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

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TWO TO TANGO, ONE IN LIMBO: A COMPARATIVE ANALYSIS OF FATHERS’ RIGHTS IN INFANT ADOPTIONS

Margaret Ryznar*

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 court room. 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 the loss of Baby Richard’s adopted home of four years. To the enraptured public, the emotional transfer of Baby Richard from his adoptive parents to his father symbolized the intense and universal nature of fathers’ rights.

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 severance of legal, familial ties. However, the zealous approach of the English law to this problem, which favors quick

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

2 See, e.g., In re Baby M, 537 A.2d 1227, 1234 (N.J. 1988) (affirming a woman’s right to change 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).


4 Baby Emily and Baby Jessica were publicly contested adoptions as well. G.W.B. v. J.S.W. (In re Adoption of 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).
and permanent placement of a child over the notification of the biological father, undermines its very purpose: the child’s best interests standard.

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 his own child. 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 to a better extent 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 grasp fatherhood or express some sort of commitment to their babies’ mothers. Neither legal system, however, has definitively addressed how a father can be protected from secret adoptions when he lacked the opportunity to grasp fatherhood or to commit to his newfound family life. And if the American courts were to embrace the English interpretation of the children’s best interests standard, fathers in both countries would 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 from secret adoptions is to establish a right to the father-child relationship that the courts must protect. Such a right can 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 protect him from concealed births, deceptions, and secret adoption plans. For children, it would provide information about their fathers, medical histories, and perhaps even result in placement with their fathers rather than outsiders.

This Article argues that both the father and the child should have their father-child relationship protected, which must be properly severed and waived by informed consent before a child is placed for adoption. Accordingly, Part I considers the American approach to fathers’ rights in

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5 See infra Part IV.

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

7 Some legal scholarship speaks of balancing children’s best interests and fathers’ rights, but this Article considers the two concepts to be more entwined. See, e.g., Karen C. Wehner, Daddy Wants Rights Too: A Perspective on Adoption Statutes, 31 Hous. L. Rev. 691 (1994).
contested adoption cases. Part II examines the English contrary position of favoring immediate severance of legal ties to a child, at the expense of obtaining both the mother’s and the father’s consent. Finally, Part III examines 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, while state legislatures have helped by creating putative father registries. Most of these efforts, however, have focused on married fathers or those who have grasped the opportunity to develop a relationship with their children, which necessarily requires knowledge of their children’s conceptions and births.

This legal framework is largely futile in the case of infant adoptions of out-of-wedlock children, wherein no such opportunity for substantive fatherhood exists prior to the adoption. The Supreme Court has not yet ruled on putative fathers in infant adoptions. Nonetheless, fathers’ rights have progressed far since the historical principles that denied unwed fathers a veto over their children’s adoptions, even when they were involved in the children’s lives.

A. Constitutional Protections

In a series of four important cases, the United States Supreme Court has protected fathers’ legal rights mostly through the equal protection and due process clauses of the Fourteenth Amendment. Although the parent-child relationship is therefore recognized to merit protection, such protection is conditioned on certain specific circumstances that trigger it.

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8 Although the constitutionalization of family law is an imperfect solution, it has aimed to preserve a parent’s right to his child.
12 The justifications for these 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.
Stanley v. Illinois\textsuperscript{13} 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. According to the Court, “The 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.”\textsuperscript{14} The state of Illinois instead was operating on a presumption that unmarried fathers were unsuitable and neglectful parents. The Court’s decision, at the minimum, mandated procedural due process to determine the children’s interests before fathers lost custody of them.

Subsequently in Quilloin v. Walcott,\textsuperscript{15} the Supreme Court restricted the protections afforded to biological fathers, requiring a biological father to legitimize his child before being able to block his child’s adoption by a stepfather—which Quilloin had failed to do. The Court rejected the argument that the father’s due process substantive rights were being violated by the application of the “best interests of the child”\textsuperscript{16} standard, particularly when he had not previously petitioned for legitimation and the mother always had custody of the child. 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 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 . . . .’”\textsuperscript{17}

In Caban,\textsuperscript{18} 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. In that case, the Court found a New York Domestic Relations Law\textsuperscript{19} provision unconstitutional, which allowed an

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\textsuperscript{13} 405 U.S. at 645.
\textsuperscript{14} Id. at 651.
\textsuperscript{15} 434 U.S. 246 (1978).
\textsuperscript{16} For background on the 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).
\textsuperscript{17} Quilloin, 434 U.S. at 552.
\textsuperscript{18} Caban v. Mohammed, 441 U.S. 380 (1979).
\textsuperscript{19} DOMESTIC RELATIONS LAW N.Y. § 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.”
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unwed mother, but not an unwed father, to prevent the adoption of their child simply by withholding consent. The sex-based discrimination breached the equal protection clause because it advanced no important state interest. Nonetheless, *Caban* allowed the possibility that states may deprive certain fathers of a veto in their children’s adoptions based on the substantiality of the father-child relationship.

Finally, in *Lehr*, the Court affirmed Quilloin’s principle that simply being the biological father was insufficient for constitutional protection. Instead, the father must grasp fatherhood to be protected. 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. Most problematically for fathers, however, the Court sanctioned limits on the notice given to fathers, holding that, “The State’s conclusion 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, cannot be characterized as arbitrary.”

In sum, the Supreme Court’s four decisions establish that a father’s right to constitutional protection exists when he has a substantial relationship with his child and has grasped the opportunity to be a father. However, the Court has not specifically addressed what constitutes grasping fatherhood, leaving open the question 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 infant adoptions. 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 questions pertaining to fathers’ rights in infant adoptions.

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20 *Lehr v. Robertson*, 463 U.S. 248, 262 (1983) (“If he 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.”).

21 *Id.* at 249. The Court concluded, “The Constitution does not require either the trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.” *Id.*


23 *Id.* at 389 (“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 note 4.
B. Legislative Solutions

The complexity of balancing fathers’ rights, children’s interests, and mothers’ rights has precluded the emergence of any one judicial 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.

The most creative and typical legislative response to infant adoptions has been the putative father registry.24 This state-specific database allows men to register the names of their sexual partners, so that should these women become pregnant and decide to place their babies for adoption, the potential fathers will be notified.25 The registry therefore serves the role of protecting fathers’ due process rights and allowing putative fathers to grasp 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 procedural rights of an unmarried father.26

Although the putative father registry is one acceptable method of protecting the father-child relationship, 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 herself, she avoids triggering the database. A national database would avoid this loophole, disincentivizing mothers from conspiring to avoid the database protections.27

Furthermore, the database scheme requires men to have perfect

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24 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 24 (2008).
25 The theory underpinning the 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 249.
27 Kidnapping in child custody cases has traditionally been of great concern. For example, the early view on the basis for 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, so 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.
information, favoring only those who know about the registry. In some states, a putative father’s ignorance of the pregnancy or birth is no excuse for not registering with the putative father registry. In many jurisdictions, the database also strictly defines the grounds and timing of any challenge to an adoption judgment. Thus, the database must be well advertised and its rules well explained in order to become effective.

Finally, the registry statutes are vulnerable to constitutional scrutiny. In particular, there are constitutional problems 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 law matters. In Florida, for example, one statute required private information on the mother and potential fathers to be printed in the newspapers before an adoption could be concluded. A court found that this Act breached the state’s constitution 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.

In sum, although American putative father registries are a constitutional method of protecting putative fathers’ rights, they are insufficient in infant adoptions. Many men have never heard of the registries, thereby losing their rights to contest the adoptions. The

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29 See, e.g., Fla. STAT. §63.142(4) (2003).
30 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).
32 Specifically, “[t]he notice . . . must contain 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. 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.
33 Article I, section 23 of the Florida Constitution provides: “[e]very 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. 1, § 23.
registries are also state-specific and thus easily avoidable by the mothers. Nonetheless, these registries are currently the primary guardians of fathers’ rights in infant adoption cases in the United States, leaving fathers mostly unprotected in the face of increasing litigation targeting their rights.

III. ADOPTIONS IN ENGLISH LAW

While American law has remained relatively silent on infant adoptions, English law explicitly disfavors fathers’ rights in such adoptions. However, English law cannot be considered in a vacuum—the courts are bound by European Union law, which is a more faithful guardian of fathers’ rights. 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

Along with the Children Act 1989, the Adoption and Children Act 2002 creates the legislative framework for adoption in England and Wales. The 2002 Act repealed the Adoption Act 1976 and significantly amended the Children Act 1989, changing the government’s policy towards adoption and impacting the role of local authorities. The changes came after a decade of review of adoption law by the Department of Health and the Law Commission.35

The primary principle governing adoption in England and Wales is the paramountcy principle of the child’s welfare,36 borrowed from the 1989 Act.37 Another important principle often employed by English courts is §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

36 Adoption and Children Act 2002, c. 1, § 1(2).
37 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;
   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) (italics added).

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prejudice the child’s welfare.” Finally, the 2002 Act includes several other considerations to guide courts in adoption cases.

Under this statutory framework, there are two grounds for allowing an adoption to proceed without parental consent. Specifically, §52(1) of the 2002 Act dispenses with consent either when 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.

As one commentator noted, “The adoption process in the UK is gradually becoming less consensual.” 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 the mother and father had only a fleeting relationship. In other words, while the fathers may have had recognizable interests in their children, they had no rights. Most recently, the Court of Appeal ruled in In re C that the 2002 Act has not changed this view, contrary to the lower court’s decision in the very same case.

In sum, the 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 permits the English courts to play a sizeable role in crafting the adoption law today.

38 Adoption and Children Act 2002, c. 1, § 1(3).
39 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.
Adoption and Children Act 2002, c. 1, § 1(4) (italics added).
40 Adoption and Children Act 2002, c. 3, § 52(1).
41 O’HALLORAN, supra note 35, at 154.
42 In re C (A Child) v XYZ County Council [2007] EWCA Civ 1206 [2].
43 Id.
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 *H (A Child) (Adoption: Consultation of Unmarried Fathers)*, 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. In *R (A Child) (Adoption: Duty to Investigate)*, Justice Holman held that there was no reason to doubt the mother’s views that the relatives could not care for the baby, so no notice of the child’s existence and adoption was given to the relatives. Finally, in *Re R (A Child) (Adoption: Disclosure)*, the Court found that although the Children Act 1989 and the Adoption Act 1976 gave judges discretion to consult with a child’s relatives, there was no duty on them to do so, particularly when it was not in the child’s best interest.

The most recent case affirming the lack of fathers’ rights in infant adoptions is *In Re. C (A Child)*, 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 carers.” 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 English courts would be uncontroversial in holding that many outsiders may not have all of the rights of a parent. However, when the issue is framed in respect to a father, consensus is more elusive.

In *In Re. C (A Child)*, a nineteen year old conceived after a one-night stand. She hid the pregnancy from both her family and the baby’s father. She sought medical attention only upon entering labor, after which she adamantly desired adoption for her baby. She listed the reasons that would prevent her family from caring for the child and refused to identify the baby’s father. However, the information she divulged sufficed to identify the baby’s father if the public authority had made independent inquiries.

The lower court judge held that the 2002 Act required exploring placement with the biological father in accordance with the child’s best

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47 *In re C (A Child) v XYZ County Council* [2007] EWCA Civ 1206 [1].
49 *In re C (A Child) v XYZ County Council* [2007] EWCA Civ 1206 [6].
interests. 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. Following the order, there was a misunderstanding that caused the local authority to write to the maternal family, requesting an interview but not providing a reason. The maternal grandparents therefore discovered the birth and offered the agency their assistance in resolving the issue.

In overruling the lower court, the English Court of Appeal viewed the 2002 Act as child-centered, but denied that a 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. 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.

Although Lady Justice Arden is prudent in minding the detriment caused by delay, she also has significant discretion under the 2002 Act to weigh delay with the needs of the child and the likely effect on the child being adopted, as well as the many other factors listed in the Act. The court compromised all of these factors for the sake of preventing delay.

Furthermore, this statutory interpretation precludes 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

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50 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 [26–27].

51 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].

52 Id. at [7]; see also Adoption: Local Authority Duty to Make Inquiries, JUSTICE OF THE PEACE & LOCAL GOVERNMENT LAW, 874–75 (2007).

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

54 Id. at [16, 17, 20].

55 Id. at [17].

56 See supra notes 37 and 39.
interests listed in the adoption legislation are compromised by swift and permanent placement of the child with strangers.\textsuperscript{57} 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.

C. European Union Case Law

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

In family law matters, Article 8 of the Convention requires the right to respect for family life.\textsuperscript{58} The European Court of Human Rights has interpreted the fundamental right of Article 8 to be access of a family member to children, opining, “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.”\textsuperscript{59} In other words, Article 8, incorporated into English law, protects parents’ and grandparents’ access to children.

\textit{Keegan v. Ireland}\textsuperscript{60} 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 cohabitating with her boyfriend, a woman conceived. She gave birth after separating from her boyfriend, placing the baby for adoption one week

\textsuperscript{57} See id.

\textsuperscript{58} Article 8 of the European Court of 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 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.


before notifying her ex-boyfriend. The European Court found unacceptable the secret adoption that occurred before the father could develop a family life with the child: “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 proposed adopters and to the subsequent making of an adoption order, amounted to an interference with the applicant’s right to respect for family life.”61

The English courts nonetheless distinguish their adoption decisions from European cases like Keegan by suggesting that “[t]he 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.”62 Indeed, in Keegan, the European Court found that the family right arose during the child’s conception, when the parents were cohabiting. However, although the parents in Keegan were romantically involved for two years, while there was only a one night stand in In Re C, 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 pathetic. However, even if separating a one night stand from a one year cohabitation that occurred prior to the child’s birth does somehow measure 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—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, conceded that “[the family life protection of Article 8] includes a potential relationship, that is, a relationship that may develop.”63 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.”64 Accordingly, the potential relationship is

61 Id. 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 (2003).
62 In re C (A Child) v XYZ County Council [2007] EWCA Civ 1206 [32].
63 Id. at [31].
64 Id. at [32].
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,\(^{65}\) which was defeated for other reasons.\(^{66}\) Thus, the grandparents have a right of access to the child in English jurisprudence when the father does not—a curious result.

In conclusion, the English courts’ interpretation of Article 8 is circular at best, and disingenuous at the 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 lack recourse in English infant adoption cases unless they take their cases to the European Court of Human Rights in Strasbourg.

IV. EMERGING LESSONS 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 approach of the United States and England towards biological fathers in infant adoption cases is one example of a noticeable divergence, even though the goal is common: the best interests of the child. However, each jurisdiction’s interpretation of the child’s best interests facilitates a different understanding of fathers’ rights in infant adoptions, raising the debate of what these 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.

A particularly significant lesson emerging from a comparison of the American and English 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. If the courts were more protective of the father-child relationship,

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\(^{65}\) This is in accordance with Marckx v Belgium, 2 Eur. Ct. H.R. 330, [45] (1979); see also note 48.

\(^{66}\) In re C (A Child) v XYZ County Council [2007] EWCA Civ 1206 [39].
children’s interests would be better advanced.

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. 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 a home, American courts are not so certain that excluding fathers is in anyone’s best interests.

Importantly, the American approach enables courts to grant fitness hearings to biological fathers who grasp 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, avoiding belated custody battles such as those of Baby Jessica and Baby Richard.

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 In Re. C (A Child). In reality, however, the best interests of children may very well require 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 following a one-night stand, the question is whether placement with strangers through adoption or the foster care system is preferable to placement with the biological father’s family. There is no obvious answer, and therefore it must be resolved by a court on the facts of each case.

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68 In re C (A Child) v XYZ County Council [2007] EWCA Civ 1206; see also supra notes 54–55 and accompanying text.

69 See supra Part II.

70 See supra notes 54–55 and accompanying text.

71 Some courts and commentators have argued that the clear preference should be for the biological parents. See, e.g., In the Matter of Mark T., 154 N.W.2d 27, 39 (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
Yet, this adjudication—in other words, a best interests hearing—is completely denied by England’s approach, which entirely axes the father from the child 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,72 which underscores the importance of a person’s access to information that allows him to know and understand his identity.73 Nonetheless, the English court, in In Re. C (A Child), decided that it is not even in the interests of the child to make inquiries into the child’s medical and familial background: “enquiries are not in the interests of the child simply because they will provide more information about the child’s background. . . .”74 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.75 Accordingly, birth certificates and adoption records of court

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72 For a good discussion of this jurisprudence in comparison to American jurisprudence on adoptees’ right to identifying information, see BLAIR & WEINER, supra note 61, at 885.

73 Gaskin v. United Kingdom, 12 Eur. Ct. H.R. 36 (1989); but see In re C (A Child) v XYZ County Council [2007] 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.”).

74 In re C (A Child) v XYZ County Council [2007] EWCA Civ 1206 [3].

75 See, e.g., Application of Anonymous, 390 N.Y.S.2d 779, 781 (1976) (“Confidentiality and the sealing of records . . . promotes the broad legislative purposes in several ways. It encourages and facilitates investigation into factors relevant to 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.”); People v. Doe, 138 N.Y.S.2d 307, 309 (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
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 launch emotional court battles to open their sealed records, grasping onto whatever constitutional provision may help.\textsuperscript{76} Others resent being treated like children by a society that bars them from learning identifying information even as adults.\textsuperscript{77} The limited research on adult adoptees reinforces their claims, finding that they frequently suffer negative consequences as a result of the lack of identifying information.\textsuperscript{78}

Many problems have also arisen following anonymous sperm donations.\textsuperscript{79} In fact, England’s Children’s Society has condemned the secrecy associated with anonymous sperm donation in an editorial published by a popular newspaper.\textsuperscript{80} According to the editorial, over 80 per cent of adopted people search for birth relatives.\textsuperscript{81}

While many people have suffered greatly as a result of the anonymity created by sealed adoption records and anonymous sperm banks,\textsuperscript{82} public

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\textsuperscript{78} See, e.g., Paul Sachdev, Unlocking the Adoption Files: A Social and Legal Dilemma, Adoption: Current Issues and Trends 141, 142–46 (Sachdev, ed. 1984); Arthur D. Sorosky et al., The Adoption Triangle (1978); and Kuhns, supra note 77, 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.”).

\textsuperscript{79} Michelle Dennison, Revealing Your Sources: The Case for Non-Anonymous Gamete Donation, 21 J.L. & Health 1,1 (2008) (recounting a 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 (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.”).

\textsuperscript{80} 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.

\textsuperscript{81} Id.

\textsuperscript{82} For arguments 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, 535 (2006).
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 answers in the future, even though one study noted that “over 85% reported that the experience of tracing relatives was positive, even when family reunions did not work out.” 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.

In response, children’s legal guardians occasionally attempt to argue in court that children have constitutional or Convention rights. In In Re C (A Child), the English court avoided expressing a final opinion on the argument that a child has a European 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.” American courts, although more receptive to the argument, have similarly failed to seriously consider that the best interests of the child requires the protection of the father-child relationship. Justice Scalia, for example, suggested a potential First Amendment right of association or free exercise on behalf of the children in Troxel v. Granville. Furthermore, in Michael H. v. Gerald D., a guardian ad litem argued on behalf of a child, albeit unsuccessfully, that a restriction on the 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.” Beyond this, constitutional rights of children have received little consideration from the Supreme Court, with children being largely unrepresented in court cases.

83 Feast, supra note 80.
84 In re C (A Child) v XYZ County Council [2007] EWCA Civ 1206 [35].
85 530 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.
86 491 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).
87 Id. at 131.
88 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 ‘co-
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, preventing the vindication of all parties’ rights. There is also little precedent for such constitutional rights to be granted to children. 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 interest of the child is 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.

In sum, it is not obvious that the best interests of the child standard requires the prioritization of permanent placement over the notification of the biological father. On the contrary, by not requiring the notification of an adopted 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. Meanwhile, closed adoptions and anonymous sperm donation suggest that children’s best interests may require that they know their identities and establish contact with their biological parents. At stake is also the very real possibility that the biological father wants to keep and raise his child. All of these benefits of a best interests hearing are flatly rejected by the current English approach to infant adoptions.

B. Fathers’ Rights

Another concept bifurcating American and English family law is that extensive 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.”).

89 Michael H 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).

90 This assumes that every right requires a remedy, as Marshall held in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). On the other hand, not all rights are remedied by law. See, e.g., Hart and Wechsler, The Federal Courts and the Federal System, 759–825 (2003); Buss, supra note 89, at 666.

91 See supra notes 88–89 and accompanying text.
of fathers’ rights. While American courts have required, under Lehr and Stanley, that due process be given to fathers who grasp fatherhood, the English Court of Appeal recently denied such protections for fathers in certain adoptions.

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 require 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.

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, such as “the interest of a parent in the companionship, care, custody, and management of his or her children.” This reciprocal nature between a parent’s obligations and his rights has been recognized by the United States Supreme Court to a certain extent: “the 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.” Yet, fathers continue to lack many of the fundamental rights in regards to their children because of the unresolved questions regarding what grasping fatherhood entails in the case of infant adoptions.

Furthermore, perhaps the worst result of depriving fathers of an early opportunity to contest their children’s adoption is the resulting message sent to fathers: you do not matter in the creation and support of a family. Such a message, reinforced by the lack of certain fundamental fathers’

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93 In re C (A Child) v XYZ County Council [2007] EWCA Civ 1206.
95 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 burdens without benefits onto fathers discourages and undermines their full role in the family unit.
96 Stanley, 405 U.S. at 645.
97 Such rights include the liberty right of a parent to control the upbringing of her child. See, e.g., Pierce v. Society of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).
99 For example, fathers lack the right to due process before the termination of their parental rights. “[S]tate intervention to terminate [such a] relationship . . . must be accomplished by procedures meeting the requisites of the Due Process Clause.” Santosky v. Kramer, 455 U.S. 745, 752 (1982) (citations omitted).
rights, institutionally discourages fathers’ involvement in their children’s lives.

Finally, protection of fathers’ rights assures that limited public resources are not wasted. In both England and the United States, there are only a limited number of willing adoptive families.\textsuperscript{100} To fill adoptive homes with children whose fathers may want to raise them is not only a waste of resources, but also not necessarily the best arrangement for the child.\textsuperscript{101} A similar public policy argument justifies the child support system, which keeps many mothers off of public support. Hence, allowing fathers to take a role in their children’s lives by simply notifying them of the birth of their children is more efficient.

In sum, protection of fathers’ rights advances three vital goals: assuring children’s best interests, encouraging fathers’ responsibilities, and preventing the use of limited adoptive homes to house 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 a justification is disingenuous and counterproductive.

\textbf{C. Women’s Rights}

Increasing fathers’ rights necessarily implicates mothers’ rights, particularly when the two sets of rights conflict\textsuperscript{102} and the broken family unit invites court intervention.\textsuperscript{103} Indeed, in most cases, increasing fathers’ rights results in the decreasing of mothers’ rights.\textsuperscript{104}

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 contributes not only to the degradation of fathers’ rights, but also undermines women’s interests by casting doubt on gender equality theories that recognize both

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\item In \textit{re C} explicitly rejects this reasoning. \textit{In re C (A Child) v XYZ County Council [2007]} EWCA Civ 1206 [42–43].
\item Buss, \textit{supra} note 89, at 666.
\item The courts do not typically become involved in the intact nuclear family unit. \textit{See}, e.g., Kilgrow v. Kilgrow, 107 S2d 885 (Ala. 1985); State v. Rhodes, 71 NC 453 (N.C. 1868).
\item 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.
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men and women as capable parents.\textsuperscript{105} Furthermore, it propagates the view of men as mere economic providers, rather than as full-time parents.\textsuperscript{106} 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.\textsuperscript{107} However, it is unlikely that many mothers will abort simply because they do not want 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 than those resulting from placement of the baby with strangers—she may limit her involvement with the child in both arrangements. In any case, abortion fears must be weighed against providing adult adoptees closure,\textsuperscript{108} and additionally must be weighed against fathers’ rights and the children’s best interests.

In sum, working for fathers’ rights not only advances children’s best interests, but also reinforces 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 concealed the pregnancy. On the other hand, if he is fit and willing to take responsibility for the child, he should be encouraged by the law to do so.

\section*{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 weary of interpreting the child’s best interests standard as primarily requiring swift and permanent placement.

In fact, the meaning of children’s best interests likely includes not only access to the paternal family’s information, but also the very real possibility that the biological father wants to keep and raise his child. To work against father’s rights in infant adoptions is simply to work against

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\footnote{105}{Nancy E. Dowd, \textit{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).}
\footnote{106}{\textit{Id.}}
\footnote{107}{\textit{See, e.g., Z County Council v R [2001] 1 FLR 365; see also In re C (A Child) v XYZ County Council [2007] EWCA Civ 1206 [59] (‘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.’).}}
\footnote{108}{For further arguments that open adoptions would not increase abortion rates, see Kuhns, \textit{supra} note 77, at 292–93.}
\end{footnotes}
children’s best interests.

It may be, as the courts contend, that many unwed fathers are disinterested and unsuitable parents. But this 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 or in the foster care system. Significantly, it is also possible and essential for the courts, through best interests hearings, to allow only the fit and willing fathers to keep custody of their children. To consistently discard this balancing effort, however, entirely undermines the best interests of the child.

In sum, while the legal rights of a father may certainly not suffice to trump a child’s best interests when they are weighed in a particular case, to institutionally discard the scales that balance parents’ and children’s interests is to ignore not only the biological and legal ties naturally formed, but, to paradoxically work against children’s best interests. Yet, this is precisely what a legal system does by not requiring the severance of both parents’ ties to a baby through informed consent before permitting adoption.

109 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.”).

110 If, for example, the father were an abusive and neglectful parent.