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Newborn Adoption: Birth Mothers, Genetic Fathers, and Reproductive Autonomy

Lori Chambers

NEWBORN ADOPTION: BIRTH MOTHERS, GENETIC FATHERS, AND REPRODUCTIVE AUTONOMY

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Abstract: *Overwhelmingly, Canadian-born children relinquished for newborn adoption have been born to unmarried mothers. Under provincial adoption acts, in cases of 'illegitimacy' only the mother's consent was necessary for a child to be eligible for adoption. Since adoption statutes were introduced, however, the distinctions between those born within and outside of marriage have been eliminated at law. Provincial legislation now recognizes a wide range of unmarried men as fathers, lists circumstances under which paternity will be presumed and provides for the use of genetic testing. But this raises significant questions in the context of newborn adoption. Whose consent is required to relinquish a child? In this paper it is argued that the unfettered right to release a newborn child for third party adoption is an essential component of women's reproductive autonomy. It is also essential to women's dignity and equality rights, and to the right to liberty and security of the person. To illustrate this argument, consent provisions are contextualized by explicating the disrespect for unmarried birth mothers that has been central to adoption regimes. This is contrasted with the*

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expanding rights of non-marital fathers under Charter *litigation. With regard to newborn adoption,* Charter *reasoning has delivered equality with a vengeance. Relinquishment should be considered an issue of reproductive freedom, not a question of custody. Interference in the birth mother's decision making process violates her s.15 right to equality; the on-going poverty and discrimination faced by single mothers are erased when the genetic claims of men are considered to give them equal standing with mothers in adoption cases. Moreover, women's s.7 rights to liberty and security of the person are vitiated when men can interfere with adoption placement, forcing women to abort or to retain custody themselves.*

INTRODUCTION

Adoption is a statutory invention that allows a child to become the full legal child of a non-biological parent.[1] Historically, and in the public mind, adoption was believed to be an altruistic mechanism for 'saving' unfortunate children; as Karen Dubinsky argues, "ideologies and images of rescue"[2] are

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1 Adoption has a long informal history. Moreover, statutory adoption is used in contexts beyond that explored in this article: newborn adoption by strangers. It is common for step-parents to adopt the biological children of their partners and adoption is used in same-sex families and surrogacy cases to formalize intentional parenthood decisions.

2 Karen Dubinsky, *Babies Without Borders: Adoption and Migration Across the Americas* (Toronto: University of Toronto Press, 2010) at 95. While she makes this argument only in regard to international adoption, it is equally relevant in the domestic context. The trope of rescue has been challenged, as she also illustrates, particularly in the international context, by horror stories of child-kidnapping and baby selling. While there is no doubt that women have been subjected to pressure in the adoption context, and that extra-legal schemes for stealing babies have been an on-going problem, it is a foundational assertion of this article that adoption, properly regulated, is an

foundational to adoption practice. But from what and from whom were (and are) children to be saved? What children would be available for adoption and under what conditions? Overwhelmingly, Canadian-born children relinquished for newborn adoption have been born to unmarried mothers. Under provincial adoption acts, in cases of 'illegitimacy' only the mother's consent was necessary for a child to be eligible for adoption. Since adoption statutes were introduced, however, the distinctions between those born within and outside of marriage have been eliminated at law.[3] Provincial legislation now recognizes a wide range of unmarried men as fathers, lists circumstances under which paternity will be presumed, and provides for the use of genetic testing.[4] But this raises significant questions in the context of newborn adoption.[5]

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important option for birth mothers and that it can be good for birth mothers, their children and adoptive families.

3 In Ontario, for example, affiliation proceedings were abolished on March 31, 1978 and the legal designation 'illegitimate' was made obsolete in 1980. See: Diana Dzwiekowski, "Casenotes: Findings of Paternity in Ontario, *Sayer v. Rollin*" (1980) 3 Can J Fam L 318 and *Family Law Reform Act*, RSO (1980), c 152, s 1(a). The intent of such reforms was clearly ameliorative: "the CLRA was intended to remove disabilities suffered by children born outside of marriage…The (Ontario Law Reform) Commission therefore 'accorded high priority to finding a means by which the child born outside marriage may be allowed to enjoy the same rights and privileges as other children in our society'. The Commission's central recommendation was that Ontario should abolish the concepts of legitimacy and illegitimacy and declare positively that all children have equal status in law. The Commission's recommendations were enacted into legislation in the form of Parts I and II of the CLRA:" *AA v BB*, 2007 ONCA 2 at para 20.

4 Ontario, *Children's Law Reform Act,* RSO (1990), c C.12, ss 1-77.

5 Most provincial birth registries and vital statistics provisions still allow the mother to register an infant alone, but registration is subject to revision, even against the will of the mother. For further information on vital statistics and the registration of birth, see:

Alberta, *Vital Statistics Act*, Alta Reg 322/2000, s 2.1; British Columbia, *Vital Statistics Act*, BC Reg 69/82, s 4; Manitoba, *Vital Statistics Act*, CCSM, c V60, s 3, enacted as RSM 1987, c V60; New Brunswick, *Vital Statistics Act*, NB Reg 87-30; Newfoundland and Labrador, *Vital Statistics Act*, SNL 2009, c V-6.01; Northwest Territories, *Vital Statistics Act*, RSNWT 1988, c V-3, ss 1-11; Nova Scotia, *Vital Statistics Act*, RSNS 1989, c 494; Ontario, *Vital Statistics Act*, RSO 1990, c V.4, ss 8-17; Prince Edward Island, *Vital Statistics Act*, RSPEI 1988, c V-4.1; Saskatchewan, *Vital Statistics Act*, SS 2009, c V-7.21; Yukon, *Vital Statistics Act*, RSY 2002, c 225, ss 1-15. Social service agencies are increasingly concerned with the identification of the father in order to ensure his consent and a smooth adoption process; questioning of the mother, therefore, may be invasive. In some American states, this potential arises because "the state's use of 'due diligence' to locate the putative father may result in a violation of the unwed mother's privacy by breaking the confidential communication the woman shares with the state agent or the court:" Cecily Helms & Phyllis Spence, "Take Notice Unwed Fathers: An Unwed Mother's Right to Privacy in Adoption Proceedings" (2005) 20 Wis Women's LJ 1 at 13. Some provinces have adopted birth father or paternity registries that automatically entitle a registered father to notice if the mother seeks third party adoption. For example, British Columbia employs a birth father registry. Notice of proceedings, however, does not automatically translate into a requirement that a father consent to adoption. This is governed under the *Adoption Act.* The act requires some level of involvement from a father before his consent will be required, but is subject to significant judicial discretion: *Adoption Act,* RSBC 1996, c 5, s 1, Part 2 – The Process Leading to Adoption. As this article will illustrate, however, even careful wording of adoption statutes does not preclude interference by an uninvolved unwed father who claims discrimination under the *Charter*. In Saskatchewan, the *Children's Law Act* provides that "where the parents have never cohabited after the birth of the child, the parent with whom the child resides is the sole custodian of the child:" The *Children's Law Act*, SS 1997, c C-8.2, s 3(2). A challenge under section seven of the Charter was dismissed in 2004: *Giles v Beisel*, [2006] 2 WWR 724. Nonetheless, in 2004, the *Adoption Amendment Act* was passed; exceptions are available and an *ex parte* application can be made to dispense with the requirement to give notice "to address the difficult circumstances

Whose consent is required to relinquish a child? Must the mother notify the father when she becomes pregnant or reveal his name to social service agencies? Should the mother and father have equal rights to determine the future of a newborn child? These legal issues have not been definitively resolved.

I argue that the unfettered right to release a newborn child for third party adoption is an essential component of women's reproductive autonomy. It is also essential to women's dignity and equality rights, and to the right to liberty and security of the person. A mother forced to notify a father might feel, for the sake of the infant, that she has no option but to discontinue adoption proceedings and retain custody against the father.[6] She should not be forced to retain custody when she wishes, for personal reasons, to release a child to a third party. Moreover, a mother afraid of such a scenario might be more likely to undergo an abortion or reverse the adoption process. No woman should feel compelled to abort when such action is "contrary to her beliefs, moral principles, or health concerns."[7]

As the only person who has provided care for the child, the mother's wishes for the child's future must be respected.

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of conception resulting from rape or incest," but it seems that otherwise a mother must tell a father of her pregnancy.

6 These fears/problems are recognized in safe haven legislation in most American states that allows a mother to abandon a baby, immediately after birth, without having to reveal her identity or that of the father, without fearing prosecution. There is, of course, an inconsistency in allowing abandonment through such channels, but insisting that a mother who does not so abandon her child must name the father. Safe haven legislation, however, is believed to prevent unsafe abandonment and infanticide. See: Susan Ayers, "Kairos and Safe Havens: The Timing and Calamity of an Unwanted Birth" (2009) 15(2) Wm & Mary J Women & Law 227.

7 Nancy Erickson, "The Feminist Dilemma Over Unwed Parents' Custody Rights" (1984) 2 Law and Inequality 447 at 455.

Relinquishing a child for adoption has to be viewed as an act of love, "as the last in a series of actions meant to provide care for the child, not as an act of abandonment that gives her no interest in the child's placement."[8] The mother who carries a child to term has made a conscious choice to parent by continuing her pregnancy. The father has made no parallel sacrifices.[9] Women who find themselves pregnant without supportive partners, still almost exclusively those who contemplate third party adoption, face a myriad of difficult decisions throughout pregnancy. A woman cannot make a fully informed and free decision to carry a child to term if she must fear the intervention of an ex-lover in the disposition of the child post-birth. Based upon an exhaustive study of all extant reported cases with regard to consent to newborn adoption in English-Canada,[10] I suggest that consent provisions have too

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8 Mary Shanley, "Fathers' Rights, Mothers' Wrongs?: Reflections on Unwed Fathers' Rights and Sex Equality" in Uma Narayan & Julia Bartkowiak, eds, *Having and Raising Children: Unconventional Families, Hard Choices and the Social Good* (Pennsylvania: The Pennsylvania State University Press, 1999) 39 at 59.

9 It can be argued that [some] men have played a supportive role. The mother, in my view, may choose to recognize such support by inviting the father [or some other involved and supportive third party] into the baby's life, but she should not be obligated to accept the involvement of a man who may deem himself supportive but who, to the mother, may appear controlling and interfering.

10 The sample consists of 284 reported cases dating from 1948 to 2010. Exhaustive QUICKLAW searches were undertaken. All provinces and territories are represented except Quebec (although there are revocation cases extant in that province). Quebec's history is very different due to the civil law tradition. Interestingly, Quebec is also the first province to attempt to grapple with social vs. genetic parenting claims. See: Robert Leckey, "Where the Parents Are of the Same Sex: Quebec's Reforms to Filiation" (2009) 23 Int'l JL Policy & Fam 62. British Columbia is also now undertaking a complete revision of parentage legislation. For further information, see: British Columbia, Ministry of the Attorney-General, Justice Services Branch,

often disrespected mothers and devalued their gestational labor. Insult is added to injury when men are accorded rights over women's bodies through purely genetic claims. The relinquishment of the child at birth is a reproductive decision that should be controlled exclusively by the mother.[11] Allowing men to override the decisions of women reduces mothers to incubators and violates women's rights under section 15 and section 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").[12]

Civil Policy and Legislation Office, "White Paper on *Family Relations Act* Reform: Proposals for a New Family Law Act", (Vancouver: Ministry of the Attorney-General, 2010), online: <http://www.ag.gov.bc.ca/legislation/pdf/Family-Law-WhitePaper.pdf>. All provinces are represented, but this article does not engage in statistical analysis of outcomes, and acknowledges that judicial discretion allows for significant variation in adoption consent cases. However, this discretion is itself dangerous for the reasons that follow. Strong patterns and themes were evident in these cases, as explained below, and particular cases were selected for extended analysis because they illustrate the problems that women can face under this unclear/contradictory legal regime. It is also of note that reported cases themselves are a limited historical/legal source. As with other aspects of family law, many cases regarding adoption are heard in courts which do not routinely report their findings, and patterns of decision-making 'on-the-ground' may not reflect the values and problems evident in reported cases. For an extended discussion of the differences between reported and unreported cases, see: Lori Chambers, *Misconceptions: Unmarried Motherhood and the Ontario Children of Unmarried Parents Act, 1921-1969* (Toronto: University of Toronto Press, 2007). Nonetheless, reported cases are important because of their 'educational' impact on lawyers, judges and the public.

11 It must be noted here that this argument applies only to newborn adoption.

12 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15 and s 7 [*Charter*].

To illustrate this argument, consent provisions are contextualized by explicating the disrespect for unmarried birth mothers that has been central to adoption regimes. This is contrasted with the expanding rights of non-marital fathers under *Charter* litigation. Part I of this article explores the passage of adoption legislation and the rights of birth mothers. The baby was a desirable commodity and the mother was treated with disdain. Her consent to adoption was often obtained under conditions of duress. In a trilogy of cases in the 1950s, the Supreme Court of Canada established that mothers can revoke their consent to adoption, with some qualifications. In 1970, the fact that she was sometimes subjected to significant coercion was acknowledged. Although these cases did not involve the rights of fathers, they are important because they reveal that adoption is part of a continuum of reproductive choices over which women need to have sole control. Moreover, they illustrate that the decision to relinquish a child for adoption is fraught and painful. In recent years, mothers' rights, on the erroneous assertion that single mothers no longer face stigma or social disadvantage, have been restricted. In contrast, an unwed father, who initially had no rights under adoption legislation, can attempt to coerce the mother into abortion, ignore, malign, and harass her, and still assert rights over the baby at the time of birth.

Part II of the article explores the origins of unwed fathers' claims in adoption cases. Traditionally, only married men had legal custody of children and unmarried men had no say in relinquishment for adoption. In the 1970s, in a context in which cohabitation was being recognized as having important parallels with marriage, unmarried fathers with existing relationships with older children were determined to have a veto right over third party adoption. Unwed fathers' claims were based on social fatherhood, particularly evidence that fathers had cohabited with, and supported, their children, not the genetic connection valorized by current fathers' rights

groups. Nonetheless, based on such precedents, more recent *Charter* analysis has opened the door for uninvolved and abusive men to claim an 'interest' in their genetic children.

In Part III of this paper, I critique the insertion of formal equality reasoning into a context that is fundamentally gendered. With regard to newborn adoption, *Charter* reasoning has delivered equality with a vengeance. Although the examples in the article are based upon the non-marital context, I argue that all women, whatever their marital status, should have the sole right to determine the future of their newborn children. After all, married men can also be abusive, manipulative, and simply disinterested. The decision to release a child for adoption is analogous to, and interdependent with, the right to abortion, and relinquishment should be considered an issue of reproductive freedom, not a question of custody. Interference in the birth mother's decision making process violates her section 15 right to equality; the on-going poverty and discrimination faced by single mothers are erased when the genetic claims of men are considered to give them equal standing with mothers in adoption cases. Moreover, women's section 7 rights to liberty and security of the person are vitiated when men can interfere with adoption placement, forcing women to abort or to retain custody themselves.

PART I: THE (LIMITED) RIGHTS OF THE BIRTH MOTHER

Before the passage of adoption statutes, the unwed mother had *de facto* responsibility for her child. But this autonomy was based on denigration of the mother, not respect for her. She and her child were outcasts. Under the common law the child born to an unmarried mother was *nullius filius*, a child of nobody. As Blackstone asserted, "the incapacity of a bastard consists principally in this, that he cannot be heir to any one, neither can

he have heirs, but of his own body."[13] It was assumed that women would lie about paternity, and that the father was "too uncertain a figure for the law to take any cognizance of him."[14] The unwed father, therefore, had no legal connection, or obligation, to his child(ren): "fatherhood was … awarded to the man assumed to share a biological connection with the child. This man … was the mother's husband."[15] Unmarried mothers faced myriad difficulties in raising children alone, and it is not surprising that 'illegitimate' infants comprised the overwhelming majority of those relinquished for adoption. Also unsurprisingly, once adoption statutes were passed, a married woman could not relinquish a baby without the consent of her husband.

Canadian jurisdictions passed adoption statutes between 1913 and 1952.[16] These statutes reflected both an on-

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13 William Blackstone, *Commentaries on the Laws of England* (London: Kerr, 1857) at 485.

14 *Re M (an infant)*, [1955] 2 QBD 479 at 488.

15 Fiona Kelly, "Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family" (2009) 21(2) CJWL 315 at 316.

16 Alberta, *An Act Respecting Infants*, (1913), c 13, ss 1-9; British Columbia, *An Act Respecting the Adoption of Children* (1935), c 2, ss 1-16; Manitoba, *Child Welfare Act*, c 35, ss 92-99; New Brunswick, *Adoption Act*, (1946), c 57; Newfoundland, *Welfare of Children Act* (1952) c 60; Northwest Territories, *An Ordinance Respecting the Adoption of Children*, (1967), c 2, ss 1-17; Ontario, *Adoption Act* (1921) c 55; Prince Edward Island, *Adoption Act* (1950) c 2; Quebec, *Loi de l'Adoption*, (1925), c 196, s 1; Saskatchewan, *Child Welfare Act*, c 278, part 4, ss 76-91. Despite the fact that adoption was not recognized under common law, informal adoption has a long, pre-statutory reform, history: GF Lemby, *Family Law* (Toronto: International Self-Counsel Press, 1971) at 157. The status of informally adopted children, however, was tenuous. For example, in 1909, foster parents in Ontario who had cared for a child for over a year, without being paid for the child's upkeep, attempted to keep the

going denigration of the unwed mother, and the new emphasis on the child as innocent, a blank slate, dependent and vulnerable.[17] It became morally imperative for the unwed mother to give up her baby. The founder of the Ontario Children's Aid Society, J.J. Kelso, argued that "no unmarried mother can successfully bring up her child and save it from disgrace and obloquy. (But) the child, if adopted young by respectable, childless people, will grow up creditably, and without any painful reminders of its origins."[18] To remove any connection with the tainted mother, an adoption order divested "the natural parent, guardian or person in whose custody the child has been of all legal rights in respect of such child."[19] The child became "for the purposes of custody of the person and

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child when the parents sought to reclaim her. Although the parents had signed an agreement with the fostering couple to release the child for adoption, the court referred to precedent and legal texts and asserted that "the law of England knows nothing of adoption" and that "parents cannot enter into an agreement legally binding to deprive themselves of the custody and control of their children; and, if they elect to do so, can at any moment resume their control over them:" *Re Davis*, [1909] OLR 384 at 386. The married father could always reclaim his child; no case establishing this right for the unwed mother, however, is extant in the Canadian context. Customary adoption, practiced by Indigenous peoples, was and remains, also, a form of informal adoption, and one which has had only tenuous legal recognition. For further information, see Cindy Baldassi, "The Legal Status of Customary Adoption Across Canada: Comparisons, Contrasts and Convergences" (2006) 39 UBC L Rev 63.

17 See: *Chambers*, *supra* note 10; and Patricia Holland, *Picturing Childhood: The Myth of the Child in Popular Imagery* (London: IB Taurus, 2004).

18 As quoted in Andrew Jones and Leonard Rutman, *In the Children's Aid: J.J. Kelso and Child Welfare in Canada* (Toronto: University of Toronto Press, 1981) at 156.

19 This paragraph summarizes the provisions of the Ontario *Adoption Act,* RSO 1921, c 55, s 10(1)(a)-(c), 11(2).

rights of obedience, to all intents and purposes the child of the adopting parents."[20] The adoption process was shrouded in secrecy; the natural parent was symbolically erased from the child's life and all original birth records were sealed. Adoption statutes introduced into law the "statutory death of the biological parents and the rebirth of the adoptee."[21] The biological father remained a shadowy figure, without rights, and with limited financial obligations, and these only in (rare) cases in which women kept their babies and could prove paternity in court.

Consent for adoption could, and still can, be granted by the judge, against the will of the parents, if the parents were deemed unfit, if the parents were imprisoned, or if the child had been made a crown ward.[22] Under some provincial regimes, unwed mothers could be determined to be unfit based simply on poverty,[23] a condition that was all too common in a world in

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20 *Adoption Act,* RSO 1921, c 55, s 11(1)-(2). Until 1970, however, with regard to wider kin the child had no legal status. With the passage of the *Child Welfare Act,* 1970, this was amended, and adopted children were made equal with natural born children unless a contrary intention was expressed in the will of wider kin. This was confirmed in *Re Barthelmes*, [1971] 1 OR 752.

21 Katrysha Bracco, "Patriarchy and the Law of Adoption: Beneath the Best Interests of the Child" (1997) 35(4) Alta L Rev 1035 at 1041.

22 Ontario *Adoption Act,* RSO 1921, c 55, s 5.

23 In Ontario, companion legislation to adoption statutes explicitly constructed the unwed mother as unfit. The *Children of Unmarried Parents Act* undermined the common law assumption that the mother was the *de facto* guardian of her illegitimate child. Instead, it provided in section 10 that "the provincial officer [the government employee appointed to enforce these three acts] may upon his own application be appointed guardian of a child born out of wedlock either alone or jointly with the mother of such child." Under child welfare legislation, the CAS had the right to remove children from the custody and control of unfit parents and to make such children

which single mothers were deeply stigmatized and employment opportunities for all women were limited. Unwed mothers were put under considerable pressure to release newborns for third party adoption. Svanhuit Josie, a child welfare worker from Ottawa, lamented in 1955 that "it seems to me that casework with the unmarried mother has come to mean the process of convincing her that it is impossible if not absolutely immoral for her to plan to keep her own child. She must be made to face the 'reality' of the situation, which means to give it up for adoption."[24] Her critique, however, prompted a harsh rebuttal from the supervisor of the Unmarried Parents Department of the Toronto Children's Aid Society, who asserted that most mothers keeping their children "were emotionally sick people" and that the social worker therefore "trie(d) to be of assistance in helping her assess the realities of her situation."[25]

Adoption statutes made placement with a third party legal. A central purpose of adoption statutes was to provide security to adoptive families; a fundamental disrespect for the 'illegitimate' mother underlay this legislation. The consent of the mother was required, but the conditions under which she gave such consent were not regulated. She faced considerable social stigma, possible familial pressure, and the prospect of

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crown wards and then to release them for adoption without parental consent to relinquishment. This power was expanded under the *Children of Unmarried Parents Act.* Section 11 established that when "the mother…through lack of means is unable, or through misconduct is unfit to have the care of the child, the child may, with the consent of the provincial officer, be dealt with as a 'neglected child'." Simply put, an unwed mother could be deemed unfit purely because of her poverty: *An Act for the Protection of the Children of Unmarried Parents*, SO 1921, c 54, ss 10-11.

24 Svanhuit Josie, "The American Caricature of the Unmarried Mother" (1955) 29(12) Canadian Welfare 247 at 249.

25 Kathleen Sutherton, "Another View" (1955) 31(5) Canadian Welfare 7.

poverty. Ostensibly, the child to be adopted was placed in a probationary home pending formal adoption and the mother had a right to revoke her consent until adoption was finalized. In practice, however, it was assumed to be in the best interest of the child to remain in the adoptive home.[26] As one judge asserted in Ontario in 1948, despite the fact that an adoption had not been finalized, the child could not be returned to the mother:

> [W]here a parent has signed a solemn consent to adoption under the provisions of the *Adoption Act* and the foster parents have taken the child and assumed their duties with a view to fulfilling the probationary requirements of the act, I do not think that a child is to be restored to the natural parent on the mere assertion of that parent's right. I think the parent must go further and show that 'having regard to the welfare of the child' it should not be permitted to remain with the foster parents.[27]

In the 1950s, a trilogy of Supreme Court cases established that, until an adoption was finalized, mothers had a right to revoke consent and have infants returned to them. In *Martin v. Duffell* (1950),[28] the mother stated her objections to the adoption promptly, but the adoptive parents and the adoption agency refused to return the child. It was found that before the final order of adoption the mother had the right to reclaim her child unless her behavior had rendered her inappropriate as a parent.[29] In *Hepton v. Maat* (1957),[30] the

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26 For an extended discussion of this issue, see: Chambers, *supra* note 10 at chapter 4.

27 *Re Fex*, [1948] OWN 497 at 499.

28 [1950] SCR 737 [*Martin*].

29 *Ibid*.

mother and father had initially given up their child because the husband was unemployed, they were very young, and they were recent immigrants from Holland with considerable financial challenges. They quickly regretted the decision and tried to revoke their consent before the adoption was finalized, but the adoptive parents contested. The court found that "natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that the fundamental natural relationship be severed."[31] In the final case of the trilogy, *Agar v. McNeilly* (1958)*,*[32] heard in 1958, it was found that "the mother of an illegitimate child, who is of good character and is able and willing to support it in satisfactory surroundings, is entitled to the custody of that child." The court also noted that the mother had been quick to revoke her consent and that the adoptive parents, and the adoption agency, had gone to great lengths to conceal the location of the child and to encourage the mother to give up her quest for the baby.[33]

In *Re Mugford* (1970),[34] the court explicitly acknowledged the problems that women faced, such as those hinted at in *Agar*. The mother sought an order for "production and delivery of the infant David John Mugford" born to her out-of-wedlock.[35] The child had been placed for adoption, but the final adoption order had not yet been granted. On learning that she was pregnant, the mother had moved to live with a married sister in Ottawa. She consulted the Children's Aid

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30 [1957] SCR 606.

31 *Ibid* at 607.

32 [1958] SCR 52 at para 10 [*Agar*]. The court is referring to its decision in *Martin*.

33 *Ibid* at para 10, referring to *Martin*.

34 [1970] 1 OR 601 [*Re Mugford*].

35 *Ibid* at para 1.

Society with regard to the future of her child and two social workers affirmed that the mother had been "tense and upset," "depressed … without much self-defense or self-assurance," and "in a state of indecision as to what should be done about the child since she would have no way of keeping it."[36] She was 19 years-old and her parents did not know that she was pregnant. She signed the adoption papers, but shortly thereafter was so distressed by her actions that she informed her parents of her predicament and sought their help in regaining custody of her child. The child had been placed in an adoptive home for only a few weeks, but the Children's Aid Society informed the mother that:

> David has adjusted well to his new environment and we cannot disturb this arrangement. However, you can feel assured that he is receiving plenty of loving care, and he will be given every opportunity to grow into a healthy and happy adult … I hope you will be able to adjust and make a new life for yourself.[37]

The court of first instance determined that there was "no evidence on the record which suggests that the respondent mother had deserted or abandoned [the] child."[38] Instead, it held that "she was motivated solely by a sincere desire to do what she thought was then in the best interests of her child despite an almost overpowering desire on her part to keep him and be a mother to him."[39] This case illustrates the social pressures that might encourage a woman to relinquish her child for adoption and the difficulty with which these decisions are

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36 *Ibid* at para 6.

37 *Ibid* at para 8.

38 *Ibid* at para 11.

39 *Ibid* at para 7.

made. The fact that the Supreme Court of Canada upheld the decision represents the high water mark of the Supreme Court's recognition of the rights of mothers.[40]

Despite these edicts from the Supreme Court, however, evidence from lower court decisions suggests that pressures within the CAS regarding adoption continued. Young women asserted that "counseling … was directed only towards adoption and did not adequately point out the alternatives"[41] and consisted of "a rough estimate of the welfare payments she would receive if she kept the baby, and having decided that this sum would provide no real life or future for her child, adoption was 'sold' to her as the only alternative."[42] Social workers continued to tell women that they could not revoke consent, and refused to return babies even when such children "had only been placed in another home for a fortnight or so and when no application for adoption had been instituted."[43]

In response to the trilogy, *Re Mugford,* and the resistance of social workers, provinces revised their adoption

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40 *Re Mugford*, [1970] SCR 261.

41 *Infant Registration No 74-09-001156 (Re)*, [1974] BCJ No 438 at para 6. In this instance, however, the court rejected her evidence on the basis that she was "too intelligent" not to have understood what she was doing.

42 *JSB (Re)*, [1972] BCJ No 275 at para 5. In this case, the judge acknowledged such pressures and the baby was returned to the mother and, perhaps not unimportantly, her new fiancé, who had expressed his commitment to the child. They were exhorted to "legitimize this relationship without delay, even if this denies them the 'nice' wedding both hope to have:" at para 18.

43 *LMC v RJT*, [1972] NBJ No 47 at para 15. Although the court acknowledged that the delays had been through no fault of the mother in this case, custody was nonetheless awarded to the adoptive parents, though they had not even known of the child's existence at the time at which the mother initially revoked her consent.

statutes, introducing provisions that made it clear that revocation was possible only within a short period of time immediately after birth; after such time, if the mother changed her mind, proceedings in court would be required. For example, Ontario established a 21-day window for withdrawal of consent.[44] An Ontario county court, interpreting the new provision, asserted that its purpose was to prevent "capricious and arbitrary evasion of a consent … the inquiry by the Court is not to be hampered by the regrets and changing whims of the natural parents."[45] The effect of these provisions was that after the short revocation period the mother "and the proposed adoptive parents [were] on an equal basis … That being so the paramount consideration is the welfare of the child."[46] In the 1980s, the Supreme Court of Canada was called upon to interpret these revisions with regard to revocation; the assumption underlying their decisions in these cases seems to be that women who relinquish their babies are simply bad

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44 Ontario *Adoption Act*, RSO 1958, s 73(7). For similar legislation in other provinces, see: Alberta, *Child Welfare Act*, RSA 2000, c 12, s 61(1) (which allows for a 10-day window for revocation of consent); British Columbia, *Adoption Act*, RSBC 1996, c 5, s 19 (which allows for a 30 day window); Manitoba, *Child Welfare Act*, RSM 1970, c 80, s 86(5) (which allows for revocation within a year, unless the child has been placed in an adoptive home); Newfoundland, *Adoption Act*, RSNL 1990, c A-3, s 12(1) (which allows for a 21-day window for revocation); Nova Scotia, *Children's Services Act*, RSNS 1989, c 68, s 11(1) (which allows for revocation until the child is placed in a home); Saskatchewan, *Family Services Act*, RSS 1978, c 52, s 4(A) (which allows for a 30-day window for revocation); Yukon, *Children's Act Part 3*, RSY 2002, c 31, s 86(1) (which allows for a 30-day window).

45 *Kilmer et al and Resney et al*, [1973] 2 OR 482 at para 29. Similar sentiments were expressed by courts in British Columbia and Newfoundland based on their revised legislation: *Re BJE*, [1961] BCJ No 116; and *Re Jenkins*, [1973] NJ No 22 [*Jenkins*].

46 See *Jenkins*, *ibid*, at para 12.

mothers, not women who face difficult circumstances and who relinquish their children as an act of love.

In a new trilogy of cases, the rights of relinquishing mothers were severely circumscribed. In the first case, *Manitoba (Director of Child Welfare) v. Y* (1981),[47] a 19-year-old Manitoba mother had released her child for adoption immediately after the seven-day waiting period, required under legislation, had elapsed. Two days later, she attempted to revoke her consent, but was told that the baby had been placed for adoption. Under provincial legislation, the mother could revoke her consent within the child's first year of life or until the baby was placed in a probationary adoptive home, whichever came first.[48] The court of first instance, therefore, found no strict violation of her rights. On appeal, Monnin J.A. found that "in effect, what the Director did by his speedy action was to deprive this young mother of all her rights…The legislature, having made provision for the withdrawal of a voluntary surrender, expected this right to be of some effect, and capable of being made use of."[49] The Supreme Court, however, disagreed and reversed the decision. The legislation did not restrict the right to place the child immediately after the signing of consent, and no rights had been violated. The woman, especially since she had already relinquished an earlier child for adoption, understood the impact of the consent form.[50] The second revocation case was heard in 1983. Although the mother in *Racine v. Woods* (1983)[51] was not found to have abandoned her child, her claim was denied. This case was complicated by the fact that a particularly long period of time

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47 *Manitoba (Director of Child Welfare) v Y*, [1981] 3 WWR 668.

48 *The Child Welfare Act*, 1974 (Man), c C80, ss 15(1)-(2), 15(4), 15(6).

49 *Supra* note 47 at para 13.

50 *Manitoba (Director of Child Welfare) v Y*, [1981] 1 SCR 625.

51 [1983] 2 SCR 173 [*Racine*].

had passed during which the child had been in the undisrupted custody of the adoptive parents. The preference for the biological parent was held to be of less importance than the best interest of the child, which the court deemed would be served by leaving the child with the parents with whom the child had bonded: "this does not mean, of course, that the child's tie with its natural parent is irrelevant in the making of an order under the section … But it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about."[52] *King v. Low* (1985)[53] confirmed these limitations on

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[52] *Ibid* at 185. It should also be noted that this case was complicated by issues of race as the mother was Aboriginal and the adoptive family consisted of a white mother and a Métis father. Some argue that the Métis father could therefore provide the necessary cultural support. However, Aboriginal identity is not Métis identity, or experience. This case, in particular Wilson J.'s assertion that the "closer the bond that develops with the prospective adoptive parents the less important the racial element becomes" has been the subject of considerable critique: see *ibid* at 187-188. While the concerns about respect for Aboriginality might have greater weight given statutory reform since 1983, *Racine* has yet to be overturned by the Supreme Court. See, Tae Mee Park, "In the Best Interests of the Aboriginal Child" (2003) 16 Windsor Rev Legal Soc Issues 43 at 43; Patricia Monture, "A Vicious Circle: Child Welfare and the First Nations" (1989) 3 CJWL 1; and Gillian Calder, "'Finally, I Know Where I Am Going to be From': Culture, Context and Time in a Look Back at *Racine v. Woods*" in Kim Brooks, ed, *Justice Bertha Wilson: One Woman's Difference* (Vancouver: University of British Columbia Press, 2010) 173. It is also important to note that the Supreme Court rejected the possibility, raised by the courts in Manitoba, of an open adoption in which the mother might apply for access. The court, in adoption cases, seems to see openness as a threat to the stability of the adoptive family. However, in divorce access cases, it is not seen as disruptive, but as necessary for the well-being of the child. For further information on divorce, access and the requirement that the mother facilitate visits by the father, see: Susan Boyd, "Backlash and the Construction of Legal Knowledge: The Case of Child Custody Law" (2001) 20 Windsor YB Access Just 141; Linda Neilson, "Putting

the rights of the natural mother. The mother had chosen private adoption in the hope that she might have some contact with the child as he grew up and released her child only because of fear of the disapproval of her family. The child left the hospital with the adoptive parents five days after his birth and resided with them thereafter without disruption. The mother immediately regretted her decision, discussed the situation with her mother and requested the return of her child, but the adoptive parents refused. The trial judge held that the mother had neither abandoned her child nor conducted herself in a manner that meant the court should refuse to enforce her rights as a guardian, but nonetheless concluded that the child should remain with the adoptive parents.[54] The Supreme Court concurred and dismissed the mother's appeal.[55]

In a recent case, an Ontario divisional court asserted that "the existence of a valid consent by a parent to an adoption is … fundamental to the integrity of the entire adoption process … Thus if it can be proven that a consent to adoption is obtained through undue influence or coercion, it can be argued that the adoption proceedings based on that consent must be nullified."[56] A 17-year-old mother claimed that she had been subjected to undue influence and that she had verbally contacted the Children's Aid Society during the requisite period to revoke her consent. Legislation, however, requires

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Revisions to the Divorce Act Through a Family Violence Research Filter: The Good, the Bad, and the Ugly" (2003) 20 Can J Fam L 11; Wanda Wiegers & Michaela Keet, "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2008) 46 Osgoode Hall LJ 733; and Alison Harvison Young, "Joint Custody As Norm: Solomon Revisited" (1994) 32 Osgoode Hall LJ 785.

53 [1985] 1 SCR 87.

54 *Ibid* at para 9.

55 *Ibid* at para 34.

56 *ND-F v Jh D*, 2007 ONCJ 49 at para 33.

that this revocation be made in writing, which she failed to do, and the Children's Aid Society, in the absence of written revocation, did not respect her wishes. The court, however, rejected her coercion claim and explicitly distinguished a situation in which a "parent has changed her mind or regrets a decision made under the influence of family members or cultural pressures."[57]

Clearly, this reflects an impoverished understanding of the challenges which unwed mothers, particularly young unwed mothers, still confront. Mothers face potential poverty and stigma, pressure from families, and may also face pressure from the bureaucracies that are ostensibly charged with helping women. While the security of the placement of the child is a legitimate concern, mothers have a legal right to reclaim children early in the adoption process and this right should be respected within the legislatively established time frame. These cases do not directly engage the question of whether or not the mother should have sole decision-making power with regard to relinquishment for adoption and concern the right to change one's mind about adoption, not the right to relinquish without interference. Nonetheless, they are important. Courts often "subordinate the importance of blood ties to the stability of the existing home setting"[58] when they assert that children should stay in adoptive homes, despite the wishes of mothers. It is ironic that precisely when the pressures to which women are subjected were being denied recognition, the rights of unwed fathers were being expanded and their 'blood ties' to children were being increasingly valorized.

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57 *Ibid* at para 22.

58 *A v Mr and Mrs B*, [1983] NWTJ No 22 at para 13.

PART II: THE RIGHTS OF UNWED FATHERS

Historically, unwed fathers had no rights or obligations to their children. In 1973, however, a father, who had cohabited with his child, asserted that he should be able to veto the unilateral decision of the mother to release the child for adoption. His position was endorsed by the Supreme Court of Canada. The father in *Children's Aid Society of Metropolitan Toronto v. Lyttle* (1973)[59] had lived with the mother of the child until the child was two years old, at which time the mother left to live with another man, taking the child with her.[60] Without informing the father, she placed the child with the Children's Aid Society for adoption. The father did not learn of the situation until the time period for contesting the wardship order had elapsed, but before the adoption order was finalized. He argued that the wardship order was void on procedural grounds as he had not been informed; without a wardship order, the adoption could not proceed. The court upheld his claim.[61]

In *R. v. Gingell* (1976),[62] the Supreme Court held that "*prima facie*, the word 'parent' when used in a statute should be given its ordinary meaning unless, in the context of the statute, a restricted meaning should be given" reversing the general presumption that illegitimate children could be excluded categorically under principles of statutory interpretation. In this case the father had lived with his

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59 [1973] SCR 568 [*Lyttle*].

60 Technically the mother was within her rights under legislation. In 1929, consent provisions within adoption had been amended such that the consent of a father was required if the child resided with, and was maintained by, the father at the time of the application: *The Statute Law Amendment Act*, SO (1929), c 23, s 11. However, Lyttle did not live with or support his child at the time of the surrender to the CAS.

61 *Supra* note 59.

62 [1976] 2 SCR 86.

children, but the mother left him, taking the children with her. She thereafter abandoned them to the Children's Aid Society and they became crown wards without his knowledge or consent. The children were returned to his custody.[63]

While historically the unwed father was constructed as "too uncertain a figure for the law to take any cognizance of him,"[64] by the 1970s courts recognized the parental efforts of cohabiting non-marital fathers. When men have established and positive relationships with their children, such an interpretation of marriage as irrelevant is entirely reasonable. But it is important to note that decisions were premised, not on the genetic connection itself, but on evidence that fathers had acted as social parents to their children. As McClung J. held in a case involving former cohabitation, "the narrow issue in this appeal and that upon which the rights of H.J.L. must be resolved is the omission of notice to him, an interested father. Full disclosure of his real presence was not made to the learned chambers judge." He made it clear, however, that he "[did] not wish to be taken as deciding that notice to biological fathers must be given in all proposed adoptions."[65]

In 1975, an Ontario divisional court directly considered the question of whether or not a mother was obligated to name the father of her child when she relinquished a newborn baby for adoption. The court explicitly distinguished newborn adoption from circumstances such as those in *Lyttle*. The court asserted that newborn adoption "discloses an entirely different statement of facts. In the *Lyttle* case, the father not only wanted custody of his son, but also in the registration of the birth, acknowledged his paternity. The proceedings taken by the Children's Aid Society were taken behind his back, although

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63 *Ibid*.

64 *Re M (an infant)*, 1955 2 QBD 479 at 488.

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

the registration, if examined, would have disclosed his relationship and name." The mother of a newborn, in contrast, would not be forced to disclose the name of the father of her child.[66]

In 1979, four Ontario wardship orders were challenged to determine the obligations of the Children's Aid Society in investigating paternity and naming fathers in adoption cases. The family court in York County held that a father of children born out of wedlock is entitled to notice and consent in adoption proceedings. The court had to consider the fact that distinctions between married and unmarried parents had been abolished. Rights of notice for the father were vigorously opposed by counsel for the Children's Aid Society who argued that giving unfettered rights to all genetic fathers would lead to violent men and sperm donors being able to interfere in adoption proceedings and would thwart the purpose of legislation by reducing rates of relinquishment. However, the court found that these concerns could be met as the Children's Aid Society had the right to exclude specific fathers after investigating the circumstances surrounding each birth and potential adoption.[67] All four applications were sent back for consent from fathers.[68]

Charter-based equality rights were first raised in the context of the adoption of non-marital children in 1986. In this case, a father petitioned for an order restraining the placement of his daughter for adoption. He had never been married to the child's mother, but had lived with her before and after the birth

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66 *Re Ward*, [1975] OJ No 2357.

67 *Re MLA and three other applicants* (1979), 25 OR (2d) 779.

68 In one case the mother had clearly stated that she did not want to name the father; in the second case the couple seemed to agree about adoption and the consent would be unproblematic; the third and fourth cases were not specified.

of the child. He argued that the requirement that only the mother consent to adoption in cases not involving marriage discriminated against him on the basis of sex and marital status and thereby violated the equality provisions of the *Charter*. The petition was granted. The court found that adoption provisions create statutory distinctions between fathers and mothers that contradict changing social conditions and the elimination of illegitimacy at law.[69] While in this case the outcome was a reasonable reflection of the father's involvement in the child's life, by endorsing the father's *Charter* arguments that he was discriminated against on the basis of his status as an unwed father, instead of focusing on indices of social fatherhood, the case opened the door for purely genetic claims by uninvolved non-marital fathers.[70]

In extensive proceedings in 1987 and 1988, an Ontario family court (York) and then a divisional court again considered the claim that biological fathers were discriminated against by not being notified with regard to the adoption of infants born out of wedlock. The case originated with a procedure for finalization of adoption. The baby was born of a casual relationship where the mother had not notified the father, but Nevins J. returned the adoption, "adjourned the proceedings, directed that the Attorneys-General of Ontario and Canada be advised that he had raised a constitutional issue as to the validity of s. 131(1) of the Act … [and] arranged for the appointment of counsel to represent the class of biological fathers who might be affected by the constitutional issue."[71]

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69 *MacVicar v Superintendent of Family and Child Services et al* (1986), 6 LW 635-026.

70 For an analysis of early *Charter* decisions, see Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to *Charter* Litigation to Further Feminist Struggles" (1987) 25(3) Osgoode Hall LJ 485.

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

Counsel representing the interests of genetic fathers argued that "the mother and the father (married or not) are necessary to conceive the child" and that "the fact of whether or not the parents are married has no effect on the child; and both are presumed to be able and entitled to care for the child."[72] Counsel for the Attorney-General asserted that "the purpose of the legislation in this regard is to achieve an expeditious adoption"[73] and that "by the fact of birth the mother has at least some minimal involvement with the care of the child, while the fathers, married or not, have no similar involvement."[74] They also submitted that "parental rights of a biological father do not exist 'in a vacuum' equal to those of the mother, but rather are rights which arise, or are 'activated' by some positive conduct being taken by the father."[75] It was asserted that, because the Children's Aid Society was obligated to investigate the circumstances surrounding pregnancy and obtain consent from involved fathers, the only father who would be excluded "is a male person who by an act of casual sexual intercourse impregnates a woman and shows no sense of responsibility for the natural consequences of the act of sexual intercourse."[76] The divisional court acknowledged that mother and father, in such cases, are not "similarly situated. The mother because of physical necessity has shown responsibility to the child … It is thus apparent that the different statutory treatment of the two persons is based on their respective demonstrated responsibility to the child, not upon their different sexes."[77] The adoption was allowed to proceed.

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72 *S(CE) v Children's Aid Society of Metropolitan Toronto* (1987), 63 OR (2d) 114 at para 22.

73 *Ibid* at para 23.

74 *Ibid* at para 23.

75 *Ibid* at para 24.

76 *Supra* note 71 at para 12.

77 *Ibid* at para 15.

In a 1992 Nova Scotia case,[78] counsel for an unwed and uninvolved father asserted that "the provision of the Act which permits an adoption of a child to take place without the consent of the father who does not come within the definition of 'parent' contained in the Act, amounts to a violation of the equality rights," and thus should be struck down as unconstitutional.[79] The applicant's counsel argued that the applicant was discriminated against in that his consent was not required because he was male and unmarried. The Children's Aid Society contended that "males do not form a discrete or insular minority that has been stereotyped or subject to historical disadvantage or vulnerability. Furthermore, the fact that the law treats men differently than women based on 'biological reality' does not constitute discrimination. Thus, the applicant has not suffered discrimination based on sex."[80] The court, however, disagreed and concluded that "the Legislature did not deliberately set out to deprive a child born out of wedlock of the possible benefit of the fostering and maintaining of a relationship with his or her father" and that *parens patriae* jurisdiction could be exercised to hear the father's claim for custody.[81]

In contrast, in 1994, the British Columbia Supreme Court held that the mother was the sole guardian of the baby immediately after birth and that she, therefore, had the legal

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78 *DT (Re),* [1992] NSJ No 387.

79 *Ibid* at para 13.

80 *Ibid* at para 16.

81 *Ibid* at para 46. This support for the unmarried mother might seem ironic, given the coercive tactics used by the Children's Aid Society to convince women to release children for adoption. However, the consent of men, of course, makes the availability of the baby for adoption more complicated and proceedings for the CAS more complex.

right to place her child for adoption without the consent of the baby's father.[82] This case provides graphic evidence of why some women fear revealing their pregnancies to men with whom they have been involved. The mother explicitly supported the claim of the adoptive parents and asserted that she would take custody herself rather than see the father succeed in his claim.[83] The genetic father had a history of abusive behavior: "Mr. Z. spat in her face, pulled her hair, and called her a slut."[84] She sought refuge in a women's shelter and charged him with assault. He was released on a promise not to see her, but breached this agreement and was arrested several times.[85] They reconciled, but "he became abusive and threatening" when he learned of her pregnancy: "he swore at her; left numerous harassing telephone messages on her answering machine; came by her apartment and banged on her door and shouted and drove by her building honking his horn."[86] When he threatened her with a knife at her abdomen, she "decided to leave Winnipeg, have her baby and place it for adoption."[87] She travelled to British Columbia, found an adoption agency and asked that information be withheld from the father because she considered him to be "a danger to her and her child."[88] She made a false formal declaration that the father of the child was unknown "because she thought it would help to keep [the baby] safe."[89] The adoptive parents were deemed 'stable', although not wealthy, and the adoptive father

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82 *JNZ v JD*, [1994] BCJ No 969.

83 *Ibid* at para 2.

84 *Ibid* at para 9.

85 *Ibid* at paras 12-15.

86 *Ibid* at para 20.

87 *Ibid* at para 24.

88 *Ibid* at para 25.

89 *Ibid* at para 31.

had been an adopted child and wanted an open adoption. The couple had been hand selected by the birth mother.[90] Her choices clearly reflected her concern and love for the child. Mr. Z "advance[d] his claim to custody on the grounds of the blood relationship between himself and the baby."[91] The mother asserted that his "abusive and violent nature makes him an unfit parent, and that the attitudes he has displayed towards her and toward women in general are of particular concern given that this child is a girl."[92] The custody of the adoptive parents was upheld.[93] It was also noted that "since baby I. will know who her father is, she can choose, at the appropriate time, whether to initiate contact with him."[94]

In contrast, in a 1998 case, the Manitoba Court of Queen's Bench, family division, expressed distress that the birth mother "would not disclose the birth father's name because 'she felt he may not have co-operated in adoption planning'."[95] This leaves open the question of whether his anticipated lack of co-operation resulted from an expectation that he would want to raise the child himself." [96] They did not inquire as to why the mother might not want her child to be raised by the father. Concern was expressed that, even with the anticipated creation of a birth father registry, "if the fact of the birth of a child has been hidden from the birth father, then he is not in a position to take advantage of the registry, so his new

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90 *Ibid* at paras 29, 35.

91 *Ibid* at para 64.

92 *Ibid* at para 68.

93 *Ibid* at para 97.

94 *Ibid* at para 97.

95 *RA (Re)*, [1998] MJ No 348.

96 *Ibid* at para 6.

rights are completely illusory,"[97] and the court asserted their right to exercise *parens patrie* jurisdiction to fill a legislative gap.[98] The court mistakenly assumed that fathers and mothers are equally involved in child-rearing: "parents are much more equal partners in relation to their children than in the past."[99] The court castigated the mother for denying the father "the right to know that he has a child … If this adoption is granted, the legal relationship between father and son will be forever terminated without any notice … That this father and this son are being treated this way is positively draconian. That the mother would act this way is unfortunate. That two agencies of the government would assist her in so doing is completely unacceptable."[100] Despite the child having been placed for two years with an adoptive family, the court ordered the agency to search for the father.

In a 2000 decision of the British Columbia Court of Appeal, a lower court decision to award custody to a genetic father was overturned. The mother had told the father of the pregnancy, and he had wanted to marry her, or live together, and raise the child together. She did not have faith in the relationship, and ceased contact with the father and released the child for adoption without giving the father's name to the adoption agency. When he learned of the adoption placement (four months after the birth), the father placed his name on the provincial birth fathers' registry and commenced proceedings for custody.[101] By doing so within the 150 day limit imposed by legislation, the father put himself within the definition of a 'father' whose consent was required for the adoption. The

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97 *Ibid* at para 36.

98 *Ibid* at para 44.

99 *Ibid* at para 47.

100 *Ibid* at para 49.

101 *British Columbia Birth Registration 99-00733*, 2000 BCCA 109.

mother regretted her decision and "although she had consented to the adoption and had not taken any steps to revoke her consent, at trial she supported the father's position, and sought an order for joint custody and access."[102] At the court of first instance, the father was granted interim custody, the adoption was denied, and the mother was awarded reasonable access. The appeal of the adoptive parents, however, was dealt with immediately to avoid further disruption or uncertainty for the child and the original decision was overturned. Rowles J.A., in dissent, would have dismissed the appellants' emphasis "on the birth father's not having taken active steps to pursue the question of his parenthood and his opposition to the adoption of the child between the time he first learned that the birth mother was pregnant and the date on which he became registered in the birth fathers' registry … [and their contention] that he did not have the best interests of the child in mind."[103] Reviewing the history of legislation with regard to adoption, Rowles J.A. asserted that the provisions of the *Adoption Act* had to be interpreted in the context of the *Charter*, and based on an understanding that "the unequal treatment accorded natural fathers evolved from tradition and social custom rather than a demonstrated unwillingness or inability to parent."[104] Prowse J.A., however, placed much more emphasis on the care to be provided to the child. The adoptive parents had bonded with the baby for 10 months, had an open adoptive agreement with the mother, and were stable and economically comfortable. The father proposed to have his mother, and a variety of other caregivers, provide care for the child. Prowse J.A. asserted that "based on the uncertainties associated with the care of the child in the birth father's home, I conclude that the trial judge erred in finding that the factors relating to the child's best interests were relatively equal as between the two

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102 *Ibid* at para 16.

103 *Ibid* at para 51.

104 *Ibid* at para 62.

families. Apart from the biological factor, the balance was clearly in favour of the adoptive parents. That being so … the biological factor assumed overriding significance," a significance with which she disagreed.[105] The court set aside the order, dismissed the application of the birth father and made an order of adoption. As the disparate outcomes in these cases illustrate, there has been little consistency or predictability in Canadian law with regard to the rights of unwed fathers in newborn adoption cases, and much room for judicial discretion. This may, however, be about to change.

An emphasis on the rights of biological fathers has been entrenched in Canadian law in *Trociuk v. British Columbia (Attorney General)* ("*Trociuk*"),[106] the leading naming case in Canada, which further jeopardizes the rights of gestational mothers who seek to relinquish children for adoption. In *Trociuk*, the Court found that "differential treatment of [unwed] mothers and fathers [in birth registration and naming] … withholds a benefit from fathers in a manner which has the effect of signaling to them and to society as a whole that fathers are less capable or less worthy of recognition or value than mothers."[107] The decision relied on a formal equality analysis that de-contextualized the positions of an unwed (and largely uninvolved) father and a custodial mother and entrenched the patriarchal norm in Canadian naming law.[108] The *Trociuk* court failed to recognize that distinctions

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105 *Ibid* at para 116.

106 2001 BCCA 368.

107 *Ibid* at para 143.

108 For discussion of the history of naming in Canada, and of the *Trociuk* decision in particular, see: Hester Lessard, "Mothers, Fathers and Naming: Reflections on the *Law* Equality Framework and *Trociuk v. British Columbia (Attorney General)*" (2004) 16(1) CJWL 165 at 202 [*Lessard*]; and Lori Chambers, "In the Name of the Father: Children,

between mothers and fathers at the time of birth are based, not on stereotypes that mothers are superior nurturers, but on the realities of pregnancy. Rejecting stereotypes that portray women as innately nurturing, and corresponding beliefs that fathers are incapable of positive parenting, "does not require that we also reject any meaningful differences between biological motherhood and biological fatherhood."[109] The ratio in *Trociuk*, however, suggests that such differences are now to be denied in the name of 'equality'; such de-contextualized analysis reduces women to the status of incubators and has disturbing consequences for mothers who wish to release their newborns for adoption.

The impact of *Trociuk* was immediately apparent in adoption cases. In 2003, prospective adoptive parents brought a motion before the Ontario Court of Justice that only the mother is a parent who must consent to adoption.[110] The circumstances of this case reveal the potential for a father to harass and abuse a woman he knows to be pregnant. The father was told of the pregnancy, but responded with anger, not support. He denied responsibility, bad-mouthed the mother, and shut her out of his life. His family ordered the mother to stay away from their house. She then decided to place the child for adoption. After the birth, and after giving a medical history for adoption, the father asserted that he and his parents wanted to raise the baby. The mother told him to seek his rights through the Children's Aid Society, which he failed to do within the prescribed time frame.[111] The mother had not cohabited with the father, did not

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Naming Practices and the Law in Canada" (2010) 43(1) UBC L Rev 1.

109 Jennifer Hendricks, "Essentially a Mother: A Child-Centered Perspective on Parents' Rights" (2007) 13 Wm & Mary J Women & L 429 at 468.

110 *DGC v RHGY*, [2003] 65 OR (3d) 563 at para 2.

111 *Ibid* at para 3.

name him on the birth certificate, and he had not claimed paternity. She therefore asserted that he did not have standing as a parent to challenge her decision.[112] Although the *Adoption Act* clearly delineates and limits the circumstances in which a biological father will be deemed to have rights with regard to adoption, requiring him to have some involvement in the pregnancy and/or child's life,[113] and despite the failure of this father to seek such rights, the definition of 'father' was held to be discriminatory.

The court determined that it "must consider whether the decision in *Trociuk v. Attorney General for British Columbia* has any bearing on this court's decision whether to declare the mother to be the only parent as defined in the legislation or whether this court should find that the biological father should be notified."[114] The court found that the father "is in fact the biological father of the child"[115] and because *Trociuk* required a mechanism to allow the father to appear on the birth registration, it followed that "the failure to notify the biological father of this proceeding and the failure to give him an

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112 *Ibid* at para 4.

113 *Adoption Act,* RSBC 1996, c 5, s 13, Part 2 – The Process Leading to Adoption: According to the provisions of this act, a father only has rights with regard to adoption if (a) has acknowledged paternity by signing the child's birth registration, (b) is or was the child's guardian or joint guardian with the birth mother, (c) has acknowledged paternity and has custody or access rights to the child by court order or by agreement, (d) has acknowledged paternity and has supported, maintained or cared for the child, voluntarily or under a court order, (e) has acknowledged paternity and is named by the birth mother as the child's father, or (f) is acknowledged by the birth mother as the father and is registered on the birth fathers' registry as the child's father.

114 *Supra* note 110 at para 5.

115 *Ibid* at para 8.

opportunity to respond to a motion to dispense with his consent, on the basis that he is statutorily excluded as a biological parent, similarly violates his rights under subsection 15(1) of the *Charter*."[116] The adoption agency was ordered to obtain the father's consent. If they could not do so, a hearing would be held to determine whether his consent could be dispensed with. If his consent was found to be required, the wardship order would be set aside and he could claim custody.[117]

This decision is clearly problematic. The father harassed and failed to support the mother. She chose adoption on the assumption that he could not interfere. Her consent, in a context in which such interference was subsequently allowed, was not free. She might well have chosen either abortion or custody herself had she been able to predict the outcome of these court proceedings. He had also failed to take any positive steps to assert his paternity by the means available to him at law, despite knowing about the birth of the baby and the impending adoption. While the uninvolved, harassing father could contest custody on the basis of his 'equality' rights, her consent was considered irrevocable. As commentators in the United States have noted, it is intensely unfair that a father can misbehave throughout the pregnancy, including denying paternity to friends and family, and that these facts "have no legal impact on his opportunity for fatherhood, symbolic or otherwise."[118] The mother is given no such second chances, despite her much greater investment in the child and her demonstrated concern for the child's best interest. Her consent is final, even in the changed circumstances involving

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116 *Ibid* at para 12.

117 *Ibid* at para 13.

118 Karen Czapanskiy, "Volunteers and Draftees: The Struggle for Parental Equality" (1991) 38 UCLA L Rev 1415 at 1427.

interference by a man she considers a threat to the well-being of her child.

In 2006, the 'Saskatchewan Dad case' "became a cause célèbre for the fathers' rights movement in Canada."[119] The 'Dad', identified as Adam Hendricks for the purpose of litigation, contested adoption on the sole basis of his genetic connection to his child. He was relentless in his use of the media to promote his cause.[120] As Wanda Wiegers asserts, "newspaper accounts [of the case] constructed fatherhood exclusively in genetic terms"[121] and rarely considered the rights of the birth mother or the abusive behavior of the father. Wiegers calls attention to the fact that "underlying much of the press coverage of the Saskatoon Dad case [is the assumption] that birth mothers have a moral duty to disclose their pregnancies to birth fathers."[122] This assumption must be contested.

The facts of the case were straightforward. The mother had recently terminated a relationship with the genetic father at the time at which she became pregnant. However, "she did not consider him the father as he had always declared he was

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119 Wanda Wiegers, "Gender, Biology, and Third Party Custody Disputes" (2009) 47 Alta L Rev 1 at 1.

120 For more information, see: Saskatoon Dad, online: Saskatoon Dad <www.saskatoondad.com>.

121 S*upra* note 119 at 3. For examples of newspaper coverage, see: Darren Bernhardt, "Trust fund set up for biological father", *Leader-Post* (31 October 2006) A17; Colby Cosh, "The Saga of Baby Ian", *National Post* (1 February 2007) A16; Lana Haight, "Dad's visit with son cancelled", *The Star Phoenix* (28 October 2006) B8; Kelly Patrick, "Biological dad barred from seeing infant", *National Post* (30 January 2007) A9; and Lynn Wells, "Dads depicted as second rate", *Leader-Post* (o February 2007) B8.

122 S*upra* note 119 at 4.

unable to have children as a result of a 1977 industrial accident. Further complicating the picture was the fact that she had been intimate with other men at the relevant time."[123] The relationship between the parties had ended as the result of a "violent incident" and the mother "complained that Adam was controlling, insecure and generally neither emotionally nor mentally healthy."[124] Hendricks, who initially denied the violence, later admitted to such actions but blamed "his problematic relationship with Rose for prompting him to drink on the evening in question, all of which resulted in him striking Rose."[125] Neither the Saskatchewan Court of Queen's Bench, family division, nor the press commented that such victim-blaming behavior is indicative of an abusive personality and would justify the mother in choosing not to inform the father with regard to her pregnancy.[126]

The mother, identified in court proceedings as Rose Swan, had a history of substance abuse and limited financial resources and she knew, as the court put it, that "she was not in a position to provide her baby with a healthy, nurturing home."[127] Smith J. described her as "self-aware of her own failings" instead of evincing any contextualized understanding of the problems she faced as an Aboriginal woman in a society rife with colonialism.[128] She wanted her child to be raised in an

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123 *Hendricks v Swan*, 2007 SKQB 36 at para 1 [*Hendricks*].

124 *Ibid* at para 17.

125 *Ibid* at para 16.

126 For information regarding characteristics of an abusive personality, see: Donald Dutton, *The Abusive Personality: Violence and Control in Intimate Relationships*, 2d ed (New York: Guilford Press, 2007).

127 *Supra* note 123 at para 2.

128 *Ibid* at para 18. For a discussion of the need for contextualized understanding of the circumstances faced by Aboriginal women, see: Sherene Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" 2000 15(2) CJLS 91.

environment that would honor her heritage. She wanted an open adoption so that she could have some contact with, and knowledge about, her child. With the help of her sister, who worked in a First Nations service agency, she hand selected an adoptive couple to parent her son. The social parents and Rose chose the child's name together and showed all signs of cooperation and voluntariness.[129] The mother endured a complicated and life-threatening pregnancy and gave the baby to the adoptive couple directly from the hospital. She exercised care and concern in her decisions for her child; nonetheless, her perspective, experiences, and concerns were effectively erased in legal reasoning and newspaper commentary.[130]

After learning about the pregnancy and adoption placement, Hendricks acted immediately to assert his parental rights. He sought information from social service agencies, but "made little progress with the authorities. Perhaps this is not surprising as Adam presented as someone who was unacknowledged by the birth mother, nor did he have a current relationship with her. To the authorities, he was simply a male voice on the phone asserting paternity."[131] Once he had succeeded in locating the child, he initiated formal proceedings to establish his paternity and the court, having before it evidence that he was the genetic father, considered the relative parenting abilities of the genetic father and the adoptive parents. The court found that "Adam's personal life may be

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129 *Supra* note 123 at para 18.

130 *Supra* note 119 at 28-30. Also disregarded in press accounts was the fact that in the adoptive family it was the father who had chosen to be "a stay-at-home parent:" *supra* note 123 at 14. Fathers' rights groups, in supporting Hendricks and ignoring the adoptive father, explicitly chose to honor the genetic connection when they could, instead, have celebrated the social role of fathers, a role freely and lovingly undertaken by the adoptive father.

131 *Supra* note 123 at para 7.

characterized as one of serial monogamy (more or less) with no commitment extending beyond three years. All the relationships have uneasy aspects, several of them deeply troubled."[132] His "experience with employment ha[d] also been somewhat eclectic"[133] and had culminated in personal bankruptcy. He was described as "emotionally fragile."[134] The Turners, in contrast, were deemed to be financially and emotionally stable and committed to parenting.[135] Ultimately, it was determined that the best interests of the child would be met by custody remaining with the adoptive parents.

The terms of the decision, however, explicitly constructed the birth mother as a non-parent and erased the care and concern that had motivated her choice to release the child for adoption and her selection of the Turners as parents. In justifying denying Hendricks custody, Smith J. quoted the Supreme Court in *King v. Low* and asserted that "parental claims must not be lightly set aside and they are entitled to serious consideration in reaching any conclusion. Where it is clear that the welfare of the child requires it, however, they must be set aside."[136] But this is not a case in which "parental claims" were being "set aside." The mother's parental claim, although rendered invisible in the terms of the decision, is what should be viewed as being honored. It is only by constructing the mother's actions as abandonment that she can be viewed as a non-parent. Smith J. also quoted Abella J.A. in determining that custody must be determined from the perspective of the child: "it is a mistake to look down at the child as a prize to be distributed, rather than from the child up to the parent as an

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132 *Ibid* at para 38.

133 *Ibid* at para 42.

134 *Ibid* at para 46.

135 *Ibid* at para 64.

136 *King v Low*, [1985] 1 SCR 87 at para 27.

adult to be accountable."[137] This conveniently renders invisible the fact that considering the father at all is simply looking at this from the perspective of paternal ownership. The genetic father had no relationship with the child to be upheld. This case would undoubtedly have been appealed by Hendricks had he not been killed "in a [tragic] motor vehicle accident in August 2007."[138] Given the ratio in *Trociuk,* the outcome of such an appeal would have been far from certain; *Hendricks* also suggests that it is inevitable that a newborn adoption case will eventually reach the Supreme Court.

A 2009 case, heard in the Ontario Superior Court of Justice, illustrates the more mundane dilemmas that pregnant women face even when genetic fathers are not violent. The mother hid the birth from the father and then claimed that he was not the father. His application was allowed in part because he had been deceived. The mother was determined to have given up her rights, but a hearing was to be held to determine custody/access as between the father and the adoptive parents.[139] Although fathers' rights groups would probably portray this case as a straight forward example of a man 'thwarted' by a dishonest mother, the underlying facts of the case are much more complicated.

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137 *MacGyver v Richards* (1995), 22 OR (3d) 481 at para 38.

138 *Supra* note 119 at 1.

139 *AL v SM*, [2009] OJ No 2972. It should be noted that the court has dismissed 'paternity fraud' cases in other contexts. In 2008, it was found that a father who had paid child support would not have such support refunded to him, despite the fact that he was not the biological father of the child, who had, unknown to him, been the product of an extra-marital affair. The wife was not obligated to disclose her infidelity: *Cornelio v Cornelio* (2008), 94 OR 3d 213 (Sup Ct J).

The father had been informed of the pregnancy. The parents had agreed upon an abortion, but the mother decided that she could not follow through with this decision. The father knew that she had not aborted, but did not show interest in her pregnancy or provide her with support, neither financial nor emotional. Because she also did not feel ready to be a parent (she was a university student at the time at which she became pregnant), and because the father had not been supportive, she told him that the child had been stillborn when in fact the child had been released for adoption.[140] She was also unsure about paternity because she had been sexually assaulted at the time of the pregnancy, a fact that she had not disclosed to the father. The father learned through a third party (the maternal grandmother) that the child had been adopted. The mother then revealed to the father that she had been sexually assaulted at the time of conception and that she was not sure about paternity.[141] Adoption proceedings were underway, with the child in a probationary placement, when the father filed his acknowledgement of paternity.[142]

The Court found that "the essence of the father's case is established, namely that she did deceive him by telling him the child was stillborn and in this way prevented him from asserting his paternity," but did not contextualize the fact that the father had been adamant that the mother should abort. The court admitted that the father did not fall within the strict definition of a father as set out in the *Children's Law Reform Act*.[143] However, the father argued that the strict definition

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140 *Ibid* at para 1.

141 *Ibid* at para 2.

142 *Ibid* at para 4.

143 A father is defined clearly under s. 8(1) of the Act: "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 in any one of the following circumstances:

should be avoided "by reference to principles of fundamental justice, including *Charter* values."[144] Although he did not explicitly raise a *Charter* argument, the father relied expressly on the ratio in *Trociuk* in asserting that the definition of 'father' "may be ripe for reconsideration."[145] Without an explicit constitutional challenge, however, the court did not decide the *Charter* issue.[146] The mother asserted that if the adoption were to fail, she would prefer to seek custody herself rather than have the father obtain custody. But the court determined that she had no such right: "the adoption placement is vulnerable as to the father only and not as to the mother."[147] A new hearing was ordered in which the adoptive parents' petition to dispense

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1. The person is married to the mother of the child at the time of the birth of the child.

2. The person was married to the mother of the child by a marriage that was terminated by death or judgment of nullity within 300 days before the birth of the child or by divorce where the decree nisi was granted within 300 days before the birth of the child.

3. The person marries the mother of the child after the birth of the child and acknowledges that he is the natural father.

4. The person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child or the child was born within 300 days after they ceased to cohabit.

5. The person has certified the child's birth, as the child's father, under the Vital statistics Act or a similar act in another jurisdiction in Canada.

6. The person has been found or recognized in his lifetime by a court of competent jurisdiction in Canada to be the father of the child" (*Children's Law Reform Act*, RSO 1990, c C.12, s 8(1)).

144 *AL v SM, supra* note 139 at para 21.

145 *Ibid* at para 30.

146 *Ibid* at para 32.

147 *Ibid* at para 58.

with consent and the father's custody claim would be heard on the same evidentiary basis to save time and money; the mother, however, would not have standing.[148]

This case provides a clear example of why 'show cause' procedures, with regard to notification or investigations by the Children's Aid Society and provisions to dispense with consent, would inevitably be inadequate. It also suggests why mothers require sole rights over the infant. The father was not violent or abusive, although he was clearly unsupportive and manipulative, and the mother would not have had standing to exclude him. Yet his interference violates her reproductive autonomy, her dignity and her equality rights. He clearly chose parenthood only after his desire that the mother abort was thwarted. The mother felt herself unable to carry through with an abortion, but she also did not feel herself to be ready to raise a child on her own and she did not consider the father capable of raising the child himself. Had she known the outcome of these proceedings, she might have chosen abortion, whatever her own beliefs or feelings, and no woman should be forced into this position. The father clearly did not intend to procreate and recreational sexual relations should not entitle men to parental rights.[149]

Yet fathers' rights claims "have obtained considerable purchase in both the legal and popular culture,"[150] and in a culture obsessed with DNA and genetic ancestry, the caring work of mothers in pregnancy (and of social parents as children

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148 *Ibid* at para 59.

149 *Supra* note 7 at 467. While some might argue that the mother has also only had sex for recreational purposes, by choosing not to abort, she has chosen parenthood in a way in which the father has not.

150 Susan Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionality and Responsibility" (2007) 25 Windsor YB Access Just 66.

grow up) is given short shift.[151] Fathers' rights groups, many of which advance claims over children on the basis of genetics alone, are politically powerful.[152] Fathers' rights commentators assert that "to override the father's long-term interest in bringing into the world a new life because of a nine-month physical burden on the mother is short-sighted."[153] Considerable sympathy exists for the position of the so-called 'thwarted father' who loses, through adoption, "any opportunity he might otherwise have had to know his child."[154] But the potential loss for the father must be measured against the risks imposed on the mother. The rhetoric of many fathers' rights groups invites "no inquiry at all into the conditions under which the woman became pregnant."[155] And legal commentators and supporters of fathers' genetic rights often describe women who refuse to notify fathers as dishonest and "bent on duping … eager, yet unsuspecting, father[s]."[156] But the mother has interests of her own at stake and too often women are afraid of societal or parental disapproval or the violence of former partners. It should be noted, as well, that women are particularly vulnerable to domestic violence when

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151 For further information see: Susan Boyd, "Demonizing Mothers: Fathers' Rights Discourse in Child Custody Law Reform Processes" (2004) 6(1) Journal of the Association for Research on Mothering 52.

152 For one prominent example, see: Fathers 4 Justice, online: Father's 4 Justice Canada <www.fathers-4-justice-canada.ca>.

153 Michael Jackson, "Fatherhood and the Law: Reproductive Rights and the Responsibilities of Men" (1992) 72 Tex J Women & L 53 at 72.

154 John Hamilton, "The Unwed Father and the Right to Know of His Child's Existence" (1988) 76 Ky LJ 949 at 956-957.

155 *Supra* note 8 at 54.

156 Cecily Helms & Phyllis Spence, "Take Notice Unwed Fathers: An Unwed Mother's Right to Privacy in Adoption Proceedings" (2005) 20 Wis Women's LJ 1 at 9.

pregnant, and when trying to leave relationships.[157] The law has an obligation to protect such women, and their right to safety and self-determination over-rides the desire of men to 'know' children that they didn't have any intention of fathering. The relationship between father and child is potential, not actual, and protecting that potential relationship comes at the price of disrespecting the actual relationship between the gestational mother and the child, and the considerable labor and risk of pregnancy. These cases beg the question: is a man a father simply by virtue of ejaculation? By upholding the de-contextualized equality rights of unwed fathers, courts have violated the section 15 and section 7 rights of women.

PART III: WOMEN'S SECTION 15 AND SECTION 7 *CHARTER* RIGHTS

As Nancy Erickson asserts, "for a man, by virtue of an accidental pregnancy, to get parental rights over the objection

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157 It is well established that women face increased risk of violence when they are pregnant and/or seeking to exit from abusive relationships. For further information on abusive behavior during pregnancy, see: "Physical Abuse During Pregnancy: Fact Sheet" (February 2004), online: Public Health Agency of Canada <http://www.phac-aspc.ca/rhs-ssg/factshts/abuseprg-eng.php>. For a critique of our failure to recognize this crime (and our ironic construction of fetal abuse as a problem with its origins in women's behavior), see: Constance MacIntosh, "Conceiving Fetal Abuse" (1998) 15 Can J Fam L 178. For further details regarding the heightened dangers that women face when exiting from abusive relationships, see: Holly Johnson, "Measuring Violence Against Women: Statistical Trends 2006", online: Minister of Industry <www.statcan.gc.ca/pub/85-570x/85-570-x2006001-eng.htm>; Rosemary Gartner, Myrna Dawson & Maria Crawford, "Women Killing: Intimate Femicide in Ontario, 1974-1994" (1999) 26 Resources for Feminist Research 151; Isabel Grant, "Intimate Femicide: A Study of Sentencing Trends for Men Who Kill their Partners" (2010) 47 Alta L Rev 779; and Bruce MacFarlane, "People Who Stalk People" (1997) 31 UBC L Rev 37.

of the pregnant woman in effect means that a woman who accidentally gets pregnant is deemed married to the source of the sperm for the purposes of decisions regarding the child."[158] It is problematic that marriage is considered in law to be proof that a man is committed to parenthood;[159] it is even more problematic to make an unmarried woman subject to the whims of a man who has no legal obligation to support or care for her, emotionally or financially, and who may, in fact, have treated her with serious disrespect, up to and including violence against her person. The ability of men to interfere in adoption placement, a fundamental component of reproductive freedom, violates women's right to equality under section 15 by denying the historic discrimination against single mothers and their current economic vulnerability. Most women who contemplate adoption are disadvantaged, often in multiple ways, and as L'Heureux-Dube J. asserted in *New Brunswick (Minister of Health and Community Services v. G. (J.)* (1999) "*New Brunswick*", "issues involving parents who are poor necessarily disproportionately affect women and therefore raise equality concerns and the need to consider women's perspectives."[160]

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158 *Supra* note 7 at 455. It is ironic to note that in the case of sperm donation, the husband is deemed to be the legal father, not the donor. So, men who ejaculate into a cup can donate their sperm as a gift; they have no responsibility, despite an intention to procreate. But men who ejaculate into a woman, without intent to procreate, are deemed fathers nonetheless and thereby acquire rights that allow them to control the women with whom they have had sex. They cannot simply make a gift of their sperm if they give their sperm via intercourse. There are, however, recent challenges in Canada to the anonymity of sperm donation. See: Angela Cameron, Vanessa Gruben & Fiona Kelly, "De-Anonymising Sperm Donors in Canada: Some Doubts and Directions" (2010) 26(1) Can J Fam L at 95.

159 Adoption cases, like many issues related to unmarried cohabitation, should prompt us to question the rights that have been accorded to men in marriage.

160 *New Brunswick (Minister of Health and Community Services) v G (J) [JG]*, [1999] 3 SCR 46 at para 113 [*New Brunswick*].

The court has failed abjectly in this regard. Single mothers, not men who have sired children out of wedlock, constitute a distinct minority subject to historical discrimination. As Hester Lessard cogently argues, fathers have not been subject to negative stereotypes or discrimination and formal equality analysis erases the long and painful history of discrimination against single mothers.[161] The potential father's contribution to conception is not equal to the contribution of the mother. Pregnancy is uncomfortable and involves weight gain, tiredness and, for some, nausea, restricted mobility and an increased risk of "medical problems like high blood pressure and diabetes."[162] Despite medical advances, pregnancy continues to create risk not only to the mother's health, but also to her life.[163] There is simply no comparison with "men who have ejaculated their sperm."[164] The mother who provides life, care, and economic support for a child for nine months is not similarly situated to the father of her child. At the time of birth, the gestational mother "is not only the primary caretaker parent, she is the only caretaker parent."[165] This assertion is not a retreat into essentialism. In fact, "ignoring the different biological positioning of birth mothers and fathers gives rise to the risk of reinforcing a cruder genetic essentialism, which suggests that genes are central to, and the most important part of, identity."[166] Nor is this acknowledgement of difference

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161 *Lessard*, *supra* note 108 at 202.

162 Ruth Colker, "Pregnant Men Revisited or Sperms is Cheap, Eggs are Not" (1996) 47 Hastings LJ 1063 at 1071.

163 According to UNICEF, in Canada, as of 2005, the odds of maternal death remained 1 in 11,000. Although this risk is low, it is not insignificant: UNICEF, "Estimates of Maternal Mortality 2008", online: <http:www.childinfo.org/maternal_mortality_countrydata.php >.

164 *Supra* note 162 at 1071.

165 *Supra* note 7 at 462.

166 *Supra* note 119 at 12.

based on "false and pejorative associations" with regard to fathers or potential fathers;[167] instead, formal equality analysis erases the history of discrimination against single mothers.[168] As consent to adoption cases reveal, single mothers have consistently been viewed with disrespect, more as a source of infants for infertile couples than as capable, loving mothers. Despite this fact, the equality rights of men, not women, have been upheld in adoption cases, delivering *Charter* equality with a vengeance. Mothers, moreover, are vulnerable to abuse during pregnancy and when trying to leave relationships, and forcing women to disclose pregnancies and include fathers in planning for children puts women at risk of abuse, a further violation of their equality rights and their rights to bodily integrity.

Moreover, allowing men to intervene in adoption violates women's section 7 rights to liberty and security of the person by interfering with women's "physical and psychological integrity"[169] with regard to the pregnancy itself. The Supreme Court of Canada has upheld that "the right to liberty guaranteed under s.7 of the *Charter* gives a woman the right to decide for herself whether or not to terminate her pregnancy,"[170] but this right is meaningless if she is forced to reveal her pregnancy to an abusive father or to someone she simply does not want in her life, and to give him a voice in the disposition of the child. The fact that men do not have any right to intervene in the decision to abort was confirmed by the Supreme Court of Canada in 1989. The argument of Guy Tremblay (himself an abusive man)[171] that he had an interest in

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167 *Supra* note 106 at para 24.

168 *Lessard*, *supra* note 108 at 202.

169 *Supra* note 160 at para 58.

170 *R v Morgentaler*, [1988] 1 SCR 30 at para 243.

171 He was not only abusive of Daigle, but also of other women, and has subsequently been convicted of assault: *R v Tremblay*, 1999 ABQB

the fetus and could prevent his girlfriend's abortion was based, like arguments regarding adoption notification, "on the proposition that the potential father's contribution to the act of conception gives him an equal say in what happens to the fetus."[172] However, the Supreme Court confirmed that no man has a "right to veto a woman's decision in respect to the fetus she is carrying."[173] Women are not obligated to tell men that they are pregnant, and can abort without interference. By slow degrees, however, legislatures and lower courts are coming to assert that the father can veto a woman's decision with regard to the disposition of the child at birth. But "the pregnant woman needs to know that if she foregoes … her right to abort, the state will enforce her plans for the child's future."[174] In Canada, a woman cannot feel certain that she will have such control. And this provides abusive men with yet another legal weapon with which to control women who are trying to protect themselves and their children. As Wilson J. noted in 1988, the right to control pregnancy "is an integral part of modern woman's struggle to assert her dignity and worth as a human being."[175] I would argue further that the right to control the disposition of the child at birth is integral to our struggles for dignity and autonomy. As the Supreme Court articulated in *Blencoe v. British Columbia (Human Rights Commission)*, the liberty interest "is engaged where state compulsions or prohibitions affect important and fundamental life choices."[176] Reproductive decisions – abortion and adoption – are certainly

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992; *R v Tremblay*, 2003 ABCA 33; and *R v Tremblay*, [2004] SCCA No 359.

172 *Tremblay v Daigle*, [1989] 2 SCR 5 at para 78.

173 *Ibid* at para 79.

174 *Supra* note 7 at 460.

175 *Supra* note 170 at para 242.

176 *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at para 49.

fundamental life choices. State interference, via the recognition of the uninvolved father as a parent, is unconstitutional. A woman's section 7 rights to liberty and security of the person with regard to termination of pregnancy and disposition of the baby at birth through adoption must be considered while "[taking into] account the principles and purposes of the equality guarantee."[177] As L'Heureux-Dube J. asserted forcefully in *New Brunswick,* without such integrated analysis, our Constitution will not respond "to the realities and needs of all members of society."[178] Current law with regard to newborn adoption responds to the needs of men and denies the reality of women's lives. Women who contemplate third party adoption still do so in a world in which their employment options are inferior to those of men and are compromised by childbirth and child-rearing;[179] daycare is expensive and difficult to obtain;[180] the majority of childcare work, even in two-parent households,

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177 *Supra* note 160 at para 115.

178 *Ibid* at para 115.

179 For further information see: Pat Armstrong & Hugh Armstrong, *The Double Ghetto: Canadian Women and their Segregated Work*, 3d ed (Toronto: Oxford University Press, 2010); Susan Boyd, *Child Custody, Law and Women's Work* (Toronto: Oxford University Press, 2003); Judy Fudge, "The New Workplace: Surveying the Landscape" (2009) 23 Man LJ 131; Shelley Gavigan & Dorothy Chunn, "From Mothers' Allowance to Mothers Need Not Apply: Canadian Welfare Law as Liberal and Neo-Liberal Reforms" (2007) 45 Osgoode Hall LJ 733; Revital Goldhar, "Restructuring Pay Equity – A Review of the Report 'Pay Equity: A New Approach to a Fundamental Right'" (2004) 3 JL & Equality 137; and Lene Madson, "Citizen, Worker, Mother: Canadian Women's Claims to Parental Leave and Childcare" (2002) 19 Can J Fam L 11.

180 For further information see: Angela Campbell, "Proceeding with Care" (2006) 26 Can J Fam L 171; and Claire Young, "Child Care: A Taxing Issue" (1994) 3 McGill LJ 539.

is performed by women;[181] stigma attaches to single female parenthood;[182] and male partners can be abusive with impunity.[183] In this context, both abortion and adoption remain essential reproductive options for women, options with which no man should have a right to interfere. Current law violates women's rights to reproductive autonomy, their equality rights, and their security of the person.

CONCLUSIONS

This article has argued that the unfettered right to release a newborn child for third party adoption is an essential component of women's reproductive autonomy. It is also essential to women's dignity and equality rights. To force the mother to abide by the wishes of a father (who may be manipulative, controlling, or violent, or who may simply have been a disinterested and unsupportive party during the

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181 For further information see: Julie Brines, "Economic Dependency, Gender and the Division of Labor at Home" (1994) 100(3) American Journal of Sociology 652; Arlie Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (New York: Viking Penguin, 1989); and Meg Luxton, *More Than a Labor of Love* (Toronto: The Canadian Women's Educational Press, 1980).

182 For further information see: Susan Boyd, "Autonomy for Mothers: Relational Theory and Parenting Apart" (2010) 18(2) Fem Legal Studies 127; Nancy Dowd, "Stigmatizing Single Parents" (1994) 18 Women's LJ 19; and Hester Lessard, "The Empire of the Lone Mother: Parental Rights, Child Welfare Law and State Restructuring" (2001) 39 Osgoode Hall LJ 717.

183 For further information see: Martha Davis & Susan Kraham, "Protecting Women's Welfare in the Face of Violence" (1955) 22 Fordham Urb LJ 114; Clark Anthony Drumbl, "Civil, Constitutional and Criminal Justice Responses to Female Partner Abuse: Proposals for Reform" (1994) 12 Can J Fam L 115; Melanie Randall, "Sexual Assault in Spousal Relationships: 'Continuous Consent' and the Law" (2008) 32 Manitoba LJ 144.

pregnancy) is to force her to become a breeding machine for a man she does not want in her life. I do not dispute, in fact I celebrate, the capacity of fathers to nurture and care for children. However, this capacity should be exercised, at the time of birth, through the choice of the mother, as a result of cooperation and of supportive behavior on the part of the father. The "father's experience of parenthood as genetic contribution (achieved through sexual intercourse)" is not comparable to the mother's far more significant role over the nine-month period of gestation and childbirth.[184] Ejaculation cannot be equated with fatherhood. But carrying a pregnancy to term is acting as a mother. In this context "it [is] appropriate to vest the gestational mother with sole parental status."[185] In recognition of the nine months of pregnancy, and of the mother's settled intention to parent, the gestational mother, even in the context of legal marriage, should have sole control over the fate of the newborn child.[186] After all, a married father

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184 *Supra* note 119 at para 18.

185 Katharine Baker, "Bargaining or Biology: The History and Future of Paternity Law and Parental Status" (2004) 14 Cornell JL & Pub Pol'y 1 at 47 [*Baker*].

186 As Nancy Polikoff has eloquently asserted, there are also risks inherent in this strategy and we must acknowledge "a larger social context of male indifference to the consequences of sexual intercourse and male irresponsibility for the economic well-being of the children they sire. What I envision as a method of liberating women and children from the control of men and of recognizing the legitimacy of deliberate childrearing without fathers, men might see as a method of solidifying sexual access to women with impunity and of eliminating unwanted financial obligations for children. What one woman considers the freedom to create the family structure she wishes, another may view as coercion into an arrangement that leaves her with no buffer against either relative or absolute poverty:" Nancy Polikoff, "The Deliberate Construction of Families Without Fathers: Is It an Option for Lesbian and Heterosexual Mothers?" (1996) 36 Santa Clara L Rev 375 at 376. In this context, expansion of funded childcare and reform of employment law remain essential.

could also be manipulative, violent, or simply unsupportive. The mother can, and most times will, choose to welcome a co-parent into the emergent family at the time of birth, through birth registration, cohabitation and/or the commencement of a relationship between the baby and a third party, who need not be the genetic father.[187] But she must also have the right to exclude the genetic father, whatever his legal relationship to her. This is essential to her potential safety, and the well-being of her child.[188] The mother must also be able to choose to relinquish her own claim on the child, and to transfer parental rights and responsibilities to a third party or parties, without the interference of the genetic father.[189] To allow a man to interfere

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[187] Post-birth "intent, as manifested, implicitly or explicitly, in an agreement with the primary caretaker, would be the critical factor in determining parental rights and obligations as the child grows:" *supra* note 185 at 62.

[188] Clearly, this raises a risk that an unpleasant mother will simply exclude a well-meaning man for personal reasons that are offensive to most people. However, this risk must be accepted as part of the balancing of the rights of mothers, fathers and children. The much greater risks involved for mothers ensure that her rights (and obligations) must be paramount.

[189] There are other reasons why such a regime makes sense: it would make fatherhood a volitional status; it would severe the link between sexual activity and reproduction; and it would provide equal parenting rights for gay and lesbian couples by allowing an immediate opt-in for a co-parent. Moreover, the emphasis on genetics in adoption cases is in contradiction to many other developments in the law of parenting: you can terminate paternal rights voluntarily without penalty; artificial insemination awards paternity to men who are known not to be genetic fathers; and, social fathers can be held responsible for child support whatever their genetic status with regard to children they have raised. For a full development of this argument, see *Baker, supra* note 185. For an extended argument with regard to the right of the same-sex co-parent to adopt, when the mother so wishes, see: Christine Metteer Lorillard, "Placing Second-Parent Adoption Along the Rational Continuum of Constitutionally

in this life-changing decision vitiates a woman's right to equality and undermines her liberty and security of the person. Newborn adoption is an essential component of women's reproductive autonomy.

Protected Family Rights" (2008) 30(1) Women's Rts L Rep 1 . For further information on the obligations of stepparents, see: Carol Rogerson, "The Child Support Obligations of Step-Parents" (2001) 18 Can J Fam L 9.