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**The Road to Equality for Unwed Biological Fathers:
A Comparative Analysis of the United States, Ireland and Canada**

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Fall 2012**

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Family, in various configurations, is protected under the United States constitution.¹ Parents specifically have a fundamental right to raise their own children.² This right may only be overcome when the parents have been afforded due process and the governmental interest is especially compelling, such as where the child has been abused or neglected.³ The fundamental right is only protected if one is a legal parent.⁴ Parenthood is automatic at birth for women and may be conclusively presumed for married men.⁵ Unwed biological fathers⁶ on the other hand face a myriad of challenges that deny many men recognition as a legal parent and the opportunity to form a social relationship with their children.

Over the last seven decades the number of children born out of wedlock has steadily increased.⁷ In 1940, less than five percent of children were born to women outside of marriage.⁸ Non-marital births peaked around fifty percent and remain above forty percent.⁹ Amongst African Americans, the number of children born out of wedlock is nearly double that of the population as a whole.¹⁰ Today, a total of more than one and a half million children are born out of wedlock.¹¹ Despite changes in society and the vast increase in children born to unwed parents over the last seventy years, the United States Supreme Court has refused to recognize the

¹ See, e.g., *Moore v. East Cleveland*, 431 U.S. 494 (1977), *Meyer v. Neb.*, 262 U.S. 390 (1923), *Prince v. Massachusetts*, 321 U.S. 158 (1944).

² *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

³ *Santosky v. Kramer*, 455 U.S. 745, 753-4 (1982).

⁴ *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁵ Cal Fam Code § 7540 (2012); N.J. Stat. § 9:3-45(a) (2012); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

⁶ I use “unwed biological father” throughout the paper in reference to the male involved in the conception of children born out of wedlock. I am using this as a status that is distinct from being a “legal parent.” This paper argues that the two should be synonymous and that unwed biological fathers should be per se legal parents.

⁷ National Vital Statistics Report, *Nonmarital Childbearing in the United States, 1940-99*, Vol. 48 No. 16, Oct. 18, 2000, figure 1 http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvsr48_16.pdf (last viewed 11/22/12); (The percentage has dipped downward in recent years and may level off at the current rate of roughly 40%).

⁸ *Id.*

⁹ National Vital Statistics Report, *Births: Preliminary Data for 2011*, Vol. 61 No. 5, Oct. 3, 2012 at 4. http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_05.pdf (last viewed 11/22/12).

¹⁰ *Id.* at Table 1 (showing that 72.3% of non-Hispanic black women gave birth out of wedlock).

¹¹ *Id.* at Table 7 (Showing just over 1.6 million births to unmarried women.)

biological relationship between father and child as sufficient for a man to be a legal parent of his child.¹²

This paper lays out a framework for the redefinition of fatherhood based on the Equal Protection of biological relationships, recognizing all biological parents as legal parents of their children. Legal parenthood includes the right of recognition under the law, inheritance through intestacy, and standing to bring a wrongful death or survivor claim¹³. Parenthood also includes a presumption favoring biological relationships for custody of minor children. Recognition of unwed biological fathers as legal parents would guarantee them these rights to the same extent that these rights are afforded to biological mothers.

Section one discusses the current United States Constitutional requirements for unwed biological fathers to be recognized as legal parents and afforded the same protection as biological mothers and married men.¹⁴ In section two, the paper discusses the narrow view of family under the Irish Constitution and its impact on the rights afforded to unwed biological fathers in Ireland. Section three discusses the recognition of legal parenthood over the last several decades for unwed biological fathers in Canada based on their biological relationship with the child. Section four sets out a path for the United States to use the Equal Protection clause of the 14th Amendment and the reasoning of the Canadian Supreme Court to legally recognize and protect unwed biological fathers as parents.

¹² This paper will not attempt to unravel why the increase in births to unwed parents has occurred but rather sees the increase as an opportunity to rethink the legal protections afforded to the unwed fathers in these situations.

¹³ This is not an exhaustive list of the rights of parenthood. This merely shows the kind of rights that the biological father would be entitled to through legal recognition as a parent.

¹⁴ This paper will be limited to heterosexual “natural” pregnancy and does not delve into the fascinating areas of reproductive technology, surrogacy, sperm donors, or any of the other evolving issues regarding parenthood in those situations.

I. The Current Interpretation of the United States Constitution Unnecessarily Requires a Biological and Social Relationship Between Unwed Biological Fathers and Their Children Before Unwed Biological Fathers are Recognized as Legal Parents, Which Violates Equal Protection.

The Supreme Court first recognized a limited due process right for unwed biological fathers in the 1970s.¹⁵ The state of Illinois restricted parenthood so that unwed biological fathers were excluded.¹⁶ When Stanley's paramour, and the mother of the children, passed away, the children became wards of the state because there was no one who fit the statutory definition of parent.¹⁷ Stanley challenged the Illinois statute which conclusively presumed unwed fathers to be unfit as a violation of Equal Protection.¹⁸ Instead of a direct answer to the Equal Protection claim, the Court circumvented the question by using Due Process to find that Stanley was entitled to a hearing on his fitness as a parent.¹⁹ The Court concluded that because all other categories of parents were entitled to a hearing and unwed biological fathers under the statute were not, the statute violated Equal Protection.²⁰ The dissent challenged the majority decision for its Due Process analysis because Due Process was never raised in the courts below.²¹ The dissent, using rational basis review in its Equal Protection analysis, found that the differences between an unwed mother and father were substantial, and therefore equal protection was not violated.²²

¹⁵ *Stanley*, 405 U.S. 645.

¹⁶ *Id.* at 650, citing Ill. Rev. Stat., c. 37, § 701-14 (Parent means the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child, and includes any adoptive parent.)

¹⁷ *Id.* at 646.

¹⁸ *Id.*

¹⁹ *Id.* at 650.

²⁰ *Id.* at 658.

²¹ *Id.* at 659 (C.J. Burger *dissenting*).

²² *Id.* at 665 (Unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate)

At the time the Supreme Court decided *Stanley*, it had not yet applied heightened scrutiny to classifications based on gender under the Equal Protection clause.²³ Although the Court recognized some parental rights in *Stanley*, the majority opinion is troubling for unwed biological fathers. Under the Court's analysis, one group of potential parents, unwed biological fathers, must prove their fitness to parent in a hearing whereas all other groups are presumed fit.²⁴ The rights granted to unwed biological fathers are especially fragile and are dependent upon a finding that they meet a social construct of parenthood. For every other conceivable group of parent, the burden is upon the state to show them unfit.

After *Stanley*, the Supreme Court held that the biological father's marital status with the mother of the child may be decisive as to whether the biological father has the ability to veto an adoption of his children.²⁵ The Court upheld the application of a Georgia statute which denied veto power over adoptions for unwed biological fathers.²⁶ The Supreme Court held that Due Process was satisfied by having a hearing in which the unwed biological father had an opportunity to show his parental fitness.²⁷ The Court dealt with the Equal Protection challenge in the most cursory of ways, stating merely that "We think appellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father."²⁸ The Court required that an unwed biological father had to not only be fit but also show that he had satisfied a social relationship to warrant being a parent.

²³ Jennifer Hendricks, *Essentially a Mother*, 13 Wm. & Mary J. of Women & L. 429, 436 (2007)

²⁴ *Stanley*, 405 U.S. at 657. (Father must make showing of fitness)

²⁵ *Quillon v. Walcott*, 434 U.S. 246, 256 (1978).

²⁶ *Id.* at 249.

²⁷ *Id.* at 255.

²⁸ *Id.* at 256.

A year later, the Court struck down a New York statute that gave unwed mothers an absolute veto over adoptions but only gave unwed biological fathers an opportunity to show that the best interests of the child were not furthered by adoption, as a violation of Equal Protection.²⁹ The Court found that the gender based distinction in the law violated Equal Protection, because some unwed fathers were capable of parenting.³⁰ The Court found the state interest in providing adoptive homes for illegitimate children insufficient and not furthered by the use of gender classifications.³¹ The Court, however, explicitly stated that it was not answering the Equal Protection challenge as between married and unmarried men.³²

These cases have created what has been termed a “biology-plus-relationship” test to decide when an unwed biological father is recognized as a legal parent of his children.³³ The Court consistently held that the biological relationship between the unwed father and the child was insufficient for the unwed biological father to claim parental rights.³⁴ Instead, the unwed biological father is required to show a relationship that satisfies the Court’s view of parenthood.³⁵ Parenthood has essentially been defined as motherhood, and for an unwed father to be a legal parent to his children, he must show that he has provided the nurture, care, and responsibility that is expected of mothers.³⁶

²⁹ *Caban v. Mohammed*, 441 U.S. 380 (1979).

³⁰ *Id.* at 389.

³¹ *Id.* at 391.

³² *Id.* at 394 n.16. (Presumably the state would have an easier job satisfying equal protection as between married and unmarried because neither is a subject class requiring a heightened scrutiny analysis. In section 4 I discuss whether unwed biological fathers could successfully gain equal rights with married fathers by raising and having the court actually answer this question).

³³ Hendricks, *supra* note 21, at 433.

³⁴ See, *Stanley*, 405 U.S. 655.; *Quillon*, 434 U.S. 246.; *Caban*, 441 U.S. 380 .

³⁵ Hendricks, *supra* note 21, at 431.

³⁶ *Id.*

The biology-plus-relationship test was first recognized in *Stanley*.³⁷ Stanley was able to show that he lived in the same home with the children and their mother.³⁸ The dissent makes a point of noting that Stanley was “unusual” compared to other unwed biological fathers.³⁹ In essence, the Court was making an exception to the normal case where an unwed biological father would be unable to meet the relationship requirement. In *Quillon*, the father failed to meet the test. The relationship with the child had been minimal.⁴⁰ The father failed the relationship test therefore,⁴¹ the court terminated the legal relationship⁴² between father and child and for all practical purposes, severed the possibility of a social relationship. The Court in *Caban* labored over the details of the relationship. The father had lived in the home with the children and their mother for a period of time and had acted the part of a parent and therefore was recognized in law as someone with a cognizable right as a parent.⁴³ *Stanley* and *Caban* were rewarded in part because their relationship with the mother of their children lasted after the birth of the child, allowing for them to form the required social relationship. The biology-plus-relationship test places the parental rights of unwed biological fathers at the mercy of their being informed of the pregnancy and given an opportunity to form a social relationship with the child. This is contrary to women who are parents based on their biological relationship with the child.

The biology-plus-relationship test is especially problematic for unwed biological fathers, who like *Quillon*, may not fill the role of social parent, but seek to retain the legal recognition. The test creates a perverse incentive for women to keep the unwed biological father from having

³⁷ *Stanley*, 405 U.S. 645.

³⁸ *Id.* at 646.

³⁹ *Id.* at 666 (White, J. *dissenting*).

⁴⁰ *Quillon*, 434 U.S. at 250-51. (describing the intermittent relationship between biological father and child).

⁴¹ *Id.* at 256. (The Court seems to suggest in dicta that actual or legal custody, or significant responsibility over the daily supervision, education, protection or care is required for the biological father to satisfy the necessary relationship component.)

⁴² *Id.* at 256. (The father had paid child support intermittently up to this point. This ceased with the adoption.)

⁴³ *Caban*, 441 U.S. at 389.

the opportunity to form a social relationship with his children. The biology-plus-relationship test has denied a biological father the legal recognition as a parent, when the mother deliberately refused the biological father the opportunity form a social relationship.⁴⁴ In *Lehr*, the biological mother concealed the child from the biological father.⁴⁵ The Supreme Court held that biology only creates the opportunity to form a social relationship but does not grant any constitutionally protected rights without a social relationship.⁴⁶ The Court held that the putative father registry⁴⁷ provided adequate protection to unwed biological fathers, because it provided notice and an opportunity to be heard if the father fit in one of the enumerated categories.⁴⁸ However in *Lehr*, a paternity action was pending, known both to the court and the mother, and the biological mother knew who the biological father was. However, because the biological father did not fit into one of the enumerated categories under the statute, he was not legally entitled to notice or an opportunity to be heard in the adoption proceeding.⁴⁹ The Court's recognition of a putative father registry as sufficient to protect the due process rights of unwed biological fathers has led

⁴⁴ *Lehr v. Robertson*, 463 U.S. 248 (1983).

⁴⁵ *Id.* at 269, (White J., *dissenting*).

⁴⁶ *Id.* at 261-2.

⁴⁷ *Id.* at 252, n.5.

⁴⁸ NY CLS Dom Rel § 111-a (2012). The seven categories enumerated by NY law:

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement;

(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law; and

(h) any person who has filed with the putative father registry an instrument acknowledging paternity of the child, pursuant to section 4-1.2 of the estates, powers and trusts law.

⁴⁹ *Lehr*, 463 U.S. at 252-3.

to the adoption of such registries across the country.⁵⁰ Such registries, however, only provide an opportunity to be heard to those who know of the existence of the registries and have availed themselves of the protections. These registries fail to provide unwed biological fathers equal treatment under the law, as they offer no guarantee of parental rights.

Even when unwed biological fathers establish and maintain a social relationship with their children, they may be denied parental rights categorically if the mother of their child is married to another man. California's irrebuttable presumption that all children born within a marriage were conclusively the husbands was challenged as a violation of Due Process.⁵¹ The Court found that the irrebuttable presumption expresses and furthers the state policy⁵² and therefore procedurally the presumption is not unconstitutional.⁵³ The biological father also challenged the statute under substantive due process, asserting a liberty interest in his child based on the social relationship that existed.⁵⁴ The Supreme Court majority held that the biology-plus-relationship test that had been used in prior cases had an additional, though unexpressed, factor: sanctity afforded to family units.⁵⁵ Ultimately because relationships between unmarried biological fathers and their children born to married woman is not a traditionally protected interest, the court held that the biological father had no protected fundamental right to raise his

⁵⁰ Currently 31 states have putative father registries. *e.g. see* (Code of Ala. § 26-10C-1 (2012); A.R.S. § 8-106.01 (2012); A.C.A. § 20-18-702 (2012); 13 Del. C. § 8-402 (2012); Fla. Stat. § 63.054 (2012); O.C.G.A. § 19-11-9 (2012); Idaho Code § 16-1513 (2012); 750 ILCS 50/12.1 (2012); Burns Ind. Code Ann. § 31-19-5-5 (2012); Iowa Code § 144.12A (2012); K.S.A. § 23-2204 (2011); La. R.S. 9:400 (2012); ALM GL ch. 209C, § 2 (2012); Minn. Stat. § 259.52 (2012); MCLS § 710.33 (2012); § 192.016 R.S.Mo. (2012); Mont. Code Anno., § 42-2-206 (2011); R.R.S. Neb. § 43-104.01 (2012); RSA 170-B:6 (2012); N.M. Stat. Ann. § 32A-5-20 (2012); NY CLS Soc Serv § 372-c (2012); ORC Ann. 3107.062 (2012); 10 Okl. St. § 7506-1.1 (2012); ORS § 109.450 (2011); 23 Pa.C.S. § 2921 (2012); Tenn. Code Ann. § 36-2-318 (2012); Tex. Fam. Code § 160.402 (2012); Utah Code Ann. § 78B-6-144 (2012); Va. Code Ann. § 63.2-1249 (2012); Wyo. Stat. § 1-22-117 (2012).)

⁵¹ *Michael H. v. Gerald D.*, 491 U.S. 110, 116-7 (1989). (The court explicitly notes that it does not reach the equal protection claim because it was not raised below.)

⁵² *Id.* at 119-20. (The state interest is the protection of the marital family unit.)

⁵³ *Id.*

⁵⁴ *Id.* at 120.

⁵⁵ *Id.* at 123.

child.⁵⁶ Justice Steven's concurrence suggests that not all rights for the biological father are eliminated and that a right to visitation may still be possible.⁵⁷ However, the effect was that an unwed biological father has become a "quasi-parent" with visitation rights greater than the public but is not himself a legally recognized parent.⁵⁸ Although the unwed biological father had done everything possible to become a parent of his child, he was denied legal recognition because the mother was already married. Women who have children with married men face no such denial of legal recognition. It is unwed biological fathers alone who are denied legal recognition as parents because of their marital status.

Currently in the United States, the Constitution has been held to only offer limited legal recognition to the parental rights to unwed biological fathers. The Court requires a biological and a social relationship, and after *Michael H*, a traditionally protected interest. The Court has consistently avoided a direct equal protection analysis and instead has relied on due process, granting merely a right to notice and an opportunity to be heard. This has led to a denial of the recognized fundamental right to parent one's own child. A direct Equal Protection analysis offers the opportunity to guarantee to unwed biological fathers the same protection of their fundamental right to parent as is offered to all women and to married biological fathers.

II. Ireland's Narrow Conception of "Family" Denies Constitutional Protection to the Parental Rights of Unwed Biological Fathers, and Should Serve as a Warning for the Continued Use of Classifications Based on Marital Status.

Unlike the United States where familial interests had to be found through the Due Process clause, the Irish Constitution explicitly protects the family unit.⁵⁹ The State recognizes family as "the natural primary and fundamental unit group of society, and as a moral institution possessing

⁵⁶ *Id.* at 125.

⁵⁷ *Id.* at 133 (Stevens J., *concurring*).

⁵⁸ Hendricks, *supra*, at 457-8. (Offering an analysis of *Troxel* if applied to *Michael H.*).

⁵⁹ IR. CONST., 1937, art. 41.1-3.

inalienable and imprescriptible rights, antecedent and superior to all positive law.”⁶⁰ Family however, is limited to the marital unit under the interpretation of the Irish courts.⁶¹ Cohabitation is insufficient for full constitutional protection.⁶²

Under the Irish system, parents with children outside of marriage are not granted protections under Art. 41.1.⁶³ The mother of such a child takes custody and guardianship under statutory law⁶⁴ and has limited Constitutional protection.⁶⁵ By contrast the biological father has no constitutional rights to his children born outside of marriage.⁶⁶

An unwed biological father has certain statutory rights that fall short of actual parentage. If the biological mother of the child consents, both mother and father can file a statutory declaration granting the biological father guardianship.⁶⁷ Absent consent, the biological father may seek a court order for guardianship.⁶⁸ Guardianship for unwed biological fathers pursuant to either method may be revoked by court order, thus creating a weaker right than that for married fathers.⁶⁹

The Irish Supreme Court has stated that the “blood link” is of little weight in determining the rights biological fathers have with their children.⁷⁰ The limited weight given to biology has led to the biological father only having a right to apply for guardianship, not an actual right to

⁶⁰ IR. CONST., 1937, art. 41.1

⁶¹ *The State (Nicolaou) v. An Bord Uchtála*, [1966] IR. 567 at 643-44.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Guardianship of Infants Act of 1964 (Act No. 7/1964) (Ir.), available at <http://www.irishstatutebook.ie/1964/en/act/pub/0007/index.html>.

⁶⁵ *G. v. An Bord Uchtála*, [1982] IR. 32 at 55.

⁶⁶ [1966] IR. 567.

⁶⁷ *supra* n63, Section 2(4) of the *Guardianship of Infants Act 1964*, as amended by, section 4 of The Children Act of 1997 (Act. No. 40/1997) (Ir.), available at <http://www.irishstatutebook.ie/1997/en/act/pub/0040/index.html>.

⁶⁸ *supra* n63, Section 6A(1) of the *Guardianship of Infants Act 1964*, as inserted by, section 12 of the Status of Children Act 1987 (Act No. 27/1987) (Ir.), available at <http://www.irishstatutebook.ie/1987/en/act/pub/0026/index.html>.

⁶⁹ GOV'T of IR., LEGAL ASPECTS OF FAMILY RELATIONSHIPS (2009), available at http://www.lawreform.ie/_fileupload/consultation%20papers/CP%20Family%20Relationships%2031-08-09%20including%20cover.pdf.

⁷⁰ *JK v VW* [1990] 2 IR 437.

guardianship.⁷¹ A large majority of unwed fathers seeking guardianship are granted guardianship; however the right to be a parent is something that should not be at the discretion of a court.⁷²

One avenue available to unwed biological fathers in Ireland is to seek recourse before the European Court of Justice by bringing a claim under Article 8 of the European Convention on Human Rights.⁷³ A biological father who was found fit by a circuit court in Ireland sought guardianship of his daughter.⁷⁴ The initial grant of guardianship was overturned by the Supreme Court of Ireland, which reaffirmed that the biological father merely has the right to petition for such guardianship and not a right to guardianship.⁷⁵ The Supreme Court laid out a test that stated

regard should not be had to the objective of satisfying the wishes and desires of the father to be involved in the guardianship of and to enjoy the society of his child unless the Court has first concluded that the quality of welfare which would probably be achieved for the infant by its present custody which is with the prospective adoptive parents, as compared with the quality of welfare which would probably be achieved by custody with the father is not to an important extent better.⁷⁶

When remanded, the High Court of Ireland found that the socio-economic differences between the adoptive parents and the biological father should not be defining, but still found that the security enjoyed by the child in a ‘family’ recognized by the Constitution would be lost if the child was placed in the care of her biological father.⁷⁷ The biological father appealed to the

⁷¹ *Id.*

⁷² *supra* 68, n26 (In 2008 there were 2,448 applications and 283 or 11.56% were denied.)

⁷³ Art. 8, ECHR. (Article 8 states: **Right to respect for private and family life** 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.)

⁷⁴ *Keegan v. Ireland*, (1994) 18 EHRR 342, at ¶9, [1994] Eur. Ct. H.R. 16969/90, at ¶ 9.

⁷⁵ *Id.* at ¶12.

⁷⁶ *Id.*

⁷⁷ *Id.* at ¶14.

Commission claiming that Article 8 was violated where he as a biological parent had neither Constitutional right to guardianship nor a right to be heard at the adoption of his child.⁷⁸

The European Court first found that a protected family existed outside of marriage under Article 8, despite Ireland's insistence that family is only a protected entity within marriage.⁷⁹ The Court held that Art. 8 was violated because of the obstacles created in Irish law that prevented a biological father from achieving guardianship of his child.⁸⁰ The Court focused on the placing of the child for adoption shortly after birth without the consent or notice of the biological father, which denied him the right to form any bonds with his child. Ultimately however, the recourse was mere monetary damages for the loss of a child, as the European Court had no authority to demand the return of the child to the biological father.⁸¹

Shortly after *Keegan*, the Irish Supreme Court had an opportunity to once more rethink its treatment of unwed biological fathers. The Court again rejected the idea that the biological father's fitness was the touchstone of the inquiry for guardianship and reasserted that all that is granted under the statutory provisions is a right to petition for guardianship.⁸² The Court stated that where the unwed biological father and mother have a stable relationship and the father nurtures the child in a situation nearly analogous to the constitutionally protected family (absent marriage), the biological father's social relationship would cause his rights to be significant.⁸³ However, the biological link remains entitled to little weight. The Irish Supreme Court also refused to recognize the European Court of Justice's opinion as part of Irish domestic law and continued to reject Constitutional protection for a de facto family relationship.⁸⁴ This holding

⁷⁸ *Id.* at ¶31.

⁷⁹ *Id.* at ¶44.

⁸⁰ *Id.* at ¶48.

⁸¹ *Id.* at ¶66-68.

⁸² *W O'R v EH*, [1996] 2 IR. 248.

⁸³ *Id.*

⁸⁴ *Id.*

leaves unwed biological fathers in Ireland without a Constitutional right to be parents and without a recourse to enforce European Court of Justice opinions in the Irish Court system.

Ireland has a system whereby the unwed biological father is not a parent nor is he protected under the Constitution. The only right such a man has is to petition the court for guardianship where his fitness will not be a controlling factor. The constraints on family under the Constitution work to deny unwed fathers the ability to form the lasting social relationship that the Court requires when granting guardianship. The guardianship right that is available to unwed biological fathers is revocable, thus forever keeping unwed biological fathers in an unstable legal relationship with their children. The Irish system makes no attempt to recognize equal parental rights based on biology, but instead has a multi-tiered system in which unwed biological fathers are on the bottom rung.

Ireland's narrow conception of 'family' and its tying of the fundamental right to parent one's biological children to the marital status of the parents should serve as a dire warning and is not a model to be followed. The United States model has come perilously close to this Irish model regarding the rights of unwed biological fathers who have children with women married to another man. Refusing to recognize the biological tie between the unwed father and the child is an unacceptable result. The Irish system is unabashedly unequal in its treatment of unwed biological fathers. The United States Constitution guarantees everyone the Equal Protection of the law and can no longer maintain a system analogous to that which exists in Ireland.

III. Canada's Journey to Legal Recognition of the Dignity Interest in the Biological Relationship Between Unwed Biological Fathers and Their Children Regardless of the Social Relationship Currently in Existence.

For nearly three decades, the Canadian courts had no leading decision on unwed biological fathers' parental rights, leading to little consistency or predictability when unwed

biological fathers challenged specific statutory provisions or court proceedings.⁸⁵ Over roughly the last decade, however, it appears that this has begun to change and that a system more protective of biological ties has gained both political acceptance and legal recognition by the courts.⁸⁶ This section will first briefly discuss the wide range of holdings to early statutory challenges. It will then turn to the Charter-based challenges and the modern trend towards a broader acceptance of unwed biological fathers' parental rights based on biology alone.

Two early cases established that unwed biological fathers could petition and gain custody of their children where a social relationship existed.⁸⁷ In *Lyttle*, the father lived with the mother and their children for two years before the mother left with the children.⁸⁸ The mother placed the children for adoption and the biological father didn't find out until after the period for contesting the wardship order had elapsed.⁸⁹ He challenged the wardship order on grounds that he had received no notice, and therefore the order should be void.⁹⁰ The court upheld his claim, voided the wardship order, and stopped the adoption process.⁹¹ Similarly, in *Gingell*, a father who had lived with his children was able to have them returned to his custody after the mother took the children and abandoned them for adoption.⁹² These two cases revolved around the "social" relationship that the biological father had established through cohabitation with his children, not the biological ties between father and child.⁹³ Courts at this time were careful to be clear that

⁸⁵ Lori Chambers, *New Born Adoption: Birth Mothers, Genetic Fathers, And Reproductive Autonomy*, 26 Can. J. fam. L. 339, 361-63 (2010).

⁸⁶ *Id.* at 382-83.

⁸⁷ *Id.* at 361-62, citing, *Children's Aid Society of Metropolitan Toronto v. Lyttle*, [1973] SCR 568; *R. v. Gingell*, [1976] 2 SCR 86. (The facts of both these cases are taken as related by Chambers because both cases are only in French.)

⁸⁸ Chambers, *supra* n.84, at 361.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 361-62.

⁹³ *Id.* at 362.

they were not protecting all biological fathers, but only those who had established a sufficient social relationship.⁹⁴

The focus in *Lyttle* on the social relationship led one court to find that where the mother is placing an infant, as opposed to an older child, for adoption the unwed biological father is not entitled to notice.⁹⁵ In reaching its conclusion, the court focused on the statutory amendments to the definition of parent.⁹⁶ The biological father in *Ward* was not listed on the birth certificate and never established a social relationship with his child, therefore he was not a legal parent and not entitled to notice of the adoption under the statute.⁹⁷ The court interpreted the statute strictly as laying out the only possibilities for a biological father to establish himself as a parent.⁹⁸

This same court once again had an opportunity to determine the rights of the biological father under a newly revised statute just a few years after *Ward*.⁹⁹ It first held that the statutory definition was not an exhaustive list for defining parent and that a person who did not meet the criteria therein could still be considered a parent.¹⁰⁰ To bolster its conclusion, the Court referred to the Children's Law Reform Act of 1977, which recognizes each child as having natural

⁹⁴ *Child Welfare Act (Re) (Alta CA)*, [1986] AJ No 303.

⁹⁵ *Re Ward*, [1975] OJ No 2357.

⁹⁶ *Id.* ("(e) "parent" means a person who is under a legal duty to provide for a child, or a guardian or a person standing in loco parentis to a child, other than a person appointed for the purpose under this Act, but where a child is born out of wedlock means the mother of the child and,

(i) a person who is under a legal duty to provide for the child pursuant to an order of a court of competent jurisdiction or pursuant to a written agreement, or

(ii) a person who, having acknowledged a parental relationship to the child, has provided or cared for the child."

⁹⁷ [1975] OJ No. 2357.

⁹⁸ *Id.*

⁹⁹ The Child Welfare Act, 1978 (Ont.), c. 85. (Defines parent in §69-1 as "(a) a guardian;

(b) a person who has demonstrated a settled intention to treat a child as a child of the person's family; and

(c) a person who is not recognized in law to be a parent of a child but,

(i) has acknowledged a parental relationship to the child and has voluntarily provided for the child's care and support.

(ii) by an order of a court of competent jurisdiction [**13] or a written agreement, is under a legal duty to provide for the child or has been granted custody of or access to the child, or

(iii) has made a written acknowledgment of the fact of his or her parentage to the adoption agency or licensee under subsection 5 of section 60 placing the child for adoption, but does not include the Crown, a society or a foster parent of a child."

¹⁰⁰ *Re M.L.A.*, [1979] 25 O.R. (2d) 779, 786.

parents¹⁰¹ and presumes that the biologically related male is the father.¹⁰² The Court, therefore, held that the biological father is a parent under the law and is entitled to notice and his consent is required in an adoption proceeding.¹⁰³ The court tempered its holding by acknowledging that some biological fathers would not be entitled to notice based on the circumstances.¹⁰⁴ The Court then remanded all four petitions that were at issue in the consolidated appeal so that notice could be given to all four biological fathers and consent obtained.¹⁰⁵ The expanded definition of parent that is protected here offers an unwed biological father who has not established a social relationship with his child, legal recognition, seemingly in direct contradiction to the statutory language and the holding of *Ward*. This set the Canadian courts closer to an equal understanding of parental rights.

The first Charter-based challenge came in 1986 and claimed discrimination on sex and marital status.¹⁰⁶ The court recognized what it called a “startling” difference in treatment for biological fathers depending on their marital status¹⁰⁷ and that gender distinctions were drawn based on nurturing roles.¹⁰⁸ The Court upheld the challenge, theoretically opening the door for broader rights to be granted to unwed biological fathers.¹⁰⁹ After this case, unwed biological fathers began to bring genetic-based claims with mixed success.

¹⁰¹ Children's Law Reform Act, 1977 (Ont.), c41. §1 “1. . . . for all purposes of the law of Ontario a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage.”

¹⁰² *Id.* at §8(1) “Unless the contrary is proven on a balance of probabilities, there is a presumption that a male person is, and he shall be recognized in law to be, the father of a child...”

¹⁰³ [1979] 25 O.R. (2d) 779, at 787-88.

¹⁰⁴ *Id.* at 790. (Specifically the court recognizes that in the case of rape or a sperm donor notice and consent would not be required.)

¹⁰⁵ *Id.* at 798-800.

¹⁰⁶ *Re MacVicar and Superintendent of Family and Child Services* (1986), 34 D.L.R. (4th) 488

¹⁰⁷ *Id.* at ¶31.

¹⁰⁸ *Id.* at ¶35.

¹⁰⁹ *Id.* at ¶38.

In Ontario, an unwed biological father of a child born of a casual relationship was granted permission to challenge his lack of notice to an adoption proceeding.¹¹⁰ The divisional court, however, found that the mother and father were not similarly situated and that the biological mother had “demonstrated responsibility” in a way the biological father had not during the pregnancy.¹¹¹ The government argued that the distinction was based upon the responsibility undertaken and not the sex of the parties.¹¹² On the other hand, the Nova Scotia court held that the legislature had not intended to deprive a child of a relationship with the biological father and therefore, the biological father’s custody claim should be allowed, although he had no social relationship with the child.¹¹³

Another Canadian court held that the mother is the sole legal guardian of the child immediately after birth and therefore can place the child up for adoption without the consent of the biological father.¹¹⁴ The Court was faced with continued domestic violence and the adoptive parents’ desire for an open adoption.¹¹⁵ Thus, in making its determination to uphold the adoption without the consent of the biological father, the court explicitly made reference to the possibility of a social relationship between the biological father and his daughter in the future.¹¹⁶

British Colombia’s decision that the mother has immediate sole custody can be contrasted with the Manitoba Court of Queen’s Bench, which required a search for the father two years after the children were placed with an adoptive family.¹¹⁷ The Court questioned the motives of the mother and her judgment in denying both the biological father and his children the right to

¹¹⁰ *CES v Children's Aid Society of Metropolitan Toronto*, [1988] OJ No 268 at ¶4.

¹¹¹ *Id.* at ¶15.

¹¹² *Id.*

¹¹³ *DT (Re)*, [1992] NSJ No 387, at ¶46.

¹¹⁴ *JNZ v JD*, [1994] BCJ No 969.

¹¹⁵ *Id.* at ¶12-15.

¹¹⁶ *Id.* at ¶97.

¹¹⁷ *RA (Re)*, [1998] MJ No 348.

have a social or legal relationship or to know of each other's existence.¹¹⁸ The court further found the rights granted under the putative father registry to be illusory where, as here, the biological father is never informed of the pregnancy.¹¹⁹

The unpredictability for unwed biological fathers continued in 2000 when the British Columbia Appeals Court overturned the district court's granting of custody to a biological father in favor of an adoptive family.¹²⁰ The unwed biological father had filled out the registry and sought custody of his child.¹²¹ On appeal by the adoptive family, the court found that the lower court had given too much weight to the biological ties between the father and child and thus reversed and granted the adoption, forever severing the father's relationship to his child.¹²²

Despite the varied results of these challenges, in 2001, unwed biological fathers won an important victory for biological ties.¹²³ The biological father sought to have his surname included on the child's birth registration.¹²⁴ The mother filed the registration with only her own surname.¹²⁵ The Supreme Court of Canada found that the Vital Statistics Statute,¹²⁶ which allowed for the mother to not acknowledge the biological father without reason, was a violation of the Charter freedoms.¹²⁷ Having found a dignity interest in the right to having one's children bear one's surname,¹²⁸ the court held that the statute intruded on this dignity interest in an impermissible manner.¹²⁹ The ultimate effect of this case was to recognize the biological father's biological relationship to his children, absent a social relationship, as significant and

¹¹⁸ *Id.* at ¶49.

¹¹⁹ *Id.* at ¶36.

¹²⁰ *Birth Registration No. 99-00733, Re*, 133 B.C.A.C. 193.

¹²¹ *Id.* at ¶1-16.

¹²² *Id.* at 116.

¹²³ *Trociuk v. British Columbia*, 2001 BCCA 368.

¹²⁴ *Id.* at ¶5.

¹²⁵ *Id.* at ¶2.

¹²⁶ *Vital Statistics Act*, R.S.B.C. 1996, c. 479.

¹²⁷ 2001 BCCA 368, at ¶13.

¹²⁸ *Id.* at ¶16.

¹²⁹ *Id.* at ¶37.

worthy of protection under the Canadian Charter. This had an immediate and profound impact on biological fathers' rights.

Shortly after *Trociuk*, an unwed biological father who had no social relationship with his child sought notice and custody after an adoption proceeding had begun in an Ontario Court.¹³⁰ The biological father did not fit any of the statutory criteria for parenthood;¹³¹ however, the court held that had a procedure existed that included the father in the birth registration forms, he would have fit within the statutory definition.¹³² The Court, using *Trociuk*, found that the biological father was a parent entitled to notice because of the biological relationship.¹³³

While biology is sufficient for a biological father to be recognized as a parent, it remains merely a factor for purposes of custody. The Saskatchewan Court of Queen's Bench awarded custody to adoptive parents despite finding that the biological father was a fit parent who did not consent.¹³⁴ After the mother denied knowing who the father was and signed a consent agreement for adoption,¹³⁵ the biological father engaged the media in order to find his child.¹³⁶ DNA tests proved that the petitioner was the biological father.¹³⁷ Despite a finding that the biological father and his paramour were "adequate,"¹³⁸ the court spent twenty seven paragraphs discussing the shortcomings of the couple.¹³⁹ The court then extolled the virtues of the adoptive family.¹⁴⁰ The Court concluded that "the best interest" standard is not satisfied by placing the child with the

¹³⁰ *DGC v RHGY*, [2003] 65 OR (3d) 563.

¹³¹ *Id.* at ¶8.

¹³² *Id.* at ¶11.

¹³³ *Id.*

¹³⁴ *Hendricks v Swan*, [2007] S.J. No. 30; 2007 SKQB 36.

¹³⁵ *Id.* at ¶18.

¹³⁶ *Id.* at ¶21.

¹³⁷ *Id.* at ¶23.

¹³⁸ *Id.* at ¶54.

¹³⁹ *Id.* at ¶29-56..

¹⁴⁰ *Id.* at ¶57-65.

“adequate” biological father and therefore allowed the adoption.¹⁴¹ Although the Court allowed visitation by the biological father,¹⁴² the full rights of parenthood were denied merely because of his gender. No biological mother is forced to undergo an examination to show her fitness nor could she lose her parental rights where she is found “adequate” by a court. Despite the Saskatchewan Court’s lip-service to the inviolability of parental rights¹⁴³ and equality¹⁴⁴, this decision suggests that biological father’s must be more than “adequate” in order to be granted custody of their own children.

Canada has a system that looks to the dignity interest that an unwed biological father has in his children. Canada recognizes that all parents, regardless of gender or marital status, have the same dignity interest when it comes to having an opportunity to raise their own children. Canada’s federal system has led to conflicting results, however, over the last decade. The current trend is the recognition that the biological relationship that an unwed father shares with his children is sufficient for him to be recognized as a parental figure. Parental recognition has been used to allow unwed fathers an opportunity to be heard in proceedings, to have their surname on the birth certificate, and to seek custody even after the child has been in an adoptive placement for an extended period of time. There are still challenges, especially with regards to the showing that an unwed biological father has to make to gain custody of his children when the mother consents to an adoption against his wishes.

Despite the shortcomings, Canada is on the path to accepting unwed biological fathers’ parental rights based on biology alone, just as they do for biological mothers. Since *Trociuk*, there has been recognition that biological fathers have a dignity interest in their children, even

¹⁴¹ *Id.* at ¶95.

¹⁴² *Id.* at ¶104.

¹⁴³ *Id.* at ¶72. (“Parental claims must not be lightly set aside, and they are entitled to serious consideration in reaching any conclusion”).

¹⁴⁴ *Id.* at ¶67.

absent a social relationship. Canada's system, even with contradictory results at times, is closer to parental equality than either the United States or Ireland. The Supreme Court of Canada's dignity analysis provides a tool, analogous to the fundamental interest already recognized in the United States, which could be used in conjunction with Equal Protection to protect the parental rights of unwed biological fathers at the birth of the child.

IV. Equal Protection, Combined With the Canadian Recognition of the Dignity Interest Created by a Biological Relationship, Offers a Path Towards Parental Equality for Unwed Biological Fathers in the United States.

The time is ripe for the United States Supreme Court to use Equal Protection to recognize and protect the parental rights of unwed biological fathers based on the biological relationship between father and child without requiring a social relationship. No other biological parent is required to show a social relationship before being legally recognized as a parent. The three systems discussed previously each recognize unwed mothers as per se capable of raising their children and require the mother's consent or a showing of neglect or abuse in order for the state to terminate the mother's parental rights.¹⁴⁵ Unwed mothers are given more than a right to notice or a right to petition to seek custody of their children. They are given the full panoply of parental rights as soon as they give birth. Unwed biological fathers are entitled to this same degree of protection under Equal Protection, because they have the same fundamental right (or dignity interest) to have at a minimum a legal relationship with their children.

This paper has examined three separate models with differing views on how to treat the rights of unwed biological fathers. In Ireland, unwed biological fathers are afforded merely the right to petition to seek guardianship. They have no actual right to guardianship of their own children and no constitutional guarantees. Despite the European Court of Justice's finding that

¹⁴⁵ [1966] IR. 567 at 643-44 (Ireland does limit the Constitutional recognition of parental rights for unwed mothers).

Ireland's restrictions violated the European Charter, Ireland has continued to restrict its view of family to the marital unit and to deny biological fathers legal recognition as parents. The United States has a test that is more open than Ireland but still restricts parental rights to a significant degree. The United States Supreme Court has laid out a biology plus test. This test requires that a biological as well as social relationship exist between the child and the biological father. Additionally, the court has said that only those rights that have traditionally been recognized are protected under due process and therefore the biological father may not have a protected interest where the mother is already married. The Canadian system has used the Charter freedoms to recognize a dignity interest in biological relationships between a father and his children. Canada has held that unwed biological father's have an interest in naming and knowing their children (just as the children have an interest in knowing their biological fathers). Under this system, Canada has allowed petitions solely on biological grounds recognizing that in certain circumstances, a requirement of a social relationship is impossible, such as where the mother has attempted to keep the pregnancy and resulting birth from the biological father. Despite its more open system, Canada still requires more from unwed biological fathers who seek custody in adoption proceedings than it does from mothers whose rights the state seeks to terminate. Each system has built in inequalities that make it difficult, and in some cases impossible, for a biological father to be a legal parent or be granted custody of his biological children. Ultimately, the goal of this paper is to create a fourth model, one which recognizes the unwed biological father as a parent entitled to the same legal recognition as the biological mother.

The United States has within its Constitution the ability to fully recognize and protect unwed biological fathers' as legal parents. Unlike Ireland where family is explicitly limited to the marital unit, the American Constitution protects under privacy a wide range of family-like

units.¹⁴⁶ The Equal Protection clause provides the United States Supreme Court ample latitude to protect unwed biological fathers, even though such rights were not traditionally protected in the past.¹⁴⁷ Following the lead of Canada's Supreme Court's Charter decisions, which recognize a dignity interest analogous to the fundamental right concept in the United States, the United States should use the Equal Protection clause to recognize unwed biological fathers as equal to all other parents entitled to the same protection of their parental rights.

Two routes are available for unwed biological fathers to challenge under Equal Protection their unequal status as parents. Unwed biological fathers could challenge statutes as creating unequal gender-based classifications between unwed biological fathers and unwed biological mothers. If the Court were to take this route, it would have at its disposal the heightened scrutiny analysis used when dealing with gender classifications.¹⁴⁸ In the past, states have claimed that the distinctions between these classes are related to the different care-giving functions between biological mothers and biological fathers. In *Stanley*, the dissent suggested that because biological fathers are usually unable or unwilling to care for their children, the different treatment was justified. States have also pointed to administrative functions, such as the ease of finding biological mothers and the difficulty of pointing to biological fathers, to justify different treatment. These interests would be insufficient under a heightened scrutiny analysis¹⁴⁹. States may also attempt to rely on the interest pointed to in the Canadian cases, an interest in facilitating adoptive placements for children. Just as in Canada, this justification will fail in the United States, because parents have a fundamental right to raise their children that cannot be supplanted

¹⁴⁶ *supra* n1.

¹⁴⁷ The Court today recognizes and protects many family and private relationships that were not protected traditionally. *E.g. see, Lawrence v. Texas*, 539 U.S. 558. (*homosexual conduct*; *Romer v. Evans*, 517 U.S. 620. (*homosexual relationship*); *Loving v. Virginia*, 388 U.S. 1 (*interracial marriage*).

¹⁴⁸ *Craig*, 429 U.S. 190.

¹⁴⁹ *Craig*, 429 U.S. 190, 197 (classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives).

except where there is a showing of parental unfitness or a compelling state interest.¹⁵⁰ A challenge of a statute that gives biological mothers per se parental rights but requires biological fathers to meet some further showing of a relationship is unequal treatment. This requirement, although previously accepted, should be rejected. Neither the biological mother nor the biological father should be required to show anymore than that they are biologically related to the child in order to be recognized under the law as a legal parent.

Under current law, for the mother to maintain her parental rights in a termination proceeding, the burden rests on the state to show that she has abandoned, neglected, or abused her child. The biological father, on the other hand, has the burden of showing that he has created a social relationship worthy of state protection. This additional burden for the biological father to be a legally recognized parent is unequal, and through the analysis used by Canada in *Trocuik* and its progeny, the United States Supreme Court could find an Equal Protection violation. The Canadian court recognized that none of the state interests were as compelling as the biological father's right to be legally recognized as a parent of his child. The Canadian Courts have further recognized that there is no method that the state can take to lessen the impact on the interest of the father. The interest a biological father has in being a legal parent is no less here in the United States than in Canada. Like Canada, the United States should recognize that the biological relationship creates the interest that is protected and relegate the social relationship test to the custody decision where it belongs.

The social relationship test that is currently used in the United States as part of the analysis to decide whether a biological father has parental rights and may veto an adoption is wrongly placed. The social relationship should be, and is, relevant only when there is a question about the custody of the child between the biological parents. However, where the biological

¹⁵⁰ *Santovsky*, 455 U.S. 745.

father seeks custody of his child as against a third party, the best interest of the child standard is not a proper analysis. The biological connection between father and child should be sufficient for the father to gain custody as against any third party¹⁵¹, just as it is sufficient for a biological mother to keep her child as against any third party absent a showing of parental unfitness. Biological relationships should create a presumption entitling biological parents to custody against the entire world except the other biological parent, just as it does for married couples. When the decision is between two biological parents the best interest of the child standard is required to look at the social relationship as both parties are equally biologically related to the child.

One argument often used to deny unwed biological fathers of parental rights is that women too are required to form a relationship with the child, and this is done during the pregnancy. It is true that women have a right to choose whether or not to reproduce and that such a decision ultimately impacts their body. During the pregnancy the woman by necessity will form a relationship with the child that the biological father simply can not. In Canada, the Supreme Court rejected the idea that pregnancy entitles the mother post birth to additional rights. The balance during pregnancy is fundamentally different than the balance once the child is born. After birth, the interests of the biological father are equal to those of the biological mother. Once a child is born, both parents sit in the same biological position towards the child, and their respective parental rights should be equal.

Unwed biological fathers could also use a second, though more circuitous and perilous route to challenge their status under Equal Protection. Unwed biological fathers could bring a direct challenge on the classification between married and unmarried biological fathers, an issue

¹⁵¹ [2007] S.J. No. 30; 2007 SKQB 36, at ¶29-56. (*requiring more than being "adequate" for biological father to have custody against an adoptive family*).

that has been avoided by the Supreme Court. The classification challenged would be marital status rather than gender. On at least two prior occasions, the Court has found that the question was either not presented or the case could be disposed of without reaching this issue. A case that squarely put this question before the court could lead to unwed biological fathers being granted legal recognition as parents to the same degree as married men.

This road would be more arduous in that the heightened scrutiny analysis that is afforded gender classifications would not be available. Without heightened scrutiny, the state would merely need to provide a rational basis for treating married and unmarried biological fathers differently. This test is notoriously easy for the state to meet and would provide a serious challenge for unwed biological fathers to show that the state interest is “irrational.” Despite the lower standard, an unwed biological father could point to the European Court of Justices decision in *Keegan v. Ireland* that found that denying a biological father rights based on marital status violated the European Charter. The Supreme Court could also look to the *Trociuk* case in Canada and the dignity interest that all biological fathers share with their children. The compelling nature of the interest might offer unwed biological fathers the ability to overcome the burden imposed by a lower standard of scrutiny.

This challenge would have to focus on the disparity of treatment between the unmarried and the married (or more closely related, divorced) father. The married or divorced father does not need to have a social relationship with his children in order to be considered a parent. The biological ties and a legal (or former legal) relationship with the child’s mother is sufficient. The unwed father has the same biological relationship to his children as a married father. The only difference then is the formalization of the relationship between the parents which the court has

said is not required for the attachment of parental rights.¹⁵² The Supreme Court has also recognized that when fundamental liberty interests were at issue, the state could not discriminate on marital status.¹⁵³

Some have argued that recognition of the parental rights of unwed biological fathers, who are not in committed relationships with the mother or who have not formed a relationship with the child, infringes upon the rights of the mother and is not in the best interest of the child.¹⁵⁴ These arguments presuppose that the parental relationship is synonymous with custody of the child. There is no doubt that where a biological father is unfit, the parental relationship can be terminated or that visitation can be limited or denied just as it can be for a mother who is unfit. Where the biological mother or the state child welfare agency thinks that it is not in the best interests of the child to have a relationship with the father, the court would be able to make a determination to sever the parental rights or limit custody. The right asserted in this paper, however, would mean the father would not have to prove his fitness or to show that he is better than an adoptive parent in order to be recognized as a legal parent of his children. By nature of biology alone, the same rights that attach to the mother would attach to the biological father, regardless of marital status, and he would be entitled to the same procedure as all other parents for those rights to be terminated. This would make unwed biological fathers legal parents recognized by law whether or not they seek custody or a social relationship.

¹⁵² *Stanley*, 405 U.S. 645.

¹⁵³ *Eisenstadt v. Barid*, 405 U.S. 438, 453. (*marital status can't be used to refuse unmarried women the right to contraceptives*).

¹⁵⁴ E. Gary Spitko, The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-parenting of Her Child, 48 Ariz. L. Rev. 97 (2006). (*would require social relationship and consent of the mother for biological father to be a parent*).

Conclusion

Unwed biological fathers as a class have been denied legal recognition as a parent of their children without a showing that they are unfit. Despite the changing look of families, the increase of children born out of wedlock, and the changing societal views on paternal involvement in child care, unwed biological fathers are treated as strangers to their children unless and until they show a social relationship sufficient to satisfy a court. The United States needs to reject such a narrow conception of parent, refuse to recognize distinctions on marital status or gender, and provide legal recognition of unwed biological fathers under the Equal Protection clause. Canada provides a framework through its dignity analysis that the United States can use to guide its Equal Protection analysis of either gender or marital status classifications.

Recognizing and protecting at birth the unwed biological fathers' parental right does more than grant men the right to consent or veto adoptions; it provides children the universal right to know both of their biological parents and an opportunity to foster a relationship that under our current law is forever denied. Most importantly, recognizing unwed biological fathers as parents at birth fulfills the promise of the Equal Protection clause by recognizing both biological parents biological relationship with the child as equal before the law.