

Unmarried Fathers, Unequal Protections

Julie Billingsley, Webster University – Saint Louis

Abstract

The family roles of men and women have changed over the past century, often in promotion of women's rights, but some claim that unmarried fathers now face discrimination based on their gender and their assumed status within the family. This paper investigates the legitimacy of these claims within the United States as a whole, as well as within the case study of the state of Missouri, using the United Nations Universal Declaration of Human Rights as a human rights frame. The process an unwed father has to navigate to become a legally recognized father with rights to custody and visitation is long, has multiple steps, and – if contested by the mother – is very expensive. Mothers do not faced with these challenges to keep primary custody and are under no obligation to assist in facilitating the relationship between father and child unless eventually ordered to do so by the courts. Since fathers who have not married their child's mother are not given the same rights of custody or visitation to their children as those who have, this paper ultimately argues that their family rights are being violated by the state.

The rights of the family are for everyone because they are grounded in universal, international human rights standards – stemming from the United Nations Universal Declaration of Human Rights (UDHR) and further outlined in various binding international legal instruments. Yet the significance of family ties is not just important because of its position in human rights frameworks; families come in many shapes and sizes, and society recognizes the vital importance of family connections. There are perhaps benefits to having a cogent definition of family and marriage, but it doesn't have to be so narrow; families and according rights will evolve over time. In the United States, for instance, the family

roles of men and women have changed over the past century, often in promotion of women's rights. Yet some claim that unmarried fathers now face discrimination based on their gender and their assumed status within the family. The process an unwed father has to navigate to become a legally recognized father with rights to custody and visitation is long, has multiple steps, and – if contested by the mother – is very expensive. Mothers do not face with these challenges to keep primary custody and are under no obligation to assist in facilitating the relationship between father and child unless eventually ordered to do so by the courts. This paper investigates the legitimacy of these claims within the United States as a whole, as well as within the case study of the state of Missouri, using the UDHR as a human rights frame.

Since fathers who have not married their child's mother are not given the same rights of custody or visitation to their children as those who have, this paper ultimately argues that their family rights are being violated by the state. Notably, a father's presence and involvement – or his absence, whether voluntary or involuntary – has significant human rights dimensions for himself and his children, as well. Studies show that what common sense suggests about any endeavor: the harder it is for a person (in this case, a father) to achieve a goal (visitation with his children), the more likely they are to give up or concede to less than what they were aiming for (Skinner & Kohler, 2002). If it is increasingly difficult for a father to be a part of a child's life, time passes and the acceptance of the father's absence increases. This reflects not only a strained relationship between mothers and fathers, but also leads to a strained father-child relationship. In many cases, this is also tied to the stigmatization of unwed parents that is reinforced by laws that privilege mothers in custody disputes, even though cohabitation among unmarried partners is socially common today. An unmarried mother in many states will be given primary custody and if the mother does not cooperate with the father seeking visitation, he must utilize the courts to access his rights as a father. This is not an easy task; there are forms to fill out, mediations to attend, paternity tests to take and wait for the results of, and even then fathers must often gain the mother's approval to visit the child or pursue further (costly) legal action. This court battle could

continue indefinitely all because the father was not married to the child's mother (Cordell Cordell, n.d.). This situation does not reflect the complexities surrounding issues of child support or the impacts of domestic violence on custody and visitation, but it does highlight what a man can expect in many places in the United States, including Missouri. The burdensome navigation of this system violates an unmarried father's right to family and ultimately has implications for the difficulties experienced by others, regardless of gender, who seek custody and visitation.

Human Rights Background

The UDHR addresses many human rights that are necessary to live a dignified life, and it also makes clear the need for family and community. The UDHR was adopted by the United Nations following World War II and the Holocaust, after the leaders of many states finally realized there are some things that a government must do (or avoid doing) to properly account for the well-being of its people. The UDHR became the foundation of modern human rights, which outlined rights such as peaceful assembly, the right to participate in the cultural life of a community, and the rights to marriage and family. For our purposes here, we will focus on Article 16, which mentions that the right to marry and to found a family should not be disrupted by the state for people of "full age, without any limitation due to race, nationality or religion" (United Nations General Assembly, 1948). However, this was not the case in the United States for many couples, even after the UDHR was adopted in 1948 by the General Assembly. The U.S., an early advocate for the UDHR, had many laws in effect which prevented interracial couples from marrying. Not until the Supreme Court decision of *Loving v. Virginia* in 1967 did this change (National Public Radio, 2007). This shows that while a human right may be accepted by the international community, in reality these rights are not always respected by states. Another necessary protection listed in Article 16 is: "They [men and women of full age] are entitled to equal rights as to marriage, during marriage and at its dissolution." Yet in Iran (another UN member state), a man can get

a divorce without much explanation in a matter of weeks; whereas, a woman must prove there is enough evidence for a divorce, which could take many years even with the help of a lawyer (Yong, 2010).

Within Article 16, there is blending of individual rights and recognition of the importance of the family as “the natural and fundamental group unit of society” which is “entitled to protection by society and the State” (United Nations General Assembly, 1948). It is necessary to look closer at the specific language used earlier: “Men and women...have the right to marry and to found a family.” It doesn’t say *to marry and found a family*. The distinction between the two acknowledges the right to family even if you are not married. Notably, the United Nations recognizes a wide variety of families in its data collection methods and considers couples living in consensual unions to be considered married in the sense that they are united in a familial partnership (United Nations Statistics Division, 2013). So, it would follow that if a man is in a consensual union with the mother of his child, they certainly qualify as a family. If that union were to dissolve (as a marriage could in divorce), the resulting relationship would still include the man as part of the child’s family as his father. If a father does not have equal legal rights concerning his child based on his sexual and legal relationship to the mother (or biological ability to carry and birth a child), this would violate the family rights outlined in Article 16. Furthermore, this is arguably also a violation of rights to freedom from discrimination highlighted in Article 2 and the right to equal protection before the law in Article 7 (United Nations General Assembly, 1948).

Case Study: Missouri

U.S. laws related to father’s rights vary widely, with some states choosing to not strictly define the role of the father while others (including the state of Missouri) are very strict on this matter. From a human rights perspective, the family rights of both child and father are violated if a child can be legally fatherless and his father must follow a lengthy legal process to claim his rights when no other parent is

required to do so. If (even after paternity has been determined) a father is unable to get visitation with his child until he takes the mother through the court system at his cost, his rights are also being violated. Both of these instances reflect some of the laws in place regarding fatherhood and visitation in Missouri. If a child is born to unmarried parents who were not intending to marry, that child has only one legal parent (the mother) whether or not the other parent is known. The woman giving birth assumes full custody and the child does not have a legal father unless he files a notice with the court and then follows specific instructions on what actions to take. The process to gain visitation of the child is long and the mother (or custodial parent) can deny the father visitation at any time, legally, until there is a custody and visitation order in place (Missouri General Assembly, 2013; Child Welfare Information Gateway, 2014).

In Missouri, once a man is notified that he is or could be a child's father, he must fill out a form and mail it into the Department of Health and Human Services within 15 days. This step does not classify him as the father, however; Missouri labels him as the "putative father" and he must be notified of court proceedings of which the child has involvement. These proceedings would include petitions for adoption and any attempt to terminate his parental rights (even though he is unable to exercise them). Then, the father would have to pay child support if requested by the mother or if she is receiving any aid from the state. Visitation can be sought at this point, however in Missouri this only means the father can legally *request* visitation with the child from the mother. She can decline. She is not forced to let him see his child until many other requirements are met and agreed upon by the mother. If at any point she decides she does not want him to visit with or have any custody of the child, she can legally do so. At that point, the father must seek a visitation and custody agreement through the courts to pursue visitation rights. If the father cannot afford to hire a lawyer, he must provide proof of his financial circumstances and then can represent himself or pay for legal assistance. The mother as biological and

legal custodial parent will be provided with legal representation by the state (Child Welfare Information Gateway, 2014; Cordell Cordell, n.d.; Your Missouri Courts, n.d.).

Once a man files a claim to paternity and his case is finally heard, he can request a paternity test. If the mother requests the testing, she does not have to pay for the lab fees. If a man requests it and the mother does not want to comply, usually he will have to pay. If the man is found to be the child's biological father, he will generally be subject to child support which will either be backdated to the date of request by the mother or to the date from which she began to receive aid from the state. In Missouri, like many other places in the U.S., a man can be required to pay child support and still not be able to see his child. Legally, child support and custody and visitation are not codependent. If the mother receives child support, she is not legally obligated to allow him to see his child. He must take her to court to exercise this right that normally comes automatically for fathers who were married to the mothers (Cordell Cordell, n.d.; Missouri Department of Health and Human Services; Your Missouri Courts, n.d). These steps in the process for a man to claim paternity outside the protection of marriage are arduous. When considering the adoption of his child they are almost unbelievable. A man is considered to have forfeited his rights as a father if he does not file the appropriate paperwork within 15 days of the birth of the child, despite the fact the mother could have *never* told him she was having his child. The only way he can contest the adoption of his child after 15 days is if: a) the mother lied about not being pregnant, b) she claimed she had an abortion or miscarriage and did not, or c) she told him the baby died after birth but it did not. The court does not allow a father to claim rights to his child if he simply never knew she was pregnant; there has to have been "misrepresentation or fraud" on her part for his rights to be recognized. Additionally, if he has been notified of her fraud he only has 15 days to follow up with the state (Cordell Cordell, n.d.; Missouri Department of Health and Human Services; Your Missouri Courts, n.d).

Discussion

Before the U.S. feminist movement began to branch out beyond achieving universal suffrage, American men benefited in a much different from divorce than women did. Men were assumed to receive custody of any children upon divorce and the woman may or may not receive alimony. This was an incentive for many women to stay in abusive, unhappy, or dysfunctional marriages; they did not want to lose their children. During this time in U.S. history, men would often have other family members or nannies take care of the children while they worked. Also common, the man would quickly remarry and another woman would take care of the children. Women began to seek or accept divorce more readily only as the feminist movement picked up in the 1940s and women were increasingly allowed primary physical custody of the children. The dynamics have changed within the courts to reflect the independence and capabilities of women, but somehow this pendulum seems to have swung too far in some areas, including Missouri. The court now makes assumptions that all women are better caregivers for their children than fathers. Thus, divorced and unmarried fathers are beginning to feel the pinch if they want to be in their children's lives. Many single mothers have basically taken on both parental roles in many cases, and the court has accepted this (Conway-Long, 2014).

Some men have been able to contest the assumption that they are dispensable to their child who was given up for adoption. The courts often find that an adoption can continue with only the mother's consent because a child born out of wedlock may technically, legally lack a father who would need to be consulted. In some recent cases, the U.S. Supreme Court has upheld the fathers' Fourteenth Amendment (which includes the Equal Protection Clause) rights and determined that the biological link between father and child was enough to give "the father an opportunity to establish a substantial relationship" (Child Welfare Information Gateway, 2014). Outside of adoption, however, it is difficult to find any evidence that the Supreme Court has heard many cases regarding the custody or visitation rights of unmarried fathers.

Yet various scientific studies provide important information for this discussion. One study, “In-Hospital Paternity Establishment and Father Involvement in Fragile Families,” investigated the impacts of in-hospital paternity establishment on child support and visitation. In the study, published by the *Journal of Marriage and Family* in 2005, it was found that 70% of the births of children to unmarried parents have paternity established within the first year. Of these, six out of seven children had paternity established in the hospital with much less time or evidence required of the father. They also found that when paternity was established in the hospital, the easiest method for unmarried fathers, the parental involvement of the father and visitation were much higher (Mincy et al., 2005). Another study, “Parental Rights in Diverse Family Contexts: Current Legal Developments,” focused on the benefits of decreasing the rigidity in the definition of parent and who has the right to parent. The researchers, Denise Skinner and Julie Kohler, insist that allowing more people to participate in raising children legally can only make families stronger. Additionally, they noted even the highest court has yet to clarify what rights a biological father has when he never married the mother. Many Supreme Court’s cases have given them this opportunity, they state that what actually came out was (my emphasis):

an unwed father is entitled to parental rights if he has developed a substantial relationship with the child, defined as a biological relationship and to the commitment of the responsibilities of parenthood. Consequently, the parental rights doctrine does not apply in full to unwed fathers. *Whereas unmarried mothers are assumed to have full parental rights by nature of their biological relationship with the child, unmarried fathers’ rights are additionally linked to their conduct* (Skinner & Kohler, 2002).

This “doctrine” is supported by case after case brought to the Supreme Court (Skinner & Kohler, 2002; Child Welfare Information Gateway, 2014). The commitment required by the court can be shown in the father being “involved or attempting to be involved in the child’s upbringing” (Child Welfare Information Gateway, 2014). The mother is not required to show this commitment and the father must prove the mother is *unfit* to parent if he wants primary custody. The mother doesn’t have to do this unless she has already legally entered into an agreement sharing custody.

The statistics reflecting the status of custody for children of unwed parents is quite stark: In 2007, only 7% of the 7.5 million non-marital children that live with an unmarried parent resided with the father. In comparison, that same year, 12.5% of the marital children lived with the father (Cuadra, 2010). While the disparity is present between marital and non-marital children when comparing primary custody held by the father or the mother, the numbers show a significant favor to the mother. This process is a long, expensive, emotionally and physically draining activity; not allowing all fathers the same rights as mothers is detrimental to the state of the family, the health of the father-child relationship, and is a violation of human rights.

Recommendations

In researching this topic, it was difficult to find as much information regarding unwed parents and father involvement as that of divorced father involvement. This suggests there is room for more studies. In particular, it would be useful to have studies with a large sample size and detailed variables that allow researchers to look into as many factors as possible and search for significant findings. I also found that the law has developed in the past four decades to more accurately reflect the changing demographics of the family; however, it is still not sufficient in providing a level playing field for unmarried parents and this seems to negatively impact the parent-child relationship, as well as the positive expectations mothers have for the fathers of their non-marital children.

If the law requires that the father's rights are contingent upon his conduct as a father and not only his biological connection, there should be similar requirements for the mother to help facilitate that. These should include issues such as: a) require mothers to notify fathers of the pregnancy and/or birth of their child within 30 days of her decision to keep the child and/or the birth of that child, b) establish a default of joint physical and legal custody of a child immediately upon paternity acknowledgement or findings of fact, c) require mediation in any instance that either parent wants a

change to the custody that is contested at the state's expense, d) provide external/independent party review of the fitness of either parent if it comes into question, at the cost of the state. This would provide a starting point for an equal footing for parents who have children out of wedlock and would not make custody decisions as reliant on whether or not either party can afford a lawyer.

Because the impacts of unmarried fathers' rights expand beyond heterosexual, two-parent, biological relationships, more research is required to study the impacts of custody decisions and visitation arrangements on the parents, the children, and the community. As same-sex marriage becomes increasingly legal in the U.S., society cannot allow this change to prevent recognition and legal status advancements of parents' rights outside of "marriage" for unmarried cohabitating couples, those in civil union, domestic partnerships, and surrogacy agreements, among others. Parental rights advancements and research should continue to reflect diversity, changing financial concerns, and seek to strengthen the family for the children.

Finally, the topic of domestic abuse and its implications on parental rights requires further study. While it is widely accepted that males abuse other males and females more than women do, the occurrence of neglect and apathy toward children by females should be addressed, as well. Because the abuse of financial aid programs and child support systems by females is a huge claim by men in recent years, there needs to be further study and regulation in that area, as well.

References

Child Welfare Information Gateway. (2014). The Rights of Unmarried Fathers. *U.S. Department of Health and Human Services, Children's Bureau*. Retrieved from <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/putative/?hasBeenRedirected=1>

Conway-Long, D. (2014). Men, Masculinities, and the Family. Lecture, *Webster University Annual Human Rights Conference*, October 9. Webster Groves, Missouri.

Cordell Cordell. (n.d.). Missouri Child Custody Questions. *Cordell Cordell: A Domestic Litigation Firm*. Retrieved from <http://cordellcordell.com/resources/missouri/missouri-child-custody-questions/>

Cuadra, B. (2010). Maternal and Joint Custody Presumptions for Unmarried Parents: Constitutional and Policy Considerations in Massachusetts and Beyond. *Western New England Law Review*, 32, 599-659.

Mincy, R., Garfinkel, I., & Nepomnyaschy, L. (2005). In-Hospital Paternity Establishment and Father Involvement in Fragile Families. *Journal of Marriage and Family*, 67(3), 611-626.

Missouri Department of Health and Human Services. (n.d.). Putative Father Registry. Retrieved from <http://health.mo.gov/data/vitalrecords/putative.php>

Missouri General Assembly. (2013). Chapter 453 Adoption and Foster Care Section 453.030. *Missouri Revised Statutes*. Retrieved from <http://www.moga.mo.gov/statutes/C400-499/4530000030.HTM>

National Public Radio. (2007). Loving Decision: 40 Years of Interracial Unions. *All Things Considered*, June 11. Retrieved from <http://www.npr.org/templates/story/story.php?storyId=10889047>

Skinner, D.A., & Kohler, J.K. (2002). Parental Rights in Diverse Family Contexts: Current Legal Developments. *Family and the Law: Family Relations*, 51(4), 293-300.

United Nations Statistics Division. (2013). Households and Families. Retrieved from <http://unstats.un.org/unsd/demographic/sconcerns/fam/fammethods.htm>

United Nations General Assembly. (1948). The Universal Declaration of Human Rights. Retrieved from <http://www.un.org/en/documents/udhr/>

Yong, W. (2010). Iran's Divorce Rate Stirs Fears of Society in Crisis. *The New York Times*, December 7. Retrieved from http://www.nytimes.com/2010/12/07/world/middleeast/07divorce.html?pagewanted=all&_r=1

Your Missouri Courts. (n.d.). Motion to Modify Child Custody (and Support). *Representing Yourself Home*. Retrieved from <http://www.selfrepresent.mo.gov/page.jsp?id=38335>

© Copyright 2015 *Righting Wrongs: A Journal of Human Rights*. All rights reserved.

Righting Wrongs: A Journal of Human Rights is an academic journal that provides space for undergraduate students to explore human rights issues, challenge current actions and frameworks, and engage in problem-solving aimed at tackling some of the world's most pressing issues. This open-access journal is available online at www.webster.edu/rightingwrongs.