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Two to Tango, One in Limbo: A Comparative Analysis of Fathers' Rights in Infant Adoptions

*Margaret Ryznar**

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I. INTRODUCTION

One of the most public and aggressive fights in the United States occurred not in a boxing ring or on Capitol Hill, but in an Illinois courtroom.[1] At stake was custody of Baby Richard. On one side of the dispute was a sympathetic, suburban, adoptive couple. On the other, a deceived father fighting for the return of a son who had been secretly adopted. The ensuing custody battle, in which the biological father ultimately prevailed, caused Baby Richard to lose his adopted home of four years.[2] To the enrap-

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1. The final and highly controversial verdict was handed down by the Illinois Supreme Court. The United States Supreme Court denied certiorari. *In re* Kirchner, 649 N.E.2d 324, 327 (Ill. 1995), *cert. denied*, 515 U.S. 1152 (1995).

2. Custody fights over children have exploded in different circumstances as well. *See, e.g.*, *In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988) (affirming a woman's right to change

tured public,[3] the emotional transfer of Baby Richard from his adoptive parents to his father symbolized the intense and universal nature of fathers' rights.[4]

The goal of any sensible family law system is to avoid this scenario, whether by permitting fathers an early opportunity to contest adoptions or by ensuring the permanent legal severance of familial ties. However, the zealous approach of the English legal system to this problem, which favors the child's quick and permanent placement over the notification of the biological father, undermines its very purpose: the child's best interests standard.[5]

On the contrary, the interests of children would be better served by recognizing their father-child relationship, instead of institutionally denying it. Any legal approach that ignores the biological father devalues the importance of a child's placement in the paternal family unit, the significance of the medical history on the father's side, the emotional link between a father and his child, and the father's legal right to parent his own child.[6] To deny the importance of any of these facets of the father-child relationship is to deny the very nature and importance of the relationship.

While American courts have protected fathers better than their English counterparts, litigation continues to pressure judges in both countries to overturn any legal framework favoring fathers' rights, particularly in cases involving unwed parents. Currently, fathers in England and the United States receive protection only when they embrace fatherhood or express commitment to their children's mothers. Neither legal system, however, has definitively addressed how a father can be protected from a secret adoption when he lacked the opportunity to embrace fatherhood or to commit to his newfound family life, such as in the case of infant

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her decision after she agreed, under a surrogacy contract, to be artificially inseminated with a man's sperm and to surrender the baby to him and his wife).

3. The print and television media became heavily embroiled in the debacle. The biological father even filed a lawsuit against *The Chicago Tribune* for defamation, which was dismissed. Kirchner v. Greene, 691 N.E.2d 107 (Ill. App. Ct. 1998).

4. Baby Emily and Baby Jessica were publicly contested adoptions as well. G.W.B. v. J.S.W. (*In re* Adoption of Baby E.A.W.), 658 So. 2d 961 (Fla. 1995) (Baby Emily); *In re* Clauson, 501 N.W.2d 193 (Mich. Ct. App. 1993) (Baby Jessica).

5. Courts in both England and the United States rely on the best interests standard in deciding child-related cases. For a background on the American best interests standard, see John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006). For a background on this principle in England, see KERRY O'HALLORAN, THE WELFARE OF THE CHILD 9-35 (Ashgate 1999).

6. *See* discussion *infra* Parts IV.A and IV.B.

adoption. And if the American courts were to follow the English interpretation of the children's best interests standard,[7] fathers in both countries would often be deprived of notice of their child's birth and the opportunity to contest any subsequent adoption of their infants.

One way to protect biological fathers[8] from secret adoptions is to establish a right to the father-child relationship that the courts must protect. This right might be granted to the child through the best interests standard, to the father through fathers' rights, or to both. It would provide the father an early opportunity to contest his child's adoption and would protect him from concealed births, deceptions, and secret adoption plans. For children, it would provide information about their fathers and medical histories, and perhaps would even result in placement within their paternal families.

This Article argues that both the father and the child should have their relationship protected[9] and that the father-child relationship must be properly severed and waived by the biological father before a child is placed for adoption. Part II therefore begins by considering the American approach to fathers' rights in contested adoption cases. Part III then examines the contrary English position of favoring immediate severance of legal ties to a child, even if at the expense of obtaining both the mother's and the father's consent. Finally, Part IV analyzes the lessons resulting from a comparison of these two approaches, concluding that to work against fathers' rights is to work against children's interests.

II. FATHERS' RIGHTS IN AMERICAN LAW

In the United States, whatever protection afforded to the father-child relationship is both judicial and legislative. The Supreme Court has weighed in on the side of fathers' rights[10] while state legislatures have contributed by creating putative father registries. Most of these efforts, however, have focused on married fathers or those who have embraced the opportunity to develop a

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7. *See supra* note 5 and *infra* Part III.B.

8. This Article may also refer to putative fathers when paternity has not been conclusively established.

9. Some legal scholarship speaks of balancing children's best interests with fathers' rights, but this Article considers the two concepts to be more entwined. *See, e.g.*, Karen C. Wehner, Comment, *Daddy Wants Rights Too: A Perspective on Adoption Statutes*, 31 HOUS. L. REV. 691 (1994).

10. Although the constitutionalization of family law is an imperfect solution, it has aimed to preserve a parent's right to his child.

relationship with their children,[11] which necessarily requires knowledge of their children's conceptions and births.

This legal framework is largely futile when out-of-wedlock children are adopted as infants, before their biological fathers have an opportunity to embrace fatherhood. The Supreme Court has not yet ruled on this issue, although fathers' rights today differ greatly from the historical principles that denied unwed fathers a veto over their children's adoptions.[12]

A. *Constitutional Protections*

In a series of four important cases,[13] the United States Supreme Court has protected fathers' legal rights mostly through the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[14] Although the parent-child relationship is therefore recognized to merit protection, this protection is conditioned on certain specific circumstances that trigger it.

Stanley v. Illinois[15] blazed the trail for establishing Fourteenth Amendment due process and equal protection guarantees to putative fathers. The Court held that an unwed father who intermittently lived with the mother of his children before her death was entitled to a hearing on his fitness as a parent before his children were taken from him.[16] According to the Court, "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[17] Before *Stanley*, Illinois operated under the presumption that unmarried fathers were unsuitable and neglectful parents.[18] The Court's decision, at the minimum, mandated procedural due process to determine the children's interests before fathers lost custody of them.

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

12. Karen R. Thompson, Comment, *The Putative Father's Right to Notice of Adoption Proceedings: Has Georgia Finally Solved the Adoption Equation?*, 47 EMORY L.J. 1475, 1477-78 (1998) ("Historically, a putative father had no rights in the adoption context until he legitimated his child.").

13. *Lehr*, 463 U.S. at 248; Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972).

14. The justifications for these federal forays into family law are "[t]he intangible fibers that connect parent and child . . . [and] are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." *Lehr*, 463 U.S. at 256.

15. 405 U.S. at 645.

16. *Id.* at 649.

17. *Id.* at 651.

18. *Id.* at 649.

Subsequently, in *Quilloin v. Walcott*,[19] the Supreme Court restricted the protections afforded to a biological father, holding that a biological father who had failed to legitimize his child could not block the child's adoption by a stepfather.[20] The Court rejected the father's argument that his substantive due process rights were being violated by the application of the children's best interests standard, particularly when he had not previously petitioned for legitimation and the mother had always retained custody of the child.[21] Although the biological father's substantive due process rights may have been curtailed by the Court's holding, he was assured procedural due process under *Stanley*: "The [lower] court expressly stated that these matters were being tried on the basis of a consolidated record to allow 'the biological father . . . a right to be heard with respect to any issue or other thing upon which he desire[s] to be heard, including his fitness as a parent . . . .'"[22]

In *Caban v. Mohammed*,[23] a case factually similar to *Quilloin*, the Supreme Court held that a father with a substantial relationship could prevent the adoption of his child by a stepfather.[24] In that case, the Supreme Court found unconstitutional a provision of the New York Domestic Relations Law[25] that allowed an unwed mother, but not an unwed father, to prevent the adoption of the child simply by withholding consent.[26] The sex-based discrimination breached the Equal Protection Clause because it advanced no important state interest.[27] Nonetheless, *Caban* still allowed states to deprive certain fathers of a veto in their children's adoptions based on the substantiality of the father-child relationship.[28]

Finally, in *Lehr v. Robertson*,[29] the Court affirmed *Quilloin*'s principle that simply being the biological father was insufficient

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19. 434 U.S. 246 (1978).
20. *Quilloin*, 434 U.S. at 255.
21. *Id.* Importantly, to say that a child's best interests require due consideration of the benefits of the father-child relationship is not to say that in no case may that relationship be severed.
22. *Id.* at 250 (quoting *In re* Application of Randall Walcott for Adoption of Child, Adoption Case No. 8466 (Ga. Super. Ct., July 12, 1976), App.70).
23. 441 U.S. 380 (1979).
24. *Caban*, 441 U.S. at 388-89.
25. N.Y. DOM. REL. LAW § 111 (McKinney 1977). The New York law provided in part, "An adult or minor husband and his adult or minor wife together may adopt a child of either of them born in or out of wedlock and an adult or minor husband or an adult or minor wife may adopt such a child of the other spouse." *Id.* at § 110.
26. *Caban*, 441 U.S. at 388-89.
27. *Id.* at 394.
28. *Id.* at 392-93.
29. 463 U.S. 248 (1983).

for constitutional protection. Instead, the father must embrace fatherhood to be protected.[30] The Court also rejected the putative father's equal protection claim, affirming that New York could treat the mother and putative father differently if the two parties had differing roles in their child's life.[31] Perhaps most problematically, however, the Court sanctioned limits on the notice given to fathers, determining that New York legislators were not being arbitrary in concluding that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees.[32]

In sum, the Supreme Court's four decisions established that a father's right to constitutional protection exists when he has a substantial relationship with his child and has embraced the opportunity to be a father. However, the Court has not specifically addressed what constitutes embracing fatherhood, leaving open the issue of how a father can do so if he does not even know about his child's birth. Thus, the current legal framework is rather helpless in cases of infant adoptions.[33] By denying certiorari in the high-profile contested adoption cases involving Baby Emily, Baby Jessica, and Baby Richard, the Supreme Court has left to the states these questions pertaining to fathers' rights in infant adoptions.[34]

B. Legislative Solutions

The complexity of balancing fathers' rights, children's interests, and mothers' rights has precluded the emergence of any one judi-

30. *Lehr*, 463 U.S. at 262. Specifically, the court opined:

> If [the biological father] grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

Id.

31. *Id.* at 267-68.

32. *Id.* at 264. The Court concluded that "[t]he Constitution does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights." *Id.* at 265.

33. Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363, 389 (1996).

34. *Id.* ("The Court's recent refusals to grant certiorari in the cases of Baby Jessica and Baby Richard indicate that the Supreme Court remains unwilling to address the question of whether an unwed father has a legal interest in—and thus the right to veto the adoption of—a child he sired out of wedlock and with whom he has not yet had an opportunity to develop a relationship."); *see also* cases cited *supra* notes 1 and 4.

cial rule or legislative resolution. The problem is heightened by infant adoptions, when the father may not know or receive notice of his child's birth or adoption.

One popular legislative response to infant adoptions has been the putative father registry.[35] These state-specific databases allow men to register the names of their sexual partners so as to receive notice if these women both become pregnant and place their babies for adoption.[36] The registry therefore serves the role of protecting fathers' due process rights by allowing putative fathers to embrace fatherhood in order to receive constitutional protection. Otherwise, putative fathers would have no method of proving their commitment to their infants. The Supreme Court held in *Lehr* that the registry was acceptable and sufficient protection of the constitutional rights of an unmarried father.[37]

Although the putative father registry is a legally acceptable method of protecting the father-child relationship,[38] it is not necessarily sufficient in its current form. Most importantly, the database is state-specific: If the baby's mother uses an out-of-state adoption agency or moves to a different state, she avoids triggering the database.[39] A national database would avoid this loophole, discouraging mothers from conspiring to avoid the database protections.[40]

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35. For an example of a state's putative registry, see Amy U. Hickman and Jeanne T. Tate, *Florida's Putative Father Registry: More Work is Needed to Follow the Established National Trends Toward Stable Adoption Placements*, 82 FLORIDA BAR JOURNAL 42 (2008).

36. The theory underpinning putative registries is that "[a] man who files with that registry demonstrates his intent to claim paternity of a child born out of wedlock and is therefore entitled to receive notice of any proceeding to adopt that child." *Lehr*, 463 U.S. at 250-51.

37. *Id.* at 264-65; *see also* Leslie Joan Harris, *Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions*, 9 J. L. & FAM. STUD. 281, 291-92 (2007).

38. *Lehr*, 463 U.S. at 265.

39. Mary Beck, *A National Putative Father Registry*, 36 CAP. U. L. REV. 295, 309-10 (2007).

40. *Id.* Kidnapping in child custody cases has traditionally been of great concern. Thus, the early view on the basis for proper jurisdiction in child custody cases was that the domicile of the child sufficed. However, this encouraged one parent to kidnap the child to another state. Therefore, the modern view embraces the approach of the Uniform Child Custody Jurisdiction and Enforcement Act. The Act accords primary jurisdiction to make an initial custody determination to the home state, which is defined as the state in which a child lived with a parent or guardian for at least six consecutive months immediately before the commencement of a child custody proceeding. UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 201 (1997).

Furthermore, the database scheme requires men to have perfect information, favoring only those who know about the registry.[41] A putative father's ignorance of the registry is often no excuse for failing to register.[42] In many jurisdictions, the database also strictly defines the grounds and timing of any challenge to an adoption judgment.[43] Thus, the database must be well-advertised and its rules well-explained in order to be effective.

Finally, the registry statutes are vulnerable to constitutional scrutiny. In particular, constitutional problems exist in crafting a statutory remedy that is sufficient to protect a father's rights but narrow enough to protect a woman's zones of privacy in family matters.[44] In Florida, for example, one statute[45] required private information on the mother and potential fathers to be printed in the newspapers before an adoption could be concluded.[46] A court found that this Act breached the state's constitution[47] by infringing on a woman's choice to seek adoption for her child and by forcing her to publicly disclose information regarding her sexual activities.[48]

In sum, although American putative father registries are a constitutional method of protecting fathers' rights, they are insufficient in infant adoptions. Many men have never heard of the reg-

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41. *See, e.g.*, Erik L. Smith, *The Ohio Putative Father Registry—The What?*, ABOUT.COM, http://adoption.about.com/cs/adoptionrights/a/the_what.htm.

42. *Lehr*, 463 U.S. at 264.

43. *See, e.g.*, FLA. STAT. § 63.142(4) (2003).

44. The depths of the due process clause have permitted the Supreme Court to create zones of privacy in family law matters ranging from child rearing to family relationships. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573-74 (2003).

45. FLA. STAT. ANN. § 63.088(5) (West Supp. 2003) (amended 2008).

46. Specifically, "[t]he notice . . . must include a physical description, including, but not limited to age, race, hair and eye color, and approximate height and weight of the minor's mother and of any person the mother reasonably believes may be the father; the minor's date of birth; and any date and city, including the county and state in which the city is located, in which conception may have occurred." *Id.* at § 63.088(6). For a discussion of the failed Florida statute, see Claire L. McKenna, *To Unknown Male: Notice of Plan for Adoption in the Florida 2001 Adoption Act*, 79 NOTRE DAME L. REV. 789 (2004). McKenna reveals a typical advertisement run under the Act:

> To unknown male: notice of plan for adoption. Mother, [mother's name], 33, is Caucasian with brown hair, brown eyes, 5ft 2in tall, weighs approximately 142lb, has fair skin and average build. Baby [baby's name], born May 23, 2002, was conceived sometime in August 2001 in Miami or Orlando. Father, unknown male, is Caucasian, approximately 30-35 years old, approximately 6ft tall, fair skin, blond, straight hair, medium build.

Id. at 792 n.13 (citing Kate Hilpern, *Indecent Exposure*, GUARDIAN, Sept. 16, 2002, at P8).

47. Article I, section 23 of the Florida Constitution provides: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life as otherwise provided herein." FLA. CONST. art. I, § 23.

48. G.P. v. State, 842 So.2d 1059, 1062 (Fla. Dist. Ct. App. 2003).

istries, thereby losing their right to contest the adoptions. The registries are also state-specific and thus easily circumvented by mothers. Nonetheless, these registries are currently the primary guardians of fathers' rights in infant adoption cases in the United States, leaving fathers vulnerable in the face of increasing litigation targeting their rights.

III. ADOPTIONS IN ENGLISH LAW

While American law has remained relatively silent on infant adoptions, the English courts have taken a position unfavorable to fathers' rights in such adoptions. However, English law cannot be considered in a vacuum—the courts are bound by European law, which is a more faithful protector of fathers' rights.[49] Ultimately, English jurisprudence may need to integrate principles from European law to harmonize the two systems, which are currently in discord.

A. *English Statutory Law*

The Children Act 1989[50] and the Adoption and Children Act 2002[51] provide the legislative framework for adoption in England and Wales. The 2002 Act repealed the Adoption Act 1976[52] and significantly amended the Children Act 1989, changing the government's policy towards adoption and modifying the role of local authorities. The changes came after a ten-year review of adoption law by the Department of Health and the Law Commission.[53]

The primary principle governing adoption in England and Wales is the paramountcy principle of the child's welfare,[54] borrowed from the 1989 Act.[55] Another important principle often em-

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49. *See* discussion *infra* Part III.C.

50. Children Act 1989, c. 41.

51. Adoption and Children Act 2002, c. 38.

52. Adoption Act 1976, c. 36.

53. KERRY O'HALLORAN, THE POLITICS OF ADOPTION, INTERNATIONAL PERSPECTIVES ON LAW, POLICY & PRACTICE 130 (Springer Books 2003) [hereinafter THE POLITICS OF ADOPTION].

54. Adoption and Children Act 2002, c. 38, § 1(2).

55. The exact list of factors that are to guide courts in respecting the paramountcy of a child's best interests is as follows:

a. the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

b. his physical, emotional and educational needs;

c. the likely effect on him of any change in his circumstances;

d. his age, sex, background and any characteristics of his which the court considers relevant;

ployed by English courts is section 1(3) of the 2002 Act: "The court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare."[56] Finally, the 2002 Act includes several other considerations to guide courts in adoption cases.[57]

Under this statutory framework, there are two grounds for allowing an adoption to proceed without parental consent. Specifically, section 52(1) of the 2002 Act dispenses with consent when either (1) the parent or guardian cannot be found or is incapable of giving consent, or (2) the welfare of the child requires that parental consent be waived.[58]

As one commentator noted, "The adoption process in the UK is gradually becoming less consensual."[59] Indeed, before the Adoption and Children Act 2002, the courts held that while a father of a newborn child generally should have a decision-making role regarding placement options, his consent was not required when he had only a fleeting relationship with the child's mother.[60] In other words, while fathers may have had recognizable interests in their

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e. any harm which he has suffered or is at risk of suffering;

f. *how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs*;

g. the range of powers available to the court under this Act in the proceedings in question.

Children Act, 1989, c. 41, §1(3) (emphasis added).

56. Adoption and Children Act 2002, c. 38, § 1(3).

57. These matters include:

a. the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),

b. the child's particular needs,

c. *the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,*

d. the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,

e. any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,

f. *the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—*

(i) *the likelihood of any such relationship continuing and the value to the child of its doing so,*

(ii) *the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,*

(iii) *the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.*

Id. at c. 38, § 1(4) (emphasis added).

58. *Id.* at c. 38, § 52(1).

59. O'HALLORAN, THE POLITICS OF ADOPTION, *supra* note 53, at 154.

60. *In re* C (A Child) v. XYZ County Council, [2007] EWCA Civ 1206 [2] (U.K.).

children, they had no rights. Most recently, the Court of Appeal ruled in *In re C (A Child)* that the 2002 Act has not changed this view, contrary to the lower court's decision in the case.[61]

In sum, the relevant statutory framework gives courts significant discretion and flexibility in adoption cases by providing them with factors to consider, as opposed to checklists of mandatory points. Importantly, this framework permits the English courts to play a sizeable role in crafting the adoption law today.

B. *English Case Law*

The flexibility of the English statutory scheme has freed the courts to mold the adoption law. However, English case law has unfortunately evolved to undermine fathers' rights in infant adoption cases. In *Re H, Re G (Adoption: Consultation of Unmarried Fathers)*,[62] for example, the President of the Family Division found no need to give notice of adoption proceedings to a father who had never cohabited with the child's mother.[63] In *Z County Council v. R (Adoption: Duty to Investigate)*,[64] Justice Holman held that no reason existed to doubt the mother's view that her relatives could not care for the baby, so no notice of the child's birth and adoption was given to the relatives. The court determined that although the Children Act 1989 and the Adoption Act 1976 gave judges discretion to consult with a child's relatives,[65] they had no duty to do so, particularly when it was not in the child's best interests.[66]

The most recent case affirming the lack of fathers' rights in infant adoptions is *In re C (A Child)*,[67] where the English Court of Appeal grappled with the issue of "whether the local authority should make inquiries to see if any of the child's birth family would be suitable [caregivers]."[68] This broad phrasing of the issue belies the requisite sub-issue: whether the biological father should be notified before his legal ties to a baby are severed for purposes of adoptive placement. The wording is strategic in that the Eng-

61. *Id.* at [2, 3].

62. [2001] 1 FLR 646.

63. However, the court determined that a father should be notified of his child's adoption as a matter of general principle. *Id.*

64. [2001] 1 FLR 365.

65. Children Act 1989, c. 41; Adoption Act 1976, c. 36.

66. *Z County Council*, [2001] 1 FLR 365. *But see Re* R (Adoption: Father's Involvement), [2001] 1 FLR 302 (suggesting that notification and joinder of father to adoption proceedings may be required under certain circumstances).

67. *In re* C (A Child) v. XYZ County Council, [2007] EWCA Civ 1206 (U.K.).

68. *Id.* at [1].

lish courts would be uncontroversial in holding that many outsiders do not have all of the rights of a parent.[69] However, when the issue is framed with respect to a father, consensus is more elusive.

In *In re C (A Child)*,[70] a nineteen-year-old woman became pregnant after a one-night stand. She hid the pregnancy from both her family and the baby's father.[71] She sought medical attention only upon entering labor, after which she adamantly desired adoption for her baby.[72] She listed the reasons that would prevent her family from caring for the child and refused to identify the baby's father, but the information she did divulge would have sufficed to identify the baby's father if the public authority had made independent inquiries.[73]

The lower court judge held that the 2002 Act required exploring placement with the biological father in accordance with the child's best interests.[74] The judge therefore directed the local authority to disclose the existence of the child to the extended maternal family, as well as to the putative father and his family, if identified.[75] Following the order, a misunderstanding occurred that caused the local authority to write to the maternal family, requesting an interview but not providing a reason.[76] The maternal grandparents therefore discovered the birth and offered the agency their assistance in resolving the issue.[77]

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69. Nonetheless, in European law, a child's grandparents have the right of access to the child. Marckx v. Belgium, 2 Eur. Ct. H.R. 330 [45] (1979). This is not true in the United States. Troxel v. Granville, 530 U.S. 57, 63 (2000) (plurality opinion).

70. [2007] EWCA Civ 1206.

71. *Id.* at [5].

72. *Id.*

73. *Id.*

74. The lower court judge opined:

> The Local Authority have no choice, they are under a duty to inform themselves of as much information about the background of the extended family as they are able to do. It may well be that somebody suitable is in a position to come forward and offer a home for this child and if so then obviously it will be in the interests of this child to be placed within the family. . . . [And also] it would be cruel in the extreme to prevent this child having as much knowledge as possible about her background in the event that she is adopted . . . .

Id. at [75].

75. The order stated:

> The Local Authority be at liberty to disclose after twenty-one days namely after 19th October 2007, the existence and identity of EMC (dob 9/7/07) along with any relevant information regarding her, to the extended maternal family and if identifiable the putative father and any extended paternal family, the mother's objections having been carefully considered but overruled in the interests of the subject child.

Id. at [73].

76. *Id.* at [7].

77. *Id.*

In overruling the lower court, the English Court of Appeal viewed the 2002 Act as child-centered, but denied that the child's interests required the biological father's consent for adoption. In particular, the court placed significant emphasis on preventing the delay of the child's permanent placement.[78] Specifically, Lady Justice Arden opined:

> Delay is always to be regarded as in some degree likely to prejudice the child's welfare: see subs (3) [of the Adoption and Children Act 2002]. Parliament has here made a value judgement about the likely impact of delay and it is not open to the court or the adoption agency to quarrel with that basic value judgement.[79]

Although Lady Justice Arden was prudent in minding the detriment caused by delay, she also had significant discretion under the 2002 Act to weigh the effect of delay with the needs of the child, as well as the many other factors listed in the Act.[80] The court compromised all of these factors for the sake of preventing delay.

Furthermore, this court's statutory interpretation generally precluded placement with the paternal family, which is justifiable only if it is assumed that placement with the biological father can never be more favorable than placement with an adoptive family—a dubious proposition. Therefore, many important interests listed in the adoption legislation are compromised by swift and permanent placement of the child with strangers.[81]

In sum, the English courts' statutory interpretation not only makes certain assumptions about the best arrangements for children's welfare, but also significantly cements English law's unfavorable view of fathers' rights, particularly in infant adoption cases. Nonetheless, English law cannot be considered without reference to the European law it has willingly integrated.

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78. *Id.* at [16, 17, 20].

79. *Id.* at [17] (citing Adoption and Children Act 2002, c. 38, § 1(3)). *See supra* note 56 and accompanying text.

80. *See supra* notes 55 and 57.

81. *See id.*

C. *European Law*

By enacting the Human Rights Act 1998,[82] the English Parliament bound the courts to abide by the European Convention on Human Rights[83] and the decisions of the European Court of Human Rights, the international court for the enforcement of the Convention.

Article 8 of the Convention recognizes the right to respect for family life.[84] The European Court of Human Rights has interpreted the fundamental right of Article 8 to be access of a family member to children, opining that "the mutual enjoyment by parent and child, as well as by grandparent and child, of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention."[85] In other words, Article 8, incorporated into English law, protects parents' and grandparents' access to children.

Keegan v. Ireland[86] is the landmark decision by the European Court of Human Rights on the rights of putative fathers in regard to the adoption of their children. The facts in the case were hardly unique: While cohabiting with her boyfriend, a woman conceived.[87] She gave birth after separating from her boyfriend and placed the baby for adoption one week before notifying him.[88] The European Court found unacceptable the secret adoption that occurred before the father could develop a family life with the child, finding that it interfered with the father's right to family life under Article 8.[89]

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82. Human Rights Act 1998, c. 42.

83. The Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

84. Article 8 of the European Convention on Human Rights specifically provides:

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

Id. at art. 8.

85. L. v. Finland, 31 Eur. H.R. Rep. 757, 758 (2000); *see also* Andersson v. Sweden, 226 Eur. Ct. H.R. 6 (1992); W. v. United Kingdom, 121 Eur. Ct. H.R. 8, 27 (1988); Marckx v. Belgium, 2 Eur. Ct. H.R. 330 [45] (1979).

86. 18 Eur. Ct. H.R. 342 (1994).

87. *Id.* at [6].

88. *Id.* at [7].

89. "The fact that Irish law permitted the secret placement of the child for adoption without the applicant's knowledge or consent, leading to the bonding of the child with the

The English Court of Appeal, in *In re C (A Child),* nonetheless distinguished its adoption decision from European cases like *Keegan* by suggesting that in order to receive legal protection of his rights, the "father must have had some relationship with the mother and expressed his commitment to the child in some way, even if there was no cohabitation."[90] Indeed, in *Keegan,* the European Court found that the family right arose during the child's conception, when the parents were cohabiting.[91] However, although the parents in *Keegan* were romantically involved for two years, whereas there was only a one-night stand in *In re C (A Child),* both adoptions were secret and occurred quickly after the children's birth, before the fathers had the opportunity to form father-child relationships. Accordingly, any distinction between *Keegan* and *In re C* based on the length of the man's commitment to the baby's mother is disingenuous when in both cases each man's commitment was minimal.

However, even if separating a one-night stand from a one-year cohabitation that occurred prior to the child's birth does demonstrate a differing level of commitment to the women involved, it does not wholly take into account the level of commitment a father may have to his child. In other words, the man who had a one-night stand may be more committed to his child than a cohabiting man that leaves his pregnant girlfriend, but the discovery of this possibility is precluded by England's institutional dismissal of a man who had only one sexual encounter with his baby's mother.

Even the English Court of Appeal, in *In re C (A Child),* conceded that the family life protection of Article 8 includes a potential relationship that may develop.[92] Nonetheless, in the very same case, the English court decided that the Convention right did not apply to the baby's father because he had no family life with her. In fact, according to the court, the existence of a family life was impossible because "he does not know of her existence."[93] Accord-

proposed adopters and to the subsequent making of an adoption order, amounted to an interference with his right to respect for family life." *Id.* at [51]. For a discussion of the reasons that prevented Mr. Keegan from asserting a claim under the Irish Constitution, see D. MARIANNE BLAIR & MERLE H. WEINER, FAMILY LAW IN THE WORLD COMMUNITY, 883 n.2a (Carolina Academic Press 2003).

90. *In re* C (A Child) v. XYZ County Council, [2007] EWCA Civ 1206 [31].

91. *Keegan,* 18 Eur. Ct. H.R. 342 at [45].

92. *In re C (A Child),* EWCA Civ 1206 [31].

93. *Id.* at [32] ("He has therefore no Convention right under art 8(1) and accordingly it is unnecessary to ask whether art 8(2) would apply in his case.").

ingly, the potential relationship is unprotected by the English courts.

Furthermore, the *In re C* court paradoxically admitted that the baby's grandparents had an Article 8 right of access to the child,[94] which was defeated for other reasons.[95] Thus, grandparents have a right of access to the child in English jurisprudence, even when the father does not—a curious result.

In conclusion, the English courts' interpretation of Article 8 is circular at best, and disingenuous at worst. If a man does not know of his child's birth, he cannot have a family life with the child. However, Article 8 protects a father's right of access to his children by virtue of protecting family life. To find that no family life exists is to find that there can never be Article 8 protection. Until English courts embrace the spirit of Article 8 jurisprudence, fathers will continue to lack recourse in English infant adoption cases unless they take their cases to the European Court of Human Rights in Strasbourg.

IV. LESSONS EMERGING FROM A COMPARISON OF AMERICAN AND ENGLISH LAW

The American and English legal systems share a long history of common law. On many issues, the two systems are identical. On others, they are entangled. When they completely diverge, however, it is important to take note of the consequent lessons.

The difference in the American and English approaches to biological fathers in infant adoption cases is one example of a noticeable divergence, despite the common goal of ensuring the child's best interests.[96] Each jurisdiction's interpretation of the child's best interests, however, facilitates a different understanding of fathers' rights in infant adoptions, fueling the debate of what the child's best interests entail and whether a father-child relationship is part of it. Although the Supreme Court of the United States and the European Court of Human Rights have not definitively addressed infant adoptions, England has taken a position unfavorable to fathers' rights. In all these jurisdictions, however, fathers are not fully protected against secret adoptions.

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94. This is in accordance with Marckx v. Belgium, 2 Eur. Ct. H.R. 330, [45] (1979); *see also supra* note 69.
95. *In re C (A Child)*, EWCA Civ 1206 [39].
96. *See supra* note 5.

A particularly significant lesson emerging from a comparison of all these jurisdictions is that the courts undermine children's best interests by destroying the father-child relationship through decisions that degrade fathers' rights and incompletely consider children's best interests. Children's interests, and those of both parents, would be better advanced if the courts were more protective of the father-child relationship.

A. *The Children's Best Interests*

Both the United States and England use the children's best interests standard to protect children in custody cases.[97] Interpreting the standard differently, however, American and English adoption law diverge. While English courts declare that the children's best interests standard requires quick and permanent placement in any home,[98] American courts are not so certain that excluding fathers is in anyone's best interests.[99]

Importantly, the American approach enables courts to grant fitness hearings to biological fathers who embrace fatherhood, wherein the best interests of the child are weighed. If extended to infant adoptions with better notice procedures, this approach is a sounder interpretation of the requirements of the best interests standard and due process. Additionally, this approach would avoid belated custody battles such as those of Baby Jessica and Baby Richard.[100]

In particular, two interests that all children possess are compromised by the English law's priority of quick and permanent placement: (1) possible placement within the paternal family and (2) identifying information about the paternal family. The first of these interests, placement with the paternal family, is implicitly rejected by the court in *In re C (A Child).*[101] In reality, however, the best interests of children may very well require their placement within the paternal family. Although a unified, two-parent home is the ideal, if it is not available in the case of unwed parents, the question is whether placement with strangers through adoption or the foster care system is preferable to placement with the biological father's family. No obvious answer exists, and

97. *See id.*

98. *In re C (A Child)*, EWCA Civ 1206; *see also supra* notes 78-79 and accompanying text.

99. *See supra* Part II.A.

100. *See supra* notes 1 and 4.

101. *See supra* notes 78-79 and accompanying text.

therefore it must be resolved by a court on the facts of each case.[102] Yet, this adjudication—in essence a best interests hearing—is completely denied by England's approach, which entirely severs the father from the adoption proceedings.

The second of these interests, identifying information about the paternal family, is explicitly rejected by the court in *In re C (A Child)* despite contrary European jurisprudence.[103] While European jurisprudence underscores the importance of a person's access to information that allows him to know and understand his identity,[104] the English court, in *In re C*, decided that it is not even in the interests of the child to make inquiries into the child's medical and familial background: "[E]nquiries are not in the interests of the child simply because they will provide more information about the child's background."[105] This policy of anonymity is reminiscent of two similar arrangements that have served children's interests poorly: sealed adoptions and anonymous sperm banks.

Sealed adoptions have been favored in the United States for policy reasons.[106] Accordingly, birth certificates and adoption records

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102. Some courts and commentators have argued that the clear preference should be for the biological parents. *See, e.g., In re* Mark T., 154 N.W.2d 27, 39 (Mich. Ct. App. 1967):

> The appellants' presentation in this case proceeds on the assumption that placing Mark for adoption is inherently preferable to rearing by his father, that uprooting him from the family which he knew from birth until he was a year and a half old, secretly institutionalizing him and later transferring him to strangers is so incontrovertibly better that no court has the power even to consider the matter. Hardly anyone would even suggest such a proposition if we were talking about a child born in wedlock.
>
> We are not aware of any sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper upbringing than one reared by his natural father who was at one time married to his mother, or that the stigma of illegitimacy is so pervasive it requires adoption by strangers and permanent termination of a subsisting relationship with the child's father. There cannot be a 'public policy' favoring adoption in all cases without regard to the particular facts, simply because, if there were such a policy, the law would not leave the consent decision to the unwed mother or permit the father to legitimate the child irrespective of whether he marries the mother.

103. *In re C (A Child)*, EWCA Civ 1206 [3]. For a good discussion of European jurisprudence in comparison to American jurisprudence on adoptees' right to identifying information, see BLAIR & WEINER, *supra* note 89, at 885.

104. Gaskin v. United Kingdom, 12 Eur. Ct. H.R. 36 (1989); *but see In re C (A Child)*, EWCA Civ 1206 [33] ("However, in Odievre v France [2003] 1 FLR 621, the Strasbourg court held that it was within a state's margin of appreciation to choose the means calculated to secure compliance with this aspect of the rights guaranteed by article 8.").

105. *In re C (A Child)*, EWCA Civ 1206 [3].

106. *See, e.g.*, Application of Anonymous, 390 N.Y.S.2d 779, 781 (N.Y. 1976):

> Confidentiality and the sealing of records . . . promotes the broad legislative purposes in several ways. It encourages and facilitates investigation into factors relevant to

of court proceedings are sealed to protect the confidentiality of the parties to an adoption. Among the fiercest critics of sealed adoptions, however, are adult adoptees. Many have launched emotional court battles to open their sealed records, grasping onto whatever constitutional provisions that might help them prevail.[107] Others resent being treated like children by a society that bars them from learning identifying information even as adults.[108] The limited research on adult adoptees reinforces their claims, finding that many suffer negative consequences as a result of the lack of identifying information.[109]

Many similar problems have also arisen in the context of anonymous sperm donations.[110] In fact, England's Children's Society has condemned the secrecy associated with anonymous sperm do-

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> planning adoption by preventing the public disclosure of embarrassing personal facts about the parties involved. Sealed records assure that natural parents will not be able to locate the child and interfere in his relationship with his adoptive parents. Confidentiality also protects adopted children who are illegitimate from any possible stigma they might otherwise have to bear because of their birth.

See also People v. Doe, 138 N.Y.S.2d 307, 309 (N.Y. 1955):

> It seems to this Court that the Legislature by Section 114 of the Domestic Relations Law has given additional assurances. For instance, it has assured the mother, who has given birth to a child born out of wedlock and finds that she cannot properly take care of the child, that instead of secreting the child or placing it with persons haphazardly, if she wishes to permit suitable, desirous and qualified persons to adopt the infant, her indiscretion will not be divulged. It further assures her that the interests of the child will be protected in that no one will ever know by means of the adoption proceeding that the child is illegitimate. It assures the foster parents that they may treat the child as their own in all respects and need not fear that the adoption records will be a means of hurting the child, which has become by this proceeding their child, or of harming themselves. It assures all persons connected with the adoption that the records will be and remain sealed and secret.

107. *See, e.g.*, Dixon v. Dep't Pub. Health, 323 N.W.2d 549, 550 (Mich. Ct. App. 1982); Alma Soc'y Inc. v. Melon, 601 F.2d 1225 (2d Cir. 1979).

108. Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 GOLDEN GATE U. L. REV. 259, 271 (1994).

109. *See, e.g.*, PAUL SACHDEV, UNLOCKING THE ADOPTION FILES (1989); ARTHUR D. SOROSKY ET AL., THE ADOPTION TRIANGLE (1978). *See also* Kuhns, *supra* note 108, at 273:

> The fact that adoptees have two sets of parents can complicate the formation of their self-identities because this fact seems to set adoptees apart from the vast majority of people, including their adoptive family. Thus, the search for origins can have a beneficial effect on adoptees' sense of identity. Even when adoptees are disappointed by what they discover, they can still benefit from learning the truth.

110. Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 1-2 (2008) (recounting the story of a teenage boy who desperately traced his origin back to a sperm donor, who had expected anonymity); *see also* Johnson v. Superior Ct., 80 Cal. App. 4th 1050, 1067 (Cal. Ct. App. 2000) ("[A] contract that completely forecloses the opportunity of a child conceived by artificial insemination to discover the relevant and needed medical history of his or her genetic father is inconsistent with the best interests of the child.").

nation in an editorial published by a popular newspaper.[111] According to the editorial, more than 80 percent of adopted people search for birth relatives, illustrating the need for people to have access to identifying information.[112]

Although many people have suffered greatly as a result of the anonymity created by sealed adoption records and anonymous sperm banks,[113] public policy reasons may weigh against releasing this sort of information. Yet, this inadvertent and unfortunate situation is the same one being *intentionally* created by the English interpretation of the children's best interests standard. By not inquiring into the paternity of an adoptee, the public authorities forego the opportunity to provide the child with answers in the future, despite research noting that "over 85 per[cent] reported that the experience of tracing relatives was positive, even when family reunions did not work out."[114] At a minimum, the experiences of those hurt by sealed adoption records and anonymous sperm banks challenge the English courts' interpretation of the children's best interests as requiring secrecy, anonymity, and swift placement, at the expense of locating and notifying the biological father.

As a result, children's legal guardians have attempted to argue in court that children have constitutional or European Convention rights. In *In re C (A Child)*, the English court avoided expressing a final opinion on the argument that a child has a Convention right to be raised by her biological father, although it determined that "[h]er potential right would not afford a justification for disclosing material [information] to the extended family or the father at this stage."[115] American courts, although more receptive to the argument, have similarly failed to seriously consider that children may have constitutional rights. In *Michael H. v. Gerald D.*,[116] for example, a guardian ad litem argued that a restriction on the

111. Julia Feast, *The Right to an Identity*, GUARDIAN (June 16, 2002), available at http://observer.guardian.co.uk/comment/story/0,,737777,00.html. "It's time for the Government to acknowledge that openness and honesty should now become the accepted practice, so that tomorrow's children grow up with dignity and a right to their identity." *Id.*

112. *Id.*

113. For the argument that adoptees may feel differently than those of gamete donations, see Ellen Waldman, *What Do We Tell the Children?* 35 CAP. U. L. REV. 517, 533-35 (2006).

114. Feast, *supra* note 111.

115. *In re* C (A Child) v. XYZ County Council, [2007] EWCA Civ 1206 [35] (U.K.).

116. 491 U.S. 110, 130-32 (1989) (plurality opinion) (rejecting the argument that a child's liberty interest in maintaining a filial relationship with her natural father and her equal protection right to rebut the presumption of her legitimacy were violated by the lower courts).

child's right of access to her biological father violated both her due process and equal protection rights. The Court did not take the opportunity to seriously focus on the child's potential constitutional claims: "[W]e find that, at best, (the child's) claim is the obverse of Michael's and fails for the same reasons."[117] Justice Scalia, however, has suggested a potential First Amendment right of association or free exercise on behalf of the children in *Troxel v. Granville*.[118] Beyond this, the constitutional rights of children have received little consideration from the United States Supreme Court,[119] with children being largely unrepresented in court cases.[120]

Indeed, providing children with a constitutional right to a father-child relationship in either England or the United States may be extreme and problematic. For example, a child's constitutional right to a father is counterproductive if that right clashes with a parent's, thus preventing the vindication of all parties' rights.[121] There is also little precedent for such constitutional rights to be granted to children.[122] However, judicial recognition that the best interests standard strongly prefers the father-child relationship is a more realistic way of protecting the relationship. This recognition can be rooted in the notion that the best interests of the child are served by the father-child relationship, such that belated custody contests are avoided, placement with the paternal father is made possible, and relevant health and identification information is gathered.

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117. *Id.* at 131.

118. 530 U.S. 57, 93 n.2 (2000) (Scalia, J., dissenting). This would allow the children to visit with their grandparents against their mother's wishes.

119. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 591 (Powell, J., dissenting) ("Even with respect to the First Amendment, the rights of children have not been regarded as 'coextensive with those of adults.'" (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 515 (1969) (Stewart, J., concurring))); *but see* Sec'y of Pub. Welfare of Pa. v. Institutionalized Juveniles, 442 U.S. 640, 652 (1979) (Brennan, J., concurring in part and dissenting in part) ("Pennsylvania must assign each institutionalized child a representative obliged to initiate contact with the child and ensure that the child's constitutional rights are fully protected. Otherwise, it is inevitable that the children's due process rights will be lost through inadvertence, inaction, or incapacity.").

120. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), was a unique parental rights case in that the child was independently represented by a guardian ad litem. Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 666 (2002).

121. This assumes that every right requires a remedy, as Chief Justice Marshall held in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803). On the other hand, not all rights are remedied by law. *See, e.g.*, RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 759-825 (5th ed. 2003); Buss, *supra* note 120, at 666.

122. *See supra* notes 119-120 and accompanying text.

In sum, it is not obvious that the children's best interests standard requires the prioritization of permanent placement over the notification of the biological father. On the contrary, by not requiring notification of a child's father before concluding an adoption, English courts deny adoptees both identifying information and the chance to be raised by their paternal families. They foreclose the possibility that fathers care deeply for their children, sending a contrary message to the children. At stake is also the very real possibility that the biological father wants to keep and raise his child. The current English approach to infant adoptions flatly rejects all of these benefits of a best interests hearing.

B. Fathers' Rights

Another concept bifurcating American and English family law is that of fathers' rights. While American courts have required, under *Lehr* and *Stanley*, that due process be given to fathers who embrace fatherhood,[123] the English Court of Appeal recently denied such protections for fathers in certain adoptions.[124]

The issue of fathers' rights, however, is as important as that of the best interests standard because the two concepts are significantly intertwined. If the courts decide that the best interests of the child do not include the protection of the father-child relationship, they may resort to the notion of fathers' rights to achieve the same protection. In other words, to protect fathers' rights is to protect children's interests, given the tremendous benefits that fathers provide their children.[125]

However, the reasons for protecting fathers' rights are more extensive than just advancing children's best interests. Given the recent pressure on fathers to pay child support and provide for their children, it is surprising that more benefits have not been extended to them,[126] such as "the interest of a parent in the com-

123. Lehr v. Robertson, 463 U.S. 248 (1983); Stanley v. Illinois, 405 U.S. 645 (1972).

124. *In re* C (A Child) v. XYZ County Council, [2007] EWCA Civ 1206.

125. *See, e.g.*, Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 215 (2006) (arguing for the importance of fathers to the welfare of their children). However, fathers' rights should not trump children's interests. *See* Hendricks v. Netherlands, 5 Eur. Ct. H.R. 223 (1982) (determining that when there is a serious conflict between the interests of a child and his father, the interests of the child must prevail under Article 8(2) of the European Convention on Human Rights); *see also supra* note 21, as well as *infra* note 140 and accompanying text.

126. However, child support payments are not always directly linked to child visitation by the courts, nor should they be in every case. Nonetheless, to systematically impose onto fathers the burdens without the benefits of parenthood discourages and undermines their full role in the family unit.

panionship, care, custody, and management of his or her children."[127] To an extent, this reciprocal nature between a parent's obligations and his rights[128] has been recognized by the United States Supreme Court: "[T]he Court has emphasized the paramount interest in the welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed."[129] Yet, fathers continue to lack many of the fundamental rights in regards to their children because of the unresolved questions as to what embracing fatherhood entails in the case of infant adoptions.

Furthermore, perhaps the worst effect of depriving fathers of an early opportunity to contest their children's adoption is the implicit message sent to fathers that they do not matter in the creation and support of a family. Such a message, reinforced by the lack of certain fundamental fathers' rights, institutionally discourages fathers' involvement in their children's lives.

Finally, protection of fathers' rights ensures that limited public resources are not wasted. In both England and the United States, there are only a limited number of willing adoptive families.[130] To fill adoptive homes with children whose fathers may want to raise them is not only a waste of resources, but is also not necessarily the best arrangement for the child.[131] A similar public policy argument justifies the child support system, which keeps many mothers off public support. Hence, allowing fathers to take a role in their children's lives by simply notifying them of their children's birth results in a more efficient allocation of resources.

In sum, protection of fathers' rights advances three vital goals: ensuring children's best interests, encouraging fathers' parenting responsibilities, and preventing the use of limited adoptive homes to care for children who have fit and willing fathers. Automatic denial of a father's ability to veto his child's adoption undermines all of these goals, and using the best interests standard as justification is disingenuous and counterproductive.

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127. *Stanley*, 405 U.S. at 645.

128. Such rights include a parent's liberty right to control the upbringing of his or her child. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

129. Lehr v. Robertson, 463 U.S. 248, 257-58 (1983).

130. *See, e.g.*, Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska's Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, 19 ALASKA L. REV. 57, 71 (2002) ("[T]he number of adoptive homes for children does not appear to have kept pace with the increase in terminations of parental rights.").

131. *In re C* rejects this reasoning. *In re* C (A Child) v. XYZ County Council, [2007] EWCA Civ 1206 [42-43] (U.K.).

C. *Mothers' Rights*

Increasing fathers' rights necessarily implicates mothers' rights, particularly when the two sets of rights conflict[132] and the broken family unit requires court intervention.[133] Indeed, in most cases, increasing fathers' rights results in the decreasing of mothers' rights.[134]

Although the correct balance must be struck, women also gain from increasing the privileges and obligations of fatherhood. To continue burdening women with all of the family planning decisions not only contributes to the degradation of fathers' rights, but also undermines women's interests by casting doubt on gender equality theories that recognize both men and women as capable parents.[135] Furthermore, it propagates the view of men as mere economic providers, rather than as full-time parents.[136] Finally, it reinforces the domestic sphere as one primarily for women.

One prominent argument in favor of increasing women's ability to choose a secret adoption is that it prevents abortions.[137] However, it is unlikely that many mothers will abort simply because they do not wish to notify the father of the child's birth. Once notified, the father may contest his child's adoption and keep the child, but the consequences for the mother in such a case do not drastically differ from the consequences of the child's placement with strangers: in both arrangements, she may limit her involvement with the child. In any case, abortion fears must be weighed against providing closure to adult adoptees and additionally must be weighed against fathers' rights and the children's best interests.[138]

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132. Buss, *supra* note 120, at 666.

133. The courts do not typically become involved in the intact nuclear family unit. *See, e.g.*, Kilgrow v. Kilgrow, 107 So. 2d 885 (Ala. 1958); State v. Rhodes, 61 N.C. (Phil.) 453 (N.C. 1868).

134. Conversely, the recent, drastic increase of women's rights in family life has resulted in a counterproductive demise of the fathers' roles, rights, and responsibilities in children's lives.

135. Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 133 (2003) (suggesting that gender equality has removed barriers to the custody and nurture of children by their fathers).

136. *Id.*

137. *See, e.g.*, *In re* C (A Child) v. XYZ County Council, [2007] EWCA Civ 1206 [59] (U.K.) ("In France law and tradition have since the 18th Century permitted anonymous birth . . . . The rationale for the acceptance of anonymous birth was that it protected families from conflict and it reduced the risk of the crimes of abortion and infanticide.").

138. For the similar argument that open adoptions would not increase abortion rates, see Kuhns, *supra* note 108, at 292-94.

Supporting fathers' rights not only advances children's best interests, but also reinforces the notion that the family is not only the mother's responsibility. Should a father agree to sever his legal rights to his child, the mother would have the same result as if she had concealed the pregnancy. On the other hand, if the father is fit and willing to take responsibility for his child, he should be encouraged by the law to do so.

V. CONCLUSION

By focusing on a child's best interests to the exclusion of fathers' rights, courts invariably and adversely affect children, depriving them of information regarding their paternal families and possible placement within those families. Thus, courts in both England and the United States must be wary of interpreting the child's best interests standard as primarily requiring swift and permanent placement, particularly when at the expense of the proper severance of a child's familial ties. To work against fathers' rights in infant adoptions is simply to work against children's best interests.

It may be, as some have contended,[139] that many unwed fathers are disinterested and unsuitable parents. But this generalization does not characterize all unwed fathers, some of whom are wholly suited to have custody of their children. Given the opportunity, many of them may choose to commit to their children, preventing their placement with strangers. Significantly, it is also possible and essential for the courts, through best interests hearings, to allow only fit and willing fathers to keep custody of their children. To consistently disregard this balancing effort, however, entirely undermines children's best interests.

While the legal rights of a father may certainly not outweigh a child's best interests in a particular case,[140] to institutionally discard the scales that balance parents' and children's interests is to

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139. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 654-55 (1972):

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children. Given the opportunity to make his case, Stanley may have been seen to be deserving of custody of his offspring. Had this been so, the State's statutory policy would have been furthered by leaving custody in him.

140. If, for example, the father were an abusive or neglectful parent.

ignore certain biological and legal ties and, paradoxically, obstruct children's best interests. Yet, this paradox is precisely what a legal system constructs by not requiring the proper severance of both parents' ties to a child before permitting adoption.