270. Many studies have been done on pregnancy out of wedlock, but almost all of them focus on the women. Very few studies that have been conducted on putative fathers specifically.[37] Those that have been done show that they are more concerned about their children than our laws and society recognize.[38] Also, unmarried biological fathers have been found to spend the same, or more, amount of time engaged with their children as married fathers, suggesting that the presumption of legitimacy is based solely on stigma and dated societal ideals. Some biological fathers experience extreme grief after losing the rights to their children, which can be a result of something as miniscule as failing to sign the correct form.[39] Notably, representations of fathers involved in paternity cases in the media are not usually positive.[40] Absent fathers are more common than fathers who truly want to be involved with their children. It is possible that this is a result of society's lack of care for this class of parent. However, familial structures have been changing and raising children outside of marriage is becoming far more common.[41]

271. As a result of these societal changes, the courts must alter the way they approach cases with putative fathers so that they are afforded the rights they should be given under the United States Constitution. Justice Brennan stated that the Due Process Clause would be violated if a State tried to force the breakup of a "natural family" when the parents and children objected without proof of unfitness and for the sole reason that it may be in the child's best interest. Though most putative father actions arise before the child is old enough to object, Due Process would arguably be violated if a court broke up the relationship between a father and his child without proof of unfitness.[42] Further, the "best interest of the child" is inadequate in these types of cases.[43] For these reasons, the biological rights doctrine should be

37 Bogart R. Leashore, *Human Services and the Unmarried Father: The "Forgotten Half"*, 28 THE FAMILY COORDINATOR 529–34 (1979).

38 Shirley Darby Howell, *Adoption: When Psychology and Law Collide*, 28 HAMLINE L. REV. 29, 54–55 (2005).

39 Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a basis for Paternal Investment*, 65 JOURNAL OF MARRIAGE AND FAMILY 213–32 (2003).

40 See, e.g., Ann O'Neill, *When is 'Daddy' More than DNA?*, Cable News Network: TURNER BROADCASTING SYSTEM, INC. (June 16, 2014); Marjorie Hernandez, *Show Me The Money! Blake's Baby Mama Accuses Him Of Hiding Cash In Nasty Legal Battle*, RADAR ONLINE, LLC. (February 27, 2018); Dianna Thompson, *Paternity Fraud – Hurting Military Men, Families, and Society*, VETS FIRST (May 18, 2016).

41 U.S. Department of Commerce, *The Majority of Children Live with Two Parents*, CENSUS BUREAU REPORTS (November 17, 2016).

42 *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 863 (1977).

43 Melissa Holtzman, *Judicial Decision Making in Contested Adoptions: The Influence of Children's Best Interests Arguments*, 42 CAO. U.L. REV. 406 (2014).

applied to contested adoption cases where a putative father wishes to have rights to the child.

A. What is the Biological Rights Doctrine?

272. For centuries, societies have felt that children are best suited with their biological parents. Born out of this tradition of keeping children with their natural parents is the "biological rights doctrine," also referred to as the "superior rights doctrine" and the "parental rights doctrine."[44] The biological rights doctrine mandates that a court cannot consider other parental arrangements for the child until the biological parent, asserting rights, is deemed unfit and has his or her parental rights terminated.[45] When using this doctrine in child custody cases, there is an underlying presumption that a child is better off with its biological parents than a third party, absent exigent circumstances. Birth parents would only lose parental rights if a clear case of unfitness was established against them.[46]

273. The Illinois Supreme Court explained its commitment to the biological rights doctrine, stating that "[t]he interest of a parent in the care, custody and control of his or her child is fundamental and not to be ignored or facilely swept away in the face of a competing petition for custody filed by a third party."[47] A third party, then, would have to show "clear and compelling" proof that it is in the child's best interest that he or she be given custody and control of the child.[48] With a focus on family preservation, the biological rights doctrine has proven successful at keeping children with the parents they belong with in custody cases. For example, the Supreme Court of Alaska used this doctrine to determine that unless the court could deem that the biological mother was unfit or had abandoned her child, she must be awarded custody.[49] Maryland has taken this one step further by using this doctrine and additionally determining that the best interests of the child were irrelevant to the determination of parental fitness.[50] Almost every state in the country regularly

44 Alexandra Dylan Lowe, *Parents and Strangers: The Uniform Adoption Act Revisits the Parental Rights Doctrine*, 30 FAM. L.Q. 379 (1996).

45 Toni L. Craig, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U.L. REV. 391 (1998).

46 H. Joseph Gitlin, *Defining the Best Interest of Children: Parents v. Others in Custody Proceedings*, 79 ILL. B.J. 556 (1991).

47 *In re Custody of Townsend*, 86 Ill. 2d 502 (1981).

48 Toni L. Craig, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U. L. REV. 391, 394 (1998).

49 *Turner v. Pannick*, 540 P.2d 1051 (Alaska 1975).

50 *McDermott v. Dougherty*, 358 Md. 320 (2005).

uses some form of the biological rights doctrine in custody cases.[51]

B. Applying the Biological Rights Doctrine

274. In order to fully afford putative fathers the rights they deserve, the biological rights doctrine should be utilized in every contested adoption case where the father has come forward to acknowledge his paternity of the child and seek custody. The application of this doctrine to these types of cases would be simple. Once the unwed mother terminates her parental rights, the putative father remains a parent.[52] If he has shown any evidence of wanting rights to his child, he should immediately be given complete custody of the child unless deemed unfit by a court. This would allow him to veto any proposed adoption that the mother has filed for. It would also mandate that the mother give notice of the birth to her sexual partner so that he may be given the opportunity to parent their child. Applying this doctrine would eliminate the potential for fathers to be perpetually unaware that their child exists due to a secret birth and adoption.

275. This doctrine has already been applied, at least impliedly, to contested adoption cases in a few states, both directly and indirectly.[53] In one case, *In re Raquel Marie X*,[54] the court directly applied the doctrine. It held that full constitutional protection — the right to a parental relationship with the child absent a determination of unfitness — is required when the putative father demonstrates a willingness to take responsibility. The court further stated that a father, who has taken every possible step toward demonstrating willingness to parent, has a constitutional right to "the fullest possible relationship" with his child and should have an equally protected interest in preventing adoption by strangers, even if the father has not actually been able to form a parental relationship.[55]

276. Another case, *In re Kirchner*,[56] stated that the putative father's consent to an adoption was necessary as long as he had shown significant effort to be involved

51 See, e.g., *Mayfield v. Braund*, 217 Miss. 514 (1953); *Sheppard v. Sheppard*, 230 Kan.146 (1981); *Gorslene v. Huck*, 98 Ohio St. 3d 238 (Ct. App.); *Rodgers v. Knauff (In re N.A.K.)*, 649 N.W. 2d 166 (Minn. 2002); *Denton v. Madorin (In re R.D.H)*, No. M2006-00837-COA-R3-JV, (Tenn. App. Ct. . Aug. 22, 2007).

52 Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 46 (1995).

53 Toni L. Craig, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U. L. REV. 391, 413 (1998).

54 *In re Raquel Marie X*, 76 N.Y. 2d 387 (1990).

55 *In re Raquel Marie X*, 76 N.Y. 2d 387 (1990).

56 *In re Kirchner*, 164 Ill. 2d 468 (1995).

with the child prior to its birth. In this case, the mother hid the baby's birth from the father by leading him to believe that the child had died. Two months later, when the mother finally told the father that the child was actually adopted, the father filed an action contesting the adoption. The court interpreted the state's Adoption Act to require the putative father's consent to be obtained or for the courts to deem him unfit by clear and convincing evidence before proceeding with an adoption action. Because of this interpretation, Illinois courts must apply the biological rights doctrine in contested adoption cases when the putative father shows willingness to parent.[57]

277. The biological rights doctrine was found to be impliedly incorporated into the state's termination statute in *In Interest of B.G.C.*[58] An unmarried woman gave birth to her daughter and placed her for adoption naming the wrong man as the father, but later regretted her decision. She informed the actual father of the birth and he promptly filed a petition to establish paternity and initiated action to block the adoption. The state's termination of rights statute required that the putative father formally terminate his parental rights before his child could be adopted by a third party. The mother's consent alone was not enough to form a valid adoption as long as the father had not abandoned the child.[59] By mandating that the putative father terminate his rights before an adoption action could proceed, the court gave the putative father the right to veto such adoption and to raise his child.

278. The *Nale v. Robertson* court, like the B.G.C. court, did not directly apply the biological rights doctrine.[60] However, it reflected the same ideals that the doctrine is based on — that the putative father's rights supersede those of any third party. In this case, the unwed father had maintained that he wanted custody of the child for the entirety of the pregnancy. He filed a notice of intent to claim paternity five days after the child was born, but the baby had already been surrendered for adoption. The adoptive family moved to have his parental rights terminated. They also petitioned to adopt the child, stating that it was in the child's best interest that it be adopted by them. According to this court, a father who has interest in a parental relationship and is not determined to be unfit has the right to veto an adoption and retain custody of his child. It further held that the United States Constitution requires that a putative father's parental rights be determined before the court can proceed with an action for adoption.[61] Though the biological rights doctrine has been used

57 *In re Kirchner*, 164 Ill. 2d 468, 502 (1995).

58 *In Interest of B.G.C.*, 496 N.W. 2d 239 (Iowa 1992).

59 *In Interest of B.G.C.*, 496 N.W. 2d 239, 239–46 (Iowa 1992).

60 *Nale v. Robertson*, 871 S.W.2d 674 (1998).

61 *Nale v. Robertson*, 871 S.W. 2d 674, 674–79 (Tenn. 1994).

in many other cases in Illinois, it is by no means the standard elsewhere.[62]

C. The Benefits of this Standard

279. Simply put, the biological rights doctrine provides basic rights to the fathers who deserve them. Putative fathers have a constitutional right to the application of this doctrine in contested adoption cases.[63] Additionally, use of this doctrine would further the interests in every state across the country.[64] Furthermore, its application is proper because it would replace the dated laws which inherently punish fathers.[65]

280. As stated in *Nale v. Robertson*, the Unites States Constitution requires that putative fathers be given the opportunity to demonstrate that they are willing to parent their children before the court can entertain an adoption action.[66] The biological rights doctrine provides them with this opportunity. Further, the United States Supreme Court has held that the Fourteenth Amendment protects the interests of parents in having relationships with their children, but third parties have no protected liberty interest in a child they are not biologically related to. These determinations alone should be enough to show that the biological rights doctrine should be applied, because it gives preference to a child's biological parent over a third-party, who has no right to the child.

281. Application of the biological rights doctrine would benefit every state in the country. It would further states' social, economic, and administrative interests. Social interests would be furthered because adoptions by third parties can have negative effects on children. They sometimes grow up feeling unwanted by their biological parents, suffer psychological or attachment problems, and lack a sense of belonging in their own families. Also, the biological rights doctrine would encourage and allow fathers to be more responsible and "step up" as parents.

282. Moreover, it would put fathers on a more equal playing field as mothers because it would encourage the mothers to be more open to resolution and would provide the fathers with a solid opportunity to raise their child. Economic interests would be furthered because states want to avoid providing welfare funding

62 See, e.g., *Doe v. Kurnick (In re Baby Girl Casale)*, 266 Ill. App. 3d 656 (1994); *In re Adoption of J.R.G.*, 247 Ill. App. 3d 104 (1993).

63 *Nale v. Robertson*, 871 S.W.2d 674, 674–79(Tenn. 1994).

64 Toni L. Craig, Comment, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U. L. REV. 391, 401–03 (1998).

65 See Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1 (2004).

66 *Nale v. Robertson*, 871 S.W. 2d 674, 679 (Tenn. 1994).

for children when a parent can be providing instead. By allowing a fit father to take responsibility for the child, there is less of a chance that the child will end up in foster care while awaiting adoption after the mother terminates her rights. It would also lighten the load of cases in family court because there would not have to be excessive litigation to determine whether the third-party adoptive parents or the biological father should have rights to the child. Finally, application of the doctrine would further administrative interests because it would promote finality in contested adoption cases.[67]

283. The Supreme Court has suggested that the best interest of the child standard is not the proper standard to use when determining biological parents' rights, so it should not be used in these cases.[68] Unfortunately, though, most courts have elected to apply the best interest of the child standard, which can severely limit the father's ability to parent his child before the case even reaches a judge. It allows judges to use nearly unlimited discretion in deciding who should have parental rights, which sometimes borders inappropriate social engineering.[69]

284. In most cases where the putative father attempts to block an adoption, the child has already been placed with a third party prospective adoptive family. Commonly, the child remains with the adoptive family during the litigation proceedings.[70] If, by the time the father is heard in court, the prospective parents have formed a bond with the child, the judge could rule that the child is better off with those parents than with his natural father.[71] If the biological rights doctrine was used, however, the adoptive family would not come in contact with the child unless and until the father is adjudicated unfit. The use of the best interest of the child standard in these types of cases inherently punishes men because it deprives them of a relationship with their children through no fault of their own.

285. Punishing putative fathers through paternity law is not a new concept. In fact, punishment was at the core of almost all early paternity laws. The goal of these laws were to punish men whom society considered sexually irresponsible. At the time the laws were created, women who birthed children outside of marriage were scorned, and society thought the men who impregnated them needed to be punished.[72] These concepts are dated and men should no longer be punished for having

67 Toni L. Craig, Comment, *Establishing the Biological Rights Doctrine to Protect Unwed Fathers in Contested Adoptions*, 25 FLA. ST. U. L. REV. 391, 404–09 (1998).

68 *Smith v. Organization of Foster Families For Equality & Reform*, 431 U.S. 816, 862–863 (1977).

69 *Watkins v. Nelson*, 748 A.2d 558 (2000).

70 See *In Interest of B.G.C.*, 496 N.W. 2d 239, 241 (1992).

71 *Giacopelli v. Florence Crittenton Home*, 158 N.E. 2d 613 (1959).

72 See Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y, 1–18 (2004).

sexual relationships outside of marriage which happen to produce children.[73] The biological rights doctrine will bring the law up to date with modern society and benefit not only the fathers, but the states it is used in as well.

D. Should the Laws Stay the Same?

286. Though the biological rights doctrine provides many benefits to the affected parties, it could be argued that it gives too many rights to the putative fathers and, in turn, takes rights away from the mothers. Too much progression could potentially limit women's decision-making authority regarding the child she is carrying. However, the biological rights doctrine appropriately balances the rights of both parents in a way our current standard does not.

287. Justice Smith, in his dissent of the majority opinion in *Smith v. Malouf*, said that he could not imagine that a woman who decided she did not want to raise her child "could travel to an abortion clinic unfettered by the State, her lover or for that matter even her husband, but once she decides to continue the pregnancy, she is no longer free to travel and go on about her business."[74] He also said that "[b]ecause the Constitution recognizes and promotes a woman's decision to carry her child to full term, this right would indeed be a hollow right if she were not also allowed to decide the fate of her child once she gave birth."[75]

288. However, both parents should be able to have decision-making power regarding a child brought to term. The mother would still be able to terminate her rights if she wished, and the child would be in complete control and care of the father. It has been argued that a woman's decision to place her child for adoption does not mean that she does not care who raises the child, and that the putative father's claim would rest on genetics alone. However, even if the biological father is a stranger to her and her baby, that would not differentiate him, in most cases, from a third-party adoptive family.

289. If the mother has good reasons for not wanting her child to be in the care of his or her father, she could argue those in a fitness hearing. These reasons could include the circumstances surrounding conception. For example, if the child was conceived as a result of abuse, rape, or incest, it could be argued in such a hearing

73 Frederick C. Schafrick, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581–85 (1972).

74 *Smith v. Malouf*, 722 So. 2d 490, 502 (1998).

75 *Smith v. Malouf*, 722 So. 2d 490, 502–08 (1998).

that he is unfit to parent.[76] These reasons could also include the father's actions during the pregnancy.

290. *In re Adoption of Doe*,[77] the Court determined that the father's consent was not necessary for the adoption of his child by a third party because he abandoned the mother and child before the child's birth. In this case, the father urged the mother to have an abortion and then failed to provide any support when she refused. It was not until after the child was placed with adoptive parents that the father married the mother and signed both an acknowledgement of paternity and the birth certificate. The adoptive parents refused to surrender the child to the biological parents and the case went to trial. The court held that pre-birth conduct of a father as it relates to the mother who needs some kind of support directly impacts the child's welfare. Because the putative father failed to provide meaningful emotional or financial support during the pregnancy, he had effectively abandoned the child according to the state's abandonment statute. As a result, he was no longer required to give consent to the adoption.[78]

291. If the biological rights doctrine was applied in this case, the outcome would likely have been the same. The father's lack of action would still be analyzed under the state's abandonment statute,[79] and he still would not be required to give consent to the child's adoption under the state's consent statute.[80] In cases like this where the biological father is deemed unfit, the courts would then defer to the mother's decision to have the child adopted. As a result, mothers would not have to worry about their children being raised by someone who could not appropriately care for them, and undeserving, abusive, or neglectful putative fathers would not be given parental rights.

292. Courts can also look at the father's treatment of the mother, irregarding the child, while pregnant with the child. In *G.W.B. v. J.S.W.* (In re Baby E.A.W.),[81] the Court held that the putative father's consent to the adoption of his child was unnecessary because he had emotionally abused the mother during her pregnancy. A state statute allowed the courts to look at evidence regarding the father's negative treatment of the mother while determining abandonment of the child. Because of the mother's testimony that he grabbed, shook, and spit at her, called her names, verbally abused her, failed to provide financial or emotional support, and even had

76 Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 82 (1995).

77 *In re Adoption of Doe*, 543 So. 2d 741 (1989).

78 *In re Adoption of Doe*, 543 So. 2d 741–746 (1989).

79 FLA. STAT. §{} 39.01 (2019).

80 FLA. STAT. §{} 63.062 (West, 2019).

81 *In Re Baby E.A.W.*, 658 So. 2d 961 (1995).

a sexual relationship with a past girlfriend during the birth mother's pregnancy, the father had effectively abandoned his child.[82] Like in the Doe case, the mother had good reasons for not wanting the father to raise the child, and the biological rights doctrine would respect those reasons if applied.

293. Throughout the legal history of this country, courts have had a preference for the mother because they felt that the care and affection of mothers were of utmost importance to their children.[83] However, familial structures are changing and children arguably need their fathers just as much as they need their mothers.[84] It is true that the father's interest in an unborn child is less than the protected liberty afforded to the mother because pregnancy has a greater effect of the mother and her body than it does on the father and his body.[85] Men and women are inherently different and have drastically different roles in the life of the child pre-birth. To this effect, Justice Smith argued in his dissenting opinion in an adoption case that:

> Whatever choice [the mother] makes, the putative father will be affected with some sort of emotion; either he will know he has a dead baby, or he will know he has a live baby. The law does not require this Court to curb the rights of women just because the man may experience one of these emotions.[86]

294. However, the roles of each parent are not significantly different after the child is born. Though the argument can be made that they should be treated differently by law according to those distinctions, the application of the biological rights doctrine does not change anything about the mother's decisions made about the child pre-birth. It simply would give the father the opportunity to parent the child after it is born. The doctrine would not, as Justice Smith said, "curb the rights of women,"[87] because any rational, reasonable, and justified basis for the mother's desire to have her child raised by a third-party adoptive family instead of the father would be respected via a fitness hearing.[88] Fathers undeserving of rights would not receive them under the biological rights doctrine.

295. Lastly, it could be argued that removing the best interest of the child standard would adversely affect children who are separated from the fathers at birth and are

82 *In Re Baby E.A.W.*, 658 So. 2d 961, 963–70 (1995).

83 Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971 N.3 (1992).

84 See generally *Father Absense and Involvement: Statistics*, NATIONAL FATHERHOOD INITIATIVE (2017).

85 See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

86 *Smith v. Malouf*, 722 So. 2d 490, 510 (1998).

87 *Smith v. Malouf*, 722 So. 2d 490, 510 (1998).

88 *Smith v. Malouf*, 722 So. 2d 490, 510 (1998).

instead in the care of another parental figure. Though it is not easily comprehensible how this would occur if the father is automatically given custody when the mother terminates hers, *Penticuff v. Miller*[89] lays out factors which could be used to determine the reasonableness of the father's superior right.

296. The Court stated that when the parent has been absent from the life of the child for a period of time, certain factors should be balanced, such as the length of time and circumstances of the separation, the child age at the time of the non-parent's care, the time elapsed before the parent sought a custody claim, and the frequency and nature of contact between the parent and child during the separation. If these factors hold negatively against the father, he should be deemed to have waived his superior right to the child.[90] However, because application of the biological rights doctrine would place the child with the father immediately, this would not be a common issue.

297. The many benefits of the biological rights doctrine certainly outweigh the possible negative effects. It is true that women would have less decision-making power regarding the placement of her child after her rights are terminated,[91] but it takes two people to create a child and both parties should be involved in the decision-making process. Putative fathers have a constitutionally protected right to foster a parental relationship with their children, and that right must be honored. For this reason, and the many reasons explained above, the law should change and the biological rights doctrine should be applied in contested adoption cases.

IV. Conclusion

298. Putative fathers in the United States are likely to gain more rights to their children in coming years. As the courts make more progressive decisions regarding individuals rights, freedoms, and liberties, specifically in family law matters, it is easy to predict that more cases will be brought by fathers fighting for their rights as well. The courts should begin to adopt the biological rights doctrine so that the decisions across the country are more uniform and the rights of all parties involved in contested adoption cases are respected. This doctrine provides putative fathers with the rights they are constitutionally afforded and protects their fundamental interests in raising their children even if the mother terminates her rights.

89 *Penticuff v. Miller*, 503 S.W. 3d 198 (2016).

90 See *Penticuff v. Miller*, 503 S.W. 3d 198, 203–04 (2016).

91 Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 82 (1995).

299. There are some contemplated negative aspects of increased rights for putative fathers, as discussed earlier. However, responsible and loving fathers should have the right to develop a parental relationship with their child if they wish to. Further, it is possible to balance the rights of both parents if the biological rights doctrine is applied in these cases. Putative fathers deserve more, and courts across the United States should recognize that.