NOTE

CONCEIVING CONSISTENCY: GIVING BIRTH TO A UNIFORM "BEST INTERESTS OF THE CHILD" STANDARD

"You cannot conceive the many without the one."
Plato, *Parmenides*.[1]

I. INTRODUCTION

A father from Indiana and a father from Florida both appealed a judgment which awarded child custody to the child's stepfather.[2] In both cases, the reviewing court employed a presumption in favor of awarding custody to the "natural" parent.[3] Both courts also evaluated the facts presented before them using the "best interests of the child" ("BIOTC") standard.[4] Despite evaluating similar facts under the same legal standard and presumption, the Indiana judge found that it would be in the "best interests of the child" for the stepfather to keep custody of the child, while the Florida judge found that the interests of the child would best be served by granting custody to the natural father.[5]

The difference, you ask?[6] The issue turns on a fundamental flaw in the execution of the longstanding guiding standard, which finds its

1. JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 78 (Justin Kaplan ed., 17th ed. 2002).

2. *In re* Guardianship of B.H., 770 N.E.2d 283, 285 (Ind. 2002); Pape v. Pape, 444 So. 2d 1058, 1059 (Fla. Dist. Ct. App. 1984).

3. *See In re Guardianship of B.H.*, 770 N.E.2d at 285, 287 ("[B]efore placing a child in the custody of a person *other than the natural parent*, a trial court must be satisfied by clear and convincing evidence that the best interests of the child require such a placement.") (emphasis added); *see also Pape*, 444 So. 2d at 1060 ("Parents have a natural and legal right to the custody of their children, and, other things being equal, *the court should award custody to a natural parent* rather than one who is not a parent.") (emphasis added).

4. *In re Guardianship of B.H.*, 770 N.E.2d at 286; *Pape*, 444 So. 2d at 1060.

5. *In re Guardianship of B.H.*, 770 N.E.2d at 288; *Pape*, 444 So. 2d at 1061.

6. *See infra* Part II (discussing that the "best interests of the child" ("BIOTC") standard is used in *every* child custody proceeding).

pronouncement in federal law, but its application at the state level.[7] Parents have a fundamental right to rear their children.[8] In accordance with this fundamental right, "fit" parents are presumed to act in their child's "best interests."[9] As a result, much is at stake in a child custody proceeding.[10] Courts in every jurisdiction evaluate issues concerning child custody under the BIOTC standard.[11] However, there is no all-encompassing definition of the BIOTC standard[12] and every state defines and applies this standard in their own way.[13]

Section 3524 of the United States Code ("18 U.S.C. § 3524") is currently the only existing federal articulation of the BIOTC standard.[14] 18 U.S.C. § 3524, which is part of the U.S. Federal Witness Protection Program ("WPP"), governs custody issues connected with the WPP.[15] The statute requires federal courts to issue orders that are consistent with the child's "best interests."[16] The statute also dictates that any federal court deciding issues of custody in connection with the WPP must apply the law of the state in which the order was issued.[17] However, even in the specific context of the WPP, the federal law is silent as to how the

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7. *See infra* Part III (noting that the difference lies in the disparate application of the BIOTC standard across states).

8. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *see also* Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.").

9. *Troxel*, 530 U.S. at 58.

10. *See id.* at 65 ("The [Due Process] Clause [of the Fourteenth Amendment] . . . includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'") (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

11. *See* Juliet A. Cox, Comment, *Judicial Enforcement of Moral Imperatives: Is the Best Interest of the Child Being Sacrificed to Maintain Societal Homogeneity?*, 59 MO. L. REV. 775, 775 (1994) ("The applicable standard in all states for deciding who should receive custody is the 'best interests of the child.'").

12. *See* Janet L. Dolgin, *Why Has the Best Interest Standard Survived?: The Historic and Social Context*, CHILD.'S LEGAL RTS. J., Winter 1996, at 2, 2 ("The [BIOTC] standard . . . is vague and non-directive . . . ."); *see also Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY 2 (2020), https://www.childwelfare.gov/pubPDFs/best_interest.pdf ("[T]here is no standard definition of 'best interests of the child.'").

13. *See generally Determining the Best Interests of the Child*, *supra* note 12, at 2-4 (discussing differences amongst states in defining and applying the BIOTC standard).

14. 18 U.S.C. § 3524 (2018). Family law issues arise in federal courts by way of federal question jurisdiction, diversity jurisdiction, supplemental jurisdiction, removal, or Supreme Court certiorari review. *See* Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 140 (2009).

15. 18 U.S.C. § 3524(a).

16. *Id.* § 3524(d)(3).

17. *Id.*

BIOTC standard is to be applied.[18] Absent a unifying federal statute pertaining to the BIOTC standard outside the context of the WPP, state court judges have much discretion in deciding exactly what the legal standard means.[19]

Consequently, each state has devised its own methodology in applying the BIOTC standard.[20] The result: a patchwork of state laws and no single consensus on what factors are determinative in deciding a child's best interest.[21] Therefore, although the *use* of the BIOTC standard is universal, the *substance and application* of the standard is anything but.[22] The lack of definitional direction regarding the BIOTC standard has resulted in drastically unpredictable outcomes,[23] leaving the determination of the child's "best interests" to the discretion of individual judges sitting in courts throughout the country.[24]

This Note will address the lack of consistency surrounding the BIOTC standard as it has been used in child legal custody adversarial proceedings.[25] This Note will perform a cross-jurisdictional comparative analysis of the BIOTC standard.[26] In doing so, this Note will evaluate the various tests and factors that several jurisdictions—New Jersey, New York, California, Rhode Island, and the District of Columbia ("D.C.")—have employed when applying the BIOTC standard.[27] These jurisdictions are highlighted to draw attention to the vastly different standards employed among the fifty states.[28] This Note will compare and contrast these different methodologies and will incorporate child welfare data from across the United States, legal scholarship, and case law to

18. *See id.* For the purposes of this Note, which seeks solely to address the lack of federal BIOTC standard in adversarial proceedings involving children, the Witness Protection Program ("WPP") itself remains outside the scope and will not be addressed in Part IV's solution. *See infra* Part IV.

19. *See* Dolgin, *supra* note 12, at 2 ("[T]he best-interest standard . . . provid[es] little concrete guidance to courts asked to settle disputes involving children's custody. The standard, as applied, grants courts remarkable flexibility. As a result, reliance on the standard ensures widely discrepant, even contradictory, results in custody cases, depending on the presiding judge.").

20. *See generally Determining the Best Interests of the Child*, *supra* note 12, at 2-4 (comparing each jurisdiction's methodologies in applying the standard).

21. *See* Dolgin, *supra* note 12, at 2 ("At best, the standard offers some broad guidance to courts handling children's custody or parentage disputes.").

22. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUDS. 337, 370 (2008).

23. *Id.*

24. Dolgin, *supra* note 12, at 3 ("[T]he interests of a child can be subverted by a judge who displaces that child's interests through application of a principle aimed at protecting the constitutional rights of adults.").

25. *See infra* Part III.

26. *See infra* Part III.A.

27. *See infra* Part III.A.1–5.

28. *See infra* Part III.A.

determine which state factors or tests are the most likely to produce successful outcomes.[29] Finally, this Note will draw a conclusion based on the amassed findings and will propose a solution for the "best interests" problem.[30]

This Note will ultimately call for reform in the application of the standard,[31] and in doing so, will call for a new federal BIOTC statute.[32] Relying on the holding in *Troxel v. Granville*, this Note will also advocate for the abandonment of state-employed parent presumptions when they do not expressly apply to "fit" parents.[33] This new federal BIOTC statutory scheme will ensure uniformity among the states and allow for more consistent, favorable, and predictable outcomes for child custody proceedings.[34]

Part II of this Note begins by defining child legal custody with respect to adversarial proceedings, separating legal custody from physical custody, and delineating between the various types of outcomes than can occur in child custody proceedings.[35] Part II proceeds by discussing the historical context of the BIOTC standard,[36] along with discussing how the BIOTC standard is used and applied in present-day custody proceedings.[37] Part II concludes by surveying the Supreme Court's jurisprudence in the area of parent-child fundamental rights.[38]

Part III defines the legal issue by analyzing the disparate application of the BIOTC standard across jurisdictions.[39] Part IV argues that the universal adoption of baseline factors as part of a BIOTC analysis will ensure consistency in the application of the BIOTC standard, as well as promote the standard's underlying motivation.[40] Part IV sets forth a possible solution: a new federal BIOTC statute.[41] Part IV also calls for the universal elimination of presumptions that are not expressly in favor of "fit" parents, as this Note argues that presumptions in favor of "natural" or "unfit" parents undermine the BIOTC standard.[42] Finally, in making its case, this Note shows how the elimination of

29. *See infra* Part III.
30. *See infra* Part IV.
31. *See infra* Part IV.
32. *See infra* Part IV.A.
33. *See infra* Part IV.B; Troxel v. Granville, 530 U.S. 57, 58 (2000).
34. *See infra* Part IV.A.
35. *See infra* Part II.A.
36. *See infra* Part II.B.
37. *See infra* Part II.C.
38. *See infra* Part II.D.
39. *See infra* Part III.A.
40. *See infra* Part IV.A.
41. *See infra* Part IV.A.
42. *See infra* Part IV.B.

presumptions not expressly in favor of "fit" parents conforms to the Supreme Court's holding in *Troxel*.[43]

II. BACKGROUND AND HISTORY OF THE "BEST INTERESTS OF THE CHILD" STANDARD

Parents have a range of options available for determining custody in the event of a separation.[44] Parents may choose to take matters into their own hands,[45] seek the help of an agreed-upon third party,[46] or make use of the adversarial system.[47] Presently, "[m]ost child-custody disputes requiring judicial resolution arise out of the dissolution of marriage" and the reviewing judge must decide which parent is awarded custody of the child or children.[48] However, a parent might seek judicial relief for a multitude of reasons.[49] Child custody proceedings, and the issues stemming therefrom, are relevant and prevalent in a contemporary society with a high tendency for divorce[50] and evolving family structures.[51] The BIOTC standard plays a crucial role in every judicially-resolved custody dispute.[52]

Subpart A defines child custody and explores the various kinds of child custody awards that a court may grant in adversarial child custody

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43. *See infra* Part IV.B; 530 U.S. 57, 58 (2000).

44. Joan B. Kelly, *The Determination of Child Custody*, FUTURE CHILD., Spring 1994, at 121, 125 ("Decisions regarding custody arrangements range along a continuum from the very informal, those agreements reached privately between parents, to those decided through the most formal procedural process, by judicial determination following trial.").

45. *See id.* Private custodial decisions have multiple advantages:

> The notion of parents making private decisions regarding custody and visitation is an appealing one, from both a psychological and an economic viewpoint. Parents can discuss their children's particular needs and reach agreements reflecting those needs, parental desires, and family values, and they can do so without depleting their economic resources.

Id.

46. *See id.* ("Some parents turn to trusted advisors or decisions makers outside the legal system—including extended family members, the clergy, or psychotherapists—for assistance.").

47. *See id.* at 126.

48. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, L. & CONTEMP. PROBS., Summer 1975, at 226, 232.

49. *See Court Processes*, OFF. OF CHILD. & FAMILIES IN THE CTS., http://ocfcpacourts.us/parents-and-families/child-dependency-system/court-processes (last visited Jan. 15, 2022) ("Parents go to court for many reasons.").

50. *See* Andy Kiersz, *This Chart Shows the Exact Age When You're Most Likely to Get Divorced*, BUS. INSIDER, https://www.businessinsider.com/divorce-statistics-when-americans-get-divorced-2019-2 (Feb. 12, 2020, 4:13 PM).

51. *See* Cox, *supra* note 11, at 781 (arguing for the reformation of existing custody law in light of modern-day family compositions).

52. Kelly, *supra* note 44, at 128.

proceedings.[53] Subpart B surveys the origin and history of the BIOTC standard in light of the traditional use of gender-based presumptions.[54] Subpart C examines the modern-day use and application of the BIOTC standard.[55] Finally, Subpart D surveys parent-child fundamental rights jurisprudence.[56]

A. Child Custody

There are two kinds of child custody considerations in each parental dispute: legal custody and physical custody.[57] Legal custody concerns the long-term decision-making regarding the child's health and welfare, including, but not limited to, the child's dental care, medical care, education, or religious instruction.[58] Physical custody concerns the day-to-day living arrangements of the child.[59]

Custody awards take the shape of several different forms: sole custody, joint custody, divided custody, and split custody.[60] Parents that are awarded sole legal custody are assigned all legal rights as parent and are awarded decision-making authority.[61] The parent that is not given legal custody of the child has limited rights with respect to decision-making authority, but maintains access to the child's records.[62] For joint legal custody awards, both parents are afforded the authority to make decisions on behalf of the child.[63] Divided legal custody grants to each parent the ability to have physical custody for certain periods of time and the ability to have legal custody while the child is in that parent's care.[64] In situations where the child has siblings, split custody allows each parent to have "sole legal and physical custody of one or more children," providing the noncustodial parent with visitation rights only.[65]

53. *See infra* Part II.A.
54. *See infra* Part II.B.
55. *See infra* Part II.C.
56. *See infra* Part II.D.
57. Kelly, *supra* note 44, at 123.
58. *Id.*
59. *Id.*
60. *Id.* at 124 tbl.1.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

Thirteen United States jurisdictions have either presumptions or preferences for joint custody awards in child custody disputes.[66] However, the kind and duration of custody awards overall varies from state-to-state and depends on the particular facts presented before the reviewing official.[67] Yet, what remains the same in each child legal custody proceeding is the use of the BIOTC standard to evaluate the facts.[68]

B. Origin and History of the "Best Interests of the Child" Standard

The historical context of the BIOTC standard is laden with gender-based presumptions.[69] Child legal custody disputes date back to biblical times.[70] English common law provided fathers with absolute rights over their children and left mothers with nothing.[71] The *parens patriae* doctrine, which emerged in the late seventeenth century in England, allowed the state to intervene in child custody disputes.[72] However, it was not until the nineteenth century that courts in England began awarding custodial rights to mothers by way of the "tender years" doctrine.[73] The "tender years" doctrine presumed that it was in the best

66. Morgan Lewis & Bockius LLP, *Best Interests of the Child—Joint Custody Factor*, NAT'L IMMIGR. WOMEN'S ADVOC. PROJECT 2-4 (Dec. 29, 2017), http://niwaplibrary.wcl.american.edu/wp-content/uploads/Appendix-Q8-Best-Interests-Joint-Custody.pdf.

67. *See* Kelly, *supra* note 44, at 123 ("Considerable variation exists among states in the definition of joint custody and the circumstances under which it is permitted or denied.").

68. *See* Kohm, *supra* note 22, at 370 ("Today, every state has a statute requiring that the child's best interests be considered whenever decisions regarding a child's placement are made."); *see also* Kelly, *supra* note 44, at 123 ("The prevailing basis at this time for determining custody is that of the best interests of the child.").

69. *See* Dolgin, *supra* note 12, at 6. These gender-based presumptions were often reflective of existing social values:

> The various presumptions that, over time, have directed application of the best-interest principle represent shifting social understandings of children and of the parent-child relationship. These understandings have interacted with the values and beliefs of individual judges to produce the history of child custody litigation since the beginning of the 19th century.

Id.

70. *Compare* LeAnn Larson LaFave, *Origins and Evolution of the "Best Interests of the Child" Standard*, 34 S.D. L. REV. 459, 464 (1989) ("Since the time of Solomon, contested child custody disputes have placed judges in an unenviable position."), *with* Kohm, *supra* note 22, at 340 ("The concept of childhood in antiquity is intriguing and conflicting when viewed as an integration of the codes of ancient civilizations: the Jewish tradition, the Greco-Roman era, and early Christianity.").

71. *See* Kohm, *supra* note 22, at 345; LaFave, *supra* note 70, at 465.

72. Kohm, *supra* note 22, at 345-46.

73. *Id.* at 346.

interests of a child, during its "tender years," to be in the mother's custody.[74]

Upon America's founding, English law formed the basis of American jurisprudence with regard to custody disputes.[75] During this period, presumptions remained in favor of biological parents.[76] However, fathers' interests were still being placed over those of the mothers.[77] Custody awards to the father "remained the norm" throughout American agrarian society, with children being viewed as capable of providing "economic utility" to their fathers.[78] After the Industrial Revolution, and by 1900, gender-based presumptions shifted in favor of mothers.[79] By 1920, courts "judicially accepted the stereotype of maternal superiority."[80]

The BIOTC standard grew out of maternal preference.[81] In American jurisprudence, the "tender years" doctrine survived until the 1970s,[82] at which point gendered presumptions ultimately faded in their popularity and were discarded by the courts.[83] The Uniform Marriage and Divorce Act of 1970 ("UMDA") set forth the BIOTC standard as a model standard for the states to follow.[84] This marked a significant change in the history of child custody.[85] The UMDA also listed several mandatory factors for the courts to consider when using the BIOTC standard:

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74. *Id.*

75. *See id.* at 347 ("The common law was brought to America with the colonists and continued to be the basis of American law."); *see also* LaFave, *supra* note 70, at 465 ("When English divorce law was imported to this country, however, the father's right to custody was considered a *prima facie*, or presumptive right.").

76. *See* Kohm, *supra* note 22, at 347 ("Natural law arguments in favor of paternal authority and parents' rights prevailed during the founding period of the new world.").

77. *See* LaFave, *supra*, note 70, at 465-66 ("A 'natural right' of fathers was widely recognized . . . .").

78. *Id.* at 466.

79. *Id.* at 467 ("The need for discipline and guidance, traditionally considered the father's realm, was deemed secondary to the need for love and nurturance.").

80. *Id.*

81. *Id.* at 468.

82. *Id.* at 469.

83. Kohm, *supra* note 22, at 368. However, other presumptions prevailed:

> Courts ruled that there could be no preference or presumption based on gender, and the concept of tender years was replaced with a presumption that afforded a custody award in divorce to the parent who was the primary caregiver to the child during the marriage. This primary caretaker presumption abolished all gender based presumptions for custody.

Id.

84. UNIF. MARRIAGE & DIVORCE ACT § 402 (UNIF. L. COMM'N 1970).

85. *See* Kelly, *supra* note 44, at 122 ("For the first time in history, custody decisions were to be based on a consideration of the child rather than on the gender or rights of the parent.").

> The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:
> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> (4) the child's adjustment to his home, school, and community; and
> (5) the mental and physical health of all individuals involved.[86]

However, only six states officially enacted the UMDA.[87]

Coinciding with a greater social demand for gender equality and acceptance of shared parenting roles,[88] in the late 1970s and early 1980s, the courts began to allow joint custody[89] and developed presumptions, statutes, and preferences in favor of joint custody.[90] Extending into the 1990s,[91] many states enacted "cooperative" or "friendly parent" statutes to encourage "active participation by both parents after separation."[92] These statutes, and preferences for joint custody generally, are based on the rationale that children "do better" when they are raised by both parents.[93]

C. The "Best Interests" Standard Today

The BIOTC standard is the leading and universally accepted legal standard for child legal custody determinations.[94] However, the standard remains without definition.[95] Apart from it being utilized at the federal level as part of BIOTC determinations made in connection with 18

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86. UNIF. MARRIAGE & DIVORCE ACT § 402.

87. *Marriage and Divorce Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=c5a9ecec-095f-4e07-a106-2e6df459d0af (last visited Jan. 15, 2022). The six states are Arizona, Colorado, Georgia, Minnesota, Montana, and Washington. *Id.*

88. J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 214 (2014).

89. *Id.* at 215.

90. *Id.* at 216 ("By 2013, thirty-six states have authorized joint custody, either by presumption, preference, or by adopting statutory language in support of cooperative parenting.").

91. *See id.* at 224-25.

92. *Id.* at 225.

93. *Id.*

94. *See* Kohm, *supra* note 22, at 370; *see also Determining the Best Interests of the Child*, *supra* note 12, at 1 ("Courts make a variety of decisions that affect children, including placement and custody determinations, safety and permanency planning, and proceedings for termination of parental rights. Whenever a court makes such a determination, judges must weigh whether the decision will be in the 'best interests' of the child.").

95. *See supra* note 12 and accompanying text.

U.S.C. § 3524 and the WPP,[96] there are currently no other existing federal statutes that articulate the BIOTC standard.[97] Furthermore, even while the standard is featured in 18 U.S.C. § 3524, the statute provides no definition for the BIOTC standard nor any indication as to how courts are to apply it.[98]

As a result of the lack of a clear definition of the BIOTC standard, states have devised varying methodologies for applying the standard.[99] The different kinds of methodologies that states have used in applying the BIOTC standard include, but are not limited to, codified factors, common law factors, totality of the circumstances approaches, and interest-balancing tests.[100] Additionally, in applying the BIOTC standard in custody proceedings, courts often either explicitly or implicitly presume that a child's "best interests" lie in remaining under the custody of their natural parent.[101] These natural parent presumptions reflect the historical notion that "parents generally decide what is in their children's welfare without state intervention"[102] and promote parents' constitutionally protected liberty interest in raising their children.[103]

D. Fundamental Rights of Parents and Children

Throughout the course of the Supreme Court's family law decision-making history, which spans almost a century, the Court has firmly established the importance of family units, defining the scope of both parents' and children's fundamental rights.[104] However, there is

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96. *See supra* text accompanying notes 14-17.

97. *See supra* text accompanying note 14.

98. *See* 18 U.S.C. § 3524(d)(3) (2018).

99. *See* Erin Bajackson, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. LAWS. 311, 348 (2013) (describing jurisdictional differences in the application of the BIOTC standard).

100. *See* Kohm, *supra* note 22, at 369. These differing methodologies are a direct result of the lack of legislative directive behind the BIOTC standard:

> The free reign of judicial discretion in the name of the best interests of the child led to some states codifying their standards, either by defining the standard, or by listing guidelines and factors to be considered, or using both techniques . . . . Attempts to balance codification of the [BIOTC] standard and case law with parental rights are evident in some cases.

Id.

101. LaFave, *supra* note 70, at 486-87.

102. DiFonzo, *supra* note 88, at 224.

103. *See* Troxel v. Granville, 530 U.S. 57, 67 (2000).

104. *See* Michael H. v. Gerald D., 491 U.S. 110, 123-24 (1989) ("[The Court's] decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.") (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977)).

sometimes a tension between the two and the Court has not yet resolved such tension.[105]

In *Meyer v. Nebraska*,[106] the Supreme Court struck down a Nebraska statute that forbid teaching in any language other than English in any private or public grammar school.[107] The Court recognized generally that the "*individual* has certain fundamental rights which must be respected."[108] In regard to parents, the Court held that they have a "natural duty" to provide their children with education that is parallel to their social stance.[109] The Court also found that the statute at issue impermissibly interfered with parents' ability to control their children's education.[110]

Two years later, the Court invalidated a state statute requiring students to attend public, rather than private, schools in *Pierce v. Society of Sisters*.[111] The Court held that that the statute unreasonably interfered with the liberty of "parents and guardians to direct the upbringing and education of children under their control."[112] In accordance with this liberty, the government may not force children to attend solely public schools.[113]

In *Prince v. Massachusetts*,[114] the Court was tasked with evaluating the constitutionality of a statute that criminalized the sale of newspapers, magazines, or periodicals by minors in public places.[115] The statute also criminally sanctioned the parents or guardians of the minors who committed the offense.[116] The appellant was the legal custodian of a nine-year-old girl who sold Jehovah's Witness magazines on the street.[117] The Court weighed three varying interests at stake: (1) the

105. *See* Planned Parenthood v. Casey, 505 U.S. 833, 899 (1992) (holding that a state may require a minor seeking an abortion to obtain the consent of their parent); *see also* Parham v. J.R., 442 U.S. 584, 606 (1979) (holding that a hearing is required prior to a child's mental health institutionalization due to the "risk of error" inherent in parental decision-making on behalf of the child).

106. 262 U.S. 390 (1923).

107. *Id.* at 390-91.

108. *Id.* at 401 (emphasis added).

109. *Id.* at 400 ("Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . . .").

110. *Id.* at 401.

111. 268 U.S. 510, 519, 534-35 (1925).

112. *Id.* at 534-35 ("The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the *high* duty, to recognize and prepare him for additional obligations.") (emphasis added).

113. *Id.* at 535.

114. 321 U.S. 158 (1944).

115. *Id.* at 160-61.

116. *Id.* at 161.

117. *Id.* at 159-62.

state's interest; (2) the legal guardian's interest; and (3) the child's interest.[118] The Court distinguished that children have a right to exercise their religion and parents have a right to provide their children with religious instruction.[119] Relying on *Meyer* and *Pierce*,[120] the Court ultimately held that "the custody, care and nurture of the child reside[s] first in the parents, whose primary function and freedom include preparation for obligations that the state can neither supply nor hinder."[121] The state could not impede on these private decisions.[122]

In *Stanley v. Illinois*,[123] the Court examined an Illinois law that placed children of unwed fathers under the protection of the State upon the mother's death.[124] The father argued that he had never been deemed unfit prior to losing custody of his children and that, therefore, the State had unconstitutionally deprived him of due process.[125] He also argued that because the state statute singled out unwed fathers, he was denied equal protection of the laws.[126] The Court agreed with both of the father's arguments,[127] once again emphasizing the importance of familial rights.[128] The Court also took issue with the presumption of unfitness employed by the State of Illinois.[129]

The Court weighed the constitutionality of a compulsory school-attendance law in *Wisconsin v. Yoder*.[130] The law required children to attend public or private school until they reached the age of sixteen.[131] The Court held that the statute unconstitutionally violated the historically and traditionally recognized fundamental right of parents in the "nurture and upbringing of their children."[132]

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118. *Id.* at 165.
119. *Id.* at 165-66.
120. 262 U.S. 390, 403 (1923); 268 U.S. 510, 534-35 (1925).
121. *Prince*, 321 U.S. at 166.
122. *Id.*
123. 405 U.S. 645 (1972).
124. *Id.* at 646.
125. *Id.*
126. *Id.*
127. *Id.* at 649.
128. *Id.* at 651.
129. *See id.* at 656-57. The Court stated:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Id.
130. 406 U.S. 205, 207 (1972).
131. *Id.*
132. *Id.* at 231-32.

In *Santosky v. Kramer*, the Court determined the constitutionality of a New York State law that terminated a parent's rights upon a finding that the child is "permanently neglected."[133] Although the Court declined to review the merits of the petitioners' claims,[134] the Court found that the "fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[135] Thus, a state's procedures in terminating parental rights need to be fundamentally fair.[136]

Troxel v. Granville, which was decided in 2000, stands for the notion that parents have a fundamental right to rear their children.[137] Under *Troxel*, fit parents are presumed to act in their child's best interests.[138] In accordance with this presumption, the Court held that:

> [S]o long as a parent adequately cares for his or her children . . . , there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.[139]

III. THE "BEST INTERESTS" PROBLEM

The lack of a uniform BIOTC standard has led to unpredictable, unfavorable, and inconsistent outcomes across jurisdictions.[140] Thus, the states are left to decide what the standard means and how to apply it.[141] This has left judges with the ultimate discretion in deciding to which

133. 455 U.S. 745, 747 (1982).
134. *Id.* at 770.
135. *Id.* at 753.
136. *Id.* at 753-54.
137. 530 U.S. 57, 66 (2000).
138. *Id.* at 68-69.
139. *Id.* Although *Troxel* dealt with the validity of a visitation statute, and not a custody statute, the constitutional implications of *Troxel* apply with equal force to custody issues. *See id.* at 61, 65 (finding that the Fourteenth Amendment protects "the interest of parents in the care, *custody*, and control of their children") (emphasis added).
140. *See* LaFave, *supra* note 70, at 461-63. Most importantly, it has produced drastic consequences for the children themselves:

> The present application of the "best interests of the child" standard . . . produces undesirable and presumably unintended outcomes: unpredictability for lawyers and litigants; protracted custody litigation in close cases; an adversarial emphasis on the marital sins of the parents, thus shifting the focus of the custody adjudication away from the children and their interests . . . .

Id. at 461-62.
141. *Id.* at 481-82.

parent legal custody of the child belongs.[142] According to Edward Kruk, a journalist for *Psychology Today*, the BIOTC standard "should be primarily concerned with [children's] essential needs, helping children grow and develop, and achieve their capabilities to the maximum extent possible."[143] Often, however, the kind of BIOTC standard that ends up being applied is not truly reflective of a child's interests.[144]

Subpart A evaluates the cross-jurisdictional disparity in the use of the BIOTC standard by examining a handful of jurisdictions' standards and their application of the standard.[145] Subpart B argues that the BIOTC standard, based on its lack of a clear definition across jurisdictions, is ineffective.[146] Subpart B goes on to argue that a more uniform application of the BIOTC standard is more likely to lead to successful child custody outcomes across jurisdictions.[147] Subpart C addresses the concerns surrounding a federal BIOTC statute in a federalist system of government.[148] Subpart C counters such concerns by suggesting that a federal BIOTC statute is the only true solution to the "best interests" problem.[149]

A. Shifting Standards Among the States

Each state defines and applies the BIOTC standard differently.[150] In addition, states have different policy preferences with regard to the BIOTC standard.[151] For example, some states have a policy preference for avoiding removal of the child from their home,[152] while other states place importance on the health, safety, or protection of the child.[153]

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142. *See* Kelly, *supra* note 44, at 129 ("Without clear guidelines, judges often make these difficult decisions by relying upon their own subjective value judgments and life experiences, resulting in unevenness in outcomes across or within jurisdictions.").

143. Edward Kruk, *What Exactly Is "The Best Interest of the Child"?*, PSYCHOL. TODAY (Feb. 22, 2015), https://www.psychologytoday.com/us/blog/co-parenting-after-divorce/201502/what-exactly-is-the-best-interest-the-child.

144. LaFave, *supra* note 70, at 487 ("Existing statutory and judicial guidelines tend to encourage parent-centered inquiries. . . . [J]udges emphasize the conduct of parents rather than the needs of the child.").

145. *See infra* Part III.A.

146. *See infra* Part III.B.

147. *See infra* Part III.B.

148. *See infra* Part III.C.

149. *See infra* Part III.C.

150. *See* LaFave, *supra* note 70, at 481-82.

151. *See Determining the Best Interests of the Child*, *supra* note 12, at 2.

152. *See id.* (listing twenty-eight states that consider this a "guiding principle" in determining the BIOTC).

153. *See id.* (listing twenty-one states that consider this a "guiding principle" in determining the BIOTC).

With the lack of a clear legislative directive[154] and the injection of particular policy preferences into the standard,[155] the BIOTC standard takes various forms across jurisdictions.[156] All but four United States jurisdictions have a relevant BIOTC statute.[157] Additionally, about twenty-two states and D.C. evaluate certain factors in determining the BIOTC.[158] However, such factors vary from jurisdiction to jurisdiction.[159] The jurisdictions also differ as to whether they employ a natural parent presumption.[160] This Subpart will analyze a sample of states, and their application of the BIOTC, in laying the foundation for this Note's proposed federal solution.[161]

1. New Jersey

New Jersey courts recognize a codified fourteen-factor test for applying the BIOTC standard.[162] Such factors include:

> [T]he parents' ability to agree, communicate and cooperate in matters relating to the child; the parents' willingness to accept custody and any history of unwillingness to allow parenting time not based on substantiated abuse; the interaction and relationship of the child with its parents and siblings; the history of domestic violence, if any; the safety of the child and the safety of either parent from physical abuse by the other parent; the preference of the child when of sufficient age and capacity to reason so as to form an intelligent decision; the needs of the child; the stability of the home environment offered; the quality and continuity of the child's education; the fitness of the parents; the

154. *See* 18 U.S.C. § 3524(d)(3) (2018); *see also* UNIF. MARRIAGE & DIVORCE ACT § 402 (UNIF. L. COMM'N 1970) (stating that the court "shall consider all relevant factors" in determining the BIOTC).

155. *Determining the Best Interests of the Child*, *supra* note 12, at 2 ("State statutes frequently reference overarching goals, purposes, and objectives that shape the analysis in making best interests determinations.").

156. Julie E. Artis, *Judging the Best Interests of the Child: Judges' Accounts of the Tender Years Doctrine*, 38 L. & SOC'Y REV. 769, 774 (2004) ("[S]tates have adopted guidelines to help guide judicial decisions about what is in a child's best interests . . . . [A]lthough the particulars of the guidelines vary from state to state.").

157. Morgan Lewis & Bockius LLP, *supra* note 66, at 1. The four jurisdictions are Rhode Island, Maryland, Mississippi, and South Dakota. *Id.*

158. *Determining the Best Interests of the Child*, *supra* note 12, at 2-3 (listing the factors and preferences).

159. *See generally* Morgan Lewis & Bockius LLP, *supra* note 157, at 2-70 (listing the factors each state considers).

160. *See Determining the Best Interests of the Child*, *supra* note 12, at 2 (stating that approximately twenty-eight states have a "preference for avoiding removal of the child from his/her home").

161. *See infra* Part III.A.1–5.

162. *See* N.J. STAT. ANN. § 9:2-4(c) (West 2020).

> geographical proximity of the parents' homes; the extent and quality of the time spent with the child prior to or subsequent to the separation; the parents' employment responsibilities; and the age and number of the children.[163]

When making decisions based on child legal custody, New Jersey courts apply and consider each of these factors individually.[164] Although the child's preference is a codified factor in New Jersey,[165] the parents' interests often override those of the child in BIOTC determinations.[166]

Judges in New Jersey employ a rebuttable presumption in favor of natural parents in awarding custody.[167] In *Watkins v. Nelson*,[168] the New Jersey Supreme Court found that this rebuttable presumption took precedence over the lower court's BIOTC analysis.[169] There, the New Jersey Supreme Court was tasked with resolving an appeal to determine which standard would be appropriate when faced with a custody dispute between a biological father and a maternal grandparent with whom the child had been living since the biological mother's passing.[170] In finding that the lower court erred in applying an incorrect standard, the New Jersey Supreme Court went so far as to say that "in an action for guardianship of a child . . . a presumption exists in favor of the surviving biological parent."[171]

A third-party can rebut this presumption by showing "unfitness, abandonment, gross misconduct, or 'exceptional circumstances'" on the part of the parent.[172] Because the maternal grandmother failed to offer sufficient evidence to disprove the presumption[173]—despite the facts that the child was born to two unmarried, teenage parents who did not live together and the three-and-a-half-year-old child had been living with the grandmother since the child was only twelve days old[174]—the

163. *Id.*

164. *See* R.K. v. F.K., 96 A.3d 291, 296-97 (N.J. Super. Ct. App. Div. 2014) (holding that, on remand, the trial court is to consider each of the factors listed in N.J. STAT. ANN. § 9:2-4 to determine the BIOTC).

165. § 9:2-4(c).

166. *See* Cooper v. Cooper, 491 A.2d 606, 613 (N.J. 1984) ("It is the court's task to attempt to accommodate the interests of both parents while serving the best interests of the child."). *But see* Kinsella v. Kinsella, 696 A.2d 556, 577 (N.J. 1997) (holding that "the primary and overarching consideration" is the BIOTC).

167. § 9:2-4(c) ("A parent shall not be deemed unfit unless the parents' conduct has a *substantial* adverse effect on the child.") (emphasis added).

168. 748 A.2d 558 (N.J. 2000).

169. *Id.* at 559.

170. *Id.*

171. *Id.*

172. *Id.* at 563.

173. *Id.* at 559.

174. *Id.* at 559-60.

grandmother was denied legal custody.[175] The New Jersey Supreme Court's decision relied heavily on the notion that a parent has a constitutionally protected, fundamental right to the "*companionship* of his or her child."[176]

New Jersey has a separate legal doctrine for third parties seeking custody, called the "psychological parenthood" doctrine.[177] This doctrine recognizes the right of a non-biological "parent" who has "stepped in to assume the role of the legal parent who has been unable or unwilling to undertake the obligations of parenthood."[178] The psychological parenthood doctrine reflects the state's public policy in assuring that the child has a continuing relationship with its parents upon the parents' separation.[179]

2. New York

Justice Cardozo, while sitting on the New York Court of Appeals, articulated the proper role of a court in making custodial determinations in *Finlay v. Finlay*.[180] Justice Cardozo's iteration of the BIOTC standard has modern-day resonance in New York courts' decision-making.[181] In protecting the "infants, qua infants," New York courts expressly consider the child's preference when making BIOTC determinations.[182]

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175. *Id.* at 570-71.

176. *Id.* at 563 (citing *In re* Baby M, 537 A.2d 1227, 1253 (N.J. 1988)) (emphasis added). *Cf.* Troxel v. Granville, 530 U.S. 57, 63 (2000) (finding that parents have a fundamental right to *rear* their children).

177. V.C. v. M.J.B., 748 A.2d 539, 549 (N.J. 2000).

178. *Id.*

179. *Id.* at 550 ("At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them.").

180. *See* 148 N.E. 624, 626 (1925). Justice Cardozo believes this role is *protection*, rather than adjudication:

> The chancellor in exercising his jurisdiction upon petition does not proceed upon the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *parens patrie* to do what is best for the interest of the child. He is to put himself in the position of a "wise, affectionate, and careful parent," and make provision for the child accordingly . . . . He is not determining rights "as between a parent and a child," or as between one parent and another. . . . He "interferes for the protection of infants, qua infants . . . ."

Id. (emphasis added).

181. *See* S.L. v. J.R., 27 N.Y.3d 558, 563 (2016) (finding that custody proceedings should "above all else" serve the BIOTC).

182. *See* Andrews v. Mouzon, 915 N.Y.S.2d 604, 606 (App. Div. 2011) ("While not determinative, the court should consider the child's expressed preference as an indication of what is in the child's best interest.") (citing Eschbach v. Eschbach, 436 N.E.2d 1260, 1263 (1982)).

However, the child's own preference is one of various factors that the courts consider.[183]

New York has a codified BIOTC standard, which provides in relevant part: "[T]he court . . . shall enter orders for custody and support as, *in the court's discretion*, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child . . . ."[184] The statute also places primary concern on allegations of previous abuse, neglect, or domestic violence with respect to the child's situation, as well as prevention of any potential risk of domestic violence for the future.[185] The statute does not list any other factors for consideration and expressly gives deference to the presiding judge to consider any other facts or circumstances that they deem relevant when making custody decisions.[186]

New York employs a "totality of the circumstances" approach in applying the BIOTC standard.[187] The totality of the circumstances includes factors such as the promotion of stability in the child's life, availability of home environments, the parents' past performances, each parents' "fitness," and the child's desires.[188] Fitness evaluations take into account each parents' ability to guide the child, provide for the child's well-being, and encourage the child's relationship with the noncustodial parent.[189] Trial courts are expressly tasked with performing BIOTC analyses.[190] Appellate courts rely heavily on the custody determinations of the trial courts and often defer to their judgment.[191]

In legal custody disputes between a parent and a nonparent, New York courts employ a presumption in favor of awarding custody to the natural parent.[192] This presumption is rebuttable, with the burden placed

183. *See Eschbach*, 436 N.E.2d at 1263-64 ("[T]he child's expressed preference is some indication of what is in the child's best interests. Of course, in weighing this factor, the court must consider the age and maturity of the child and the potential for influence having been exerted on the child.").

184. N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2020) (emphasis added).

185. *Id.*

186. *Id.*; *see also* N.Y. DOM. REL. LAW § 70 (McKinney 2020) ("In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.").

187. Bressler v. Bressler, 996 N.Y.S.2d 160, 161 (App. Div. 2014) ("The best interests of the child are determined by a review of the totality of the circumstances.") (citing *Eschbach*, 436 N.E.2d at 1263).

188. Tofalli v. Sarrett, 56 N.Y.S.3d 184, 185-86 (App. Div. 2017).

189. *Id.*

190. *See* Andrews v. Mouzon, 915 N.Y.S.2d 604, 606-07 (App. Div. 2011).

191. *See id.*

192. Wolfford v. Stephens, 43 N.Y.S.3d 837, 838 (App. Div. 2016).

on the nonparent to show that "extraordinary circumstances" exist.[193] A nonparent seeking legal custody must first meet this burden before the court applies the BIOTC standard.[194] Such a presumption, however, is not extended to the biological relatives seeking custody upon termination of the natural parents' rights.[195]

3. California

California has codified BIOTC factors.[196] These factors primarily work to protect the health, safety, and welfare of the child.[197] As a result, an entire provision in California's BIOTC statute encourages courts to evaluate past history of child abuse.[198] The California BIOTC statute also contains a provision that is concerned with the "habitual or continual illegal use of controlled substances" by either of the child's parents.[199] Additionally, California's BIOTC statute explicitly prohibits courts from taking into consideration the gender or sexual orientation of the parent or relative seeking custody.[200]

California has a separate statute that deals with assessing the preference of the child.[201] The statute provides that "[i]f a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation, the court shall consider, and give due weight to, the wishes of the child in making an order granting or modifying custody or visitation."[202] However, California courts have made clear that considering the child's own preference is not mandatory and could even have adverse effects.[203]

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193. *Id.*

194. *Id.*

195. *See In re* Zarlia Loretta J., 804 N.Y.S.2d 313, 314 (App. Div. 2005).

196. CAL. FAM. CODE § 3011(a) (West 2020).

197. *Id.*; *In re* Marriage of Brown & Yana, 127 P.3d 28, 32 (Cal. 2006).

198. FAM. § 3011(a)(2)(A)(i).

199. *Id.* § 3011(a)(4). This specific provision was added to the statute in 1996 as part of the California legislature's acknowledgment that parents' continued use of controlled substances presents immanent dangers to their children. *See* Wainwright v. Superior Court, 100 Cal. Rptr. 2d 749, 754 (Cal. Ct. App. 2000).

200. FAM. § 3011(b). California is one of three states that include factors that a court may *not* consider while making a BIOTC determination. *See Determining the Best Interests of the Child*, *supra* note 12, at 3.

201. CAL. FAM. CODE § 3042 (West 2020).

202. *Id.* § 3042(a).

203. *See* Stack v. Stack, 11 Cal. Rptr. 177, 183 (Cal. Dist. Ct. App. 1961) ("In many cases it may be quite unwise to inquire as to the child's preference; doing so may destroy what little good will is left between the parents or between one of the parents and the child."); *see also In re* Marriage of Mehlmauer, 131 Cal. Rptr. 325, 329 (Cal. Ct. App. 1976) ("Father treats [§ 3042] as if an expression of desire by a [fourteen-year-old] conclusively binds the court to follow that

California trial courts are provided with "the widest discretion to choose a parenting plan that is in the best interest of the child."[204] California courts apply the BIOTC standard by considering not only the codified factors, but also any other relevant factors.[205] California courts are also concerned with maintaining stability in custody arrangements, which manifests itself as a primary caretaker presumption.[206]

In accordance with this primary caretaker presumption, California employs a "changed circumstance rule," where once a court decides a particular custody plan based on the BIOTC, the court will not modify that custody order unless there is some significant change in circumstance that alters the BIOTC.[207] This rule applies whenever there has been a judicial custody order.[208] The stated purpose of this rule is to allow for "judicial economy and protecting stable custody arrangements."[209]

4. Rhode Island

Rhode Island does not have a codified BIOTC standard.[210] Instead, Rhode Island uses common law factors when applying the BIOTC standard.[211] These factors, which were first outlined in *Pettinato v. Pettinato*,[212] *must* be weighed when they are relevant to a court's BIOTC

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expression in a modification proceeding. The treatment is erroneous, the standard is consideration and due weight.").

204. Montenegro v. Diaz, 27 P.3d 289, 293 (Cal. 2001).

205. *In re* Marriage of Brown & Yana, 127 P.3d 28, 32 (Cal. 2006).

206. *See id.* California's primary caretaker presumption dictates that:

> Once the trial court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the best interest of the child, "the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining" that custody arrangement.

Id.

207. *Montenegro*, 27 P.3d at 293.

208. *Id.*

209. *Id.* at 294.

210. Pettinato v. Pettinato, 582 A.2d 909, 913 (R.I. 1990) ("Our Legislature has not statutorily defined the factors that compose the 'best interests of the child' standard. Consequently, in this state, the best interests of the child standard remains amorphous and its implementation has been left to the sound discretion of the trial justices.").

211. *Id.*

212. *Id.* Rhode Island's BIOTC factors are:

> (1) The wishes of the child's parent or parents regarding the child's custody.
>
> (2) The *reasonable preference of the child*, if the court deems the child to be of sufficient intelligence, understanding, and experience to express a preference.
>
> (3) The interaction and interrelationship of the child with the child's parents, the child's siblings, and any other person who may significantly affect the child's best interest.
>
> (4) The child's adjustment to the child's home, school, and community.

determination.[213] In applying the BIOTC standard, Rhode Island courts "must consider a combination of and an interaction among *all* the relevant factors that affect the child's best interests."[214] Trial court judges will typically first consider each of the eight *Pettinato* factors in light of the present case.[215] However, it is up to the reviewing judge to determine which factors are relevant in BIOTC determinations, and their decision is afforded great deference.[216]

When deciding whether to terminate a natural parent's rights, Rhode Island courts will first perform a balancing test.[217] However, Rhode Island courts recognize a presumption in favor of awarding custody to the natural parent.[218] To rebut this presumption, the opposing party must demonstrate the natural parent's unfitness.[219] Rhode Island statutorily describes potential circumstances that would give rise to a finding of parental unfitness.[220] Any such allegation of parental unfitness must be supported by clear and convincing evidence.[221] Although Rhode

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(5) The mental and physical health of *all individuals involved*.

(6) The stability of the child's home environment.

(7) The moral fitness of the child's parents.

(8) The willingness and ability of each parent to facilitate a close and continuous parent-child relationship between the child and the other parent.

Id. at 913-14 (emphasis added).

213. *Id.* at 913.

214. Valkoun v. Frizzle, 973 A.2d 566, 575 (R.I. 2009) (quoting *Pettinato*, 582 A.2d at 914) (emphasis added).

215. Ayriyan v. Ayriyan, 994 A.2d 1207, 1214 (R.I. 2010) ("In [the trial court's] decision, which, in [the Supreme Court's] view, very well could serve as a template for how such a decision should be written, the trial justice discussed each of the *Pettinato* factors in detail.").

216. *Id.* at 1213.

217. *In re* Kristen B., 558 A.2d 200, 203 (R.I. 1989) ("[T]he termination of parental rights involves a balancing of interests, those of the state, the child, and the natural parents.").

218. *See In re* Brooklyn M., 933 A.2d 1113, 1122 (R.I. 2007) ("Rights to the custody, care, and nurturing of children presumptively lie with the parents . . . ."). Further, when faced with deciding whether to terminate a natural parent's rights, the courts "should not presume the child and his parents are adversaries." *In re* Kristen B., 558 A.2d at 203.

219. *In re Brooklyn M.*, 933 A.2d at 1122 ("[T]he state must prove parental unfitness before a court will terminate such a natural parent-child relationship.").

220. 15 R.I. GEN. LAWS ANN. § 15-7-7(a) (2020) (listing reasons for which a parent may be deemed unfit, such as the parent's prior criminal history or institutionalization, conduct towards the child, and their behavior in general). Generally, a court may find parental unfitness when the parent has "exhibited behavior or conduct that is seriously detrimental to the child, for a duration as to render it improbable for the parent to care for the child for an extended period of time." *In re* Adele B., 229 A.3d 671, 683 (R.I. 2020) (citing *In re* Violet G., 212 A.3d 160, 166 (R.I. 2019)).

221. *In re* Steven D., 23 A.3d 1138, 1161 (R.I. 2011) ("[T]he state 'must prove parental unfitness by clear and convincing evidence in order to satisfy the parent's right to due process.'") (citing *In re* Alexis L., 972 A.2d 159, 165 (R.I. 2009)).

Island courts utilize a natural parent presumption, the courts also recognize that a natural parent's rights are not unlimited.[222]

5. D.C.

D.C. has codified BIOTC factors.[223] The BIOTC statute lists seventeen factors for the courts to consider, with a preference-of-the-child factor listed as the first factor.[224] Not only do D.C. courts consider the wishes of the child, but, in the termination of parental rights context, the courts also consider the interests of all parties involved.[225] In considering each party's interests, D.C. courts perform an interest-balancing test in proceedings concerning termination of parental rights.[226] D.C. has a policy preference for awarding custody

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222. *See In re Brooklyn M.*, 933 A.2d at 1122 ("[A] parent's genuine love for [the] child, or an existence of a bond between parent and child, is not sufficient to overcome the child's fundamental right to a safe and nurturing environment.") (second alteration in original) (quoting *In re* Brianna D., 798 A.2d 413, 415 (R.I. 2002)); *see also* Rubano v. DiCenzo, 759 A.2d 959, 973 (R.I. 2000) ("[The biological parent's] interest is not an unqualified one because the rights of a child's biological parent do not always outweigh those of other parties asserting parental rights, let alone do they trump the child's best interests.").

223. *See* D.C. CODE ANN. § 16-914(a)(3) (West 2001).

224. *Id.* D.C.'s BIOTC statutory factors comprehensively include:

> (A) *the wishes of the child* as to his or her custodian, where practicable;
> (B) *the wishes of the child's parent or parents* as to the child's custody;
> (C) the interaction and interrelationship of the child with his or her parent or parents, his or her siblings, and any other person who may emotionally or psychologically affect the interest;
> (D) the child's adjustment to his or her home, school, and community;
> (E) the mental and physical health of all individuals involved;
> (F) evidence of an intrafamily offense as defined in § 16-1001(8);
> (G) the capacity of the parents to communicate and reach shared decisions affecting the child's welfare;
> (H) the willingness of the parents to share custody;
> (I) the prior involvement of each parent in the child's life;
> (J) the potential disruption of the child's social and school life;
> (K) the geographic proximity of the parental homes as this relates to the practical considerations of the child's residential schedule;
> (L) the demands of parental employment;
> (M) the age and number of children;
> (N) the sincerity of each parent's request;
> (O) the parent's ability to financially support a joint custody arrangement;
> (P) the impact on Temporary Assistance for Needy Families, or Program on Work, Employment and Responsibilities, and medical assistance; and
> (Q) the benefits to the parents.

Id. (emphasis added).

225. D.C. CODE ANN. § 16-2353(a) (West 2001).

226. *In re* K.A., 484 A.2d 992, 998 (D.C. 1984).

determinations that result in keeping the child in their current home.[227] However, natural parent presumptions only apply in custody determinations when the natural parent has been deemed "fit."[228]

Even still, the natural parent presumption has invaded the decisions of D.C.'s higher courts.[229] Higher courts have applied a natural parent presumption to both permanent and temporary child custody placements.[230] This presumption can be rebutted by a showing of clear and convincing evidence that the BIOTC would not be served by keeping custody with the natural parent.[231] Despite the natural parent presumption, D.C. has long recognized that the BIOTC standard is the controlling legal standard in all custody determinations.[232]

When it comes to the termination of parental rights, D.C. applies a separate BIOTC standard with a different set of codified factors.[233] The statute governing termination is evocative of the jurisdiction's policy preference of keeping the child in their current home, based on the "need for continuity of care and caretakers and for timely integration into a stable and permanent home . . . ."[234] Much like in the custody context, D.C. courts have expressly declined to apply a natural parent presumption for the termination of parental rights, unless the natural parent has been proven to be fit.[235] This is based on the recognition that the BIOTC is the overarching consideration and that the rights of even fit parents are not absolute.[236]

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227. D.C. CODE ANN. § 16-2320(a)(3)(C) (West 2001) ("It shall be presumed that it is generally preferable to leave a child in his or her own home.").

228. *In re* Minor Child T.C., No. N-1314-99, 2002 WL 32113968, at *15 (D.C. Super. Ct. Nov. 25, 2002) ("There is a presumptive right of a 'fit' mother to have custody of and raise her child. Unless there is clear and convincing evidence that requires the Court, in the 'best interest' of the child, to deny custody to the mother and award custody to a third party.").

229. *In re* D.S., 88 A.3d 678, 685 (D.C. 2014) ("[W]hat is in a child's best interest is informed by venerable principles that recognize a natural parent's right to develop a relationship with his child."). In *In re D.S.*, the D.C. Court of Appeals recognized that the "parental presumption has roots in the U.S. Constitution," but failed to note *Troxel*. *See id.* at 686.

230. *Id.* at 686-88.

231. *Id.* at 689.

232. *See* Bazemore v. Davis, 394 A.2d 1377, 1382 (D.C. 1978) (finding that the BIOTC is the overriding legal tenet in custody disputes). In *Bazemore*, the D.C. Court of Appeals found clear error in the lower court's decision based on the lower court's use of a maternal custody preference. *Id.* at 1379.

233. D.C. CODE ANN. § 16-2353(b) (West 2001). Such factors turn on considerations of health, quality of relationships, and the child's opinion. *In re* K.A., 484 A.2d 992, 995 (D.C. 1984).

234. § 16-2353(b)(1).

235. *See In re* S.M., 985 A.2d 413, 420 (D.C. 2009) (remanding with an instruction for the lower court to apply a BIOTC balancing test with a preference for a fit parent before terminating the natural father's rights).

236. *Id.* at 419.

Similar to the "psychological parenthood" doctrine in New Jersey, D.C. recognizes the potential role of "de facto parents," who may petition for child custody.[237] A "de facto parent" is defined as an individual who has lived in the same household as the child, has taken on certain responsibilities with respect to the child, and has formed an emotional bond with the child.[238] The clear and convincing evidence standard applies to petitions by "de facto parents."[239]

B. Void for Vagueness

How effective is the current BIOTC standard?[240] In one camp, one will find legal scholars who argue that the BIOTC standard is *necessarily* ambiguous, as what is in a child's "best interests" is ultimately a subjective determination based on the situation at hand.[241] They thus argue that the BIOTC standard is better left to the discretion of the state legislature to define.[242] In the other camp, one will find legal scholars who argue that the current BIOTC standard is utterly ineffective.[243] This Subpart argues that the legal standard, because of its lack of definitional direction, is ineffective.[244]

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237. D.C. CODE ANN. § 16-831.03 (West 2001). The statute provides that "[a] de facto parent may file a complaint for custody of a child or a motion to intervene in any existing action involving custody of the child." *Id.*

238. *Id.* § 16-831.01(1)(B).

239. *See* Fields v. Mayo, 982 A.2d 809, 814 (D.C. 2009); *see also* § 16-831.03 ("An individual who establishes that he or she is a de facto parent by clear and convincing evidence shall be deemed a parent . . . if a third party is seeking custody of the child of the de facto parent."). The clear and convincing evidentiary standard is "defined as the evidentiary standard that lies somewhere between a preponderance of evidence and evidence probative beyond a reasonable doubt." *In re* K.A., 484 A.2d 992, 995 (D.C. 1984).

240. *See supra* note 100 and accompanying text.

241. Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 BALT. L. REV. 83, 98 (2011). The BIOTC standard is also praised for its theoretical underpinning: that children deserve to have a say in the processes affecting them. *See* Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 268 (1987).

242. Warshak, *supra* note 241, at 100.

243. *See* Dolgin, *supra* note 12, at 6 ("A standard that directs courts to focus on children's interests in determining their custodial arrangements can only provide scanty concrete guidance."). Those opposed to the current BIOTC standard find that:

> In its current state, this principle offers little guidance to decision-makers who have to make decisions impacting on the lives of children and adults. This implies that decision-makers have considerable leeway in exercising discretion in giving weight to differing arguments and considerations when making decisions on the best interests of a child. Potentially, this poses a considerable problem not only for individuals affected by the decisions, but also for the rule of law and the legitimation of the State in general, and the courts and child welfare authorities in particular . . . .

Marit Skivenes, *Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions?*, 53 ACTA SOCIOLOGICA 339, 339-40 (2010). The most notable opponent of the

The BIOTC standard, since its inception, was meant to represent a "moral imperative" to protect children involved in adversarial proceedings.[245] In practice, however, the standard has diverged from its original purpose.[246] Legal scholar Seema Shah, in her empirical study of the BIOTC standard, finds several flaws in the application of the standard.[247] These flaws include the fact that: courts fail to take account of a child's autonomy[248]; the standard is difficult to apply in practice because it is difficult to know what is actually in a child's best interests[249]; and the standard does not clearly allow for the interests of other individuals involved to be taken into account.[250] In other words, the BIOTC standard, as it stands, is too vague.[251]

Perhaps the greatest difficulty in applying the BIOTC standard is the task of honoring the interests of the child while also protecting the

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BIOTC standard is legal scholar Robert Mnookin, who finds that the standard is inherently indeterminate. *See* Mnookin, *supra* note 48, at 255-56.

244. *See supra* Part III.A (showing that the BIOTC standard is applied differently jurisdiction-to-jurisdiction).

245. Andrew Schepard, *"Best Interests of the Child"*, CHILD CUSTODY PROJECT, https://childcustodyproject.org/essays/bests-interests-of-the-child (last visited Jan. 15, 2022). Professor Andrew Schepard, a professor at the Maurice A. Deane School of Law at Hofstra University, refers to the BIOTC standard as "fundamentally a moral statement; recognizing our responsibility to try to 'do right' by children through an orderly and rational process when parents separate or divorce. The best-interests standard keeps everyone's focus on the duty to protect the weakest, most vulnerable actor in the separation or divorce process." *Id.*

246. *See* Dolgin, *supra* note 12, at 6 ("The standard has provided the illusion of consistency for the law in the regulation of family matters during a period of tumultuous change in the form and ideology of family. Only because the principle is so broad has it been able to serve this end.").

247. Seema Shah, *Does Research with Children Violate the Best Interests Standard? An Empirical and Conceptual Analysis*, 8 NW. J.L. & SOC. POL'Y 121, 147 (2013).

248. *Id.* at 148. This argument is confirmed by the fact that many states place qualifications on when a court is to take into consideration a child's own preference, such as if the child is "of an age and level of maturity to express a reasonable preference." *See Determining the Best Interests of the Child*, *supra* note 12, at 4. However, the Centers for Disease Control and Prevention suggests that children may be able to express preferences for caretakers earlier than the state legislatures may think. *See Important Milestones: Your Child by Eighteen Months*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/actearly/milestones/milestones-18mo.html (Aug. 11, 2021) (indicating that children "cling to caregivers" as early as eighteen months old).

249. Shah, *supra* note 247, at 148. The state driven BIOTC standard makes it difficult to delineate between a child's best interests and the "needs or goals of the state." *See* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 486-87 (1984).

250. Shah, *supra* note 247, at 149. This Note argues that the BIOTC standard does not properly allow for *any* interest to be taken into account, including that of the child. *See* Dolgin, *supra* note 12, at 3 ("[T]he interests of a child can be subverted by a judge who displaces that child's interests through application of a principle aimed at protecting the constitutional rights of adults."); *see also* Charlow, *supra* note 241, at 270 ("Judges cannot be certain that their decisions are best for the children involved; science has not yet provided a sound basis for such decisions. Nor can judges be certain that their decisions are legally correct, because the law remains undefined.").

251. Charlow, *supra* note 241, at 269.

fundamental rights of biological parents.[252] There is no clear measure for weighing these competing interests.[253] To protect parents' fundamental rights, numerous states employ presumptions in favor of *biological* parents when deciding issues of child custody.[254] While presumptions have historically been used in making custody determinations,[255] the use of presumptions in the context of child custody is generally problematic because "they challenge the fundamental moral goal of the best interests test—treating children and families as individuals and unique beings."[256] Additionally, presumptions are often not truly reflective of reality.[257]

This begs the question of which approach is most effective in applying the BIOTC standard.[258] Psychologists call for a more child-focused approach: one that specifically places the child's needs at the forefront of a BIOTC determination.[259] International authorities expressly dictate that "[i]n all actions concerning children . . . the best interests of the child shall be a *primary* consideration."[260] While there is no clear consensus amongst legal scholars as to which approach to the BIOTC standard is in fact best,[261] this Note proposes that adding even just a little more definition to the standard can lead to more successful child custody outcomes.[262]

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252. *See* Kohm, *supra* note 22, at 351-52 ("From the [BIOTC] doctrine, children's rights grew and developed, and out of that jurisprudence arose ardent support for children to be vested with rights of their own, creating an extreme chasm between children and their parents by presenting these rights in direct conflict with one another.").

253. *See supra* Part III.A (evaluating disparate applications of the BIOTC standard).

254. *See, e.g.*, UTAH CODE ANN. § 62A-4a-201(1)(c) (West 2020) ("It is in the best interest and welfare of a child to be raised under the care and supervision of the child's *natural* parents.") (emphasis added).

255. Kelly, *supra* note 44, at 122.

256. Schepard, *supra* note 245.

257. Charlow, *supra* note 241, at 279.

258. *See supra* Part III.A.1–5 (showing different iterations of the BIOTC standard across five sample jurisdictions).

259. Kruk, *supra* note 143; *see also* Schepard, *supra* note 245 ("The governing legal standard should remind parents of their responsibility—while marriages and relationships may dissolve, parents are forever.").

260. United Nations Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3 (emphasis added). As of January 2022, the United States has signed, but has not ratified, the United Nations Convention on the Rights of the Child. Linda D. Elrod, *The Federalization of Family Law*, A.B.A. (July 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law. United States jurisdictions consider a child's "best interests" as *either* the paramount consideration or a primary consideration, which Shah argues adds further definitional confusion to the BIOTC standard. Shah, *supra* note 247, at 145.

261. Schepard, *supra* note 245.

262. *See* Charlow, *supra* note 241, at 270.

C. Concerns of Federalism

Opponents of a federal BIOTC standard point to the fact that the area of family law generally falls within the purview of the states.[263] Thus, they argue that the creation of a federal BIOTC standard will disrupt fundamental notions of federalism,[264] resulting in too much centralism in an area which was historically left to the states.[265] However, custody issues regularly move across state borders.[266] Additionally, as this Note points out, because of the various iterations of the BIOTC standard at the state level, there is much confusion in its application.[267] It simply would not be realistic to call for each state to amend their own BIOTC legislation.[268] What is needed, instead, is a uniform, federal standard.[269]

IV. A UNIFORM "BEST INTERESTS OF THE CHILD" STANDARD

Family unit demographics in the modern era are dynamic.[270] The BIOTC standard needs to be both broad enough to accommodate for the

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263. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 91-92 (2000) (Scalia, J., dissenting). In his dissenting opinion, Justice Scalia warned:

> If we embrace this unenumerated right, I think it obvious—whether we affirm or reverse the judgment here, or remand as Justice Stevens or Justice Kennedy would do—that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.

Id. at 93. The Supreme Court has carved out a "domestic relations exception" to federal jurisdiction, blocking federal courts from deciding family law-related issues on the merits. Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 697 (1995).

264. *Federalism*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/federalism (last visited Jan. 15, 2022) (defining federalism as "a system of government in which the same territory is controlled by two levels of government.").

265. Elrod, *supra* note 260 ("Historically, family law has been a matter of state law. State legislatures define what constitutes a family and enact the laws that regulate marriage, parentage, adoption, child welfare, divorce, family support obligations, and property rights. State courts generally decide family law cases."); Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdictional Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845, 853-54 (1992).

266. Goldstein, *supra* note 265, at 852-53.

267. *See supra* Part III.A.

268. *See supra* Part III.A.1–5.

269. *See supra* Part III.A.

270. *See* Troxel v. Granville, 530 U.S. 57, 63 (2000) ("The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household.").

evolving nature of family life,[271] as well as narrow enough to add more predictability and favorability to judicial outcomes.[272] To this end, Subpart A proposes a new federal BIOTC standard, which creates a more uniform definition and subsequent application of the BIOTC standard across states.[273] Subpart A also explains the necessary components of a uniform BIOTC statute and offers model language for a federal BIOTC standard statute.[274] In calling for the uniform application of the BIOTC standard, Subpart B urges the abandonment of court-employed presumptions that are not expressly in favor of "fit" parents, bringing the application of the BIOTC standard closer in line with reality.[275]

While opponents of a federal BIOTC statute may argue that family law is typically and historically state driven,[276] this Note finds that a federal BIOTC statute can be enacted through Congress's Commerce Clause,[277] Full Faith and Credit Clause,[278] or Spending Clause[279] powers.[280] A new federal BIOTC standard may also be enacted by way of an amendment to any of the existing federal family law-related statutes.[281] One such example of an existing federal statute is the Parental Kidnapping Prevention Act ("PKPA"),[282] which was enacted in 1980 under Congress's Full Faith and Credit Clause power and was meant to resolve jurisdictional conflicts in child custody cases.[283]

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271. *See* Kelly, *supra* note 44, at 129 ("A[n] . . . advantage of the best interests standard is that it is potentially responsive to changing social or legal trends outside custody law.").

272. *See* Dolgin, *supra* note 12, at 6 ("The best-interest standard has often served actual children poorly . . . . [T]he best-interest standard is so vague that it can be, and sometimes has been, used to subvert children's interests entirely and instead to serve the interests of contending adults.").

273. *See infra* Part IV.A.

274. *See infra* Part IV.A.

275. *See infra* Part IV.B.

276. Elrod, *supra* note 260.

277. U.S. CONST. art. I, § 8, cl. 3.

278. *Id.* art. IV, § 1.

279. *Id.* art. I, § 8, cl. 1.

280. *See* Elrod, *supra* note 260. Passing statutes within the realm of family law is not a new task for Congress:

> Beginning with the New Deal legislation of the 1930s, Congress has used its powers under the Commerce Clause, the Full Faith and Credit Clause, and the spending power to set policy. A brief look at the areas of child support and child protection illustrate how Congress has set the national social welfare agenda by passing laws, allocating money for programs, and requiring states to comply with federal regulations to receive funding.

Id.

281. *Id.*

282. 28 U.S.C. § 1738 (2018).

283. *Id.* § 1738A(a). The Parental Kidnapping Prevention Act ("PKPA") provides that "[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify . . . any custody determination or visitation determination made consistently with the provisions of this section by a court of another State." *Id.*

A. A New Federal "Best Interests of the Child" Statute

18 U.S.C. § 3524(d)(3), the only existing federal statutory articulation of the BIOTC standard, currently provides in relevant part:

> The court and master shall, in determining the dispute, give substantial deference to the need for maintaining parent-child relationships, and any order issued by the court shall be in the *best interests of the child*. In actions to modify a court order brought under this subsection, the court and the master shall apply the law of the State in which the court order was issued or, in the case of the modification of a court order issued by a district court under this section, the law of the State in which the parent resides who was not relocated in connection with the protection provided under this chapter.[284]

While 18 U.S.C. § 3524(d)(3) pertains to a specific context for BIOTC determinations, the statute is referenced specifically for its definitional silence regarding the BIOTC standard.[285] This Note takes the position that a new federal BIOTC statute with baseline, listed factors would add more uniformity to the disjointedly applied and defined BIOTC standard.[286] This Note urges that the below newly-proposed legislation, deemed 18 U.S.C. § 3524(j), be added in order to make the BIOTC standard effective, practical, and more than just a term of art.[287]

> 18 U.S.C. § 3524(j):
> 1. Legal Custody of Children
> (A) In any proceeding between parents in which the custody of a child is raised as an issue, the best interest of the child shall be the primary consideration.[288]
> (B) To determine which custody arrangement is in the best interests of the child, the court *must* consider all relevant factors, including, but not limited to[289]: (i) the wishes of the child as to their custodian[290]; (ii) the

284. 18 U.S.C. § 3524(d)(3) (2018) (emphasis added).

285. *See id.*; *see also supra* note 18 and accompanying text.

286. *See supra* note 243 and accompanying text. The language used in the model statute is based on this Note's findings in Part III. *See supra* Part III.A.1–5.

287. *See infra* text accompanying notes 288-97; *see also* Schepard, *supra* note 245 ("Essentially, the 'best interests' test is at best an aspirational statement; it is what society hopes the outcome of a child custody dispute will be rather than a proscription for a particular type of custody arrangement in a particular family.").

288. D.C. CODE ANN. § 16-914(a)(3) (West 2001); *see also supra* note 260 and accompanying text.

289. § 16-914(a)(3).

290. *Id.* § 16-914(a)(3)(A). Only a minority of states currently consider this factor. *See Determining the Best Interests of the Child*, *supra* note 12, at 4 ("Approximately 12 states and the

> wishes of the child's parent or parents as to the child's custody[291]; (iii) the history of domestic violence, if any[292]; (iv) the safety of the child[293]; (v) the fitness of the parents,[294] evaluated based on the totality of the circumstances[295]; and (vi) the mental and physical health of all individuals involved.[296]
>
> (C) "[T]he court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child."[297]

Provision (1)(A) of the newly proposed 18 U.S.C. § 3524(j) makes the BIOTC standard the *primary* consideration in any child legal custody proceeding, which clarifies the discrepancies between states in the prioritization afforded to the BIOTC.[298] Provision (j)(1)(B)'s establishment of baseline factors that the states would be required to consider while applying the BIOTC standard not only works to better define the BIOTC standard,[299] but also lessens the amount of discretion afforded to judges in the use and application of the standard.[300]

Provisions (j)(1)(B)(i) and (ii) allow judges to take into account how the child thinks or feels about the proceedings affecting them,[301] while still recognizing the fundamental rights of parents.[302] Provisions (j)(1)(B)(iii) and (iv) would require states to consider the likelihood of future abuse, domestic violence, or other safety concerns brought about by the child's placement with a prospective custodian.[303] Provision (j)(1)(B)(v) would require courts to consider the fitness of the parents

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District of Columbia require courts to consider the child's wishes when making a determination of best interests."). Such a factor is recognized internationally:

> Paragraph 1 [of Article 12 of the Convention on the Rights of the Child] assures, to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity. Paragraph 2 states, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her . . . . The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention.

U.N. Comm. on the Rights of the Child, 51st Sess. at 3, U.N. Doc. CRC/C/GC/12 (July 1, 2009).

291. § 16-914(a)(3)(B).
292. N.J. STAT. ANN. § 9:2-4(c) (West 2020).
293. *Id.*
294. *See id.*
295. Bressler v. Bressler, 996 N.Y.S.2d 160, 161 (App. Div. 2014).
296. Pettinato v. Pettinato, 582 A.2d 909, 913 (R.I. 1990).
297. ARIZ. REV. STAT. ANN. § 25-403(B) (2013).
298. *See supra* note 260 and accompanying text.
299. *See supra* note 250 and accompanying text.
300. *See supra* note 243 and accompanying text.
301. *See supra* text accompanying notes 289-90.
302. *See supra* text accompanying note 291.
303. *See supra* text accompanying notes 292-93.

without the need for a parental presumption.[304] Provision (j)(1)(B)(vi) allows judges to take into consideration the mental and physical health of anyone who may be involved in making a custody decision.[305]

Finally, provision (j)(1)(C) serves as a catch-all provision for BIOTC determinations.[306] Provision (j)(1)(C) properly considers the intricacies associated with family life by allowing for courts to consider *any* other factors that they deem relevant in making a BIOTC determination.[307] Provision (j)(1)(C) also forces courts to articulate the reason for making their BIOTC decision, something that state courts currently might not—and often do not—do.[308]

B. The Elimination of Presumptions Not Expressly in Favor of "Fit" Parents

Troxel provides that "fit" parents are presumed to act in their child's best interests.[309] However, numerous jurisdictions presume that *natural* parents are "fit" parents.[310] Child welfare data suggests that this is likely not the case, with high rates of domestic violence occurring across the United States.[311] Thus, this Note proposes as an additional solution to the BIOTC problem, the elimination of any state-employed presumptions that are not expressly in favor of "fit" parents.[312] The elimination of presumptions not expressly in favor of "fit" parents would

304. *See supra* text accompanying note 294. The model statute requires courts to utilize a "totality of the circumstances" approach to making fitness determinations, as this Note finds New York's "totality of the circumstances" approach to fitness determinations is most appropriate. *See supra* text accompanying note 295; *see also supra* Part III.A.2.

305. *See supra* text accompanying note 296.

306. *See supra* text accompanying note 297.

307. *See supra* text accompanying note 297.

308. *See supra* text accompanying note 297; *see also* Artis, *supra* note 156, at 775.

309. Troxel v. Granville, 530 U.S. 57, 58 (2000). The Court never defines what constitutes parental "fitness." *See id.*

310. *See Determining the Best Interests of the Child*, *supra* note 12, at 2 (identifying twenty-eight states and four United States territories that employ preferences in keeping the child with their natural parents).

311. *See* Sarah Catherine Williams, *State-Level Data for Understanding Child Welfare in the United States*, CHILD TRENDS (Oct. 28, 2020), https://www.childtrends.org/publications/state-level-data-for-understanding-child-welfare-in-the-united-states (showing that seventy-eight percent of child maltreatment perpetrators in the United States are the parent of the child). Maltreatment is defined as "[c]hild neglect and abuse." *Id.*

312. *See Child Welfare Outcomes 2016: Report to Congress*, CHILD.'S BUREAU (Sept. 9, 2019), https://www.acf.hhs.gov/cb/resource/cwo-2016 ("During 2016, approximately 672,000 children were confirmed to be victims of maltreatment. The overall national child victim rate was 9.1 child victims per 1,000 children in the population."); *see also* Williams, *supra* note 311 (showing that in 2019, there were 656,243 children found to be victims of maltreatment).

allow for greater uniformity in the application of the BIOTC standard[313] and would make the BIOTC standard more reflective of reality, as *natural* parents cannot always be presumed to be "fit."[314]

Natural parent presumptions are based on the goal of maintaining stability in the child's home life[315] and the idea that there is an inherent fondness between parent and child that should remain as undisturbed as possible.[316] However, even the Supreme Court has recognized that while parents have a fundamental right to rear their children,[317] such a right is not absolute.[318] Instead, the Court's precedent serves to remind state courts that "protecting the rights of natural parents is appropriate only when they have *undertaken their corollary parental responsibilities*."[319]

Therefore, *Troxel*, and the rest of the cases in *Troxel*'s lineage,[320] make clear that *only* "fit" parents can be presumed to act in their child's "best interests."[321] Any state-employed natural parent presumptions are thus not constitutionally required[322] and are certainly not statistically supported.[323] In other words, natural parent presumptions could be causing more harm than good.[324] To ensure that courts are truly honoring

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313. *See supra* Part III.A.1–5 (showing how five jurisdictions employ parental presumptions differently).

314. *See* Williams, *supra* note 311.

315. *See, e.g.*, N.J. STAT. ANN. § 9:2-4 (West 2020) (including a factor that evaluates the stability of the child's home environment).

316. Lauren Valastro, Comment, *Training Wheels Needed: Balancing the Parental Presumption, the Best Interest Standard, and the Need to Protect Children*, 44 TEX. TECH L. REV. 503, 506 (2012).

317. Troxel v. Granville, 530 U.S. 57, 63, 66 (2000).

318. Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1076 (1996).

319. *Id.* at 1077 (emphasis added).

320. 530 U.S. at 58; *see also supra* Part II.D (outlining the Court's parental fundamental rights jurisprudence).

321. Kaas, *supra* note 318, at 1077 ("These cases appear to establish the rule that the Constitution will protect all biological parent-child relationships as long as they also involve the exercise of responsibility and the existence of actual psychological ties.").

322. *Id.* at 1078 ("[F]or the Constitution to protect the rights of parents, biology alone is not enough.").

323. *See* Williams, *supra* note 311 (showing that Alaska, Arizona, California, D.C., Georgia, Hawaii, Idaho, Maine, Massachusetts, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Puerto Rico, Rhode Island, South Carolina, South Dakota, Washington, and Wyoming have higher parent maltreatment perpetrator percentages than the average percentage across the entire United States).

324. *See* Kaas, *supra* note 318, at 1083. Associate Professor Kaas argues that part of the problem is that:

> [A]lthough the State has the right to intervene in a family to protect a child, the child does not have a reciprocal right of a guarantee of safety and may not sue the State for failing to protect [him or] her. Children thus do not even have an absolute right to safety from abuse.

the child's "best interests," the existing state-employed natural parent presumptions should be universally eliminated.[325]

V. CONCLUSION

The BIOTC standard, as it exists in its many forms today, has provided judges with an incredible amount of discretion.[326] This is due to the lack of a clear definition for the standard.[327] With no clear federal statutory direction, the BIOTC standard shapeshifts from one state to the next.[328] The irony being that the BIOTC standard is not "standard" at all.[329]

Although the BIOTC standard was a welcome development from the gender-based custody presumptions and awards of the past,[330] the BIOTC standard, in its current state, remains purely a moniker.[331] The lack of consistency across jurisdictions applying the *same* legal standard warrants the enactment of a uniform, federal statute defining the standard.[332] When a single BIOTC determination could result in the termination of legal parenthood,[333] and thus the deprivation of a parent's fundamental right,[334] it serves both parents and children well to have a

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Id. at 1083-84.

325. *See* Valastro, *supra* note 316, at 511 ("The best interest standard has digressed from its original meaning of that which is wholly best for a child to a murky standard that relies less on what a court deems best for a child than on what the court believes is less offensive to the parents' child-rearing rights."). Natural parent presumptions are unnecessary when there exists a more clearly defined BIOTC standard that allows for a mechanism for weighing these competing interests. *Id.* ("This inconsistency arose from the unnecessary—and conflicting—merger of the best interest standard with the courts' desire to protect parents' child-rearing rights."). *But see* Kohm, *supra* note 22, at 374 ("A presumption-free environment is ultimately unrealistic. Every judge, by virtue of his or her humanity, has inherent biases and uses various presumptions, even if unconsciously, to make an initial award of custody, which will often be extremely difficult to change on appeal.").

326. *See* Kohm, *supra* note 22, at 339 ("The application of [the BIOTC] standard . . . has turned toward near pure judicial discretion in contemporary judging, causing litigators and advocates to have no rule of law to rely upon.").

327. *See supra* note 12 and accompanying text.

328. *See supra* Part III.A.1–5.

329. *Standard*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/standard (last visited Jan. 15, 2022) (defining standard as "*substantially* uniform . . . . ") (emphasis added).

330. *See supra* Part II.B.

331. Dolgin, *supra* note 12, at 7-8.

332. *See supra* Part III.A.1–5 (showing how the BIOTC standard is applied differently in five jurisdictions).

333. *See supra* Part II.C (describing how the BIOTC standard is used in child legal custody decisions).

334. *See supra* Part II.D (describing the jurisprudential development of parents' constitutionally protected right to rear their children).

more constructed legal standard guiding such an important judicial decision.[335]

To ameliorate the "best interests" issue, this Note proposes the enactment of a federal BIOTC statute with threshold factors for the state courts to consider while making child legal custody decisions.[336] The proposed statute offers a clear mechanism for evaluating the interests, concerns, and well-being of all parties involved in the decision.[337] In search of a more uniform application of the BIOTC standard, this Note also calls for the elimination of all state-employed parent presumptions that are not expressly in favor of "fit" parents.[338] As this Note demonstrates, it is wholly possible to conceive consistency in the face of all of the "best interests" chaos.[339] A uniform BIOTC standard is long overdue and the best possible solution will come by way of a uniform, federal standard.[340]

*Victoria L. Pepe**

335. *See supra* note 252 and accompanying text.

336. *See supra* Part IV.A.

337. *See supra* Part IV.A.

338. *See supra* Part IV.B.

339. *See generally supra* Part IV (illustrating a potential solution to the BIOTC problem).

340. Dolgin, *supra* note 12, at 6 ("Why . . . has this vague, often self-contradictory rule of law survived for almost two centuries?").

* J.D. Candidate, 2022, Maurice A. Deane School of Law at Hofstra University; B.A. English and Government & Politics, 2019, University of Maryland, College Park. I would like to thank my Notes Editor, Alexandra Piscitello, who provided me with the utmost support in my Note-writing endeavors. I would also like to thank Stacie Nadel, Rebecca Hood, Christopher Picciano, and the *Hofstra Law Review* Volume 50 Staff Members for their contributions toward the publication of this Note. A debt of gratitude is owed to my Faculty Advisor, Professor Kevin McElroy, for being a guiding force since my first semester of law school; thank you for helping me each step of the way. Thank you, as well, to my fellow Volume 50 Managing Editors, Nicole Donadio and Jason Egielski, for their diligence and dedication; I am so glad to have served alongside you both. Finally, I owe everything and more to my mother, Maria; my father, David; my brother, David, Jr.; my sister, Nicole; and my sister-in-law, Marisa for their constant support and love. Grazie mille. This Note is dedicated in loving memory to my grandfather, Phil Pepe, who encouraged me to become a writer, go to law school, or do both. I am sure that he would have been pleased to find out that by way of publication of this Note, I have done both.