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VISITATION RIGHTS IN ILLINOIS: THE UNILATERAL DENIAL OF VISITATION FOR A PARENT CONVICTED OF A SEX OFFENSE

INTRODUCTION

In 1977, the Illinois legislature enacted the Illinois Marriage and Dissolution of Marriage Act (IMDMA or Act).¹ This broad reform of the former statutory scheme codified, among other things, the standards and guidelines by which decisions would be made about the custody and welfare of a child whose parents were divorcing.² However, one unassuming subsection of the IMDMA may have potentially devastating effects. Subsection 607(e) of the Act mandates that a family court judge deny all visits between a child and a noncustodial parent who has been convicted of a sex crime against a minor, regardless of whether the victim of the crime is the child the parent seeks to visit.³ On November 20, 2013, the Illinois Supreme Court heard oral argument in a case challenging the constitutionality of subsection 607(e).⁴

In enacting subsection 607(e), the Illinois Legislature presumably sought to protect minor children from recidivism by a sex offender parent. However, the statutory scheme does not meaningfully balance a parent's right to contact with his child with the goal of protecting that child.⁵ The confusing subsections of section 607 make it difficult to determine the legislature's intent with respect to visitation.⁶ However, by unilaterally revoking a parent's visitation rights based solely on a criminal sex offense conviction, subsection 607(e) contradicts the larger purpose of section 607.⁷

1. Illinois Marriage and Dissolution of Marriage Act (IMDMA), Pub. Act No. 80-923, 1977 Ill. Laws 2675 (codified as amended at 750 ILL. COMP. STAT. 5/101-802 (2012)).

2. 750 ILL. COMP. STAT. 5/102(7).

3. *See id.* § 607(e).

4. *Roberta B. v. Donald B.*, No. 115463 (Ill. Jan. 29, 2013).

5. For the sake of clarity and uniformity I refer to the sex offender parent in the masculine form. This is not to suggest the law applies only to fathers or that fathers are more likely to be sex offenders; rather, this Comment seeks only to explore the legal implications of subsection 607(e), without regard to gender.

6. *See, e.g., In re Marriage of Chehaiber*, 917 N.E.2d 5, 8, 11 (Ill. App. Ct. 2009) (attempting to discern the legislative intent behind subsection 607(c) and finding the language of the Act ambiguous).

7. *See infra* notes 121-163 and accompanying text.

Far more troublesome is the Act's tension with the Fourteenth Amendment guarantees of both procedural and substantive due process. The Act, as it stands, threatens to unconstitutionally deprive a parent of a fundamental right.⁸ First, subsection 607(e) unilaterally revokes a parent's visitation rights without any hearing on the fitness of the parent or the potential risk of harm to the child,⁹ thereby violating procedural due process. Second, although the legislature has shown a compelling interest for depriving parents of a fundamental right, it has failed to narrowly tailor this law to serve that interest.¹⁰ As a result of these deficiencies, subsection 607(e) is an unconstitutional infringement on important parental interests.

This Comment analyzes the failings of section 607 as a whole and concludes that subsection 607(e) should be invalidated because it infringes on constitutionally protected interests. Part II discusses the evolution of custody and visitation standards employed by Illinois courts, and examines how visitation with a noncustodial parent affects a child's well-being.¹¹ Part II also discusses the evolution and goals of sex offender legislation and how it interacts with the due process protections of the Fourteenth Amendment.¹² Part III analyzes the statutory and constitutional arguments supporting invalidation of subsection 607(e).¹³ Part IV discusses the societal and legal implications of subsection 607(e) and proposes an alternative method for the Illinois legislature to further the goal of protecting children from recidivist sex offenders.¹⁴ Finally, Part V concludes that subsection 607(e) should be invalidated and redrawn in order to effectively protect children from the dangers presented by a sex offender parent, while ensuring that parents' constitutional rights—even those of sex offenders—are not impermissibly infringed upon.¹⁵

8. See *infra* notes 170–186 and accompanying text.

9. See 750 ILL. COMP. STAT. 5/607(e) (2012).

10. See *infra* notes 187–226 and accompanying text.

11. See *infra* notes 16–120 and accompanying text.

12. See *infra* notes 16–120 and accompanying text.

13. See *infra* notes 130–236 and accompanying text.

14. See *infra* notes 237–239 and accompanying text.

15. See *infra* Part V.

II. BACKGROUND

A. *Child Custody and Visitation Determinations in Illinois*

Since 1846, Illinois courts have considered the “best interests” of a child when determining custody and visitation arrangements.¹⁶ The interpretation of that standard has followed the general evolution of bases for custody determinations in the United States.¹⁷ Until the early twentieth century, gender dictated custody determinations and courts usually granted custody to fathers because children were considered property.¹⁸ A preference for maternal custody later emerged under the “tender years” doctrine, which was based upon the perception that women were more nurturing and better equipped than men to care for young children.¹⁹ In early cases, Illinois courts typically found that maternal custody best served the interests of children during their so-called tender years.²⁰ These early decisions placed substantial weight on the child’s moral upbringing.²¹ In this fault-based divorce system, a spouse who committed a marital indiscretion such as adultery or cruelty might lose custody of the children because of that indiscretion.²²

16. *Cowles v. Cowles*, 8 Ill. (3 Gilm.) 435, 440 (1846) (“[N]o certain rule can be laid down for the government of the court in all cases, except that the best interests of the child must be consulted.”).

17. See generally June Carbone, *Child Custody and the Best Interests of Children—A Review of From Father’s Property to Children’s Rights: The History of Child Custody in the United States*, 29 FAM. L.Q. 721 (1995) (book review).

18. Catherine R. Albiston et al., *Does Joint Legal Custody Matter?*, 2 STAN. L. & POL’Y REV. 167, 168 (1990).

19. Mark D. Matthews, Note, *Curing the “Every-Other-Weekend Syndrome”: Why Visitation Should Be Considered Separate and Apart from Custody*, 5 WM. & MARY J. WOMEN & L. 411, 424–25 (1999).

20. See, e.g., *Miner v. Miner*, 11 Ill. 43, 49–50 (1849) (“[A]n infant of tender years is generally left with the mother . . . merely because of [the father’s] inability to bestow upon it that tender care which nature requires, and which it is the peculiar province of a mother to supply.”); *Cowles*, 8 Ill. (3 Gilm.) at 440 (“[C]onsidering [a child’s] tender age, they stand in need of that kind assistance which can be afforded by none so well as a mother.”).

21. See, e.g., *Hewitt v. Long*, 76 Ill. 399, 403 (1875) (where a father sought custody of his fourteen-year-old daughter with whom he had very little contact her whole life, the court questioned: “[is it] just, [is it] in accordance with humane, equitable principles, to place this child’s welfare, physical and moral, in such jeopardy?”); *Smith v. Smith*, 155 Ill. App. 14, 17 (1910) (“We are clearly of opinion that to . . . commit [the child] to the custody of appellee, a confessed adulteress, the wife of her former paramour, and the mother of a child whose paternity is in doubt, would be a misfortune indeed. The influences surrounding the child, as a member of the family of appellee, would most probably tend to his moral undoing . . .”).

22. See *Tomasiewicz v. Tomasiewicz*, 229 Ill. App. 385, 391–92 (1923); Lynn D. Wardle, *Parental Infidelity and the “No-Harm” Rule in Custody Litigation*, 52 Cath. U. L. Rev. 81, 85–86 (2002).

Illinois custody decisions, like those in most other jurisdictions, began to evolve after World War II.²³ As gender equality became prevalent and as more women entered the workforce, the idea that women were best suited to have custody of their children faded;²⁴ instead, courts looked to the primary caretaker to determine the best custody and visitation arrangement.²⁵ The strict moral considerations that influenced the courts of the mid-1800s likewise fell out of favor; by 1952, the Illinois Supreme Court no longer considered a parent's adulterous behavior in custody proceedings.²⁶

The enactment of the IMDMA in 1977 provided courts with standards—which make no mention of gender or moral misconduct—to consider when making custody and visitation determinations.²⁷ Courts now consider a variety of factors including: the wishes of the parents, the wishes of the child, the interaction and relationship between the child and the parents, the child's adjustment to his home and community, the mental and physical health of all affected individuals, the possibility or occurrence of physical violence or abuse, and whether a parent is a sex offender.²⁸ The Act also provides a presumption “that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child.”²⁹

Illinois has a strong public policy interest in the preservation of parent-child relationships.³⁰ A healthy, close relationship between a parent and his child benefits both the child and the parent, as a “parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring.”³¹ These benefits serve important social functions; parental involvement in a child's upbringing helps shape the child into a socially responsible,

23. See Matthews, *supra* note 19, at 424–26.

24. *Id.* at 425.

25. *Id.*

26. See Nye v. Nye, 105 N.E.2d 300, 303–04 (Ill. 1952) (granting custody to an adulterous mother because “[o]ther than the alleged prior misconduct on the wife's part here, she is shown to be an affectionate, dutiful mother, giving proper care and guidance to her child”).

27. Illinois Marriage and Dissolution of Marriage Act (IMDMA), Pub. Act No. 80-922, § 602, 1977 Ill. Laws 2675, 2695 (codified as amended at 750 ILL. COMP. STAT. 5/602 (2012)).

28. 750 ILL. COMP. STAT. 5/602(a)(1)–(10).

29. *Id.* § 602(c).

30. See, e.g., Pleasant v. Pleasant (*In re Marriage of Pleasant*), 628 N.E.2d 633, 640 (Ill. App. Ct. 1993) (“There is a strong public policy to preserve the relationship between a parent and child.”); Frail v. Frail, 370 N.E.2d 303, 304 (Ill. App. Ct. 1977) (“[T]he sound public policy [of] this State encourages the maintenance of strong inter-family relationships . . .”).

31. Franz v. United States, 707 F.2d 582, 599 (D.C. Cir. 1983).

independent thinker³² who will reach maturity equipped to “preserve and promote our system of government and our way of life.”³³ Parental influence on children also “ensures the preservation of diversity and pluralism in our culture.”³⁴ In enacting section 607, the Illinois legislature intended to foster “a healthy and close relationship between parent and child”³⁵ by promoting liberal visitation between the child and the noncustodial parent.³⁶

Section 607 sets forth the considerations and standards of proof that govern visitation determinations for noncustodial parents, grandparents, stepparents, and siblings.³⁷ A noncustodial parent “is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger seriously the child’s physical, mental, moral or emotional health.”³⁸ To determine what constitutes reasonable visitation, courts must look to the best interests of the child.³⁹ A finding of endangerment “is an extraordinary [one] that is onerous, stringent, and rigorous. It is more stringent than the best interests standard.”⁴⁰ The trial court has broad discretion over determinations of visitation privileges⁴¹ and must take into account the impact that both parents have on their child’s upbringing.

32. See *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion) (“[The] affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens.”); see also *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (“The duty to prepare the child for ‘additional obligations,’ . . . must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship.”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“[T]hose who nurture [the child] and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”).

33. *Franz*, 707 F.2d at 598 (footnotes omitted).

34. *Id.*

35. *Griffiths v. Griffiths*, 468 N.E.2d 482, 484 (Ill. App. Ct. 1984); see also *In re Marriage of Eckert*, 518 N.E.2d 1041, 1045 (Ill. 1988) (“It is also in the best interests of a child to have a healthy and close relationship with both parents . . .”).

36. See, e.g., *In re Marriage of Diehl*, 582 N.E.2d 281, 294 (Ill. App. Ct. 1991) (“The courts of this State have been reluctant to deny visitation rights . . . because sound public policy encourages the maintenance of strong family relationships Therefore, liberal visitation is the rule; restricted visitation is the exception.” (quoting *In re Marriage of L.R.*, 559 N.E.2d 779, 789 (Ill. App. Ct. 1990) (internal quotation marks omitted))).

37. 750 ILL. COMP. STAT. 5/607 (2012).

38. *Id.* § 607(a).

39. *In re Marriage of Chehaiber*, 917 N.E.2d 5, 10 (Ill. App. Ct. 2009) (“Illinois courts have widely held that the test to determine whether visitation is ‘reasonable’ is whether the visitation is in the child’s best interests.”).

40. *Pleasant v. Pleasant (In re Marriage of Pleasant)*, 628 N.E.2d 633, 640 (Ill. App. Ct. 1993) (citations omitted).

41. *Frail v. Frail*, 370 N.E.2d 303, 304 (Ill. App. Ct. 1977).

B. A Child Needs Both Parents

Frequent and regular contact with the noncustodial parent is important to a child's development, well-being, and sense of self.⁴² Having access to both parents exposes a child to each parent's personalities, views, and emotional support.⁴³ Additionally, a regular and frequent visitation schedule with the noncustodial parent increases stability and predictability while also offsetting the turmoil in a child's life created by divorce.⁴⁴

For the child, having meaningful visitation with a noncustodial parent has a positive impact at all stages of development.⁴⁵ Children who do not have a close relationship and ongoing visitation with noncustodial parents tend to have lower levels of cognitive development,⁴⁶ while those with frequent visitation have higher cognitive development.⁴⁷ The social development of a child is also positively affected by visitation with the noncustodial parent.⁴⁸ Trust and self-esteem, both important foundations for developing social skills, "are maintained in the child by having predictable parents who care."⁴⁹ Through regular visitation, the noncustodial parent exposes the child to another world view, problem-solving techniques, and a source of emotional support.⁵⁰ Trying different approaches to life's challenges, modeling parental behaviors, and seeking advice from others develops problem-solving skills and mechanisms for dealing with complex emotions.⁵¹ Having contact with both parents exposes children to more parental behaviors and responses; in fact, the parents' divergent approaches may actually complement each other.⁵² This exposure gives children the ability to interact with the world and cope with the emotional troubles associated with divorce.⁵³

Despite the instability of a fractured family, contact with the noncustodial parent also gives a child a more complete sense of history

42. See Matthews, *supra* note 19, at 418.

43. See *id.* at 418-19; see also Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 909 (1984).

44. Matthews, *supra* note 19, at 418-19.

45. See Bartlett, *supra* note 43, at 909.

46. *Id.*

47. Matthews, *supra* note 19, at 418-19.

48. *Id.*

49. *Id.* at 419 (quoting WILLIAM F. HODGES, INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS, AND PSYCHOTHERAPY 151 (1986)).

50. *Id.* at 417-19.

51. *Id.* at 417-18.

52. *Id.* at 419.

53. See Matthews, *supra* note 19, at 419.

and self-identity because “[t]he child who is offered a more realistic sense of his parents and his past may achieve a continuity that allows him to establish his own identity.”⁵⁴ Divorce necessarily disrupts a child’s life and increases the likelihood of sadness and depression,⁵⁵ as well as feelings of guilt or responsibility.⁵⁶ Visitation helps alleviate these negative feelings because both parents are able to offer emotional support and reassurance.⁵⁷ Continued interaction with a non-custodial parent gives a child a meaningful basis for constructing her self-identity and ameliorates the negative emotional ramifications of divorce.⁵⁸

C. Legislative Treatment of Sex Offenders

Widespread media coverage of child sex crime cases raised public concern for child safety, prompting reactions from Congress and state legislatures.⁵⁹ Beginning in the early 1990s, the federal government enacted a series of restrictive laws regarding post-incarceration treatment of, and control over, sex offenders.⁶⁰ Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (Jacob Wetterling Act) in 1994,⁶¹ which sought to encourage states to establish sex offender registries by conditioning the continued receipt of 10% of a state’s Byrne Formula Grant Program criminal justice funds on the creation of a registry.⁶² The Jacob Wetterling Act required law enforcement departments to keep residential and employment information of sex offenders and mandated community notification of the presence and location of sex offenders.⁶³ Further, the Adam Walsh Child Protection and Safety Act of 2006 mandates that sex offender information be

54. Bartlett, *supra* note 43, at 906, 910.

55. *See id.* at 907.

56. Matthews, *supra* note 19, at 419.

57. *Id.*; *see also* Bartlett, *supra* note 43, at 907.

58. *See* Matthews, *supra* note 19, at 415.

59. *See generally* Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 17 (2008) (tracing congressional enactments regarding sex offender registration from the early 1990s to 2008).

60. *See id.* at 29.

61. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2000) (repealed 2009)).

62. *See* 42 U.S.C. §14071(e)(2) (1994) (repealed 2009); *see also* Wright, *supra* note 59, at 29. The Byrne Formula Grant Program is “the main general federal funding source for state criminal justice programs.” Wayne A. Logan, *Megan’s Laws as a Case Study in Political Stasis*, 61 *SYRACUSE L. REV.* 371, 377 (2011).

63. Wright, *supra* note 59, at 30.

made available in online databases.⁶⁴ As a result, every state has instituted sex offender registries and notification systems.⁶⁵

These legislative enactments reflected a common assumption that the rate of recidivism is higher for sex offenders than for non-sex offender criminals.⁶⁶ However, the data about recidivism rates for sex offenders are inconclusive,⁶⁷ and some statistics even suggest that the recidivism rate for sex offenders is significantly lower than for non-sex offenders.⁶⁸ A study of 17,000 Illinois sex offenders found that, five years after release, fewer than 50% had been re-arrested for any offense, fewer than 10% had been re-arrested for a sexual offense, and fewer than 6% had been re-arrested for the same sexual offense.⁶⁹ Still, the assumption that sex offenders have high rates of recidivism persists. That assumption has led many jurisdictions to enact laws that prohibit sex offenders from living or working near parks, schools, day-care centers, and public transportation stops.⁷⁰ The goal of these laws is to prevent sex offenders from interacting with children, thereby eliminating or reducing the risk of a sex offender re-offending.⁷¹

D. *The Fourteenth Amendment Guarantee of Procedural Due Process*

“It is procedure that spells much of the difference between rule by law and rule by whim or caprice.”⁷² The procedural due process guarantee of the Fourteenth Amendment is triggered when the government attempts to infringe upon life, liberty, or property interests without providing the injured party a meaningful opportunity to be

64. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 118, 120 Stat. 587, 596 (codified at 42 U.S.C. § 16918 (2006)); *see also* Wright, *supra* note 59, at 30.

65. Marissa Cegliean, Note, *Predators or Prey: Mandatory Listing of Non-Predatory Offenders on Predatory Offender Registries*, 12 J.L. & POL'Y 843, 843-44 (2004).

66. Wright, *supra* note 59, at 26.

67. *See id.* at 26; *see also* Sharon Brett, Article, “No Contact” Parole Restrictions: Unconstitutional and Counterproductive, 18 MICH. J. GENDER & L. 485, 490-92 (2012) (providing a brief overview of studies on recidivism rates).

68. *See* Katherine Godin, *The New Scarlet Letter: Are We Taking the Sex Offender Label Too Far?*, R.I. B.J., Nov.-Dec. 2011, at 17, 19 (discussing recent recidivism rates collected by the U.S. Department of Justice).

69. Wright, *supra* note 59, at 26 (citing Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Re-Arrest Patterns*, 17 CRIM. JUST. POL'Y REV. 83, 93-95 (2006)).

70. Wright, *supra* note 59, at 42; Chiraag Bains, Conversation, *Next-Generation Sex Offender Statutes: Constitutional Challenges to Residency, Work, and Loitering Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 483 (2007).

71. *See id.*; *see also* Brett, *supra* note 67, at 489.

72. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

heard *before* the deprivation of that interest.⁷³ The doctrine is generally not concerned with the process that is available to an individual *after* the interest has been infringed upon.⁷⁴ Modern procedural due process analysis consists of a two-part inquiry.⁷⁵ The initial determination is whether process is due.⁷⁶ If so, the court must then determine how much process is due to the injured party.⁷⁷ In the 1976 case *Mathews v. Eldridge*, the Supreme Court established a three-factor balancing test to answer the latter query.⁷⁸ The *Mathews* factors are (1) the private interest affected by government action; (2) the risk of erroneous deprivation of that interest (and the value of more or alternate process); and (3) the governmental interest, which includes the function, the administrative burden, and the financial burden that more or alternate process would require.⁷⁹

The Supreme Court has not defined the exact severity or nature of the private interest at stake, but the interest generally must either be of “brutal need”⁸⁰ or its deprivation would constitute a loss of an “interest [that] is one within the contemplation of the liberty or property language of the Fourteenth Amendment.”⁸¹ This factor is given greater weight when the loss is a monetary benefit or if the deprivation is detrimental to the health or livelihood of the citizen.⁸² The

73. See J. Michael McGuinness, *Procedural Due Process Rights of Public Employees: Basic Rules and a Rationale for a Return to Rule-Oriented Process*, 33 NEW ENG. L. REV. 931, 934–35 (1999); According to the Court in *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 281 (1990), “It cannot be disputed that the Due Process Clause protects an interest in life” However, procedural due process usually focuses on liberty and property interests. See, e.g., *Jago v. Van Curen*, 454 U.S. 14, 17 (1981) (noting that the private interest asserted must be “within the contemplation of the liberty or property language of the Fourteenth Amendment” (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (internal quotation marks omitted))).

74. The availability of post-infringement process may, in some rare instances, affect the procedural due process analysis. See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547–48 (1985) (“We conclude that all the process that is due is provided by a predetermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute.”).

75. See generally *Mathews v. Eldridge*, 424 U.S. 319 (1976).

76. See *id.* at 343.

77. See *id.* at 333–34. While complex and, obviously, outcome determinative, this Comment does not contemplate the initial query as to whether process is due. This Comment assumes a deprivation of a parent’s right to visitation is afforded due process.

78. See *id.* at 334–35; accord *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion) (applying the *Mathews* three-factor balancing test).

79. *Mathews*, 424 U.S. at 335.

80. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (quoting *Kelly v. Wyman*, 294 F. Supp. 893, 899–900 (1968)). This usually refers to a governmental benefit that the plaintiff requires for subsistence. See *id.* at 265.

81. See *Jago v. Van Curen*, 454 U.S. 14, 17 (1981) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (internal quotation marks omitted).

82. See, e.g., *Mathews*, 424 U.S. at 340–43 (discussing various considerations that add to or detract from the weight of the private interest, including the length of deprivation, the availabil-

Supreme Court has held that the degree of the deprivation must also be considered.⁸³ Parental rights receive special consideration in accordance with the “Court’s historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.”⁸⁴ This interest is particularly compelling when “a family unit has been broken or, at the very least, stressed almost to the breaking point.”⁸⁵ Because the weight of parental rights is so compelling, this factor tilts heavily in favor of the private party.⁸⁶

When assessing the risk of erroneous deprivation of a private interest, courts must consider what procedures the plaintiff has available to seek redress for the injury and the extent to which such procedures add to that risk.⁸⁷ Courts must also determine whether additional or substitute procedural safeguards will be of value.⁸⁸ If the government provides sufficient pre-infringement process, procedural due process is satisfied and the citizen is left with the available post-infringement legal avenues.⁸⁹ The basic requirements of procedural due process are notice and an opportunity to respond before the deprivation;⁹⁰ an extensive evidentiary hearing is not always required.⁹¹ Ultimately, any additional or alternate procedures must avoid an erroneous deprivation that is likely under the procedures already in place.⁹²

The third factor in the *Mathews* balancing test assesses the governmental interests and the burden placed on the government to adopt

ity of retroactive relief, and whether the deprivation will cause immediate, potentially irreversible harm).

83. *Id.* at 340–41 (finding that the private interest was the uninterrupted payment of disability benefits, which plaintiff could supplement with other benefits or employment); *cf. Goldberg*, 397 U.S. at 264 (“[T]he crucial factor in [the welfare] context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate.”).

84. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

85. Anthony Miller, *The Case for the Genetic Parent: Stanley, Quilloin, Caban, Lehr, and Michael H. Revisited*, 53 LOY. L. REV. 395, 412 (2007).

86. *Santosky*, 455 U.S. at 759.

87. *Mathews*, 424 U.S. at 343.

88. *Id.*

89. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547–48 (1985).

90. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (“The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.”).

91. *See Mathews*, 424 U.S. at 323–24, 349 (holding that an administrative review with no allowance for oral arguments provided sufficient process for terminating disability benefits).

92. *See, e.g., id.* at 343–45 (finding that an oral hearing would not add significant value when the governmental procedures already allowed for a “paper” hearing and the relevant evidence was purely documentary).

new or additional procedures.⁹³ This includes, for example, the “societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing.”⁹⁴ However, the public interest in conserving judicial resources and avoiding needless financial expense is not dispositive.⁹⁵ In some instances the government may put forth an interest in preserving the existing procedures that is not solely motivated by economics, such as a *parens patriae* interest.⁹⁶ In those instances, courts look to whether the existing procedures must remain unaltered in order to serve the noneconomic public interest.

The results from balancing the *Mathews* factors necessarily vary because of the fact-specific nature of the parties’ interests and the procedures available. Ultimately, “[t]he essence of [procedural] due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’”⁹⁷ Because of the amorphous nature of the factors, a fact-specific inquiry is required on a case-by-case basis to determine whether the procedural due process guarantee of the Fourteenth Amendment has been violated.

E. *The Fourteenth Amendment Guarantee of Substantive Due Process*

The doctrine of substantive due process has traveled a long and circuitous path.⁹⁸ Simply put, “[s]ubstantive due process asks the question of whether the government’s deprivation of a person’s life, liberty or property is justified by a sufficient purpose.”⁹⁹ Former Chief Justice Rehnquist summarized the doctrine as follows: “The Due Process Clause guarantees more than fair process, and the ‘liberty’ it protects includes more than the absence of physical restraint.

93. *Id.* at 347.

94. *Id.*

95. *Id.* at 348 (“Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some . . . decision.”).

96. See *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (stating that, in parental rights termination cases, a state has a *parens patriae* interest in providing for the welfare of the child); see also *Darryl H. v. Coler*, 585 F. Supp. 383, 390 (N.D. Ill. 1984) (“The State, in its role as *parens patriae*, is the ultimate protector of the rights of children, and may act to provide for their health, safety and welfare when the parents fail to do so.”), *aff’d in part, vacated in part*, 801 F.2d 893 (7th Cir. 1986).

97. *Mathews*, 424 U.S. at 348 (third alteration in original) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring)).

98. See generally Ronald A. Parsons, Jr. & Sheila S. Woodward, *The Heart of the Matter: Substantive Due Process in the South Dakota Courts*, 47 S.D. L. REV. 185, 186–99 (2002) (briefly recounting the evolution of the substantive due process doctrine from inception to present day).

99. Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).

The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests.”¹⁰⁰

To determine whether substantive due process has been violated, courts must determine whether the alleged unconstitutional infringement involves a fundamental right.¹⁰¹ If so, the Due Process Clause protects the right in question, and courts must subject the challenged action to strict scrutiny.¹⁰² For the infringement upon a fundamental right or interest to be constitutionally permissible under strict scrutiny, the asserted governmental interest must be compelling *and* the governmental action must be narrowly tailored to achieve that compelling interest.¹⁰³ This is an extraordinarily difficult standard for the government to meet.¹⁰⁴

The Supreme Court has identified the fundamental rights and interests enumerated in the Bill of Rights as protected by substantive due process.¹⁰⁵ The Court has also acknowledged that some fundamental rights are implicitly guaranteed constitutional protection.¹⁰⁶ The Supreme Court¹⁰⁷ has granted protection to unenumerated rights such as the rights to marry,¹⁰⁸ to have children,¹⁰⁹ to direct the education and upbringing of one’s own children,¹¹⁰ to marital privacy and the use of contraception,¹¹¹ to abortion,¹¹² and likely to the right to refuse life-sustaining medical treatment.¹¹³ However, this list is not exhaustive. As Justice McReynolds noted in *Meyer v. Nebraska*, liberty interests

100. *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (citations omitted).

101. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1315–16 (2007).

102. See *id.*

103. *Roe v. Wade*, 410 U.S. 113, 155 (1973) (“Where certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.” (citations omitted)).

104. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1452 (2d ed. 1988) (“[T]here are very few cases which strictly scrutinize and yet uphold instances of impaired fundamental rights.”).

105. *Glucksberg*, 521 U.S. at 720.

106. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–34 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

107. *Glucksberg*, 521 U.S. at 720 (collecting cases). The *Glucksberg* Court provided a list of implied fundamental rights that the Supreme Court had come to recognize by that point. This author has reproduced that list—as well as the cases cited therein—here for the reader’s convenience.

108. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

109. See *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

110. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); see also *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

111. See *Griswold*, 381 U.S. at 484–86.

112. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

113. See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 277–78 (1990).

as contemplated by the Fourteenth Amendment include rights to “acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [one’s] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”¹¹⁴

Strict scrutiny aims to evaluate the ends and the means of legislation: the government must put forth a compelling end, which may be permissibly realized only through narrowly tailored means.¹¹⁵ This compelling end may be viewed as the purpose behind the challenged law, and the state bears the burden of showing such an interest.¹¹⁶ The state must be attempting to achieve an important and valuable goal, rather than an arbitrary or unrelated one.¹¹⁷

However, it is the narrow tailoring of the governmental action that is more often the focus of substantive due process analysis because the means the government employs are more easily observable than the interest asserted.¹¹⁸ Thus, courts examine the nature of the act or the words of a statute to ensure governmental action prevents collateral harm that might arise.¹¹⁹ The government may well have a compelling interest, “but if rights are violated in order to accomplish the interest, then the law is not sufficiently narrowly drawn.”¹²⁰ When the government seeks to deprive an individual of a fundamental right or interest, yet fails to put forth a compelling state interest realized through narrow tailoring of the governmental action, that action will be found unconstitutional as a violation of the doctrine of substantive due process.

III. ANALYSIS

Subsection 607(e), designed to protect children from recidivist sex offender parents, not only constitutes an untenable inconsistency

114. *Meyer*, 262 U.S. at 399; accord *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (Justice Stewart quoting and reaffirming this description of liberty interests).

115. Andrew M. Schnitzel, *Balancing Police Action Against an Underdeveloped Fundamental Right: Is There a Right to Travel Freely on Public Fora?*, 114 PENN ST. L. REV. 667, 688 (2009).

116. *Id.*

117. See, e.g., *Moore v. City of E. Cleveland*, 431 U.S. 494, 499–500 (1977) (plurality opinion) (finding that the city’s asserted interests in controlling traffic, parking, and population density were only tenuously related to an ordinance that placed severe restrictions on non-nuclear family residing in the same home).

118. See Erich C. Straub & James E. Kachelski, *The Constitutionality of Wisconsin’s Sexual Predator Law*, WIS. LAW., July 1995, at 16 (“The debate has centered around whether a state law has been ‘narrowly drawn.’”).

119. *Id.*

120. *Id.*

when compared with the overall purpose of section 607, but also contemplates an impermissible infringement of constitutionally protected rights. The Fourteenth Amendment right to procedural due process is implicated because no family court hearing is provided for the deprivation of his liberty interest in having visitation with his child. This is the case even though an offending parent is granted a hearing for the deprivation of his liberty interest in being free from confinement in the criminal court. Substantive due process concerns arise because the statute denies a parent's fundamental right to visitation with his child in order to realize Illinois's compelling interest without the narrow tailoring strict scrutiny requires. Providing for a hearing on the deprivation of visitation would cure the faults of subsection 607(e).

A. Subsection 607(e) Is Irreconcilable with the Overall Purpose of Section 607

Section 607 is disorganized and confusing, incorporating a mish-mash of inconsistent standards and burdens of proof. Some of this disorder resulted from the need to redraft the grandparent-visitation provisions in the wake of *Troxel v. Granville*, in which the Supreme Court found a Washington grandparent-visitation statute unconstitutional.¹²¹ However, in winnowing the wheat from the chaff, it becomes apparent that subsection 607(e) fails to serve the underlying legislative purpose of section 607 because it implicitly strips the family court of its discretion to determine visitation arrangements. It is also evident that the whole of section 607 is ripe for revisitation by the legislature because it does not present a cohesive, sensible scheme for courts to use in making visitation determinations, regardless of the underlying factual circumstances in a given case.

As previously discussed, Illinois has a strong public policy interest in preserving and promoting the parent-child relationship.¹²² To achieve this important policy goal, section 607 sets forth various standards for courts to consider when making visitation decisions.¹²³ By providing different standards, the legislature indicated which circumstances require heightened care and consideration.¹²⁴ Essentially,

121. See *Troxel v. Granville*, 530 U.S. 57, 72-73 (2000) (plurality opinion) (finding the Washington state grandparent-visitation statute unconstitutional because it impermissibly infringed upon a parent's right to make child rearing decisions); see also *Flynn v. Henkel*, 880 N.E.2d 166, 169 (Ill. 2007) (noting that "[s]ection 607(a-5)(3) was added after [the Illinois Supreme Court] held the former grandparent visitation statute unconstitutional" in the wake of *Troxel* (citation omitted)).

122. See *supra* notes 30-36 and accompanying text.

123. See *In re Marriage of Chehaiber*, 917 N.E.2d 5, 9-11 (Ill. 2009).

124. See *In re Parentage of J.W.*, 990 N.E.2d 698, 706-09 (Ill. 2013).

these varying standards are value judgments that indicate the importance of granting, restricting, or denying visitation rights.¹²⁵ While the legislature has made these initial value judgments, they are left open-ended to provide courts with broad discretion to implement them so that fact-specific determinations reflecting the policy concerns will be made.¹²⁶

1. *The Labyrinthine Language of Subsections (a), (b), (c), and (h)*

Under section 607, five categories of people have a statutory right to petition for—or to seek modification of an order for—visitation with a child: (1) noncustodial parents;¹²⁷ (2) grandparents, great-grandparents, and siblings;¹²⁸ (3) stepparents;¹²⁹ (4) a “substitute” person who may exercise visitation on behalf of a deployed member of the United States Armed Forces;¹³⁰ and (5) members of the first three categories who have been convicted of first-degree murder of a child’s close relative or of committing a sex offense against a minor.¹³¹ Each category contains express language granting the trial court discretion to make visitation decisions and sets forth its own evidentiary standard¹³²—except that which governs sex offenders.¹³³

a. Noncustodial Parent Visitation: Subsections 607(a) and (c)

Subsection (a) provides standards for initially determining whether the noncustodial parent will be granted visitation rights. The parent is entitled to “reasonable visitation rights,”¹³⁴ which courts determine under a “best interests of the child” standard.¹³⁵ If, after a hearing, the court finds that visitation rights “would *endanger seriously* the child’s physical, mental, moral or emotional health,” then no visitation is allowed.¹³⁶ Subsection (c) generally tracks subsection (a) in providing the standards for the modification or restriction of rights under an existing order.¹³⁷ However, two important differences exist. First, subsection (c) *explicitly* states that the “best interest” standard is to be

125. *See id.* at 706–07.

126. *Id.* at 707–09.

127. *See* 750 ILL. COMP. STAT. 5/607(c) (2012).

128. *See id.* § 607(a-5)–(a-7).

129. *See id.* § 607(b).

130. *See id.* § 607(h).

131. *See id.* § 607(e)–(f).

132. *See infra* notes 135–154 and accompanying text.

133. *Compare* 750 ILL. COMP. STAT. 5/607(e), *with id.* § 607(a), (a-5)–(c), (f), (h).

134. *Id.* § 607(a).

135. *See, e.g., In re Marriage of Chehaiber*, 917 N.E.2d 5, 11 (Ill. 2009).

136. *See* 750 ILL. COMP. STAT. 5/607(a) (emphasis added).

137. *See In re Chehaiber*, 917 N.E.2d at 9.

used for modification, while subsection (a) has only been *interpreted* to require the best interest standard.¹³⁸ Second, subsection (c) does not expressly provide for a hearing, though it does require a finding of serious endangerment to the child in order to restrict visitation.¹³⁹

b. Grandparent, Great-Grandparent, and Sibling Visitation:
Subsections 607(a-5) and (a-7)

Subsection (a-5) provides grandparents, great-grandparents, and siblings with the right to file a petition for visitation,¹⁴⁰ and places the burden of proof on the petitioner to show that prohibiting visitation would be “harmful to the child’s mental, physical, or emotional health.”¹⁴¹ Subsection (a-7) suspends the right to file a motion to modify for two years after the entry of a grandparent-visitiation order unless, on the basis of affidavits, the current environment may “endanger seriously the child’s mental, physical, or emotional health.”¹⁴² This subsection further provides that a court “shall not modify” the visitation order unless, “by clear and convincing evidence,” the court finds it “necessary to protect the mental, physical, or emotional health of the child.”¹⁴³ If the court *does* modify the grandparent-visitiation order, it “shall state in its decision specific findings of fact in support of its modification.”¹⁴⁴ Finally, the parent “may always petition to modify visitation upon changed circumstances when necessary to promote the child’s best interest.”¹⁴⁵

It is unclear whether this final clause is intended to allow a parent to file a motion to modify grandparent visitation, parent visitation, or any type of visitation. Because this provision is in a subsection devoted to grandparent visitation, and because modification of parent visitation is otherwise provided for in the statute, it is likely that this provision covers only motions to modify grandparent-visitiation orders. This ambiguity is worth noting, however, as another instance of the lack of clarity in section 607.

138. Compare 750 ILL. COMP. STAT. 5/607(a) (providing for “reasonable visitation,” which has been interpreted by courts to trigger the best interests standard), with *id.* § 607(c) (allowing for modification “whenever modification would serve the best interest of the child”).

139. *Id.* § 607(c) (“[T]he court shall not restrict a parent’s visitation rights unless it finds that the visitation would endanger seriously the child’s physical, mental, moral or emotional health.”).

140. *Id.* § 607(a-5)(1).

141. *Id.* § 607(a-5)(3).

142. *Id.* § 607(a-7)(1).

143. 750 ILL. COMP. STAT. 5/607(a-7)(2).

144. *Id.*

145. *Id.*

Confusion about the “serious endangerment” standard also arises when interpreting subsection (a-5). What has happened to the concern for a child’s moral health set forth in subsections 607(a) and (c)? Is “harmful” the same as “endangered seriously”? Does the language of these subsections—“harmful” as used in subsection (a-5)(3) and “necessary to protect” as used in subsection (a-7)(2)—incorporate by reference the “endanger seriously” standard used in subsections 607(a) and (c)? It is also the *only* subsection that explicitly requires the court to include specific findings of fact in its order.

Compared to the other provisions, the grandparent-visitation provisions contain requirements that are much more straightforward, such as certain threshold circumstances that must exist before a grandparent may petition for visitation rights.¹⁴⁶ The legislature created “a rebuttable presumption that a fit parent’s actions and decisions regarding grandparent . . . visitation are not harmful” to the child.¹⁴⁷ Further, eleven factors are set forth for the family court to consider when making decisions about grandparent visitation, a useful guide that no other visitation provision contains.¹⁴⁸

c. Stepparent Visitation: Subsection 607(b)

Subsection (b) provides a stepparent with a right to reasonable visitation, subject to some conditions on the underlying circumstances.¹⁴⁹ Here, the court must determine that visitation is in the “best interests and welfare of the child.”¹⁵⁰ Thus, in addition to the confusion caused by reading the best interests standard into “reasonable visitation” in subsection (a), the legislature has added “welfare” to the best interest standard—but only for stepparent visitation.

d. Substitute Visitation: Subsection 607(h)

Visitation with a substitute person on behalf of a parent who is deployed with the United States Armed Forces may also be ordered.¹⁵¹ The court must determine that substitute visitation is in the child’s “best interest” to grant a motion for substitute visitation.¹⁵² Notably, the trial court retains the discretion to make the determination of whether and how the substitute visitation should be exer-

146. *See id.* § 607(a-5)(1).

147. *Id.* § (a-5)(3).

148. *Id.* § 607(a-5)(4).

149. *See* 750 ILL. COMP. STAT. 5/607(b)(1.5).

150. *Id.*

151. *Id.* § 607(h).

152. *Id.*

cised.¹⁵³ However, this subsection also demonstrates the inconsistency of each subsection's best interests standard.¹⁵⁴

e. What Does the Morass of Section 607 Indicate?

The muddle of undifferentiated standards, inconsistent details, and varying use of specific terms all indicate a statute that has been amended only when necessary, which created an unpredictable statutory scheme. For example, it would be absurd to believe that the failure to provide for the child's moral health as a consideration in the grandparent-visitation provisions is due to a legislative belief that grandparent visitation has no impact on a child's morality.¹⁵⁵ Instead, it indicates that because those provisions were redrawn recently,¹⁵⁶ a change in social norms and attitudes has rendered the explicit use of "moral health" unnecessary. Just as Illinois courts have moved away from using morality as a basis for custody determinations,¹⁵⁷ so too has the legislature moved away from using morality as a basis for visitation determinations. This is not to say that the legislature does not care about morality; rather, subjective moral considerations are no longer used in these types of determinations.¹⁵⁸

These inconsistent standards do not indicate carefully drawn legislative value judgments that weigh the importance of child visitation for each group. It would be nonsensical to argue that because section 607 includes standards to provide general direction for a court's exercise of broad discretion, the legislature intended the variances in language to create minor distinctions between the importance of visitation with noncustodial parents, grandparents, stepparents, and substitute persons. It is the grant of broad discretion to the trial court that promotes the underlying purposes of the statute. Rather, the varying

153. *See id.*

154. Notably, subsection 607(f)—which pertains to visitation sought by a party "convicted of first degree murder of the parent, grandparent, great-grandparent, or sibling of the child"—uses the "best interest" standard, as opposed to the "best interests" standard. *Id.* § 607(f). While this is an admittedly minor point that should not alter the interpretation of the standard, it does illuminate another inconsistency created by the legislature that further frustrates the interpretation of section 607.

155. This would be particularly absurd in light of the fact that the grandparent-visitation provisions constitute approximately half the length of section 607. While it was amended to cure its constitutional failings, it still provides for many specific concerns and sets forth a heightened standard (probably "serious endangerment") for restrictions, indicating the importance the legislature places on grandparent visitation. It is highly unlikely that the legislature does not care what impact grandparents have on a child's moral health.

156. *See Flynn v. Henkle*, 880 N.E.2d 166, 169 (Ill. 2007).

157. *See supra* notes 16–41 and accompanying text.

158. This furthers the policy behind promoting visitation by fostering a spectrum of morality free from judicial interference.

standards indicate the legislature's failure to draft an interrelated, cohesive visitation scheme. The grandparent-visitation provisions seem to have heightened standards¹⁵⁹ not because of inherent weight, but because the subsection was redrawn after the Supreme Court found a similar law to be unconstitutional in *Troxel*. In response, the legislature had to provide greater specificity so that the law would serve the same basic function, yet remain within constitutional constraints.¹⁶⁰ The specificity required to avoid the constitutional issues accounts for the standards in that subsection, not a legislative intent to inhere grandparent visitation with greater import.

2. Subsection 607(e)

Upon thorough analysis of the language of subsection 607(e), it becomes apparent this subsection does not effectively realize the legislative intent underlying Section 607. There is no room for judicial discretion in determining what, if any, visitation is best for a child whose parent has been convicted of a sex offense against a minor; without this determination by the family court, a child may suffer a denial of contact with a noncustodial parent who may be a positive and important influence. Subsection (e) provides, in its entirety:

No parent, not granted custody of the child, or grandparent, or great-grandparent, or stepparent, or sibling of any minor child, convicted of any offense involving an illegal sex act perpetrated upon a victim less than 18 years of age including but not limited to offenses for violations of Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 11-1.70, or Article 12 of the Criminal Code of 1961 or the Criminal Code of 2012, is entitled to visitation rights while incarcerated or while on parole, probation, conditional discharge, periodic imprisonment, or mandatory supervised release for that offense, and upon discharge from incarceration for a misdemeanor offense or upon discharge from parole, probation, conditional discharge, periodic imprisonment, or mandatory supervised release for a felony offense, visitation shall be denied until the person successfully completes a treatment program approved by the court.¹⁶¹

The plain language of this subsection strips the trial court judge of any discretion to determine whether visitation would be in the child's best

159. This Comment does not seek to discern whether the variance in language establishes different standards because it is irrelevant to the argument at hand. It is likely, though, that a court would find the language in the grandparent-visitation provisions to be equivalent to the serious endangerment standard, given the similarity in the language.

160. See generally Michael K. Goldberg, *The New, Narrower Illinois Grandparent Visitation Statute*, 92 ILL. B.J. 578 (2004).

161. 750 ILL. COMP. STAT. 5/607(e) (2012) (footnote omitted).

interests or whether the child would be seriously endangered by visitation with the parent. An evaluation of the statute as a whole, in conjunction with the history of the grandparent-visitation provisions, indicates that subsection 607(e) is inconsistent with the legislative intent underlying section 607. However, this inconsistency is very different from those already discussed. Though the rest of section 607 is confusing, every other provision grants broad judicial discretion to make visitation determinations, even in the case of a person convicted of first-degree murder of the child's parent.¹⁶² Conversely, subsection 607(e) eliminates *any* discretionary determination by the family court.¹⁶³

Furthermore, subsection 607(e) makes no express reference to the legislative intent to deny the family court discretion. Rather, it predicates the denial of visitation on a criminal sentence that is wholly unrelated to a parent's visitation rights.¹⁶⁴ Where every other subsection contains express language granting the family court discretion, an implied revocation of discretion for determining visitation with a sex offender parent is insufficient, especially in light of the seriousness of the parental rights and the state's purpose in granting such broad discretion in all other visitation matters.

This analysis reveals two important points. First, these inconsistencies indicate that subsection 607(e) is not narrowly tailored.¹⁶⁵ One need only look to the grandparent-visitation provisions to find an example of how subsection 607(e) could be tailored narrowly. Second, even though a court might construe subsection (e) to avoid finding it unconstitutional, the Illinois legislature should redraw subsection (e) to grant the family court discretion, thereby creating a more consistent visitation statute. It is illogical to allow a family court to make decisions based on a best interests standard for visitation with a murderer, but not for visitation with a parent who does not necessarily pose a threat to the child. Addressing this problem would be a step toward a more cohesive, logical, and consistent statutory scheme.

B. Applying Procedural Due Process to Subsection 607(e)

By revoking visitation rights based solely on criminal court proceedings, subsection 607(e) denies a parent the procedural due process guarantee of the Fourteenth Amendment because no hearing on the actual deprivation of the right is provided. When a government seeks

162. *See id.* § 607(f).

163. *See id.* § 607(e).

164. *See id.*

165. *See infra* notes 187–226 and accompanying text.

to deprive or deny a private right or interest in life, liberty, or property, courts must apply a balancing test to determine whether, and how much, process is due.¹⁶⁶ The factors to be balanced are: (1) the private interests at stake; (2) the risk of an erroneous deprivation of the private interests or rights and whether different or more process would alleviate the risk; and (3) both the governmental interest supporting the use of the procedure in place and the burden on the government of implementing more process.¹⁶⁷

1. *The Private Interest at Stake*

Parents “who have participated in their child’s upbringing do have a substantive fundamental right to a relationship with their child and a concomitant procedural right to establish their genetic and personal relationship with the child.”¹⁶⁸ While it is well settled that parents have a fundamental liberty interest in some sort of relationship with their child,¹⁶⁹ the weight of the interest is not necessarily the same for custodial and noncustodial parents.¹⁷⁰ Though the Supreme Court has not expressly ruled on the liberty interest in *visitation* rights, it appears as though the finality of terminating parental rights gives rise to a procedural due process claim.¹⁷¹ This requirement of finality is in tension with Justice Blackmun’s forceful language in *Santosky v. Kramer*:

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. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to de-

166. See *Mathews v. Eldridge*, 424 U.S. 319, 332–35 (1976).

167. *Id.* at 334–35.

168. Miller, *supra* note 85, at 399.

169. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

170. See Colleen McMahon, Note, *Due Process: Constitutional Rights and the Stigma of Sexual Abuse Allegations in Child Custody Proceedings*, 39 CATH. LAW. 153, 157 (1999).

171. See *Santosky v. Kramer*, 455 U.S. 745, 759 (1982) (“When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.”); see also *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (“[T]here can be no doubt, where, as here, the result of the judicial proceeding was permanently to deprive a legitimate parent of all that parenthood implies.”). This requirement of finality has gained some traction in the circuit courts, with a distinction being made between custodial and noncustodial rights. See, e.g., *Brittain v. Hansen*, 451 F.3d 982, 992 (9th Cir. 2006); *Terry v. Richardson*, 346 F.3d 781, 786 (7th Cir. 2003); *Franz v. United States*, 707 F.2d 582, 602 (D.C. Cir. 1983).

stroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.¹⁷²

While Justice Blackmun references the final action of dissolving all parental rights, his impassioned language emanates from the personal strife caused by the destruction of such a right, which is “essential to the orderly pursuit of happiness by free men.”¹⁷³

Even though temporary deprivations of interests generally do not carry significant weight in a procedural due process analysis, subsection 607(e)’s indefinite deprivation of a parent’s right to visitation is sufficiently serious that it should be given considerable weight. The denial of visitation is based on the conviction in the criminal court and the duration of the denial is dependent upon the criminal court sentencing.¹⁷⁴ Therefore, it cannot be said that this governmental action is only a minor, temporary deprivation of the private interest because it may continue for many years based on the terms of incarceration, parole, and probation set by the criminal court.¹⁷⁵ While a deprivation of a day or two of visitation would not qualify as grievous loss or irreparable harm,¹⁷⁶ a sustained deprivation of visitation must, at some point, tip the scales. One scholar argues that “[v]isitation provides the only means to enable a non-custodial parent to maintain a relationship with the child. In essence, denying visitation is tantamount to terminating the parental rights of the non-custodial parent.”¹⁷⁷ The termination of parental rights has repeatedly been given considerable weight in procedural due process cases.¹⁷⁸

2. *The Risk of Erroneous Deprivation and the Likelihood that Alternate Procedures Would Provide More Accurate Results*

Considering the legislative purpose of section 607 in giving the family court broad discretion when making visitation determinations, the risk of an erroneous deprivation of a parent’s liberty interest in having contact with his child is high because the law mandates a complete bar on contact. The broad discretion granted to the family trial court is

172. *Santosky*, 455 U.S. at 753–54.

173. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

174. See 750 ILL. COMP. STAT. 5/607(e) (2012).

175. See 730 ILL. COMP. STAT. 5/5-4.5-25 (2012).

176. *Terry v. Richardson*, 346 F.3d 781, 786 (7th Cir. 2003) (“Losing a single day of visitation differs in kind and duration from the deprivations cited by [plaintiff], which is significant because the gravity of his loss determines the process to which he is entitled.”).

177. Ayelet Blecher-Prigat, *Rethinking Visitation: From a Parental to a Relational Right*, 16 DUKE J. GENDER L. & POL’Y 1, 5 (2009).

178. See Miller, *supra* note 85, at 412–15 (discussing the major Supreme Court cases involving termination of parental rights and procedural due process).

proper; it helps ensure the legislative purpose is realized by allowing the court that is acquainted with the parties to balance the parental interests with the state's interest in ensuring the safety of children. Under the current statutory scheme, this delicate balance is eliminated and the criminal court is indirectly charged with determining the length of the cessation of visitation. The criminal court may not even know that this duty has been placed in its hands because there is no provision in the IMDMA that explicitly vests the criminal court with the responsibility. Subsection 607(e) also requires the parent to complete a rehabilitation program, which the family court (apparently) has the discretion to approve, but this is the final step in the process currently afforded to parents subject to subsection 607(e). The family court approval of a treatment program is not a review or appeal of the deprivation, and it will not correct any error made or cure any harm caused if the deprivation was improper.

This underscores the fact that there is no hearing whatsoever provided for the actual deprivation of the private interest at stake—the visitation rights. The criminal court conducts a hearing on the criminal charges, and then imposes a sentence and parole or probationary period based on the results of that hearing. The family court, after completion of the criminal sentence, may conduct a hearing regarding which treatment program it should approve, but the family court is not required to hold such a hearing. The statute does not expressly provide for a hearing on this issue.¹⁷⁹ Moreover, not once does the statute provide for a hearing on the revocation of the parent's visitation rights, the risk of harm to the child, or whether the purposes of section 607 are served by the denial of these rights.¹⁸⁰ Simply put, the current process afforded is no process at all. Without procedural safeguards, the risk of erroneous deprivation is extraordinarily high.

Alternate procedures would increase the accuracy of governmental action. A hearing in front of the family court alone would eliminate the procedural due process issues, and it need not be as arduous or costly as a criminal trial. A relatively short evidentiary hearing that gives the affected parent an opportunity to present evidence as to why his visitation rights should not be denied would suffice. A meaningful opportunity to be heard, whatever the form, is all that the Fourteenth Amendment requires.¹⁸¹ The trial court could then exercise its discre-

179. 750 ILL. COMP. STAT. 5/607(e).

180. *Id.*

181. *Cf.* McGuinness, *supra* note 73, at 934–35.

tion in determining whether the child is at a risk of harm and whether the parent ought to continue to have some form of visitation.¹⁸²

3. *The Governmental Burden of Providing More Process and the Interest in Maintaining the Status Quo*

The argument against requiring the government to afford more process is largely economic, but it is couched in the language of public policy. The legislature seemingly felt it appropriate to create a bright line presumption that any parent convicted of a sex offense against a minor presented a risk of harm to his own children. The current statutory scheme has the added benefit of judicial and legislative efficiency. Requiring Illinois to afford more process would necessarily entail the expenditure of judicial resources in order to hold hearings. The legislature would also have to redraw the statute, expending even more resources.

These policy justifications are unavailing. Affording more process would actually serve the government's interest in protecting children more effectively. The State of Illinois legitimately seeks to protect and provide for the best interests and safety of its children. However, important, far-reaching social concerns exist with respect to the harm that can be caused when a noncustodial parent is absent from a child's life.¹⁸³ It is possible that the majority of sex offender parents pose a risk of harm to their children and should not have visitation; but not every sex offender parent poses a risk of harm.¹⁸⁴ If a sex offender parent were given an opportunity to be heard, the family court might not find a risk of harm and the child would enjoy the many benefits of having both parents involved, thereby fulfilling the governmental interests in both safeguarding children and encouraging parent-child relationships.¹⁸⁵

Additionally, the financial burden associated with providing more process is not overly severe. Illinois should be required to assume the financial burden of providing an evidentiary hearing before the family court when restricting or denying a sex offender parent's visitation rights. As the statute stands, the family court judge will have to ex-

182. The trial court has the discretion to restrict or condition the visitation rights—there is no worry that providing this sort of hearing would automatically grant the sex offender parent the exact same, unregulated access to his children as a non-offending parent. See *infra* notes 27–41 and accompanying text.

183. See *supra* notes 42–58 and accompanying text.

184. See Sharon Brett, *supra* note 67, at 490–92 (discussing studies and findings on sex offender recidivism).

185. Cf. *Stanley v. Illinois*, 405 U.S. 645, 654–55 (1972) (finding that unmarried fathers were entitled to a hearing on fitness before losing custody).

pend resources to enter the order unilaterally denying the parent's visitation rights. There would be little additional cost to provide a brief evidentiary hearing, which would allow the parent to present evidence that visitation presents no risk of harm to the child. The statute does not require the state to get involved in the case beyond providing for this hearing, because it is a civil matter to be litigated by the private parties. If the state were to choose to intervene on behalf of the child, the expense to do so would also likely be minimal because a criminal case has already resulted in a conviction. The same evidence would then be used to show that visitation between the parent and child would pose a risk of harm to the child. Admittedly, the economic burden on the government will end up increasing to a degree. However, as Justice White observed, "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 . . . it needlessly risks running roughshod over the important interests of both parents and child. It therefore cannot stand."¹⁸⁶

C. *The Fourteenth Amendment Guarantee of Substantive Due Process*

Section 607(e) denies parents the substantive due process guarantee of the Fourteenth Amendment because the law is not the least restrictive means of protecting children from recidivist sex offenders. This Comment suggests that rights of both the noncustodial sex offender parent and the custodial parent are fundamental rights. If fundamental rights are involved, the governmental action must be subjected to strict scrutiny review when challenged.¹⁸⁷ Few people would contest that the state has put forth a compelling interest in protecting minor children from the possible danger of visitation with a sex offender parent who may re-offend.¹⁸⁸ However, subsection 607(e) is not narrowly

186. *Id.* at 656–57.

187. *See, e.g., Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (noting that when a state seeks to infringe upon a fundamental right "the infringement [must be] narrowly tailored to serve a compelling state interest").

188. Courts have recognized that a state's interest in protecting children is "extraordinarily weighty" and it seems that there exists no reasonable argument that protecting children from recidivist sex offenders is not a compelling interest. *See, e.g., Darryl H. v. Coler*, 801 F.2d 893, 902 (7th Cir. 1986) ("The state has an obligation to prevent loss of life and serious injury to those members of the community to whom it has a very special responsibility, the young. As the Supreme Court remarked in *Wyman v. James*, 'There is no more worthy object of the public's concern.'" (citation omitted)).

tailored to eliminate collateral harm from the state's efforts to protect children.

I. A Noncustodial Parent's Visitation Rights—Fundamental or Not?

The Supreme Court has not had occasion to decide whether a parent's visitation rights are constitutionally protected.¹⁸⁹ However, constitutional law scholars and, more importantly, Supreme Court precedent suggest a finding that a noncustodial parent has a fundamental right to visitation with his child.¹⁹⁰ In one of the earliest substantive due process cases addressing parental rights, the Court observed, "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."¹⁹¹ For ninety years, the Court has recognized the importance of the parent's role in shaping and influencing a child's moral, emotional, and educational well-being.¹⁹² Visitation with a noncustodial parent deeply impacts a child and prepares the child to become a responsible, functional citizen capable of contributing to the social fabric of the community.¹⁹³

The Court's family law precedent articulates a number of factors that influence decisions regarding family life. These factors include the individual and societal benefits of parental involvement in children's lives,¹⁹⁴ the degree of parental involvement,¹⁹⁵ and the type and length of the deprivation of visitation or custody.¹⁹⁶ When a noncustodial parent has been actively involved in the child's life and upbringing, visitation rights are deemed more important.¹⁹⁷

189. See Blecher-Prigat, *supra* note 177, at 5.

190. See, e.g., Miller, *supra* note 85, at 399 ("The *Stanley-Lehr* line of [Supreme Court] cases is very important because it establishes that genetic parents (in this case unwed fathers) who have participated in their child's upbringing do have a substantive fundamental right to a relationship with their child . . ."); Steven L. Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121, 124-39.

191. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

192. Compare *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (noting that the due process notion of liberty includes "the right of the individual to . . . establish a home and bring up children"), with *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) (recognizing the "fundamental right of parents to make decisions concerning the care, custody, and control of their children").

193. See *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion); see also *supra* notes 42-58 and accompanying text.

194. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion); *Pierce*, 268 U.S. at 535.

195. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

196. See, e.g., *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 27 (1981).

197. See *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); see also *Lehr*, 463 U.S. at 261.

Though courts are hesitant to recognize previously unidentified fundamental rights,¹⁹⁸ the nature and length of the deprivation of visitation may implicate a fundamental right. Indeed, several courts have found that brief deprivations of a few days or hours are insufficient to require substantive due process protection.¹⁹⁹ These considerations point to some sort of fundamental interest in visitation for the noncustodial parent.²⁰⁰

Subsection 607(e) fails to contemplate any of these concerns and operates in precisely the opposite manner as the state action involved in the few decisions that have discussed substantive due process and visitation. In those cases, plaintiffs sought damages in § 1983 tort actions against police officers who intervened in disputes over visitation schedules²⁰¹—an unlikely situation for a court to declare a “new” fundamental right.²⁰² Moreover, the plaintiffs sought relief for past deprivations,²⁰³ not for prospective deprivations of the sort contemplated by subsection 607(e). Subsection 607(e) creates a bar to future visitation that will last for the entirety of any probation or parole sentence, as opposed to a discrete, past denial of visitation for only a few hours or days. While the denial of visitation rights may seem unimportant because the noncustodial parent is entitled to less time with the minor child than the custodial parent, visitation is the only means by which the noncustodial parent can reasonably sustain a meaningful connection with that child.²⁰⁴ Thus, as previously discussed, a denial of that visitation essentially “terminat[es] the parental rights of the noncustodial parent.”²⁰⁵ The length and nature of the deprivation both tend

198. See Howard J. Vogel, *The “Ordered Liberty” of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1495–99 (2007).

199. See, e.g., *Brittain v. Hansen*, 451 F.3d 982, 996 (9th Cir. 2006); *Zakrzewski v. Fox*, 87 F.3d 1011, 1014 (8th Cir. 1996); *Wise v. Bravo*, 666 F.2d 1328, 1332–33 (10th Cir. 1981).

200. Though the Court’s holding in *Michael H. v. Gerald D.* might seem to suggest that an unwed father does not enjoy a fundamental right to establish his paternity and consequently be granted visitation rights, that splintered decision actually supports an argument for constitutional protection. *Michael H. v. Gerald D.*, 491 U.S. 110, 136 (1989) (Brennan, J., dissenting) (“Five Members of the Court refuse to foreclose ‘the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child’s conception and birth.’” (quoting *id.* at 133 (Stevens, J., concurring))); see also, *Miller*, *supra* note 85, at 399.

201. See *Brittain*, 451 F.3d at 992–95; see also *Zakrzewski*, 87 F.3d at 1013–14; *Wise*, 666 F.2d at 1333.

202. A plaintiff who is asserting a tort action against the government is simply not a very sympathetic plaintiff, thus hindering a chance at identifying a fundamental right.

203. See *Brittain*, 451 F.3d at 994–95; see also *Zakrzewski*, 87 F.3d at 1014; *Wise*, 666 F.2d at 1333.

204. Blecher-Prigat, *supra* note 177, at 5.

205. *Id.*

to suggest that this denial of visitation may well rise to a level that demands constitutional protection.

2. *The Custodial Parent's Fundamental Right with Respect to Visitation*

Subsection 607(e) also proscribes the custodial parent from consenting to visitation,²⁰⁶ thereby denying the parent “the fundamental right . . . to make decisions concerning the care, custody, and control of their children.”²⁰⁷ The Supreme Court has found that a fit parent’s determinations with respect to grandparent visitation should be afforded deference by courts.²⁰⁸ In *Troxel v. Granville*, the state law’s broad language did not require the family court to give any consideration to the fit parent’s decisions about the visitation.²⁰⁹ In particular, the Court took issue with the clause that allowed “any person” to file for visitation and further allowed the family court to grant the visitation request so long as it was in the child’s best interests.²¹⁰ The law lacked narrower language requiring some degree of deference to the parent’s decisions regarding visitation.

Similarly, subsection 607(e) does not require, let alone allow, the family court to take into account the (presumably fit) custodial parent’s opinion about visitation between the child and noncustodial parent.²¹¹ Theoretically, a custodial parent may not only consent to supervised visitation, but also encourage it. For example, if the noncustodial sex offender parent were convicted of statutory rape of the custodial parent, the custodial parent might encourage visitation.²¹² This scenario demonstrates the possibility of an unconstitutional infringement of a custodial parent’s fundamental right to “make decisions concerning the care, custody, and control of their children.”²¹³

206. See 750 ILL. COMP. STAT. 5/607(e) (2012).

207. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion).

208. See *id.* at 66–67.

209. *Id.* at 67.

210. *Id.*

211. 750 ILL. COMP. STAT. 5/607(e).

212. The age of consent in Illinois is seventeen. 720 ILL. COMP. STAT. 5/11-9.1(b) (2012). Under subsection 607(e), it is possible that a nineteen-year-old could be convicted of rape after engaging in consensual sex with a sixteen-year-old and be precluded from visitation with the resulting child for the duration of the imprisonment or probationary sentence.

213. *Troxel*, 530 U.S. at 66 (plurality opinion).

3. *Narrowly Tailored Means of Effectuating a Compelling State Interest*

Narrow tailoring can be achieved in many ways and is necessarily fact-specific. If a statute that seeks to deny fundamental rights is drawn in a manner that eliminates collateral harm, the law may stand.²¹⁴ But where such a statute is overbroad, it does not sufficiently protect constitutional rights and cannot remain on the books.²¹⁵ Subsection 607(e) is an example of a “breathhtakingly broad” statute.²¹⁶ The broad language concerning the crimes underlying the sex offense convictions and the treatment-program requirement alone forecloses arguments in favor of finding the statute narrowly drawn.²¹⁷ However, subsection 607(e) could arguably be seen as the least restrictive means to realize the compelling interest because (1) the denial is predicated on a criminal conviction, so the danger a parent presents has been proved beyond a reasonable doubt; and (2) the statute applies only to noncustodial parents and only to sex offenses perpetrated against minors.

Courts have held that a state may put forth a compelling interest in protecting children only when there is an actual, articulable danger posed to children.²¹⁸ A general fear of abuse is not enough to support infringement upon a parent’s rights to visitation. Here, subsection 607(e) assumes that visitation places the child in danger of sexual abuse, even if the child was not the victim of the sex offense for which the noncustodial parent was convicted. It may be argued that a criminal conviction, because it is subject to proof beyond a reasonable doubt, is sufficient to give rise to an articulable danger to the child.

However, this argument fundamentally misunderstands the role of family courts in visitation determinations. The burden of proof in a criminal court is entirely irrelevant. The right being infringed—either the noncustodial parent’s right to visitation or the custodial parent’s right to consent to visitation—is not at issue in the criminal court.

214. *See, e.g.*, *Moore v. City of E. Cleveland*, 431 U.S. 494, 499–500 (1977) (plurality opinion).

215. *Id.*

216. *Troxel*, 530 U.S. at 67 (plurality opinion).

217. *Cf. id.*

218. *See, e.g.*, *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 486 (7th Cir. 2011) (“It does not suffice for the official to have probable cause merely to believe that the child was abused or neglected, or is in a general danger of future abuse or neglect.”); *Berman v. Young*, 291 F.3d 976, 983–84 (7th Cir. 2002) (“The family’s due process interests must be balanced against the government’s interest in protecting children from abuse when it has ‘some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.’” (quoting *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1019 (7th Cir. 2000))).

Therefore, when the criminal conviction operates to automatically deny these rights, *that denial* is not subject to any burden of proof whatsoever.²¹⁹ The family court should make the visitation determination, regardless of the burden of proof in the criminal case, because the legislature has given the family court broad discretion in the vast majority of custody and visitation proceedings.²²⁰ This discretion would enable the family court to determine whether visitation is appropriate, and would allow any actual, articulable dangers of visitation with a sex offender parent to come to light. A determination in the family court would fully consider the denial of a fundamental right, thereby reducing or eliminating collateral harm to noncustodial parents who do not pose an actual threat.

The limitation of applicability to only *noncustodial* parents who have been convicted of a sex offense against a *minor* may lend support to an argument that subsection 607(e) is narrowly drawn. Arguably, these requirements narrow the application of the law to a smaller set of people than the law could have otherwise addressed. For example, the legislature could have written the subsection to include both the custodial and the noncustodial parent. The law could also have included a sex offense perpetrated against any victim, not just a minor victim, or any criminal conviction at all. In this sense, the language of subsection 607(e) does narrow its applicability.

However, this is not sufficiently narrow to survive strict scrutiny. The language of subsection 607(e) invites a broad reading; it does not limit its applicability to discrete portions of the Criminal Code. Subsection 607(e) states that the family court must deny visitation to any

parent, not granted custody of the child . . . convicted of *any offense* involving an illegal sex act perpetrated upon a victim less than 18 years of age *including but not limited to* offenses for violations of Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 11-1.70, or Article 12 of the Criminal Code of 1961 or the Criminal Code of 2012.²²¹

This broad language implicates “*any offense*” under the named sections and articles committed against a person under the age of eigh-

219. If the parent were convicted of a sexual crime against the child he is seeking visitation with, then this section of the statute would possibly be constitutional with respect to his rights. However, there are instances in which this section, as applied, would still unconstitutionally infringe on parental rights. If the statute were to create a rebuttable presumption of endangerment predicated on the conviction, this potentiality could be dealt with in a family court hearing.

220. See *supra* notes 135–162 and accompanying text.

221. 750 ILL. COMP. STAT. 5/607(e) (2012) (emphasis added). A “sex offense” is defined as any offense within Article 11 of the Criminal Code, which defines a child as any person under seventeen years of age. 720 ILL. COMP. STAT. 5/11-9.1(b) (2012).

teen.²²² It is precisely this sort of language that led the Supreme Court to find the statute in *Troxel* a “breathtakingly broad” law that denied a custodial parent’s fundamental right to make decisions about visitation.²²³ Moreover, subsection 607(e) specifies that violations of certain provisions in Article 11 of the Illinois Criminal Code will subject a parent to a denial of visitation. While this alone is not necessarily problematic, it ignores many provisions from Article 11 that put children at risk, such as promoting juvenile prostitution.²²⁴ Though subsection 607(e) indicates convictions are not limited to those specifically laid out, thereby allowing a court to predicate denial of visitation on a conviction for promoting juvenile prostitution, this language brings in the entire universe of possible convictions with vague limiting language.

Additionally, the subsection’s applicability to noncustodial parents is not sufficiently narrow because it presents an illogical reading of the statutory scheme that does not ultimately serve the state’s interest. When the family court makes a custody determination, a parent’s status as a sex offender is already considered.²²⁵ It is nonsensical to argue that it is acceptable for the court to determine, under a best interests of the child standard, that a sex offender parent may retain primary physical custody of a child but that a noncustodial sex offender parent may not have any visitation. Moreover, this reading does not meaningfully serve the state interest set forth. If a state seeks to protect children from recidivist sex offenders, then preventing a noncustodial parent from having visitation only marginally serves that goal because it only protects that particular child from that particular parent.²²⁶ This section of the statute only protects children from one single person—one who has not even been conclusively found to present a danger to that child.

Subsection 607(e)’s limitations are simply not the least restrictive means to achieve the legislature’s goal. Providing a hearing for the noncustodial parent is one obvious way by which collateral harm can be reduced. In an evidentiary hearing, the family court can determine

222. See 750 ILL. COMP. STAT. 5/607(e).

223. See *Troxel v. Granville*, 530 U.S. 57, 67 (2000) (plurality opinion) (“The Washington nonparental visitation statute is breathtakingly broad. According to the statute’s text ‘[a]ny person may petition the court for visitation rights at any time’ and the court may grant such visitation rights” (alteration in original)).

224. 720 Ill. Comp. Stat. 5/11-14.4 (2012). Indeed, all of Article 11 is devoted to sex offenses, see *id.* § 11-0.1 to 11-45, and it would make far more sense for the “any offense” language in subsection 607(e) to refer to Article 11 generally and Article 12 specifically, since Article 12 is devoted to the more general “bodily harm.” See *id.* §12-0.1 to 12-38.

225. 750 ILL. COMP. STAT. 5/602(a)(9).

226. Cf. *Moore v. City of E. Cleveland*, 431 U.S. 494, 499–500 (1977) (plurality opinion).

whether a true risk of harm exists and can avoid denying both parents' fundamental rights while still realizing the state's interest in protecting children from actual, articulable harm. A provision allowing the family court to order supervised visitation would also avoid overly restricting parental rights while still achieving the goal of protecting children. Additionally, the legislature could detail, with far greater specificity, which criminal offenses trigger a denial of visitation rights. Because subsection 607(e) infringes on the fundamental rights of custodial and noncustodial parents and is not narrowly tailored to achieve a compelling state interest, it fails strict scrutiny and is unconstitutional.

IV. IMPACT

Subsection 607(e) has a very limited application and has not yet been interpreted by the Illinois Supreme Court; however, the potential impact is severe. On its face, denying a sex offender visitation with his children when that deprivation is couched in language about protecting children may seem insignificant. However, a child's cognitive and social development depends on contact with her parents.²²⁷ It is troubling to have a law on the books that can seriously disrupt a child's development by taking away a parent's right to visitation, even if that parent is reviled by society but poses no threat to his child.

While subsection 607(e) is an impermissible infringement on constitutionally protected rights, it does not mean that the legislature cannot enact a law with respect to sex offender parent visitation rights. Provided that the legislature considers the constitutional concerns when redrafting subsection 607(e), as it did with the grandparent visitation provisions, the state can effectively and permissibly regulate visitation rights. A wise starting point would be to separate visitation with a sex offender *parent* from the provisions for visitation with sex offender grandparents, great-grandparents, stepparents, and siblings, as the constitutional implications are very different for the latter categories of relatives based on the closeness of the familial relationship. This Comment recommends a modified version of subsection 607(e) with four main sections: (1) a definitional section; (2) a section that provides for a rebuttable presumption against visitation; (3) a section that provides for adequate due process protections; and (4) a section with guidelines for shaping relief.

First, a definitional section is necessary to clearly identify the conditions that trigger application of the law. The definitional section

227. See *Mathews*, *supra* note 19, at 413–19.

should relate only to parents convicted of a crime involving an illegal sex act perpetrated on a minor victim.²²⁸ Singling out parents and identifying applicable criminal conduct sets the stage for narrowly tailored regulation, as it recognizes a parent's unique fundamental interests in contact with his child. After the definitional section, the following provisions would cure the remainder of the constitutional issues with subsection 607(e):

(2) A parent who fits the description in 5/607(e)(1) [the definitional provision] shall be presumed to present a risk of harm to the child and visitation with such a parent shall be presumed to endanger seriously the child's physical, mental, moral, or emotional health.

(3) Upon such a parent's motion, the court shall hold an evidentiary hearing during which such a parent may present evidence to rebut the presumption in 5/607(2). During the evidentiary hearing, the custodial parent and the state shall have an opportunity to present relevant evidence.

(4) Should the court find, on the basis of clear and convincing evidence, that such a parent as defined in 5/607(e)(1) does not present a risk of serious endangerment to the child, and the court determines, after considering all relevant factors, including but not limited to those set forth in Section 602(a), that visitation would be in the child's best interests, the court shall state in its decision specific findings of fact in support of its order allowing for visitation. The court may order reasonable alternative visitation arrangements including, but not limited to, supervised visitation with the minor child at the residence of another person or at a local public or private facility, or visitation to be facilitated through electronic communication or other means during which the child is not in the parent's actual physical custody.²²⁹

Proposed subsection 5/607(e)(2) provides for a rebuttable presumption that visitation with a sex offender would "endanger seriously" the child. This rebuttable presumption serves two purposes. First, it allocates the burden of proof to the offending parent, thereby realizing the legislative goal of protecting children from sexual abuse by making visitation between a sex offender parent and his child the excep-

228. The Illinois Criminal Code draws a number of lines with respect to the age of the victim and the relationship between the victim and the perpetrator. *See, e.g.*, 720 ILL. COMP. STAT. 5/11-1.20 to 5/11-1.70. A thorough statutory analysis of all of Article 11 of the Criminal Code would be necessary in order to propose an adequate definitional section—an endeavor beyond the scope of this Comment. Because of this vast undertaking, this Comment will assume that it is possible to draft an adequate definitional section that narrows applicability to parents convicted of sex offenses against minors.

229. Portions of the language in this proposed revision are drawn from other visitation provisions in section 607. *See* 750 ILL. COMP. STAT. 5/607(a), (a)(2), (a-7)(2), (c), and (f).

tion rather than the rule. Second, a rebuttable presumption provides an opportunity for the sex offender parent to demonstrate that visitation poses no risk of harm to the child.

The third section, which cures the procedural due process deficiencies, provides any parent subject to the subsection the right to a hearing at which he may offer evidence to show that visitation would be appropriate under the standard the legislature set forth. This provision also allows the custodial parent an opportunity to present evidence relevant to his or her position on whether the noncustodial parent should have visitation, and further allows the state to present evidence relevant to its interest in protecting children from harm. Finally, the fourth section provides standards for the court to employ in deciding whether to grant visitation, and guidelines indicating appropriate means to shape visitation, such as supervised visits or contact limited to mail, telephone, or the Internet. The statute redrafted in this manner would cure the constitutional ills of the current statutory scheme.

V. CONCLUSION

The legislature has a compelling interest in protecting children from recidivist sex offenders and should enact laws that will achieve that goal. However, the legislature has a concurrent interest in preserving and promoting parent-child relationships. The state must refrain from taking action that infringes on parents' fundamental right to control the care and upbringing of their children. Subsection 607(e), as it stands, focuses solely on the goal of protecting children without due regard for these parental rights.

Subsection 607(e) is inconsistent with the general purpose of section 607 because it does not allow the family court any discretion to determine whether a child faces an actual risk of harm. This cannot be reconciled with section 607's general purpose of granting broad discretion to a family court with greater knowledge of the family's circumstances, which allows for the protection and promotion of a parent's involvement in his child's life. Further, the statute violates procedural and substantive due process guarantees by denying a fundamental right through a law that is not narrowly drawn and does not provide for a hearing. The legislature must take steps to both ensure the safety of children and protect parental rights, even if the parent is a sex offender. Accordingly, this statute should be redrawn. A replacement statute that takes both of these important considerations into account will serve to protect Illinois's children and avoid unconstitu-

tional infringement on the fundamental right of parents to direct the care, custody, and control of their children.

*Sydney M. Hutt**

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