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Comment

Rights of Unwed Fathers and the Best Interests of the Child: Can These Competing Interests be Harmonized? Illinois' Putative Father Registry Provides an Answer

If . . . the best interests of the child is to be the determining factor in child custody cases, persons seeking babies to adopt might profitably frequent grocery stores and snatch babies from carts when the parent is looking the other way. Then, if custody proceedings can be delayed long enough, they can assert that they have a nicer home, a superior education, a better job or whatever, and that the best interests of the child are with the baby snatchers. Children of parents living in public housing or other conditions deemed less than affluent and children with single parents might be considered particularly fair game. The law, thankfully, is otherwise.¹

We must remember that the purpose of an adoption is to provide a home for a child, not a child for a home.²

I. INTRODUCTION

Emotions run high in contested adoptions. Parties with different and competing interests vie for the most favorable position in proceedings determining who will receive parental rights over the child, what is best for the child, and how the law applies in any given situation.³ These parties can include the child, the biological parents, the adoptive parents, and even the state itself.⁴ Some commentators argue that the best interests of the child should be paramount to a court in deciding to whom it will award custody of the child.⁵ Others argue

1. *In re Doe*, 638 N.E.2d 181, 188 (Ill.) (Heiple, J., writing in support of the denial of rehearing), *cert. denied*, 115 S. Ct. 499 (1994) (popularly known as the *Baby Richard* case).

2. *Id.* at 190 (Heiple, J., writing in support of the denial of rehearing).

3. *See infra* part III.

4. *See generally* H. JOSEPH GITLIN, ADOPTIONS: AN ATTORNEY'S GUIDE TO HELPING ADOPTIVE PARENTS 3-5, 30-72 (1987) (discussing the procedures in adoptions).

5. *See generally* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 16-23 (1973) (arguing that if a child has been adopted and has lived with the adoptive parents for a period of time, the child has come to know these parents as his or her own; abrupt removal from this environment, in an effort to protect a biological parent's interest in the child, thus will have severe consequences on the child's psychological

that the biological parents' rights⁶ are just as important—or even more important—than those of any of the other interested parties when determining who will have the right to raise the child.⁷ When these interests clash in adoption proceedings, the court must determine whose interest will prevail. Often, no party emerges unscathed from a contested adoption proceeding.⁸

Recently, these competing interests clashed in the Illinois case, *In re Doe*⁹ ("*Baby Richard I*").¹⁰ In *Baby Richard I*, the Illinois Supreme

well-being, and because of this, the child should never be removed from the established parent-child relationship); Suzette M. Haynie, Note, *Biological Parents v. Third Parties: Whose Right to Child Custody is Constitutionally Protected?*, 20 GA. L. REV. 705, 742-44 (1986) (claiming that the best interests of the child standard is the only constitutional analysis applicable in third-party custody proceedings).

6. Specifically, this Comment focuses on the rights of unwed, biological fathers.

7. See, e.g., Margaret Beyer & Wallace J. Mylniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 233 (1986) (addressing the need to establish a permanent relationship between parent and child); Alexandra R. Dapolito, Comment, *The Failure to Notify Putative Fathers of Adoption Proceedings: Balancing the Adoption Equation*, 42 CATH. U. L. REV. 979 (1993) (focusing on the manner in which courts are addressing the rights of unwed biological fathers); John R. Hamilton, Note, *The Unwed Father and The Right to Know of His Child's Existence*, 76 KY. L.J. 949 (1988) (discussing the unwed father's rights with respect to his biological children); Stacy L. Hill, Note, *Putative Fathers and Parental Interests: A Search for Protection*, 65 IND. L.J. 939 (1990) (addressing how to better serve the needs of all parties involved in custody cases).

Some commentators suggest other, more unique approaches to parent-child relationships. See, e.g., Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988) (arguing that the entire approach to family rights issues should focus more on responsibility than rights); Barbara B. Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993) (creating the "gestational father" as viewed from a "generist's" perspective).

8. See *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994). In this case, unless a subsequent ruling holds otherwise, the adoptive parents will lose custody of the child they have raised since infancy, the child will be removed from the only home the child has ever known, and the biological parents will have to struggle to create a familial bond with a three-year-old child who is a stranger to them. See also *In re Clausen*, 502 N.W.2d 649 (Mich. 1993) (popularly known as the *Baby Jessica* case). The results in the *Baby Jessica* case are similar to those in *In re Doe* cited above. In addition, *Clausen* exemplifies the difficulty courts face when reconciling differing state adoption laws in interstate proceedings.

9. 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994) [hereinafter *Baby Richard I*].

10. Subsequent to the Illinois Supreme Court's decision in *Baby Richard I* and its denial of rehearing, the adoptive parents petitioned for a writ of certiorari, which the United States Supreme Court denied on November 7, 1994. *Doe v. Kirchner*, 115 S. Ct. 499 (1994). In the meantime, the Illinois General Assembly amended its adoption law, see *infra* part III.C, and the adoptive parents petitioned the Circuit Court of Cook County for a custody hearing pursuant to the new law. *In re Kirchner*, No. 78101, 1995 WL 80012, at *5 (Ill. Feb. 28, 1995) (per curiam) [hereinafter *Baby Richard II*]. *Baby Richard*'s biological father then petitioned the Illinois Supreme Court for a writ of habeas corpus to require the adoptive parents to surrender custody of *Baby Richard*. *Id.* at

Court invalidated Baby Richard's adoption—over three years after his adoption—reasoning that Baby Richard's biological father was not an unfit parent and that the adoption was invalid without the biological father's consent.¹¹ In direct response to the Illinois Supreme Court's decision in this case, the Illinois General Assembly amended the Illinois Adoption Act ("Amended Adoption Act").¹² The Amended Adoption Act requires an unwed father who has not established a relationship with his child to register with the state within thirty days of the birth of his child in order to maintain parental rights in the event of a subsequent adoption proceeding.¹³ In enacting this Putative Father Registry provision,¹⁴ the Illinois General Assembly attempted to

*1. The Illinois Supreme Court heard oral arguments on January 25, 1995, and on that same day it issued the writ of habeas corpus with an opinion to follow. *Id.* On February 28, 1995, the Illinois Supreme Court issued its written opinion of its January 25, 1995 decision to issue the writ of habeas corpus. *In re Kirchner*, No. 78101, 1995 WL 80012, at *1. The adoptive parents and Richard's guardian ad litem next filed for recall of mandate and stay of issuance of the writ of habeas corpus before Justice Stevens as Circuit Justice for the Seventh Circuit. *O'Connell v. Kirchner*, 115 S. Ct. 891 (Stevens, Circuit Justice 1995). On January 28, 1995, Justice Stevens as Circuit Justice denied the request. *Id.* at 891-92. The adoptive parents and Richard's guardian ad litem then undertook applications for stay addressed to Justice O'Connor and referred to the Court. *O'Connell v. Kirchner*, 115 S. Ct. 1084 (1995). The Court denied the applications with Justice O'Connor issuing a brief dissent in which Justice Breyer joined. *Id.* See also *infra* part III.D (briefly discussing the Illinois Supreme Court's decision in that case).

11. *Baby Richard I*, 638 N.E.2d at 182-83. For a complete discussion of *Baby Richard I*, see *infra* part III.A.

12. Uniform Interstate Family Support Act, Pub. Act No. 88-550, § 975, 1994 Ill. Legis. Serv. 403-17 (West) (codified at ILL. COMP. STAT. ANN. ch. 750, §§ 50/1, 50/8, 50/11, 50/12a, 50/12.1, 50/20, 50/20a, 50/20b (West Supp. 1995)).

13. ILL. COMP. STAT. ANN. ch 750, § 50/12.1(h) (West Supp. 1995). Section 50/12.1(h) specifically states:

Except as provided in Section 8(b) of this Act, failure to timely register with the Putative Father Registry (i) shall be deemed to be a waiver and surrender of any right to notice of any hearing in any judicial proceeding for adoption of the child, and the consent of that person to the adoption of the child is not required, and (ii) shall constitute an abandonment of the child and shall be prima facie evidence of sufficient grounds to support termination of such father's parental rights under this Act.

Id. See *infra* part III.C for a more detailed explanation of the requirements set forth in the Illinois Adoption Act which allow for a putative father to receive notice of adoption proceedings in a limited set of circumstances.

14. Generally, "putative father" means "[t]he alleged or reputed father of a child born out of wedlock." BLACK'S LAW DICTIONARY 1237 (6th ed. 1990). The Amended Adoption Act defines "putative father" as:

[A] man who may be a child's father, but who (1) is not married to the child's mother on or before the date that the child was or is to be born and (2) has not established paternity of the child in a court proceeding before the filing of a petition for the adoption of the child. The term includes a male who is less than 18 years of age.

ILL. COMP. STAT. ANN. ch 750, § 50/1(R) (West Supp. 1995).

balance the often conflicting interests that the State has in securing adoptions,¹⁵ in providing what is best for the child,¹⁶ and in protecting the constitutional rights of unwed fathers.¹⁷ This Comment examines these competing interests and the complex issues inherent in contested adoption proceedings, specifically focusing on Illinois' efforts to strike an appropriate balance.¹⁸

First, this Comment reviews the United States Supreme Court decisions that established a liberty interest in the relationship between parents and their children.¹⁹ Next, it examines the background of the Supreme Court decisions that established the parameters of the liberty interest which may exist between an unwed father and his child in adoption proceedings.²⁰ Within this context, this Comment then discusses the structure of the Illinois Adoption Act ("Adoption Act") as it existed at the time the Illinois Supreme Court invalidated Baby Richard's adoption in *Baby Richard I*.²¹ This Comment then discusses the facts and opinions of *Baby Richard I*,²² followed by a brief discussion of the public outcry and the initial legislative and judicial response.²³ It then discusses the Amended Adoption Act,²⁴ and the Illinois Supreme Court's refusal to apply the amendments to the facts in *Baby Richard*.²⁵ It then briefly analyzes the *Baby Richard* case,²⁶ and more fully analyzes Illinois' Amended Adoption Act.²⁷ Next, this Comment recognizes that Illinois' Putative Father Registry successfully balances

15. See *Caban v. Mohammed*, 441 U.S. 380, 389 (1979).

16. *Id.* at 391.

17. *Lehr v. Robertson*, 463 U.S. 248, 256 (1983). The *Lehr* Court concluded: "The intangible fibers that connect parent and child have infinite variety. They 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." *Id.*

18. In an attempt to provide insight into the legal and psychological considerations surrounding the competing interests involved, many commentators have written on the various complex aspects of contested adoptions. See, e.g., *supra* note 7. A complete analysis of every consideration involved in contested adoption proceedings is beyond the scope of this Comment.

19. See *infra* part II.A.

20. See *infra* part II.B.

21. See *infra* part II.C.

22. See *infra* part III.A.

23. See *infra* part III.B.

24. See *infra* part III.C.

25. See *infra* part III.D.

26. See *infra* part IV.A. Although the focus of this Comment is primarily on the Adoption Act and its amendments, the *Baby Richard* case is briefly discussed and analyzed. A detailed analysis of the *Baby Richard* case, however, is beyond the scope of this Comment.

27. See *infra* part IV.B-D.

the competing interests which surround contested adoption proceedings, but this Comment also proposes some modifications.²⁸ Finally, this Comment concludes that the goals of the states must be to ensure that state adoption laws and procedures are efficient, comprehensive, and specific enough to protect all parties in adoption proceedings.²⁹

II. BACKGROUND

A. *The Liberty Interest in Parent-Child Relationships*

The United States Supreme Court has addressed the issue of familial and parental rights in a series of cases.³⁰ Specifically, the Court has held that the Fourteenth Amendment³¹ establishes a liberty interest in the parent-child relationship.³² This interest coincides with the parents' duty to care for their children,³³ and stems from the basic

28. See *infra* part V.

29. See *infra* part VI.

30. *Santosky v. Kramer*, 455 U.S. 745 (1982) (addressing the rights of parents in a termination proceeding); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 33 (1981) (holding that the Constitution does not require appointment of counsel for indigent parents in every termination proceeding); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977) (discussing procedures for removal of foster children from foster homes); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (recognizing constitutional protection for the extended family unit); *Wisconsin v. Yoder*, 406 U.S. 205, 234-36 (1972) (holding that parents have a constitutionally protected right to control the education their children receive); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (addressing the rights of parents and their children to disseminate religious information); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (denying the state the right to force children to attend public schools); *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (holding that a state could not forbid the teaching of a foreign language to children who had not passed the eighth grade).

Although this list is not exhaustive, these cases provide a framework in which to discuss the liberty interest in the parent-child relationship.

31. "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

32. *Meyer*, 262 U.S. at 399. In its opinion, the Court stated:

While this Court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness . . .

Id. (citations omitted) (emphasis added).

33. *Pierce*, 268 U.S. at 534-35; see also *Meyer*, 262 U.S. at 400. One commentator suggests that the duty-rights relationship is embodied in the term "custody":

history of values in this society.³⁴ Although a state may intrude upon this interest through regulation,³⁵ it may do so only if the state's interest in protecting the child³⁶ or the health and safety of its citizens outweighs the established liberty interest of the parent-child relationship.³⁷ Furthermore, the Court has also held that the history and tradition surrounding the function of the extended family³⁸ elevates the

[T]he parent's constitutional right to be with, provide for, and control his or her child is inextricably linked to the parent's duty to provide for the child's physical and emotional needs. The term "custody" has been used to describe this intermingling of rights and duties. That the Constitution particularly protects the custodial rights of biological parents who perform custodial responsibilities has been stated as a fact and explained in terms of tradition and natural right. . . . [P]arents who live with, provide for, and form emotional attachments with their children perform the social function of caring for children, and their interests are worth protecting.

Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After Lehr v. Robertson*, 45 OHIO ST. L.J. 313, 323 (1984).

34. *Moore*, 431 U.S. at 503. Justice Powell emphasized this relationship in the *Moore* opinion: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.*

35. *See id.* at 499 (citing *Prince*, 321 U.S. at 166).

36. The term "parens patriae" is often used to describe the interest the state has in protecting the children who live within the state's borders:

"Parens patriae," literally "parent of the country," refers traditionally to role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane, and in child custody determinations, when acting on behalf of the state to protect the interests of the child. It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents.

BLACK'S LAW DICTIONARY 1114 (6th ed. 1990) (citations omitted).

37. *Moore*, 431 U.S. at 499; *Yoder*, 406 U.S. at 214; *see also Pierce*, 268 U.S. at 534-35 (noting that the state action must be reasonable); *Meyer*, 262 U.S. at 399-400 ("The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect.").

This does not mean that the state may not limit parental rights. Indeed, in *Prince*, the Court stated: "[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction." *Prince*, 321 U.S. at 167; *see also Moore*, 431 U.S. at 503 ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'" (alteration in original) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring))).

38. The term "extended family" is used in this context to describe families related by blood which extend beyond parent and child, often including grandparents and cousins. "Extended family" is defined as "a larger family group which includes near relatives (as patrilineal descendants) and which collateral lines are kept fairly distinct." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 804 (1986).

extended family to a level that is protected by the Constitution.³⁹ Thus, the liberty interest which protects familial relationships does not apply solely to the biological parent and his or her child.

While the Court has held that the Fourteenth Amendment protects the biological family unit, it has been hesitant to explicitly conclude that a liberty interest exists within a "psychological" parent-child relationship.⁴⁰ For example, in *Smith v. Organization of Foster Families for Equality & Reform*,⁴¹ the Court confronted the issue of whether foster parents have a liberty interest in their relationship with their foster children.⁴² In reviewing a statute governing foster parents, the Court failed to explicitly acknowledge a liberty interest in the relationship between foster parents and children,⁴³ although it hinted that it would be more likely to protect such an interest when foster parents face governmental intrusion than when foster parents face the biological parents' interests.⁴⁴

39. *Moore*, 431 U.S. at 504-06. In *Moore*, the Court held that a city ordinance limiting occupancy of dwellings in a particular neighborhood to "members of a single family" violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 499, 506. The plaintiff lived with her grandsons. *Id.* at 496. The State determined that this arrangement violated the city ordinance because the two grandsons were not brothers, but rather were first cousins and did not fall within the definition of "family" as prescribed by the ordinance. *Id.* at 495-97. But see *id.* at 537 (Stewart, J., dissenting). Justice Stewart concluded:

The interest that the appellant may have in permanently sharing a single kitchen and a suite of contiguous rooms with some of her relatives simply does not rise to that level. To equate this interest with the fundamental decisions to marry and to bear and raise children is to extend the limited substantive contours of the Due Process Clause beyond recognition.

Id. (Stewart, J., dissenting); see also *id.* at 549 (White, J., dissenting). Justice White agreed with Justice Stevens, stating: "I cannot believe that the interest in residing with more than one set of grandchildren is one that calls for any kind of heightened protection under the Due Process Clause." *Id.* (White, J., dissenting).

40. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 847 (1977).

41. 431 U.S. 816 (1977).

42. *Id.* at 842-47. The child in *Smith* had lived with the foster parents for more than a year. *Id.* at 818 n.1. The foster parents claimed that the psychological bond that was created between them and the child was worthy of recognition as a true "family" relation and therefore was entitled to the same protection as the traditional biological family. *Id.* at 839.

43. *Id.* at 847.

44. See *id.* at 846-47. Justice Brennan, writing for the Court, limited the issue to whether the foster parents had been afforded adequate procedural due process. *Id.* at 839. He did, however, address whether the foster parents had an interest in their relationship with the foster child sufficient to be protected by the Fourteenth Amendment. *Id.* While finding that biology is not the only factor significant in determining whether a liberty interest exists within familial relationships, Justice Brennan determined:

It is one thing to say that individuals may acquire a liberty interest against

The New York statute at issue in *Smith* required that prior to removal of a foster child, the foster parents must receive notice of the removal, must be allowed to request a conference with the social services department,⁴⁵ and must be allowed a full administrative hearing upon demand.⁴⁶ Without specifying whether a liberty interest exists in the foster family context, the *Smith* Court held that these procedures for removing a foster child from a foster home satisfied the requirements of procedural due process.⁴⁷ The Court noted, however, that even if a protected liberty interest was at stake, these procedures were nevertheless constitutional.⁴⁸ In this way, the Court resisted an explicit extension of the liberty interest in family relations beyond biological connections.⁴⁹

Moreover, in establishing and setting the boundaries of the liberty interest in familial relationships, the Court has focused on the rights of adults. In the process, the Court has left unclear whether any

arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right—an interest the foster parent has recognized by contract from the outset. *Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.*

Id. at 846-47 (footnote omitted) (emphasis added); *cf. id.* at 857-58 (Stewart, J., concurring). While generally agreeing with the Court's opinion, Justice Stewart favored a stronger position when dealing with this issue:

In these circumstances, I cannot understand why the Court thinks itself obliged to decide these cases on the assumption that either foster parents or foster children in New York have some sort of "liberty" interest in the continuation of their relationship. Rather than tiptoeing around this central issue, I would squarely hold that the interests asserted by the appellees are not of a kind that the Due Process Clause of the Fourteenth Amendment protects.

Id. (Stewart, J., concurring).

45. *Id.* at 820 n.3, 829-30.

46. *Id.* at 830.

47. *Id.* at 848-49. The Court addressed several factors in determining whether due process was satisfied. *See id.* at 848-49. These factors included: (1) the private interest that would be affected; (2) the risk of an erroneous deprivation of such an interest; and (3) the government's interest in protecting the child. *Id.*

48. *Id.* at 847.

49. *Id.* The marital relationship, however, plays an important role in setting the parameters of familial relationships protected by the Constitution. *See Michael H. v. Gerald D.*, 491 U.S. 110, 123 n.3 (1989) (plurality opinion) (writing for the plurality, Justice Scalia discusses the importance of the "unitary family," referencing the importance of the marital family in our society's history and traditions); *see also infra* notes 114-36 and accompanying text for a detailed discussion of this case.

reciprocal and independent interest exists in the parent-child relationship as viewed from the child's perspective.⁵⁰

B. Unwed Fathers and the "Earned" Liberty Interest

Although the United States Supreme Court recognized a liberty interest in the parent-child relationship within the biological family unit, prior to 1972 unwed fathers had no rights to custody of their children.⁵¹ By not including the unwed father within the definition of "parent," early Illinois adoption laws explicitly excluded the need for the unwed father's consent in adoption proceedings involving his child.⁵² Historically, adoption laws excluded the unwed father from custody proceedings because society viewed him as an irresponsible and usually absent parent, unwilling to assume his responsibility to the child by marrying the mother.⁵³

In 1972, in *Stanley v. Illinois*,⁵⁴ the United States Supreme Court finally confronted the exclusion of unwed fathers from the definition of "parent" in state statutes.⁵⁵ The *Stanley* decision invalidated an

50. See *Wisconsin v. Yoder*, 406 U.S. 205, 241-46 (1972) (Douglas, J., dissenting) (suggesting that the child has constitutionally protected interests which should also be considered); see also Kirsten Korn, Comment, *The Struggle For The Child: Preserving The Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1286-90 (1994) (discussing the history of the rights of children, and suggesting that these rights are often viewed from the parents perspective); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion). The *Michael H.* plurality stated: "We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship." 491 U.S. at 130 (plurality opinion).

51. See Korn, *supra* note 50, at 1297. But see ILL. REV. STAT. ch. 7, para. 5 (E.B. Myers & Chandler, 1867). The early Illinois Bastardy laws required that the unwed father pay for the support of the child. *Id.* If the father complied with this requirement, he was entitled to custody of the child after the child reached a certain age—suggesting that he had bought the child from the mother and was now entitled to his goods. See *id.* If the mother refused to relinquish custody, the father was no longer obligated to make his support payments. *Id.* This option was foreclosed in 1949 by House Bill Number 83.

52. ILL. REV. STAT. ch. 4, para. 2 (1909). The relevant language reads as follows:

The [adoption] petition shall state one or more causes for adoption, the name, if known, the sex and the approximate age of the child sought to be adopted and if it is desired to change the name, the new name, and either the name, or that the name is unknown to petitioner (a) of the person having the custody of such child; and (b) of each of the parents or of the surviving parent of a legitimate child or of the mother of an illegitimate child; . . .

Id. (The unwed father was not included in the definition of "parent.")

53. Hill, *supra* note 7, at 941.

54. 405 U.S. 645 (1972).

55. See Karen C. Wehner, Comment, *Daddy Wants Rights Too: A Perspective on Adoption Statutes*, 31 HOUS. L. REV. 691, 703-04 (1994) (discussing the rights of unwed fathers before 1973).

Illinois law which irrebuttably presumed an unwed father to be unfit to raise his biological child, and which failed to require a court to hold a hearing to determine his fitness before the State could deprive him of custody.⁵⁶ The Illinois law did not presume that married fathers were unfit.⁵⁷ Peter Stanley, the father of the children, challenged this law as a violation of his constitutional rights to due process and equal protection under the law.⁵⁸

The Supreme Court held the Illinois law unconstitutional because it denied unwed fathers the same treatment as other parents, and thus denied unwed fathers *equal protection* of the laws.⁵⁹ In particular, the Court held that *all* Illinois parents are entitled to a hearing determining their parental fitness before the State can deny them custody and control of their children.⁶⁰ The underlying facts of this case heavily

56. *Stanley*, 405 U.S. at 650. The Court characterized the Illinois law as follows:

Under Illinois law, therefore, while the children of all parents can be taken from them in neglect proceedings, that is only after notice, hearing, and proof of such unfitness as a parent as amounts to neglect, an unwed father is uniquely subject to the more simplistic dependency proceeding. By use of this proceeding, the State, on showing that the father was not married to the mother, need not prove unfitness in fact, because it is presumed at law. Thus, the unwed father's claim of parental qualification is avoided as 'irrelevant.'

Id.

In *Stanley*, the mother of the children had died, and the State proceeded to remove the children from the father's custody because at her death, the children became wards of the State. *Id.* at 646.

57. This was true regardless of whether the fathers were divorced, separated, or widowed. Nor did it make the presumption with unwed mothers. *Stanley*, 405 U.S. at 650.

58. *Id.* at 647.

59. *Id.* at 649. The Court held that "Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody. It follows that denying such a hearing to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause." *Id.* at 658 (footnote omitted). Condemning the State's procedures, the Court noted that "when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child." *Id.* at 657.

60. *Id.* at 658. The Court determined that the State's interest here was misguided and somewhat arbitrary, and did not overcome Stanley's protected interest in his children:

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.

Id. at 654-55 (footnotes omitted).

influenced the Court's decision.⁶¹ Stanley's relationship with his children was significant: he had lived with the mother and the children on and off for eighteen years⁶² and had supported the children their entire lives.⁶³ Because Stanley's interest in his relationship with his children was substantial, the Court concluded that the relationship deserved protection and deference under the Constitution, absent any countervailing state interest.⁶⁴

Stanley marked the Supreme Court's first significant recognition of the constitutional protection of the parental rights of unwed fathers. After *Stanley*, the Court subsequently expanded upon its analysis of the parameters of the parental rights of unwed fathers.⁶⁵

1. The Significance of the Family Unit and the Unwed Father's Relationship with His Child in Determining What Process Is Due

In *Quilloin v. Walcott*,⁶⁶ the Court appeared to limit its decision in *Stanley* by holding that the State of Georgia was not required to grant an unwed father veto power over the adoption of his child.⁶⁷ The unwed father in *Quilloin* challenged a Georgia adoption law which, in certain adoption proceedings, required only the consent of the mother.⁶⁸ The mother in this case had subsequently married a man

61. *Id.* at 654.

62. *Id.* at 646.

63. *Id.* at 650 n.4. These facts, however, made no difference under the Illinois law which presumed Stanley to be an unfit parent because he was unwed. *Id.* at 650.

64. *Id.* at 651. The Court noted:

Even while refusing to label him a 'legal parent,' the State does not deny that Stanley has a special interest in the outcome of these proceedings. It is undisputed that he is the father of these children, that he lived with the two children whose custody is challenged all their lives, and that he has supported them.

Id. at 650 n.4.

65. The Court decided four cases: *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); and *Quilloin v. Walcott*, 434 U.S. 246 (1978).

66. 434 U.S. 246 (1978).

67. *Id.* at 256.

68. The Court summarized the Georgia adoption law:

[U]nder Georgia law a child born in wedlock cannot be adopted without the consent of each living parent who has not voluntarily surrendered rights in the child or been adjudicated an unfit parent. Even where the child's parents are divorced or separated at the time of the adoption proceedings, either parent may veto the adoption. In contrast, only the consent of the mother is required for adoption of an illegitimate child. To acquire the same veto authority possessed by other parents, the father of a child born out of wedlock must legitimate his offspring, either by marrying the mother and acknowledging

other than the father, and she and her husband wanted to adopt her children.⁶⁹ While the unwed father received notice of the adoption and was permitted a hearing,⁷⁰ the hearing focused on the best interests of the child,⁷¹ and afforded the unwed father no right to veto the adoption.⁷² The lower court granted the adoption, finding it was in the best interests of the child.⁷³

The United States Supreme Court held that, under the circumstances, the Georgia statute did not violate the unwed father's equal protection or due process rights.⁷⁴ With respect to the alleged equal protection violation, the Court reasoned that a significant difference exists between the interests of unwed fathers and married, separated, or divorced fathers.⁷⁵ The State, therefore, could permissibly distinguish between the classifications of fathers in its adoption laws.⁷⁶ Regarding Quilloin's due process claim, the Court noted that Quilloin never exercised custody or assumed any responsibility for the care and upbringing of his children.⁷⁷ Thus, while *Stanley* ensured that an

the child as his own, or by obtaining a court order declaring the child legitimate and capable of inheriting from the father. But unless and until the child is legitimated, the mother is the only recognized parent and is given exclusive authority to exercise all parental prerogatives, including the power to veto adoption of the child.

Id. at 248-49 (citations omitted).

69. *Id.* at 247. Several factors worked in favor of the adoption: (1) the mother had retained custody of the child for the child's entire life; (2) the court found the mother's husband fit to care for the child; and (3) the child expressed a desire to be adopted by the mother's husband. *Id.* at 251.

For a discussion of a New York statute which allows mothers and their husbands to adopt the mother's children, see *infra* note 86.

70. *Quilloin*, 434 U.S. at 253.

71. *Id.* Quilloin, unlike the unwed father in *Stanley*, was not completely barred from arguing his fitness as a parent: "[Appellant] was given the opportunity to offer evidence on any matter he thought relevant, including his fitness as a parent." *Id.* If Quilloin had not been allowed to raise the issue of his parental fitness at the legitimation hearing, presumably he would have had a claim under *Stanley*. It is true that the legitimation hearing was meant to determine what was in the best interests of the child; however, Quilloin's parental fitness was a part of that determination. *Quilloin*, 434 U.S. at 253.

72. *Id.* Quilloin wanted to legitimate his child. *Id.* at 253-54. Had the lower court allowed this legitimation, the unwed father would have acquired the power to veto the adoption. *Id.*

73. *Id.*

74. *Id.* at 255-56.

75. *Id.* at 256. The Court stated that the unwed father's "interests are readily distinguishable from those of a separated or divorced father, and accordingly . . . that the State could permissibly give [the unwed father] less veto authority than it provides to a married father." *Id.*

76. *Id.*

77. *Id.* The Court specifically noted Quilloin's absence from his relationship with his child:

unwed father will receive a hearing concerning his fitness before a state can terminate his parental rights, *Quilloin* demonstrated that an unwed father may have less protection when the biological mother is part of the family unit adopting the child.⁷⁸

In *Caban v. Mohammed*,⁷⁹ the Court once again considered the issue of the unwed father's consent in adoption proceedings. In *Caban*, as in *Quilloin*, a state adoption law denied an unwed father the right to consent to the adoption of his child.⁸⁰ In contrast to the *Quilloin* Court, however, the *Caban* Court ruled that a state law which did not require the consent of the unwed father in adoption proceedings was unconstitutional.⁸¹

In *Caban*, Abdiel Caban and the mother of his two children, although never married, had lived together for approximately four years, during which time the two children were born.⁸² In addition, the children's birth certificates identified Caban as their father, and he had provided support for the children.⁸³ After the couple separated, Caban continued to show interest in his children, often visiting and communicating with them.⁸⁴ The mother subsequently met another

[H]e has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child.

Id.

78. The Court here referred to *Stanley*:

In *Stanley v. Illinois* this Court held that the State of Illinois was barred, as a matter of both due process and equal protection, from taking custody of the children of an unwed father, absent a hearing and a particularized finding that the father was an unfit parent. . . . *Stanley* left unresolved the degree of protection a State must afford to the rights of an unwed father in a situation, such as that presented here, in which the countervailing interests are more substantial.

Id. at 247-48 (citations omitted). The Court went on to explain:

[T]he result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, were in the "best interests of the child."

Id. at 255.

79. 441 U.S. 380 (1979).

80. *Id.* at 384.

81. *Id.* at 394. The Court stated: "The effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child." *Id.*

82. *Id.* at 382-83.

83. *Id.*

84. *Id.*

man whom she later married.⁸⁵ The mother and her husband then petitioned for the adoption of the children.⁸⁶ The lower court granted the adoption to the mother and her husband, noting that state law did not require Caban's consent.⁸⁷ Caban appealed, arguing that the New York law violated his rights under the Equal Protection Clause of the Fourteenth Amendment, and that he had a due process right to a continued relationship with his children absent a showing of his unfitness as a parent.⁸⁸

The United States Supreme Court held that the law was unconstitutional under the Equal Protection Clause, reasoning that the State failed to show any substantial relationship between its classification of unwed fathers and an important state interest.⁸⁹ While New York argued that the state's interest in the well-being of the child was a legitimate state interest,⁹⁰ the Court concluded that this alone was not enough to "justify gender-based distinction[s]."⁹¹ The underlying facts of *Caban* played a significant role in determining its outcome. The Court distinguished the unwed father in *Quilloin* from the unwed

85. *Id.*

86. *Id.* at 383. Some state statutes allow the mother to adopt her own children. *Id.* at 383 n.1. New York's law provided for such an adoption:

Section 110 of the N.Y. Dom. Rel. Law (McKinney 1977) provides 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. (quoting N.Y. DOM. REL. LAW § 110 (McKinney 1977)).

Caban attempted to cross-petition for adoption. The lower court found, however, that he was precluded from doing so as the mother had not given her consent. *Id.* at 383-84.

87. *Id.* The New York law provided in part: "Consent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the mother, whether adult or infant, of a child born out of wedlock." *Id.* at 385 (quoting N.Y. DOM. REL. LAW § 111 (McKinney 1977)).

88. *Id.* The unwed father cited *Quilloin* as supporting authority for this proposition. *Id.*

89. *Id.* at 391.

90. *Id.* The Court agreed, stating that "[t]he State's interest in providing for the well-being of illegitimate children is an important one. We do not question that the best interests of such children often may require their adoption into new families who will give them the stability of a normal, two-parent home." *Id.*

91. *Id.* The Court reasoned that the roles of the mother and father were not substantially different:

[M]aternal and paternal roles are not invariably different in importance. Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. *The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother.*

Id. at 389 (emphasis added).

father in *Caban*, because the latter had acknowledged his responsibilities and had participated in the care and support of his children.⁹² Because *Quilloin* and *Caban* were fact-intensive decisions, and because the equal protection analysis differed between the two cases, the precise interest of unwed fathers in their relationships with their children remained unclear.⁹³

2. Clarification of the Unwed Father's Potential Liberty Interest

In *Lehr v. Robertson*,⁹⁴ the United States Supreme Court clarified when an unwed father's interest deserves due process protection.⁹⁵ *Lehr* concerned a New York statute that implemented a "putative father registry."⁹⁶ The purpose of this registry was to ensure that unwed

92. *Id.* at 389 n.7. The Court claimed *Quilloin* never addressed the gender-based classification system in that statute. *Id.* While the *Caban* Court's statement is true, the *Quilloin* Court implemented an Equal Protection Clause analysis based upon the distinction between the classifications of parents. *Quilloin*, 434 U.S. at 255-56. The classification system in *Quilloin* distinguished unwed fathers from both married or divorced fathers and biological mothers. See *supra* notes 66-76 and accompanying text.

Note, however, that the Court left room to interpret this decision when it stated:

In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child. Indeed, under the statute as it now stands the surrogate may proceed in the absence of consent when the parent whose consent otherwise would be required never has come forward or has abandoned the child.

Caban, 441 U.S. at 392 (footnote omitted).

93. See Buchanan, *supra* note 33, at 328-38 (analyzing and discussing the ambiguities left in the wake of *Quilloin* and *Caban*).

94. 463 U.S. 248 (1983).

95. *Id.* at 261.

96. *Id.* at 250. The New York statute provided:

"1. The department shall establish a putative father registry which shall record the names and addresses of . . . any person who has filed with the registry before or after the birth of a child out of wedlock, a notice of intent to claim paternity of the child

"2. A person filing a notice of intent to claim paternity of a child . . . shall include therein his current address and shall notify the registry of any change of address pursuant to procedures prescribed by regulations of the department.

"3. A person who has filed a notice of intent to claim paternity may at any time revoke a notice of intent to claim paternity previously filed therewith and, upon receipt of such notification by the registry, the revoked notice of intent to claim paternity shall be deemed a nullity nunc pro tunc.

"4. An unrevoked notice of intent to claim paternity of a child may be introduced in evidence by any party, other than the person who filed such notice, in any proceeding in which such fact may be relevant.

"5. The department shall, upon request, provide the names and addresses of persons listed with the registry to any court or authorized agency, and such information shall not be divulged to any other person, except upon order of a court for good cause shown."

fathers, who may come forward and claim an interest in a future adoption proceeding, express their intent to claim paternity via the registry prior to the institution of the adoption.⁹⁷ If registered under the statute, an unwed father would receive notice of any adoption proceeding so that he could then be present at a hearing to determine the best interests of the child.⁹⁸

The unwed father in *Lehr* lived with the mother prior to the birth of the child and visited her in the hospital when the child was born.⁹⁹ After the birth, however, he did not live with the mother or the child, and he did not participate in the financial support of the child.¹⁰⁰ Furthermore, his name was not on the child's birth certificate.¹⁰¹ The mother of the child married another man, and she and her husband

Id. at 250-51 n.4 (quoting N.Y. SOC. SERV. LAW § 372-c (McKinney 1981 & Supp. 1983)).

97. *Id.* at 250-51. It also functioned to enable the unwed father to secure his right to notice in adoption proceedings. *Id.* at 251. The Court also noted that New York provided notice to unwed fathers who fit into one of several other categories:

"2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

"(a) any person adjudicated by a court in this state to be the father of the child;

"(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

"(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two of the social services law;

"(d) any person who is recorded on the child's birth certificate as the child's father;

"(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

"(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

"(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law.

"3. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child."

Id. at 251-52 n.5 (quoting N.Y. DOM. REL. LAW § 111-a(2), (3) (McKinney 1977 & Supp. 1982-1983)).

98. *Id.* at 251-52 & n.5.

99. *Id.* at 252.

100. *Id.*

101. *Id.*

filed a petition to adopt her son.¹⁰² Approximately thirty days later, the unwed father filed for visitation and for an establishment of paternity.¹⁰³ Soon thereafter, he discovered information about the adoption proceeding and attempted to intervene.¹⁰⁴ The lower court denied his request and granted the adoption.¹⁰⁵ The unwed father appealed to the United States Supreme Court, alleging that his lack of notice of the adoption proceedings and the gender-based classifications in the New York statute violated his constitutional rights.¹⁰⁶

The Supreme Court held the New York statute constitutional, and expressly noted the distinction between unwed fathers who actively participate in the care and support of their children and those who do not.¹⁰⁷ Because *Lehr* had not established a relationship with his child, the Court held that the New York law had not violated his rights under the Equal Protection Clause.¹⁰⁸ The Court also indicated that the mere biological relationship between an unwed father and his child is not enough to raise that relationship to the level required for special protection under the Constitution.¹⁰⁹ The Court emphasized, however, that this biological relationship provided the unwed father with the opportunity to establish a substantial relationship with his child which, if accomplished, afforded the unwed father more protection under the Constitution.¹¹⁰ Thus, the Court created a specific test for determining

102. *Id.* at 250.

103. *Id.* at 252.

104. *Id.* at 253.

105. *Id.* The unwed father's request to intervene proceeded through a series of courts before finally being denied by the New York Court of Appeals. *Id.* at 253-55.

106. *Id.* at 255. The Court summarized his claims:

First, he contends that a putative father's actual or potential relationship with a child born out of wedlock is an interest in liberty which may not be destroyed without due process of law; he argues therefore that he had a constitutional right to prior notice and an opportunity to be heard before he was deprived of that interest. Second, he contends that the gender-based classification in the statute, which both denied him the right to consent to Jessica's adoption and accorded him fewer procedural rights than her mother, violated the Equal Protection Clause.

Id.

107. *Id.* at 266-68.

108. *Id.* at 267-68. The Court concluded that "[b]ecause appellant, like the father in *Quilloin*, has never established a substantial relationship with his daughter, the New York statutes at issue in this case did not operate to deny appellant equal protection." *Id.* at 267 (citation omitted).

109. *Id.* at 261.

110. *Id.* at 262. The Court explained:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of

an unwed father's interest: "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause."¹¹¹

Together, *Stanley*, *Quilloin*, *Caban*, and *Lehr* indicate that absent a putative father registry, an unwed father must actively participate in the support and rearing of his child in order to maintain any parental rights in an adoption proceeding involving his child.¹¹² Once he has created this relationship, these cases indicate that he has established a liberty interest in his relationship with his child. Thus, if an unwed father fulfills his parental duties, states should provide him with notice of the adoption proceeding and an opportunity to be heard.¹¹³

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. (footnotes omitted).

111. *Id.* at 261 (citation omitted) (quoting *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)).

The Court also noted that unwed fathers who do not establish such a relationship may still receive notice under the New York statute as long as they register with the putative father registry. *Id.* at 264. Thus, the right to receive notice in this situation was completely within the father's control. *Id.* The Court noted:

By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica. The possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself.

Id.

112. See *supra* notes 54-111 and accompanying text.

113. *Lehr*, 463 U.S. at 268 (White, J., dissenting). Justice White explained the minimum the states must provide an unwed father who has established a liberty interest in his relationship with his child: "If the entry of the adoption order . . . deprived [an unwed father] of a constitutionally protected interest, he is entitled to notice and an opportunity to be heard before the order can be accorded finality." *Id.* (White, J., dissenting).

In 1982, the United States Supreme Court decided *Santosky v. Kramer*, 455 U.S. 745 (1982). *Santosky* plays an important role in establishing the process by which a state may terminate parental rights by requiring the state to bifurcate its termination procedure. *Id.* at 760. First, the State must determine the fitness of the parent. *Id.* If the State finds the parent unfit to care for his or her child, the State may then proceed to analyze what action would be in the best interest of the child. *Id.*

While the New York law in *Lehr* required only a determination of the best interests of the child in proceedings to terminate the parental rights of the unwed father, the decision in *Lehr* does not conflict with *Santosky*. The Court in *Lehr* explicitly stated that it was not addressing the adequacy of New York's termination procedure. *Lehr*, 463 U.S. at 262-63.

3. Complicating the Boundaries of the Rights of Unwed Fathers

Six years after the *Lehr* decision, the Supreme Court, in *Michael H. v. Gerald D.*,¹¹⁴ once again considered the issue of an unwed father's liberty interest in his relationship with his child. Rather than clarifying the issue, however, the *Michael H.* decision further complicated the analysis of unwed fathers' rights.¹¹⁵

In *Michael H.*, Carole, the mother of the child at issue, became involved in an adulterous affair with Michael.¹¹⁶ During this time, Carole gave birth to a child, and she listed Gerald D., her husband, as the father on the child's birth certificate.¹¹⁷ Carole, however, had also told Michael that the child might be his.¹¹⁸ Carole separated from her husband for some time, and she and the child spent time with Michael.¹¹⁹ During this period, Michael supported and cared for the child, and held the child out as his own.¹²⁰ Some time later, Carole reconciled with her husband and rejected Michael's attempts to visit the child.¹²¹ Consequently, Michael filed a filiation action,¹²² which he subsequently dropped when he and Carole reunited.¹²³ Carole, Michael, and the child then began living together, and they signed a stipulation that Michael was the child's natural father.¹²⁴ They never filed this stipulation, however, as Carole left Michael the following month.¹²⁵ Michael then sought visitation rights.¹²⁶ Prior to this action by Michael, blood tests indicated that, in all probability, Michael was in fact the father.¹²⁷

114. 491 U.S. 110 (1989) (plurality opinion).

115. For a more complete analysis of this case, see Joan C. Sylvain, *Michael H. v. Gerald D.: The Presumption of Paternity*, 39 CATH. U. L. REV. 831, 832-35 (1990); see also Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 16-19 (1992) (discussing the *Michael H.* case in greater detail); Korn, *supra* note 50, at 1304-06 (same).

116. *Michael H.*, 491 U.S. at 113 (plurality opinion).

117. *Id.* (plurality opinion).

118. *Id.* at 114 (plurality opinion).

119. *Id.* (plurality opinion).

120. *Id.* (plurality opinion).

121. *Id.* (plurality opinion).

122. *Id.* (plurality opinion).

123. *Id.* (plurality opinion).

124. *Id.* at 114-15 (plurality opinion).

125. *Id.* at 115 (plurality opinion).

126. *Id.* (plurality opinion). Eventually, Gerald intervened in the action and moved for summary judgment under a California law which presumes a child born into a marriage to be the child of the husband. *Id.* (plurality opinion).

127. *Id.* at 114 (plurality opinion).

California's law at that time, however, created an irrebuttable presumption that a child born in a marriage is the legitimate child of the married couple.¹²⁸ As a consequence of such a presumption, Michael's attempt at proving his fatherhood was irrelevant, as was his prior relationship with the child.¹²⁹ Under California law, Michael thus had no rights to a continued relationship with the child.

The Supreme Court upheld the California law as constitutional under the Fourteenth Amendment.¹³⁰ Justice Scalia, writing for the plurality, emphasized the importance of and the tradition surrounding the sanctity of marriage.¹³¹ He reasoned that the importance of marriage and the traditional family unit protected the existing family from Michael's claim.¹³² Noting that precedent failed to support Michael's

128. *Id.* at 117 (plurality opinion). The substantive provisions of the statute read as follows:

"§ 621. Child of the marriage; notice of motion for blood tests

"(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.["]

Id. (plurality opinion) (quoting CAL. EVID. CODE § 621 (West Supp. 1989) (repealed 1994)).

129. *Id.* at 119 (plurality opinion).

130. *Id.* at 119-30 (Justice Scalia, joined by Chief Justice Rehnquist, wrote the plurality opinion. While Justices O'Connor and Kennedy concurred in part, Justice Stevens concurred in judgment only.). Michael challenged the California statute on two grounds. As the plurality summarized: "First, he asserts that requirements of procedural due process prevent the State from terminating his liberty interest in his relationship with his child without affording him an opportunity to demonstrate his paternity in an evidentiary hearing." *Id.* at 119 (plurality opinion). Second, he "contends as a matter of substantive due process that, because he has established a parental relationship with [the child] Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship." *Id.* at 121 (plurality opinion).

131. *Id.* at 125 (plurality opinion). Justice Scalia explained that "the evidence shows that even in modern times—when, as we have noted, the rigid protection of the marital family has in other respects been relaxed—the ability of a person in Michael's position to claim paternity has not been generally acknowledged." *Id.* (plurality opinion). This decision has been criticized by commentators as contradictory to previous cases which establish a liberty interest in the unwed father's relationship with his child. *See, e.g.*, Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 *FORDHAM L. REV.* 971, 980 (1992). One commentator noted somewhat cynically: "The Supreme Court's opinion affirming the California decision in *Michael H.* was largely concerned with the treatment of irrebuttable presumptions, with the theoretical basis for the protection of 'liberty interests' under the Fourteenth Amendment, and with tiresome political skirmishing between Justices Scalia and Brennan." Clark, *supra* note 115, at 17.

132. *Michael H.*, 491 U.S. at 124 (plurality opinion). While Michael cited *Stanley*, *Quilloin*, *Caban*, and *Lehr* to suggest that a liberty interest exists where there is biological parenthood in addition to an established parental relationship, Justice Scalia stated that Michael's interpretation of those cases was distorted: "We think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors

claim,¹³³ the plurality refused to find a liberty interest in Michael's relationship with his child.¹³⁴ Specifically, Justice Scalia distinguished the language used in *Lehr* by noting that, in *Michael H.*, the child was born into a marriage and was thus legitimate.¹³⁵ The plurality, therefore, held that the determination of whether Michael's interest in his child deserved protection is appropriately a matter for state law, and not constitutional law.¹³⁶

Michael H. and the cases previously discussed¹³⁷ exemplify the Court's inability to craft a clear and succinct analysis of the boundaries of an unwed father's liberty interest in his relationship with his child.¹³⁸ While an unwed father may establish a protected liberty

but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family.” *Id.* at 123 (plurality opinion).

133. *Id.* at 125 (plurality opinion). Justice Scalia noted:

We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man. Since it is Michael's burden to establish that such a power (at least where the natural father has established a relationship with the child) is so deeply embedded within our traditions as to be a fundamental right, the lack of evidence alone might defeat his case.

Id. (plurality opinion).

134. *Id.* at 127 (plurality opinion). In denying that a liberty interest existed in Michael's relationship with his child, the plurality noted the importance of state law:

What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.

Id. (plurality opinion).

135. *Id.* at 128-29 (plurality opinion). Justice Scalia distinguished *Lehr*:

Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter. In *Lehr* we quoted approvingly from Justice Stewart's dissent in *Caban v. Mohammed*, to the effect that although “[i]n some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father,” “the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist.”

Id. at 129 (plurality opinion) (citations omitted) (alteration in original).

136. *Id.* at 129-30 (plurality opinion). (“It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.”).

137. See *supra* notes 54-136 and accompanying text.

138. Also note that *Michael H.* was a plurality decision; *Caban* was a 5-4 decision; *Lehr* was a 6-3 decision; and two justices did not participate in the *Stanley* decisions.

interest in his child by assuming parental responsibility,¹³⁹ a state may deny him such a liberty interest when that child is born into an existing marital relationship.¹⁴⁰ In general, the Court has been content to allow the states to progress individually in deciding what laws provide the most reasonable distribution of individual rights in adoptions.¹⁴¹ This approach, however, leaves the states and unwed fathers with the potential for great uncertainty.

C. Illinois Adoption Law Prior to the 1994 Amendments

In the State of Illinois, prior to the Illinois Supreme Court's vacatur order in *Baby Richard I*, adoption law consisted of the Adoption Act¹⁴² and case law interpreting the Adoption Act.¹⁴³

Only *Quilloin* produced a unanimous decision.

139. See *supra* notes 51-113 and accompanying text.

140. See *supra* notes 114-36 and accompanying text; see also Jody L. Pabst, Note, *In re Paternity of C.A.S. and C.D.S.: The New Status of Putative Fathers' Rights in Wisconsin*, 1992 WIS. L. REV. 1669 (discussing how Wisconsin followed the Supreme Court's decision in *Michael H.* and held that when a child is born to a woman married to a man other than the biological father, the State will presume that the mother's husband is the father).

141. In *Lehr*, the Court discussed state participation in defining the legal issues surrounding the parent-child relationship:

In the vast majority of cases, state law determines the final outcome. Rules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State. Moreover, equally varied state laws governing marriage and divorce affect a multitude of parent-child relationships.

Lehr v. Robertson, 463 U.S. 248, 256 (1983) (citations omitted) (footnotes omitted); see also *Santosky v. Kramer*, 455 U.S. 745, 771 (1982) (Rehnquist, J., dissenting) ("State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society. . . . We have found, however, that leaving the States free to experiment with various remedies has produced novel approaches and promising progress.").

142. Illinois Adoption Act, 1959 Ill. Laws 1269 (codified as amended at ILL. COMP. STAT. ANN. ch. 750, §§ 50/01 to § 50/24 (West 1993) (amended 1994)).

143. See *infra* notes 152-64 and accompanying text.

Cases regarding adoption and custody, and the standards to be applied in those proceedings must be analyzed carefully because custody and adoption proceedings can create very different results for the parties involved. In custody actions, the rights of the biological parents are not necessarily terminated. *In re Abdullah*, 423 N.E.2d 915, 917-18 (Ill. 1981) In adoption proceedings, all rights a parent has to the continued relationship with the child are usually terminated. See ILL. COMP. STAT. ANN. ch. 750, § 50/17 (West 1993).

Consequently, Illinois courts use a different analysis when determining the outcome of each type of proceeding. In custody proceedings, Illinois courts apply the superior rights doctrine in conjunction with, and sometimes subservient to, the best interests of the child standard. See *In re Townsend*, 427 N.E.2d 1231, 1234 (Ill. 1981) (defining the superior rights doctrine as "an accepted presumption that the right or interest of a natural parent in the care, custody and control of a child is superior to the claim of a third

The Adoption Act required the consent of each of the child's parents—including an unwed father—unless a parent was found to be unfit.¹⁴⁴ When the father of the child to be adopted was unwed, the Adoption Act dictated that the unwed father be notified of the adoption proceeding by personal service,¹⁴⁵ or when the unwed father could not be located, by publication.¹⁴⁶ Furthermore, the Adoption Act stated that the unwed father could not attack the validity of the adoption because he did not receive notice of all proceedings, if he was initially served with proper notice.¹⁴⁷

Although the Adoption Act required that the unwed father receive notice of the adoption, his consent was not required in some instances. First, if the mother or the husband of the mother brought the adoption petition, the unwed father was required to establish his paternity within thirty days of being informed that he was the father of the child.¹⁴⁸ If he failed to do so, a court could find him unfit, thus negating the need

person"); *People ex rel. Edwards v. Livingston*, 247 N.E.2d 417, 421 (Ill. 1969) (stating that although a natural parent has a superior right to custody of a child, such a right may yield when it conflicts with the best interests of the child). In adoption proceedings, however, the Illinois Supreme Court has held that a court must first find either that "the minor's natural parents or guardian consent[ed] to the adoption or . . . that the natural parents are unfit." *In re Syck*, 562 N.E.2d 174, 176 (Ill. 1990).

144. Prior to *Baby Richard I*, the Adoption Act provided that: "Except as hereinafter provided in this Section, consents shall be required in all cases, unless the person whose consent would otherwise be required shall be found by the court, by clear and convincing evidence: (1) to be an unfit person as defined in Section 1 of this Act; . . ." ILL. COMP. STAT. ANN. ch. 750, § 50/8(a) (West 1993) (amended 1994); *see also id.* § 50/1 (D) (describing a variety of factors that establish an individual's unfitness under the statute).

The Act also indicated that the consent of a parent to the adoption of his or her child was irrevocable unless it was obtained by fraud or duress. *Id.* § 50/11. The time period within which the adoption could be challenged because of fraud or duress was limited to 12 months. *Id.*

145. *Id.* § 50/12a.

146. *Id.* § 50/7 (West 1993).

147. The Adoption Act prior to the *Baby Richard* case stated:

In the event the putative father does not file a declaration of paternity of the child or request for notice within 30 days of service of the above notice, he need not be made a party to or given notice of any proceeding brought for the adoption of the child. An Order or judgment may be entered in such proceeding terminating all of his rights with respect to the child without further notice to him.

Id. § 50/12a(4). But see § 55/1, which indicates that:

[n]o attack upon or proceedings contesting the validity of an adoption decree heretofore entered shall be made either directly or collaterally because of the failure to serve notice on or give notice to the reputed father, unless such attack or proceedings shall be instituted within one year after the effective date of this Act.

Id. § 55/1.

148. *Id.* § 50/1(D)(n)(2) (West 1993) (amended 1994).

for his consent.¹⁴⁹ Second, the unwed father's consent was not required if he failed to openly live with the child, or failed to hold himself out to be the father of the child.¹⁵⁰ While the Adoption Act stated that the best interests of the child should be paramount in adoption proceedings,¹⁵¹ the Illinois Supreme Court's holding in *In re Adoption of Syck*¹⁵² controlled the process by which the State could terminate parental rights.

In *Syck*, the mother and the father of a child were divorced and the father had custody of the child.¹⁵³ The father and his family consistently frustrated the mother's attempts to communicate with the child.¹⁵⁴ The mother lived in a different state and was unable to afford frequent visits with the child.¹⁵⁵ The father subsequently married and petitioned for adoption of the child.¹⁵⁶ The trial court, finding the mother to be an unfit parent because she had failed to maintain a reasonable degree of interest in the child, granted the adoption.¹⁵⁷ The Illinois appellate court affirmed.¹⁵⁸ In affirming, however, the Appellate Court applied the best interests of the child standard.¹⁵⁹ The

149. *Id.*

150. *See id.* § 50/8 (listing factors to be considered when determining whether the consent of the unwed father is required). Among others, a court could consider whether the putative father paid for medical expenses incurred by the mother during pregnancy, whether he paid for the support of the child, whether he visited the child, or whether he maintained regular communication with the child or person having legal custody of the child. *Id.*

151. The Adoption Act prior to *Baby Richard I*, as well as after the amendments, provides that "[t]he best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act." *Id.* § 50/20a.

152. 562 N.E.2d 174 (Ill. 1990).

153. *Id.* at 176.

154. *Id.* at 176-80.

155. *Id.* at 177-79.

156. *Id.* at 179.

157. *Id.* at 181. "The circuit court held that Mark and Lisa [the biological father and his wife] had presented clear and convincing evidence that Lorrie had failed to maintain a reasonable degree of interest, concern, or responsibility as to Paul's welfare." *Id.*

158. *Id.*

159. *Id.* The language of the appellate court quoted by the Illinois Supreme Court is as follows:

"We must first look to Paul's present well-being and his future in reviewing this decision. It is Paul, more so than any other party, who stands to benefit more or suffer more as a result of the trial judge's decision. After a complete hearing on this matter in the trial court, the trial judge obviously believed Paul's well-being and future would be better protected by terminating Lorrie's parental rights, which eliminated any obstacle for Lisa's adoption of Paul. We agree with the trial judge's decision."

Id. It should be noted that Justice Heiple, who wrote the opinion in *Baby Richard I*,

mother then appealed the decision to the Illinois Supreme Court.¹⁶⁰

In an unequivocal decision, the Illinois Supreme Court reversed, holding that before terminating a parent's rights, a court must find by clear and convincing evidence that the parent is unfit.¹⁶¹ The *Syck* court further stated that courts can only apply the best interests of the child standard after finding a parent unfit.¹⁶² Thus, after *Syck*, courts could not consider the best interests of the child until both parents either consented to the adoption or were found to be unfit.¹⁶³ Notwithstanding the clear dictates of *Syck*,¹⁶⁴ and the express provisions of the Adoption Act, when the *Baby Richard* case came before the Illinois Appellate Court, the best interests of the child standard became "paramount."

III. DISCUSSION

A. Baby Richard I: *The Illinois Supreme Court Recognizes the Unwed Father's Liberty Interest*

Quilloin, *Caban*, *Lehr*, and *Michael H.* all contained similarities in their facts which were important to the United States Supreme Court's decisions. All of these cases involved adoptions where the biological mother was a part of the family adopting the child.¹⁶⁵ In all of these

dissented in this appellate court decision. *Id.* Indeed, his dissent may have foretold the outcome of the *Baby Richard* case:

Justice Heiple dissented, stating that the circuit court's finding that Lorrie had failed to maintain a reasonable degree of interest in Paul's welfare was against the manifest weight of the evidence; furthermore, Justice Heiple stated that the appellate court had erred when, in deciding whether to terminate Lorrie's parental rights, it had first considered Paul's best interests.

Id.

160. *Id.*

161. *Id.* at 184.

162. *Id.* at 183.

163. See Shelly B. Bostick, *The Baby Richard Law: Changes to the Illinois Adoption Act*, 82 ILL. B.J. 654, 655 (1994). It should also be noted that this process is consistent with the United States Supreme Court's decision in *Santosky v. Kramer*, 455 U.S. 745 (1982). See *supra* note 113.

164. A caveat is warranted regarding Illinois case law on adoption. The language Illinois courts used in adoption cases can easily be taken out of context and interpreted incorrectly. For example, in *In re M.M.*, the Illinois Supreme Court used language which suggests that the most important factor to be considered in any adoption case must be the best interests of the child. 619 N.E.2d 702, 712 (Ill. 1993). However, in *In re M.M.*, the parental rights of the biological parents had already been terminated, and the court was attempting to determine whether the *custodian's* ability to consent to the adoption of the child could be conditioned upon allowing the biological parents to continue a relationship with the child after the adoption. *Id.* at 706.

165. See *supra* part II.B.

cases, the children were past infancy when the adoption proceedings ensued.¹⁶⁶ All of the unwed fathers had ample time to establish a relationship with their child, and the mothers did not preclude them from doing so.¹⁶⁷ When the mother places the child for adoption at infancy without informing the unwed father, however, the father has no opportunity to establish a relationship with the child. This was the situation presented to the Illinois Supreme Court in *Baby Richard I*.¹⁶⁸

1. The Facts and Opinions Below

In *Baby Richard I*, the unwed father, Otakar Kirchner, claimed that the adoption of his son by a third-party couple, the Does, was invalid because he never consented to the adoption.¹⁶⁹ In 1989, Otakar lived with Daniella, the mother of the child, but they were not married.¹⁷⁰ At that time, Otakar and Daniella were both recent immigrants from Czechoslovakia.¹⁷¹ While they were living together, Daniella became pregnant, and during the pregnancy, Otakar returned to Czechoslovakia for a few weeks to tend to personal matters.¹⁷² While he was there, his aunt called Daniella and told her that Otakar was having an affair.¹⁷³

166. See *supra* part II.B.

167. See *supra* part II.B. But see *Lehr v. Robertson*, 463 U.S. 248, 271 (1983) (White, J., dissenting) (arguing that the unwed father was precluded from establishing a relationship with his child by the actions of the mother).

Appellant has never been afforded an opportunity to present his case. The legitimation proceeding he instituted was first stayed, and then dismissed, on appellees' motions. Nor could appellant establish his interest during the adoption proceedings, for it is the failure to provide Lehr notice and an opportunity to be heard there that is at issue here. We cannot fairly make a judgment based on the quality or substance of a relationship without a complete and developed factual record. This case requires us to assume that Lehr's allegations are true—that but for the actions of the child's mother there would have been the kind of significant relationship that the majority concedes is entitled to the full panoply of procedural due process protections.

Id. (White, J., dissenting).

168. *In re Doe*, 638 N.E.2d 181 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994).

169. *In re Doe*, 627 N.E.2d 648, 649 (Ill. App. 1st Dist. 1993), *rev'd*, 638 N.E.2d 181 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994).

170. *Id.* Otakar and Daniella were married on September 12, 1991. *Id.* at 651.

171. *Id.*

172. *Id.* There was no doubt that Otakar was the child's father. *Id.* The child was expected to be born on March 16, 1991. *Id.* Otakar provided support for Daniella while she was pregnant, and paid for her prenatal care. *Id.* at 649.

173. *Id.* While he was away, Otakar's aunt called Daniella and told her that Otakar had rekindled an old relationship, and that he had married and was on his honeymoon. *Id.* Daniella phoned Otakar and confronted him with this information. *Id.* Otakar denied the allegations; Daniella did not believe him, however, and broke off their relationship. *Id.*

The news of this alleged affair led Daniella to place the child for adoption, and to move out of the apartment that she had been sharing with Otakar.¹⁷⁴ Four days after the child's birth, Daniella consented to the adoption of the child.¹⁷⁵ She refused to reveal the name of the father to the adoptive parents, the Does.¹⁷⁶ Daniella then informed Otakar, who had returned from his trip, that the child had died at birth.¹⁷⁷

Otakar, however, did not believe that the child was dead, and began inquiring about the birth of his child.¹⁷⁸ After much effort,¹⁷⁹ he discovered that the child had been born alive and had been placed for adoption.¹⁸⁰ Otakar then contested the adoption on the grounds that he had not consented to the adoption.¹⁸¹ Otakar and Daniella were sub-

174. *Id.* Daniella moved into a shelter for abused women. *Id.* While at the shelter, she decided to place the child for adoption. *Id.* On February 11, 1991, and several times thereafter, Daniella met with an attorney and the prospective adoptive parents (the Does). *Id.* at 650. The dissent in the appellate court's decision contends that Daniella was pressured into the adoption by a social worker at the shelter. *Id.* at 657 (Tully, J., dissenting).

175. *Id.* at 650.

176. *Id.* The Does' attorney, preparing for the adoption of the yet-to-be-born child, asked Daniella for the name of the father. *See id.* Daniella refused to disclose his name, stating that she was afraid he would assert his parental rights if she did. *Id.* The attorney made no further inquiries into the identity of the father or his address. *Id.* at 659 (Tully, J., dissenting). In mid-February, Daniella moved in with her uncle who lived in suburban Chicago. *Id.* at 650.

177. *Id.* On February 8, 1991, Otakar returned home and found that Daniella had moved out of the apartment they had been sharing. *Id.* at 649. Otakar phoned Daniella at her uncle's house, but she refused to take his calls. *Id.* at 650. Otakar attempted to give Daniella money to help with her prenatal care by employing the assistance of a mutual friend. *Id.* Daniella refused to accept the money. *Id.*

178. *Id.* On March 16, 1991, Daniella gave birth at a suburban hospital. *Id.* On March 20, 1991, Daniella executed a consent form for the adoption of her child. *Id.* She stated on the form that the identity of the father was unknown. *Id.*

179. *Id.* Around the time Daniella gave birth, Otakar began inquiring about the birth of his child at the hospital where they had originally planned on having the child. *Id.* Daniella, however, had gone to another hospital. *Id.* Otakar also searched Daniella's home and car for any signs of a live birth, called various hospitals, and searched through public records. *Id.*

180. *Id.* Between May 5, 1991 and May 10, 1991, a mutual friend of Otakar and Daniella informed Otakar that the baby had not died and that Daniella had given the child up for adoption. *Id.* On May 12, 1991, Otakar returned to his home and found that Daniella had returned. *Id.* at 651. She informed Otakar of the adoption and expressed her regret at the decision to place the child for adoption. *Id.*

181. *Id.* On May 18, 1991, Otakar contacted an attorney who filed an appearance on June 6, 1991 in the adoption proceeding. *Id.* The trial court found that Otakar did not have standing to intervene in the adoption. *Id.* On September 21, 1991, Otakar and Daniella married. *Id.* Otakar then filed a petition to declare paternity, which eventually confirmed that he was the biological father. *Id.* This provided Otakar with the ability to exercise standing in the adoption proceeding. *See id.*

sequently married.¹⁸² By the time Otakar intervened in the adoption proceeding, fifty-seven days had passed since the birth of the child.¹⁸³ The trial court held that by clear and convincing evidence Otakar was an unfit parent because he failed to show enough interest in the child within the first thirty days of the child's birth.¹⁸⁴ Since he was found unfit, Otakar's consent was not required for the adoption of his child.¹⁸⁵

The Illinois Appellate Court upheld the trial court's finding of parental unfitness.¹⁸⁶ Had the court ended its analysis with this finding, Otakar could have appealed to the Illinois Supreme Court on the grounds that the trial court abused its discretion in finding him unfit.¹⁸⁷ Instead, writing for the court, Justice Rizzi concluded that the best interests of the child standard controlled the outcome of the case, thereby revealing the confusion surrounding the applicable law in contested adoption proceedings.¹⁸⁸

2. The Opinion of the Illinois Supreme Court

Justice Heiple, writing for the court, quickly dismissed the Illinois Appellate Court's decision and reversed its ruling.¹⁸⁹ The supreme

182. *Id.* at 651.

183. *Id.* at 649. On December 23, 1991, the Does filed an amended adoption petition, alleging Otakar to be an unfit parent as he had not shown interest in his child within the first 30 days after the child's birth. *Id.* at 651.

184. *Id.* Under ILL. COMP. STAT. ANN. ch. 750, § 50/1(D)(1) (West 1993), if a parent does not show a reasonable degree of interest in the child within the first 30 days after the child's birth, the court may find the parent unfit. The unfitness of the parent must be proven by clear and convincing evidence. *Id.*; see also *Santosky v. Kramer*, 455 U.S. 745, 747-78 (1982) (holding that "clear and convincing evidence" is the standard which must be met when terminating the parental rights of biological parents).

185. Under ILL. COMP. STAT. ANN. ch. 750, § 50/8(a)(1) (West 1993) (amended 1994), the consent of an unfit parent is not required in adoption proceedings. See *supra* part II.C.

186. *In re Doe*, 627 N.E.2d 648, 654 (Ill. App. 1st Dist. 1993), *rev'd*, 638 N.E.2d 181 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994). The appellate court stated:

There is clear and convincing evidence that Otakar was an unfit person to have a child because he failed to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a newborn child during the first 30 days after the birth. His consent to the adoption was therefore not required.

Id. (citations omitted).

187. Indeed, the Illinois Supreme Court began its analysis with this issue, finding that Otakar had shown a reasonable degree of interest in his child. *Baby Richard I*, 638 N.E.2d at 182.

188. Justice Rizzi explained that "[i]f there is a conflict between Richard's best interest and the rights and interests of his parents, whomever they may be, the rights and interests of the parents must yield and allow the best interest of Richard to pass through and prevail. This tenet allows for no exception." *In re Doe*, 627 N.E.2d at 652.

189. *Baby Richard I*, 638 N.E.2d at 182.

court held that the evidence did not support the finding that Otakar failed to show a reasonable degree of interest within the first thirty days after the child's birth.¹⁹⁰ The court concluded that Otakar's efforts to discover the existence of his child indicated his interest in his child.¹⁹¹ The court was also swayed by the fact that Daniella frustrated Otakar's efforts, and that the Does' attorney failed to make any attempt to find Otakar.¹⁹²

Moreover, the court concluded that Otakar was not given an opportunity to establish a relationship with the child and thus was unable to discharge any parental duties.¹⁹³ Finally, Justice Heiple, strictly applying Illinois law, concluded that the best interests of the child standard should never have been applied because the father's parental rights had not been properly terminated.¹⁹⁴

3. The Concurring Opinion

In her concurring opinion, Justice McMorrow expanded on the court's analysis, first addressing the issue of whether the best interests of the child should outweigh any other considerations.¹⁹⁵ Citing the Adoption Act and *Syck*,¹⁹⁶ she agreed with the court that the biological parent must first be found unfit by clear and convincing

190. *Id.*; see also *id.* at 186 (McMorrow, J., concurring). "In my opinion, the proof presented here did not demonstrate, by clear and convincing evidence, that respondent was an unfit parent under section 1(D)(1) of the Adoption Act. Consequently, the trial court's determination was against the manifest weight of the evidence." *Id.* (McMorrow, J., concurring).

191. *Id.* at 182. See *supra* note 179 for a description of Otakar's efforts to discover what had happened to his child.

192. *Baby Richard I*, 638 N.E.2d at 182. The court noted that Illinois law required the adoptive parents to make a good-faith effort to notify the natural parents of the adoption proceedings. *Id.* The court concluded that "[t]hese laws are designed to protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child." *Id.*

193. *Id.* at 181.

194. *Id.* The court explained:

In the opinion below, the appellate court, wholly missing the threshold issue in this case, dwelt on the best interests of the child. Since, however, the father's parental interest was improperly terminated, there was no occasion to reach the factor of the child's best interests. That point should never have been reached and need never have been discussed.

Id. at 182. Justice McMorrow, concurring in the opinion, wrote a more lengthy opinion detailing the relevant statutory and case law which supported the decision of the court. See *infra* notes 195-202 and accompanying text.

195. *Baby Richard I*, 638 N.E.2d at 183 (McMorrow, J., concurring).

196. See *supra* notes 152-64 and accompanying text for a detailed discussion of *Syck*.

evidence before parental rights can be terminated.¹⁹⁷ Justice McMorro concluded that the appellate court's emphasis on the fact that the child had lived with the adoptive parents for his entire life was "misguided."¹⁹⁸ While she sympathized with the adoptive parents, she noted that Otakar contested the adoption less than two months after the child was born, and that it was not Otakar's fault that the child was now three years old.¹⁹⁹

Furthermore, Justice McMorro concluded that the evidence did not support a finding that Otakar was an unfit parent by clear and convincing evidence.²⁰⁰ She stressed the severity of terminating parental rights, and the need for substantial proof of unfitness.²⁰¹ Finally, she emphasized the fact that Daniella thwarted Otakar's attempts to discover the existence of his child, and that the adoptive parents knew Daniella intended to do so.²⁰²

197. *Baby Richard I*, 638 N.E.2d at 183-86 (McMorro, J., concurring). Justice McMorro emphasized the importance of *Syck*: "This court's holding in *Syck* reflected the express requirements of our Adoption Act . . . that parental rights generally cannot be terminated unless the parent has been proven unfit." *Id.* at 184 (McMorro, J., concurring) (citing ILL. COMP. STAT. ANN. ch. 750, § 50/8(a) (West 1993) (amended 1994)). *But see infra* part III.D.2 (discussing Justice McMorro's analysis in her *Baby Richard II* dissent).

198. *Baby Richard I*, 638 N.E.2d at 186 (McMorro, J., concurring).

199. *Id.* (McMorro, J., concurring). Justice McMorro explained:

No one would disagree with the view that children, especially those of tender years, should not be bantered about between biological and foster or adoptive parents. Delay damages the child, regardless of who is eventually awarded custody of the child. The parents, adoptive and biological, also suffer greatly and unnecessarily. These concerns, although valid, do not justify the appellate court's decision in the instant cause to ignore the clear requirements of our Adoption Act that parental unfitness must be proven *before* the court can proceed to a consideration of the child's best interests.

Id. (McMorro, J., concurring).

200. *Id.* (McMorro, J., concurring).

201. *Id.* (McMorro, J., concurring). Justice McMorro explained:

Because termination of parental rights is a permanent and complete deprivation and severance of the relationship between child and parent, legal precedent has demanded a heightened standard of proof, i.e., clear and convincing evidence, in order to prove parental unfitness. In my opinion, the proof presented here did not demonstrate, by clear and convincing evidence, that respondent was an unfit parent under section 1(D)(1) of the Adoption Act. Consequently, the trial court's determination was against the manifest weight of the evidence.

Id. (McMorro, J., concurring) (citations omitted).

202. *Id.* at 187 (McMorro, J., concurring). Justice McMorro criticized the actions of the adoptive parents:

In addition, I believe that the adoptive parents shared a portion of the risk that the respondent, if he discovered the child were still alive, would attempt to assert his parental rights to the child. The record indicates that the adoptive

However simple the decision appeared to Justice Heiple and the rest of the justices,²⁰³ the fact that the child was then over three years of age complicated matters.²⁰⁴ Nevertheless, the Illinois Supreme Court, in its June 16, 1994 decision, ordered the child removed from the only home and parents he has ever known.²⁰⁵

*B. Court Orders Baby Richard Returned to Biological Father:
Public Outcry Prompts Quick Response*

The public's reaction to the Illinois Supreme Court's decision in the *Baby Richard* case was acute.²⁰⁶ Journalists expressed much of the public's outrage regarding the Illinois Supreme Court's decision in

parents were informed of the biological mother's intention to prevent the respondent from asserting any parental interest in the child whatsoever, by misrepresenting to the respondent that the baby had died, even though the biological mother knew the father's identity, as well as his whereabouts. The adoptive parents acquiesced in the biological mother's scheme. The record is devoid of any indication that the adoptive parents made any effort to ascertain the identity of the respondent, or his whereabouts, so that he could be advised of the child's existence.

Id. (McMorrow, J., concurring).

203. Justice Heiple commented that "[t]he adoption laws of Illinois are neither complex nor difficult of application." *Id.* at 182.

204. Indeed, Justice Heiple addressed this fact in the opinion:

Unfortunately, over three years have elapsed since the birth of the baby who is the subject of these proceedings. To the extent that it is relevant to assign fault in this case, the fault here lies initially with the mother, who fraudulently tried to deprive the father of his rights, and secondly, with the adoptive parents and their attorney, who proceeded with the adoption when they knew that a real father was out there who had been denied knowledge of his baby's existence. When the father entered his appearance in the adoption proceedings 57 days after the baby's birth and demanded his rights as a father, the petitioners should have relinquished the baby at that time. It was their decision to prolong this litigation through a lengthy, and ultimately fruitless, appeal.

Id.

205. *See id.*

206. *See, e.g., Baby Richard: Case Hits a Nerve in Chicago*, S.F. CHRON., July 16, 1994, at A8 ("How can an old man in a black robe tear a family apart like this?" (quoting radio talk show caller)); Richard D. Rotunda, *'Richard' Case Defies the Law as Well as Logic*, CHI. TRIB., July 17, 1994, § 4, at 3 ("Justice James Heiple last week once again rejected the best interests of 'Baby Richard' with legal reasoning as strange as the decision he has reached."). Another newspaper article asked:

For how many days must we weep for the children of America? How much longer do we watch them suffer? The news gets worse each day, for they are drowned like a litter of unwanted kittens, beaten to death by abusive parents or given away by a court system that has less regard for their rights than for a bale of hay.

Patty Uihlein, *His 'True' Parents*, CHI. TRIB., Nov. 19, 1994, § 1, at 24.

their newspaper columns.²⁰⁷ Illinois Governor Jim Edgar called for a special session of the General Assembly and promised the public new legislation²⁰⁸ which would not only help avoid similar situations in the future, but which would also attempt to reverse the outcome of the *Baby Richard* case.²⁰⁹

In the midst of the wave of public reaction, the adoptive parents petitioned for rehearing, and during the pendency of the rehearing, the Illinois General Assembly amended the Adoption Act.²¹⁰ On July 12, 1994, the Illinois Supreme Court responded by denying the adoptive parents' request for a rehearing and by reiterating that the lower courts had incorrectly applied Illinois law.²¹¹ Moreover, Justice Heiple wrote a terse commentary, criticizing the press, the General Assembly, and Governor Edgar.²¹²

207. See Bob Greene, *The Sloppiness of Justice Heiple*, CHI. TRIB., June 26, 1994, §5, at 1; Bob Greene, *Supreme Injustice for a Little Boy*, CHI. TRIB., June 19, 1994, § 5, at 1; Eric Zorn, *Sloppiness Goes a Long Way in Court*, CHI. TRIB., June 28, 1994, § 2, at 1.

208. See *infra* part III.C (discussing the Amended Adoption Act).

209. Jan C. Greenburg, *New Law May Upend Fight for 'Richard,'* CHI. TRIB., July 6, 1994, § 2, at 1; *Edgar Calls for Special Session on Baby Richard Legislation*, CHI. DAILY L. BULL., July 1, 1994, at 1.

210. See *infra* part III.C (discussing the Amended Adoption Act).

211. *Baby Richard I*, 638 N.E.2d at 191. Justice McMorrow did not concur here but saw many issues which needed to be resolved:

Issues that form the basis of my vote to allow the petitions for rehearing include: the extent of the court's duty to protect children when that protection may conflict with parental rights established by law; the propriety of the court's disregarding laws designed to prevent the taking of a child from biological parents where the evidence of parental unfitness may be insufficient but where the best interests of the child call for such separation; whether the broad policy statement in the Adoption Act concerning the best interests of the child should be interpreted as predominant over the articulated requirements of the Act; and whether which, if any, of the courts involved in this case misapprehended, unduly emphasized, or attached inappropriate credibility to certain evidence presented at trial. Further argument on these matters would be helpful.

Id. (McMorrow, J., dissenting from the denial of the petitions for rehearing).

212. *Id.* at 189-90. In his opinion, Justice Heiple wrote:

[C]olumnist Greene has used this unfortunate controversy to stimulate readership and generate a series of syndicated newspaper columns in the Chicago Tribune and other papers that are both false and misleading. In so doing, he has wrongfully cried 'fire' in a crowded theater, and has needlessly alarmed other adoptive parents into ill-founded concerns that their own adoption proceedings may be in jeopardy.

Id. at 189. Justice Heiple commented further that "[t]he governor, in a crass political move, announced his attempt to intervene in the case. And the General Assembly, without meaningful debate or consideration, rushed into law a constitutionally infirm statute with the goal of changing the Supreme Court's decision." *Id.* at 190.

*C. The Amended Adoption Act: Illinois Introduces
A Putative Father Registry*

In direct response to the public's reaction and to the Governor's involvement in the case, the Illinois General Assembly amended the Adoption Act, effective July 3, 1994, significantly altering Illinois' Adoption Act.²¹³ The Amended Adoption Act introduces a putative father²¹⁴ registry,²¹⁵ changes the consent²¹⁶ and notice²¹⁷ requirements, re-emphasizes the best interests of the child standard,²¹⁸ mandates that an expedited process be implemented in adoption proceedings,²¹⁹ and states that in the event of a vacated or a denied adoption petition, a custody hearing shall be implemented pursuant to part VI of the Illinois Marriage and Dissolution of Marriage Act.²²⁰

Other state legislatures also have enacted putative father registries, which allow the unwed father to secure notice of any future adoption proceedings involving his child by taking specific steps outlined in the statutes.²²¹ By affording a putative father certain procedural pro-

213. Adoption Act Amendments § 975, 1994 Ill. Legis. Serv. 403-17 (West) (codified as amended at ILL. COMP. STAT. ANN. ch. 750, §§ 50/1, 50/8, 50/11, 50/12a, 50/12.1, 50/20, 50/20a, 50/20b (West Supp. 1995)); see *Edgar Calls for Special Session on Baby Richard Legislation*, CHI. DAILY L. BULL., July 1, 1994, at 1; Greenburg, *supra* note 209, at 1. Indeed, Justice Tully, in his dissent in the appellate court decision, predicted that the law needed changes. *In re Doe*, 627 N.E.2d at 664 (Tully, J., dissenting).

214. The Amended Adoption Act defines "putative father" as follows:

"Putative father" means a man who may be a child's father, but who (1) is not married to the child's mother on or before the date that the child was or is to be born and (2) has not established paternity of the child in a court proceeding before the filing of a petition for the adoption of the child. The term includes a male who is less than 18 years of age.

ILL. COMP. STAT. ANN. ch. 750, § 50/1(R) (West Supp. 1995).

215. *Id.* § 12.1.

216. *Id.* § 50/8.

217. *Id.* § 50/12a.

218. *Id.* § 20a.

219. *Id.* § 50/20.

220. *Id.* §§ 50/20, 50/20b.

221. See, e.g., ARIZ. REV. STAT. ANN. § 8-106.01 (Supp. 1994) (unwed father must file claim of paternity within 30 days of the birth of the child); ARK. CODE ANN. §§ 9-9-207, 9-9-210, 9-9-212, 9-9-224, 20-18-701 to 20-18-705 (Michie 1991 & Supp. 1993) (to ensure notice, regardless of father's relationship with his child, he must register); IDAHO CODE § 16-1513 (Supp. 1994) (unwed father may register prior to the date of any termination proceeding); IND. CODE ANN. §§ 31-3-1.5-1 to 31-3-1.5-16, 31-3-1-6, 31-3-1-6.1 (West 1979 & Supp. 1994) (no action by the father can relieve him of the responsibility of registering with the putative father registry); LA. REV. STAT. ANN. §§ 400, 400.1 (West 1991 & Supp. 1995) (father who files with the registry is presumed to be the father of the child); MO. ANN. STAT. §§ 211.442 to 211.487, 192.016 (Vernon 1983 & Supp. 1994) (statute defining parent excludes fathers who fail to affirm

tections, which vary depending on specified circumstances set forth in the Amended Adoption Act,²²² Illinois' new Putative Father Registry essentially achieves the same effect.²²³ Specifically, in certain circumstances a putative father is entitled to grant or to withhold consent,²²⁴ while in others, he is entitled to receive notice of a pending adoption.²²⁵

Under the Amended Adoption Act, a putative father is entitled to grant or withhold consent to an adoption *only* if he participates in the care of the child, *regardless* of whether he was aware of paternity or of the child's birth.²²⁶ In contrast, prior to the amendments, the Adoption Act required consent from an unwed father if he participated in the care and upbringing of his child *and* had been informed that he was the father of the child.²²⁷ Presumably, therefore, prior to the 1994 amendments, if an unwed father did not know he was the father of the child, his consent might have been required even if he did not participate in the child's care.

Although an unwed father may not be entitled to grant or withhold consent under the Amended Adoption Act, he may nevertheless be entitled to receive notice of a proposed adoption *provided he registers* with the Putative Father Registry.²²⁸ Under this provision, however,

paternity); N.M. STAT. ANN. §§ 32A-5-3, 32A-5-19, 32A-5-20 (Michie 1993) (purpose of registry is to protect the parental rights of unwed fathers who assume parental responsibility); N.Y. DOM. REL. LAW §§ 111, 111-a (McKinney 1988 & 1994), N.Y. SOC. SERV. LAW §§ 372-c, 384-c (McKinney 1992) (unwed father can secure notice of future adoption proceedings by filing with the registry); OKLA. STAT. ANN. tit. 10, § 55.1 (West 1994) (repealed) (unwed father must file an intent to claim paternity); TENN. CODE ANN. § 36-2-209 (1991) (unwed father must file intent to claim paternity); UTAH CODE ANN. § 78-30-4.8 (1992 & Supp. 1994) (unwed father may file notice of claim of paternity and willingness and intent to support his child); WIS. STAT. ANN. § 48.025 (West 1987) (unwed father may file any time except after a termination proceeding).

222. The actions of the unwed father can dictate what rights will be preserved. For example, if the unwed father registers with the Putative Father Registry, but does not take any other action to indicate an interest in his child, the Amended Adoption Act only requires that he be given notice of a hearing determining the best interests of the child. ILL. COMP. STAT. ANN. ch. 750, §§ 50/12.1, 50/12a (West Supp. 1995). His consent to the adoption is not needed. *See infra* notes 226-29 and accompanying text.

223. *See infra* notes 228-37 and accompanying text.

224. *See infra* note 226 and accompanying text.

225. *See infra* notes 228-29 and accompanying text.

226. *See* ILL. COMP. STAT. ANN. ch. 750, § 50/8 (listing the new section of the Amended Adoption Act which controls the consent requirement); *see also id.* 50/12.1(g)(3) ("A lack of knowledge of the pregnancy or birth is not an acceptable reason for failure to register.").

227. *See supra* note 144 (quoting the language of ILL. COMP. STAT. ANN. ch. 750, § 50/8(a) prior to the amendments).

228. The provision requires:

the unwed father secures only a right to participate in a hearing regarding the best interests of the child, and does not have the right to withhold consent to the adoption.²²⁹

The Amended Adoption Act also implements another significant change which purportedly allows the adopting parents to rely on the mother's written statement identifying the unwed father.²³⁰ Thus, it

Notwithstanding any inconsistent provision of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in this subsection, the persons entitled to notice that a petition has been filed under Section 5 of the Act shall include:

- (a) any person adjudicated by a court in this State to be the father of the child;
- (b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the Putative Father Registry under Section 12.1 of the Act;
- (c) any person who at the time of the filing of the petition is registered in the Putative Father Registry under Section 12.1 of the Act as the putative father of the child;
- (d) any person who is recorded on the child's birth certificate as the child's father;
- (e) any person who is openly living with the child or the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;
- (f) any person who has been identified as the child's father by the mother in a written, sworn statement, including an Affidavit of Identification as specified under Section 11 of the Act;
- (g) any person who was married to the child's mother on the date of the child's birth or within 300 days prior to the child's birth.

The sole purpose of notice under this Section shall be to enable the person receiving notice to appear in the adoption proceedings to present evidence to the court relevant to the best interests of the child.

ILL. COMP. STAT. ANN. ch. 750, § 50/12a(1.5) (emphasis added).

229. *Id.* Presumably, if the unwed father has attempted to participate in the caretaking of the child and the mother has precluded him from doing so, yet he has registered with the Putative Father Registry, he will have fulfilled the requirements under § 50/11 and therefore his consent to the adoption would be required. However, this is not specified in the statute.

230. Specifically, the Amended Adoption Act provides:

The petitioners in an adoption proceeding are entitled to rely upon a sworn statement of the biological mother of the child to be adopted identifying the father of her child. The affidavit shall be conclusive evidence as to the biological mother regarding the facts stated therein, and shall create a rebuttable presumption of truth as to the biological father only. Except as provided in Section 11 of this Act, the biological mother of the child shall be permanently barred from attacking the proceeding thereafter. The biological mother shall execute such affidavit in writing and under oath. The affidavit shall be executed by the biological mother before or at the time of execution of the consent or surrender, and shall be retained by the court and be a part of the Court's files.

appears that if the mother claims that she does not know the father's identity, the adopting parents have no further duty to discover the identity of the biological father.²³¹ Nevertheless, in situations where there is no indication that the putative father has consented to the adoption or at least waived his rights, the Amended Adoption Act seems to require the adoptive parents to search the Putative Father Registry in order to determine whether the biological father has registered.²³² On its face, therefore, the amendments to the Adoption Act conflict in their effect and purpose.²³³ Accordingly, in a case such as *Baby Richard I*, the Amended Adoption Act apparently requires the adopting parents to request a search of the Putative Father Registry.²³⁴

In addition, by specifying that expediency in adoption proceedings is in the best interests of the child, the Amended Adoption Act places greater emphasis on the best interests of the child—an interest already considered “paramount” in the Adoption Act prior to the amendments.²³⁵ This broad policy statement²³⁶ functions in conjunction with

ILL. COMP. STAT. ANN. ch. 750, § 50/11(b).

231. *Id.* § 50/11. See *supra* notes 228, 230 for the exact language of this provision.

232. While the putative father registry states that the adopting parents *may* search the registry to determine if the biological father has registered, it appears that if the biological father has not consented to the adoption or has waived his right to consent, the adopting parents *must* search the registry. ILL. COMP. STAT. ANN. ch. 750, § 50/12.1. These sections provide the following:

(c) An interested party, including persons intending to adopt a child, a child welfare agency with whom the mother has placed or has given written notice of her intention to place a child for adoption, the mother of the child, or an attorney representing an interested party may request that the Department search the Registry to determine whether a putative father is registered in relation to a child who is or may be the subject to an adoption petition.

(d) A search of the Registry may be proven by the production of a certified copy of the registration form, or by the certified statement of the administrator of the Registry form, or by the certified statement of the administrator of the Registry that after a search, no registration of a putative father in relation to a child who is or may be the subject of an adoption petition could be located.

....

(i) In any adoption proceeding pertaining to a child born out of wedlock, if there is no showing that a putative father has consented to or waived his rights regarding the proposed adoption, certification as specified in subsection (d) *shall be filed* with the court prior to entry of a final judgment order of adoption.

Id. (emphasis added).

233. See *infra* part IV.

234. ILL. COMP. STAT. ANN. ch. 750, § 50/12.1.

235. *Id.* 50/20a. The provision specifically states: “It is in the best interest of persons to be adopted that this Act be construed and interpreted so as not to result in extending time limits beyond those set forth herein.” *Id.*

236. Justice McMorro has commented that she believes the General Assembly's

two other provisions in the Amended Adoption Act which require promptness in the initial trial phase, as well as expediency in the appellate process.²³⁷ These changes attempt to preclude lengthy adoption proceedings, as well as contests to adoptions.²³⁸ The justification for these changes cannot be questioned, particularly in light of the circumstances surrounding the *Baby Richard* litigation.²³⁹

Finally, the Amended Adoption Act states that in the event of a vacated or a denied petition for adoption, the court shall institute a custody hearing pursuant to part VI of the Illinois Marriage and Dissolution of Marriage Act.²⁴⁰ Presumably, under this provision, if an unwed father contests the adoption of his child and the court vacates the adoption, or if the adoption petition is denied, the father does not instantly gain the right to custody of his child.²⁴¹ Instead, the court must then decide which party should retain custody based upon the child's best interests.²⁴²

focus on the best interests is a "broad policy statement." *Baby Richard I*, 638 N.E.2d at 183 (McMorrow, J., concurring) (referring to ILL. COMP. STAT. ANN. ch. 750, § 50/20a (West 1993) (amended 1994)).

237. The Amended Adoption Act provides that "[p]roceedings under this Act shall receive priority over other civil cases," appeals under this Act "shall be prosecuted and heard on an expedited basis" absent any good cause for not doing so, and if a court vacates a judgment order for adoption or denies a petition for adoption, "the court shall promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of the proceedings." ILL. COMP. STAT. ANN. ch. 750, § 50/20.

The provision governing the time limit for relief from final judgment or order states that a petition for relief from such a judgment "must be filed not later than one year after the entry of the order or judgment," and any appeal under this Act "shall be heard on an expedited basis." *Id.*

238. *Id.* § 50/20b; Bostick, *supra* note 163, at 658.

239. If, for example, the Does had been required to give up the child they had adopted when the child was only five months old, very few would have taken such an interest in the *Baby Richard* case. In contrast, the child was four years old when the Illinois Supreme Court ordered the adoptive parents to give up their adoption rights. See *supra* part III.A-B.

240. ILL. COMP. STAT. ANN. ch. 750, §§ 50/20, 50/20b. Under the Illinois Marriage and Dissolution of Marriage Act, the custody hearing would be controlled by the best interests of the child standard. See *supra* note 143 (discussing the standard applied in custody proceedings).

241. See *infra* notes 249, 258-63, and accompanying text for a discussion of the Illinois Supreme Court's analysis of this new provision.

242. See *infra* notes 244-63 and accompanying text.

D. Baby Richard II: An Overview of the Illinois Supreme Court's Final Opinion

Subsequent to the Illinois Supreme Court's decision in *Baby Richard I*,²⁴³ Richard's adoptive parents petitioned for a writ of certiorari, which the United States Supreme Court denied on November 7, 1994.²⁴⁴ Richard's adoptive parents then attempted to use a provision in the Amended Adoption Act that allowed them to petition the Illinois courts for a hearing to determine who would retain custody of Richard.²⁴⁵ According to the language in the Amended Adoption Act, the best interests of the child standard, as applied through part VI of the Illinois Marriage and Dissolution of Marriage Act, would control the custody hearing.²⁴⁶

In response, Otakar filed a petition of habeas corpus with the Illinois Supreme Court to require the adoptive parents to surrender custody of Richard based upon the court's June 16, 1994 *Baby Richard I* decision.²⁴⁷ In its *Baby Richard II* habeas corpus ruling, the Illinois Supreme Court once again ordered that Richard be returned to his biological father.²⁴⁸

243. See *supra* part III.A.

244. Doe v. Kirchner, 115 S. Ct. 499 (1994). For the complete procedural history of the litigation concerning Baby Richard, see *supra* note 10.

245. *Baby Richard II*, No. 78101, 1995 WL 80012, at *14. The Illinois Supreme Court summarized the Does' argument supporting the application of the Amended Adoption Act:

The Does contend that this recent amendment to the Adoption Act, which gives adoptive parents standing to seek permanent custody of the child in a failed adoption, applies to the instant case. In support, they argue that the amendment became effective on July 3, 1994, prior to this court's denial of the Does' petition for rehearing and prior to the United States Supreme Court's denial of the Does' writ of certiorari. Because of these post-decision petitions, the Does conclude that the instant case was still pending after the effective date of the amendments and thus that the legislation applies.

Id. This amendment applies to all cases pending on and after the amendment's effective date, thus potentially providing the adoptive parents in the *Baby Richard* case the opportunity to apply it to their case. ILL. COMP. STAT. ANN. ch. 750, § 50/20.

246. *Id.* 50/20b. The amended section provides:

In the event a judgment order for adoption is vacated or a petition for adoption is denied, the court shall promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of the proceedings pursuant to Part VI of the Illinois Marriage and Dissolution of Marriage Act. The parties to said proceedings shall be the petitioners to the adoption proceedings, the minor child, any biological parents whose parental rights have not been terminated, and other parties who have been granted leave to intervene in the proceedings.

Id.; see *supra* note 143 (discussing the standard applied in custody proceedings).

247. *Baby Richard II*, No. 78101, 1995 WL 80012, at *1.

248. *Id.*

1. The Court's Per Curiam Rejection of the Does' Attempt to Retain Custody of Baby Richard

In a per curiam decision, the Illinois Supreme Court rejected the Does' arguments that they should be granted a custody hearing pursuant to either the Illinois Marriage and Dissolution of Marriage Act or the Amended Adoption Act.²⁴⁹ The *Baby Richard II* court began its opinion by relating the history of the case, and by stressing that the Does and their attorney did not attempt to discover Otakar's identity.²⁵⁰ The court then reprimanded the Does for their complicity in deceiving Otakar, and stated that the Does had both a legal and a moral responsibility to return Richard to Otakar when Otakar initially intervened in the adoption proceeding in 1991.²⁵¹ The court also reaffirmed that a parent may not be divested of all parental rights unless that parent is first found to be unfit,²⁵² and that in the instant case, Otakar exhibited sufficient interest in his child to withstand a challenge to his fitness as a parent.²⁵³

The *Baby Richard II* court then addressed whether each of the respective parties possessed standing to proceed in this case.²⁵⁴ The court held that Otakar had standing to act on behalf of his son in the habeas corpus petition.²⁵⁵ In holding that Otakar maintained proper

249. *Id.* at *18.

250. *Id.* at *1-4. The court noted that "[a]t all relevant times, both the Does' lawyer and the Does were fully aware that Daniella knew who the father was and that she intended to tell the father that the child had died at birth." *Id.* at *1.

251. *Id.* at *2. The court criticized the adoptive parents:

We note that at this point [when Otakar intervened in the adoption proceeding] the adoption proceedings were rendered wholly defective. On June 6, 1991, the Does had both a legal and moral duty to surrender Richard to the custody of his father. Richard was then less than three months of age. Instead, the Does selfishly clung to the custody of Richard. They have prolonged these painful proceedings to the child's fourth birthday and have denied Otto any access to his own son.

Id.

252. *Id.* at *3-4. The court also held that the law places the burden of proof on the adoptive parents to prove that the unwed father is indeed unfit by clear and convincing evidence. *Id.* at *4; see also *supra* note 184 (stating the United States Supreme Court's holding in *Santosky v. Kramer*, 455 U.S. 745 (1982)).

253. *Baby Richard II*, No. 78101, 1995 WL 80012, at *4. The court stated that "[t]hrough lies, deceit and subterfuge, Otto was denied any opportunity to establish any involvement with his child during the first 57 days of his life." *Id.*

254. *Id.* at *5-16. An in-depth analysis of the standing issue is beyond the scope of this Comment. This Comment will, however, discuss the court's holding as it relates to the constitutionality and application of the amendments to the Adoption Act.

255. *Baby Richard II*, No. 78101, 1995 WL 80012, at *5. The court held that Kirchner had properly filed the writ of habeas corpus and that the court had jurisdiction to hear the writ "pursuant to article VI, section 4(a), of the Illinois Constitution of

standing, the court noted the distinction between a custody determination and an adoption proceeding, and stressed the significance of an adoption proceeding, explaining that the latter terminates all parental rights.²⁵⁶ The court emphasized that, under Illinois law, a court may not apply the best interests of the child standard to determine who should have custody of a child unless a parent has been found to be unfit by clear and convincing evidence.²⁵⁷

The court then held that the Does did not have standing under the Illinois Marriage and Dissolution of Marriage Act to pursue a custody hearing in the instant case because Otakar had not been found to be an unfit parent, nor had he ever voluntarily relinquished his parental rights.²⁵⁸ The court cited several United States Supreme Court decisions to support this holding.²⁵⁹ The court stated that once an invalid adoption is vacated, the adoptive parents cannot utilize the Illinois Marriage and Dissolution of Marriage Act to deprive a biological parent of his or her parental rights.²⁶⁰ The court held that, under the facts of this case, application of the Illinois Marriage and Dissolution of Marriage Act would be improper.²⁶¹

1970, as well as Supreme Court Rule 381(a)." *Id.*

256. *Id.* at *8; *see also supra* note 143 (discussing the distinction between custody and adoption proceedings in terms of the effect they have on parental rights).

257. *Baby Richard II*, No. 78101, 1995 WL 80012, at *4. The court also noted the public policy considerations for this holding:

Moreover, we note the extremely adverse public policy ramifications of holding that parents and their offspring can be deprived of the care, custody and control of the natural parent through the deceitful circumvention of the safeguards afforded natural parents in the Adoption Act: namely, the right to notice and the absolute right to veto the adoption absent a finding of unfitness.

Id. at *8.

258. *Id.* at *13. The court stated: "Thus, we find that section 601(b)(2) [of the Illinois Marriage and Dissolution of Marriage Act] cannot be invoked as against Otto in the instant case because he has never voluntarily relinquished his right to the care, custody and control of his child." *Id.*

259. *Id.* at *9. The court cited *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380, 392 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); and *Stanley v. Illinois*, 405 U.S. 645 (1972), to support the proposition that "fathers such as Otto, whose parental rights are not properly terminated and who, through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity and do develop this relationship." *Id.* at *10; *see supra* part II (discussing each of these United States Supreme Court cases).

260. *Baby Richard II*, No. 78101, 1995 WL 80012, at *10.

261. *Id.* at *11. The court held:

[W]here an unwed father is fit and willing to develop a relationship with and raise his child, but is prevented from doing so through deceit and an invalid

The court also denied the Does standing under the Amended Adoption Act because the General Assembly passed the Act after Otakar's rights had been finally adjudicated.²⁶² The court held that under these circumstances, allowing the legislative act to intervene and to control the outcome of the *Baby Richard* case would violate the doctrine of separation of powers as embodied in article II, section 1 of the Illinois Constitution of 1970.²⁶³ Essentially, the court foreclosed any option to attack its *Baby Richard I* decision, and thus reaffirmed Otakar's full and complete custody of Richard.

2. The Dissents by Justices Miller and McMorro

In his dissent, Justice Miller stated that he disagreed with the court's decision that the Does lacked standing to pursue a custody hearing, explaining that the record was insufficient to answer certain factual questions.²⁶⁴ Essentially, Justice Miller disagreed with the court's conclusions concerning the behavior of the Does in the initial adoption

adoption proceeding, that father is entitled to the care, custody and control of his child upon the subsequent vacatur of the invalid adoption. Under these facts, we hold that a section 601(b)(2) hearing under the Marriage and Dissolution of Marriage Act would be improper because it would contravene the safeguards afforded unwed fathers in the Adoption Act.

Id.

262. *Id.* at *14.

263. *Id.* at *13-*16. The court emphatically expressed its holding:

This court will not be blind to the circumstances surrounding the enactment of a statute in determining whether it violates separation of powers principles. The legislative branch of Illinois' three-branch government cannot sit as a reviewing court over the decisions of the judicial branch which has adjudicated a suit at law and established and articulated the legal rights of the parties to the litigation. To hold otherwise would render the separation of powers doctrine a nullity and threaten the very fabric of our democracy.

Id. at *16. By basing its holding on the Illinois Constitution, the court may well have been attempting to preclude review by the United States Supreme Court by narrowing its holding to Illinois law. *See infra* note 289.

264. *Baby Richard II*, No. 78101, 1995 WL 80012, at *18, *20 (Miller, J., dissenting). Justice Miller wanted to remand the case to the circuit court for a hearing to determine the factual issues raised under section 601(b)(2) of the Illinois Marriage and Dissolution of Marriage Act:

I agree with the majority's premise that a nonparent seeking standing under section 601(b)(2) must not have acted illicitly in gaining custody of the child. That inquiry, however, raises a number of important factual questions that have not previously been resolved. Indeed, determinations of standing under section 601(b)(2) are fact-intensive inquiries that require consideration of a number of circumstances. Nonetheless, the majority proceeds to resolve these issues without the benefit of a factual record adequate to support the opinion's conclusions.

Id. at *20 (Miller, J., dissenting) (citation omitted).

proceedings.²⁶⁵

Justice McMorro also dissented in the *Baby Richard II* case.²⁶⁶ In a forceful and lengthy opinion, Justice McMorro criticized the court for its characterization of the facts.²⁶⁷ She believed that the record failed to show that the Does and their attorney participated in a scheme to deceive Otakar.²⁶⁸ Moreover, Justice McMorro suggested that Otakar was an unfit parent who had known of the existence of his child since the child's birth.²⁶⁹

Justice McMorro also opined that Otakar lacked standing to bring a habeas corpus petition, as his interests conflicted with those of Richard.²⁷⁰ She believed that after the court's order of vacatur of the Does' adoption petition, Richard became a ward of the court who remained in the temporary custody of the Does.²⁷¹ Justice McMorro explained that because Richard was a ward of the court, the court was responsible for acting on behalf of the child's well-being.²⁷² Accordingly, Justice McMorro concluded that a custody hearing to determine the best interests of the child would have been appropriate.²⁷³

265. *Id.* at *20-*21 (Miller, J., dissenting).

266. *Id.* at *22-*47 (McMorro, J., dissenting).

267. *Id.* at *22-*26 (McMorro, J., dissenting).

268. *Id.* at *24-*25 (McMorro, J., dissenting). Justice McMorro believed that the adoptive parents had no way of finding out who or where Otakar was:

[T]here is nothing in the record to indicate that the Does or their attorney had or were able to obtain information regarding Kirchners [sic] identity or residence. Similarly, there is nothing in the record to establish that the Does or their counsel knew of friends or relatives who might have revealed Kirchner's identity or whereabouts.

Id. at *24 (McMorro, J., dissenting).

269. *Id.* at *22-*25 (McMorro, J., dissenting). Justice McMorro characterized Otakar as abusive, too busy to marry the woman who would bear his child, and a heavy gambler. *Id.* at *23-*24 (McMorro, J., dissenting).

270. *Id.* at *27 (McMorro, J., dissenting). Justice McMorro stated that "Kirchner represents his own interests. The Does represent their own and Richard's interests, based on their family relationship." *Id.* (McMorro, J., dissenting).

271. *Id.* (McMorro, J., dissenting).

272. *Id.* at *32 (McMorro, J., dissenting).

273. *Id.* (McMorro, J., dissenting). Justice McMorro expressed much of the sentiment surrounding the *Baby Richard* case:

My conviction that the Does have standing, or interests in the outcome of Richard's custody placement, is also partially rooted in common sense, which recognizes their central role in his life as his parents in every sense of the word except biologically. Moreover, they are the only ones who have ever had legal and physical custody of the child, following the voluntary termination of the biological mother's rights four days after the baby was born [sic]. Case law reveals that they not only have "standing" but are necessary and proper parties to such hearing.

Furthermore, Justice McMorrow stated that applying the Amended Adoption Act to the *Baby Richard* case would not violate the separation of powers doctrine, as the *Baby Richard* case was still pending at the time the General Assembly passed the Amended Adoption Act.²⁷⁴ According to Justice McMorrow, since the amendments to the Adoption Act applied to the case, and since the amendments had not been held constitutionally infirm, the Does should have been allowed a custody hearing pursuant to the Amended Adoption Act.²⁷⁵ Justice McMorrow also opined that a custody hearing would not violate Otakar's constitutional rights because a custody determination would not divest him of all his parental rights.²⁷⁶ Finally, Justice McMorrow stated that allowing Otakar to bring the habeas corpus petition violated Richard's constitutional and statutory rights.²⁷⁷

Id. (McMorrow, J., dissenting) (citation omitted).

274. *Id.* at *38-*39 (McMorrow, J., dissenting). Justice McMorrow explained: Until rehearing was denied and the United States Supreme Court denied review by certiorari, the case was still "pending" in the courts and was not yet "final" for the purpose of applying the recent amendments to the Adoption Act. In addition, this court stayed its mandate in the instant case pending review by the United States Supreme Court. Unless and until the mandate issues, there is no final or enforceable judgment.

Id. at *38 (McMorrow, J., dissenting).

275. *Id.* at *37-*40 (McMorrow, J., dissenting). Justice McMorrow stated that, "[t]hese unambiguous provisions grant the Does direct standing to participate in a hearing regarding Richard's custody. Therefore, unless the amendments do not apply or are held to be constitutionally infirm, Kirchner's challenge to the Does' standing in a custody hearing is wholly foreclosed." *Id.* at *38 (McMorrow, J., dissenting).

276. *Id.* at *46 (McMorrow, J., dissenting). Justice McMorrow distinguished the United States Supreme Court cases on which the majority relied, stating:

Unlike the issues before this court at this time, *Caban*, *Quilloin*, *Lehr*, and *Michael H.* involved the complete and irrevocable termination of parental rights of an unwed father and not a custody determination. . . . Only *Stanley* involved a custody determination. An unwed father's right to a hearing in a custody determination is the extent of Kirchner's due process rights under *Stanley*.

Id. (McMorrow, J., dissenting) (citations omitted).

277. *Id.* at *40-*42 (McMorrow, J., dissenting). Justice McMorrow believed that Richard had a right to procedural due process under the Fourteenth Amendment of the United States Constitution to determine where his best interests lay. *Id.* at *41 (McMorrow, J., dissenting). While she conceded that the United States Supreme Court had not established a liberty interest in a child's relationship with his or her family, she believed that procedural due process protected Richard as Illinois' Amended Adoption Act provided him with the right to a hearing to determine his best interests in the instant case. *Id.* (McMorrow, J., dissenting). Justice McMorrow believed that "[t]he State of Illinois ha[d] conferred upon Richard a liberty interest in his emotional and psychological relationship with the Does. The State cannot deprive Richard of this interest without following the procedures provided by State statute." *Id.* (McMorrow, J., dissenting).

IV. ANALYSIS

Beginning with *Stanley v. Illinois*, an unwed father's right to participate in the custody and control of his child has expanded significantly over time.²⁷⁸ The United States Supreme Court tempered this expansion, however, by requiring that an unwed father must in some way actively participate in the care and nurturing of his child in order to establish a constitutionally protected liberty interest.²⁷⁹ The inherent value of the parent-child relationship,²⁸⁰ the importance of the responsibilities surrounding parenting,²⁸¹ and the continued reliance on the institution of marriage to assist in defining legal issues²⁸² all help to create boundaries which define the unwed father's liberty interest in his relationship with his child.²⁸³

This liberty interest, however, coexists with other potentially competing interests. Aside from this liberty interest, states have an interest in securing adoptions,²⁸⁴ as well as an interest in protecting chil-

278. See *supra* notes 54-65 and accompanying text.

279. *Lehr v. Robertson*, 463 U.S. 248, 262 (1983); see *supra* notes 94-111 and accompanying text.

280. The Court in *Stanley* stressed the importance of this relationship by stating:

The private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citation omitted).

281. Justice Stevens stressed the importance of parental responsibility in *Lehr*:

When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection. . . . "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship."

Lehr, 463 U.S. at 261 (citations omitted) (alteration in original).

282. *Id.* at 256-57; see *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion).

283. *Baby Richard I*, 638 N.E.2d at 182. In *Baby Richard I*, Justice Heiple explained that Illinois' adoption "laws are designed to protect natural parents in their preemptive rights to their own children wholly apart from any consideration of the so-called best interests of the child. If it were otherwise, few parents would be secure in the custody of their own children." *Id.*

284. Illinois states its concern in the introduction to House Bill 2424:

WHEREAS, The legislature declares that children are our society's most valued

dren.²⁸⁵ In balancing these interests, states must also attempt to stay within the boundaries established by the United States Supreme Court.²⁸⁶ Illinois' Amended Adoption Act, while needing some revision, successfully balances these complicated issues and will help to avoid future tragedies similar to the one that resulted from the *Baby Richard* litigation.

A. *The Tragedy of Baby Richard*

The *Baby Richard* case produced a tragic result for all parties involved: the adoptive parents lost custody of Richard, a child who they raised as their own; the biological father must attempt to build a parent-child relationship with a child he has never met; and Richard must adapt to living away from the only home he has even known.²⁸⁷ The Illinois Supreme Court, however, correctly analyzed and followed the applicable law and precedent when it held in *Baby Richard I* that Richard's adoption improperly terminated the biological father's parental rights.²⁸⁸ Furthermore, in *Baby Richard II*, the Illinois Supreme Court correctly stood firm in its previous decision in favor of the biological father, by holding that the Does lacked standing to seek a custody hearing, and that the Amended Adoption Act could not be applied to Baby Richard without running afoul of the Illinois Constitution.²⁸⁹

resource; and

WHEREAS, In recent years, growing numbers of children have been denied the benefit and comfort of safe, appropriate, and permanent care from biological, adoptive, or foster parents; and

WHEREAS, In order to best serve the interests of the children of Illinois, the legislature must take steps to ensure that biological parents are accorded reasonable opportunities to acknowledge their parenthood, adoptive parents are able to reasonably rely on the adoption courts for timely completion of adoptions, and foster parents are included as responsible members of the State child welfare system

Uniform Interstate Family Support Act, Pub. Act No. 88-550, § 101, 1994 Ill. Legis. Serv. 381 (West).

285. See *supra* note 36 and accompanying text.

286. See *supra* part II.A-B.

287. See *supra* notes 204-05 and accompanying text.

288. See *supra* part III.A for a detailed discussion of *Baby Richard I*.

289. *Baby Richard II*, No. 78101, 1995 WL 80012, at *14-*15. See *supra* part III.D for a discussion of *Baby Richard II*.

By avoiding a ruling on the Amended Adoption Act's constitutionality under the Federal Constitution, the Illinois Supreme Court may have effectively precluded further review by the United States Supreme Court. Prior to the issuance of the written opinion of *Baby Richard II*, Justice O'Connor stated: "That we are left guessing about the basis for the Illinois Supreme Court's decision, particularly when opinions are forthcoming, gives me considerable pause. A decision that the Federal Constitution invalidates the

The Adoption Act in effect when the Illinois Supreme Court vacated the adoption order provided that courts must determine parental fitness prior to terminating parental rights.²⁹⁰ Moreover, the Illinois Supreme Court's own holding in *Syck* indicated that parental fitness must be determined before courts apply the best interests of the child standard, essentially ensuring that once a parent establishes a protected liberty interest in the parent-child relationship, courts will not terminate that parent's rights.²⁹¹

In deciding that the best interests of the child standard controlled the outcome of *Baby Richard I*, the Illinois Appellate Court disregarded the precedential significance of the Illinois Supreme Court's holding in *Syck*,²⁹² and pieced together an odd combination of statutes²⁹³ and case law²⁹⁴ to reach this conclusion. Upon reviewing the appellate court's decision in *Baby Richard I*, the Illinois Supreme Court merely reversed this application of Illinois law.²⁹⁵

Illinois statute may raise a conflict with decisions of other courts." See *O'Connell v. Kirchner*, 115 S. Ct. 1084 (1995) (O'Connor, J., dissenting from denial of certiorari).

290. See *supra* part II.C (discussing Illinois adoption law prior to the court's vacatur order in *Baby Richard I*).

291. See *supra* notes 152-64 and accompanying text.

292. *In re Doe*, 627 N.E.2d 648, 652 n.2 (Ill. App. 1st Dist. 1993).

293. Justice Rizzi cited language in the Illinois Juvenile Court Act and the Federal Adoption Assistance and Child Welfare Act of 1980. *Id.* at 653 (citing ILL. COMP. STAT. ch. 750, § 405/2-14 (West 1992) and 42 U.S.C. § 675(5)(C) (1988)).

We extrapolate and infer from the Juvenile Court Act, as amended, and the federal Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, as amended, that after a newborn child has been placed for adoption and lives continuously thereafter for longer than 18 months with his adopting parents who adopt or have adopted him pursuant to a judgment of adoption, it would be contrary to the best interest of the child to remove him from his home and family by disturbing the judgment of adoption.

Id. (citations omitted).

294. To support the use of the best interests of the child standard, Justice Rizzi cited *In re Abdullah*, 423 N.E.2d 915 (Ill. 1981), *Edwards v. Livingston*, 247 N.E.2d 417 (Ill. 1969), and *In re Ashley K.*, 571 N.E.2d 905 (Ill. App. 1st Dist. 1991). However, these cases are clearly distinguishable. In *Edwards*, the court was not terminating parental rights; it was merely deciding custody. 247 N.E.2d at 221. Moreover, *Edwards* was decided before *Syck*. In *Abdullah*, which was also decided prior to *Syck*, the father had already been found unfit when the court applied the best interests of the child standard. 423 N.E.2d at 917. Finally, in *Ashley K.*, the court was, once again, only deciding which party would be allowed custody. The court was not terminating parental rights. *In re Ashley K.*, 571 N.E.2d at 923. It is noteworthy that Justice Rizzi wrote the opinion in *Ashley K.*

295. Justice Heiple, writing for the court in the *Baby Richard I*, noted:

The adoption laws of Illinois are neither complex nor difficult of application. Those laws intentionally place the burden of proof on the adoptive parents in establishing both the relinquishment and/or unfitness of the natural parents and, coincidentally, the fitness and the right to adopt of the adoptive parents.

The fact that it took more than three years for a final determination in the *Baby Richard* case²⁹⁶ created the tragedy in the outcome. In determining the unfitness of a biological parent, a court must undertake the difficult task of evaluating that parent's behavior toward his or her child.²⁹⁷ While it could be argued that the biological father in the *Baby Richard* case did not show sufficient interest in his child within the first thirty days of the child's birth, or within thirty days after he discovered the child's existence, it could also be argued that he did in fact show sufficient interest.²⁹⁸ Regardless of the decision rendered, if it had been made shortly after the issue first arose, the impact on the parties would have been far less significant.²⁹⁹ The changes in Illinois' Amended Adoption Act successfully provide protection for these interests so that the impact upon future parties will not be as severe.

*B. Illinois' Amended Adoption Act: Adequate
Protection for Unwed Fathers?*

In most instances, Illinois' Amended Adoption Act adequately protects the unwed father's liberty interest in his relationship with his child. In *Baby Richard*-type cases, however, where through deceit the father is unaware of the child's birth, the Amended Adoption Act fails

In addition, Illinois Law requires a good-faith effort to notify the natural parents of the adoption proceedings. These laws are designed to protect natural parents in their preemptive rights to their own children . . .

Baby Richard I, 638 N.E.2d at 182.

296. As of the date of this Comment, the litigation of the *Baby Richard* case has not yet reached its conclusion. *Baby Richard* has, however, been returned to his biological father, Otakar. See Alex Rodriguez, *Traumatic Day Tries Neighbors' Emotions*, CHI SUN-TIMES, May 1, 1995, at 7 (*Baby Richard* was returned to Otakar on April 30, 1995); *Chronology of Case*, CHI. SUN-TIMES, May 1, 1995, at 7 (detailing the chronology of the *Baby Richard* case). For the complete procedural history of the litigation concerning *Baby Richard*, see *supra* note 10.

While the Illinois Supreme Court determined that the Does could not bring a custody hearing, the court did not rule on the constitutionality or application of the amendments to the Adoption Act.

297. ILL. COMP. STAT. ANN. ch. 750, § 50/1(D) (West Supp. 1995).

298. The difficulty of such an evaluation is evidenced by the *Baby Richard* case itself. In her dissenting opinion from the denial of the petitions for rehearing, Justice McMorro expressed concern that the "courts involved in this case [could have] misapprehended, unduly emphasized, or attached inappropriate credibility to certain evidence presented at trial." *Baby Richard I*, 638 N.E.2d at 191 (McMorro, J., dissenting). It is just as plausible from the facts of the *Baby Richard* case that the biological father did in fact show enough interest. See *In re Doe*, 627 N.E.2d at 656-66 (Tully, J., dissenting) (arguing that the biological father's attempts to discover the existence of his child showed an adequate degree of interest).

299. Dapolito, *supra* note 7, at 1023-24.

to protect the father's liberty interest in his relationship with his child.

Initially, the Amended Adoption Act provides that a father gains the right to consent to the adoption of his child if he minimally participates in the care and nurturing of his child.³⁰⁰ Accordingly, an unwed father can gain the right to consent to the adoption of his child by doing considerably less than a fully committed parent.³⁰¹ For example, if an unwed mother initiates a paternity action against an unwilling unwed father and the court enters an order finding him to be the legal father, the unwed father gains the right to grant or to withhold consent to the adoption of his child.³⁰² Moreover, if the unwed father pays for the medical expenses of the child's birth and provides for the financial support of the child, he gains the right to consent to the adoption without ever providing any of the emotional or psychological support that a child requires.³⁰³

In addition, Illinois' Amended Adoption Act adequately protects an unwed father's inchoate³⁰⁴ liberty interest. Under the Act, an unwed father can secure his right to notice of future adoption proceedings by simply registering with the Putative Father Registry.³⁰⁵ Once notified,

300. See *supra* part III.C.

301. See Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991).

The way the father can undertake his limited degree of parental responsibility is . . . noteworthy. A father can choose: does he want to provide custodial care, a personal relationship, or financial support? Whichever he picks, that is enough. . . . Should the mother have any choice about what parenting work the father undertakes? Should she have a choice about the work she undertakes? By not mentioning this issue, the [United States] Supreme Court in *Lehr v. Robertson* confirms that the mother's choice is nonexistent.

Id. at 1420.

302. ILL. COMP. STAT. ANN. ch. 750, § 50/8.

303. *Id.* One commentator criticized the effect of provisions such as this:

Monetary support is no doubt important to children. Nonetheless, this definition of parental equality fails to address the other types of caring that a child needs. As one court put it,

We can best provide for the support of minors by avoiding artificial division of the panoply of parental responsibilities and looking to the capacity of the parties involved. Support, as every other duty encompassed in the role of parenthood, is the equal responsibility of both mother and father.

Czapanskiy, *supra* note 301, at 1434 (quoting *Conway v. Dana*, 318 A.2d 324, 326 (Pa. 1974)).

304. His interest is described as inchoate because while he has not established a relationship with his child, the potential exists, and if he actively participates in the care and nurturing of his child, he will develop a constitutionally protected liberty interest in his relationship with his child. All that is required is action by the unwed father.

305. ILL. COMP. STAT. ANN. ch. 750, § 50/12.1.

the father can participate in a hearing to determine the best interests of the child.³⁰⁶ While this provision does not provide the father with the ability to withhold consent to the adoption, without additional efforts by the father to indicate his interest in the child, such a right has not been earned.³⁰⁷

This protection is consistent with the previously discussed United States Supreme Court decisions,³⁰⁸ and at least arguably mirrors society's values regarding the responsibilities a parent should assume.³⁰⁹ The mere biological relationship between an unwed father and his child is simply insufficient to establish a protected liberty interest.³¹⁰ The

306. *Id.*

307. One commentator suggested:

The opportunity interest is constitutionally protected only to the extent that the biological father who claims protection wants to make the commitments and perform the responsibilities that give rise to a developed relationship because it is only the combination of biology and custodial responsibility that the Constitution ultimately protects.

Buchanan, *supra* note 33, at 368 (citation omitted). Nevertheless, this commentator also recognized that:

[w]hen the state has no official evidence, such as prior termination, consent, or waiver, that a biological father has lost his opportunity interest, and the state may not assume from the combination of passage of time and assumption of parental responsibility by another that the father's interest has lapsed, the father's biological connection alone requires the state to notify him of proceedings in which it may irrevocably cut off his opportunity to turn his potential relationship into an actual one.

Id.

308. *See supra* part II.A-B.

309. Undeniably, a child is a dependent who relies upon the adult parent to provide for his or her needs. One commentator has noted the recognition of the importance of this relationship:

Since the earliest days of the modern liberal state, parenthood has been expressed in terms of exchange: Parents have rights with respect to their children in exchange for the performance of their parental responsibilities. Sir William Blackstone, John Locke, and Samuel Pufendorf, for example, all state that the rights or powers of parents arise from their duties in caring for their offspring. As Locke writes, "the *Power . . . that Parents have over their Children*, arises from that Duty which is incumbent upon them, to take care of their Off-spring, during the imperfect state of Childhood."

Bartlett, *supra* note 7, at 297 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 348-49 (Peter Laslett ed., 1960) (3d ed. 1698)).

The experience and meaning of responsibility may be quite personal and individualized. Its meaning, however, is derived within a social context that defines ideal roles for persons engaged in particular relationships. Thus, while individuals to a certain extent choose the terms of their own relationships, the choices they make and the meaning given to those choices are strongly shaped by role expectations defined by the community.

Id. at 299 (citations omitted).

310. *See Lehr v. Robertson*, 463 U.S. 248, 262 (1983).

United States Supreme Court stated in *Lehr v. Robertson*³¹¹ that the biological relationship provides the unwed father with the unique *opportunity* to establish a relationship.³¹² If the father fails to seize this opportunity, and merely registers with the Putative Father Registry, he simply has not indicated an interest which is worthy of constitutional protection.³¹³

Moreover, the Amended Adoption Act provides that if an unwed father registers with the Putative Father Registry, and commences a parentage action within thirty days of the registration, he will obtain the ability to withhold consent to any adoption proceedings.³¹⁴ Again, this seems generous when compared to the duties and the responsibilities of the unwed mother who presumably must feed, clothe, nurture, protect, house, and provide for the child's medical needs.³¹⁵ The unwed father, merely by taking two legal actions, gains the right to control the actions and the wishes of the mother, and can significantly influence who will have the right to raise the child by withholding consent to any adoption proceeding.³¹⁶

311. 463 U.S. 248 (1983).

312. *Id.* at 262.

313. See Buchanan, *supra* note 33, at 368-71. This statement perhaps exemplifies a value judgment. It is supported, however, by the United States Supreme Court decisions discussed in part II.B, *supra*, and expresses this author's moral values. There may be an inherent danger in attempting to control the behavior of individuals based upon such values. One commentator explains the danger of forcing moral values upon society via state law:

When I speak of societal construction of parenthood, I refer to a process of community norm-building about what it means to be a parent. This process might lead to the prohibition of individual choices. Communities can be repressive. Thus individuals must, and do, sometimes resist, fending off the community as it attempts to shape individuals to its own vision. . . . The struggle between the community speaking in a common voice and individuals speaking in many voices is a struggle inevitable in any society that attempts to set itself on liberal foundations.

Bartlett, *supra* note 7, at 304-05 (citations omitted).

314. ILL. COMP. STAT. ANN. ch. 750, § 50/8.

315. An unwed mother who does not provide for her child may well be found unfit and can lose custody of her child. See *id.* § 50/1 (defining "unfit person"). Indeed, the law can treat unwed mothers and unwed fathers very differently. One commentator notes:

The discrepant treatment of unwed mothers and fathers with respect to responsibilities toward their children must, therefore, arise from a source other than the reliability of identification [of the unwed father]. A more likely source is the notion that family law supports and reinforces fathers as volunteers. The father can evade or at least delay the imposition of a family relationship. On the other hand, if he wants a family relationship, he can claim it, and the mother has only limited means to deny it to him.

Czapanskiy, *supra* note 301, at 1431.

316. See *supra* note 300-07 and accompanying text.

These provisions of the Amended Adoption Act adequately safeguard the father's constitutionally protected liberty interest in his child even though they place upon the unwed father the burden of ensuring that he is informed of the child's birth.³¹⁷ This burden, in essence, requires that the father participate in some manner in his relationship with the child or with the mother prior to the birth of the child.³¹⁸ This burden is consistent with the United States Supreme Court's previous decisions.³¹⁹ The unwed father has a unique relationship with his child as he has participated in the child's conception.³²⁰ Just as the unwed father is required to earn his constitutionally protected liberty interest in his relationship with his child, he must also actively participate prior to the birth of the child to ensure that he has knowledge of the impending birth.³²¹

When an unwed father is unaware of the child's existence due to the mother's deception, however, the Amended Adoption Act fails to protect the unwed father's liberty interest in his child. Specifically, the Amended Adoption Act provides that upon the vacatur or denial of an adoption petition,³²² which necessarily requires a finding that the unwed father is fit, "the court shall promptly conduct a [custody] hearing . . . pursuant to Part VI of the Illinois Marriage and Dissolution Act."³²³ This hearing focuses on the best interests of the child, and essentially disregards the unwed father's liberty interest.³²⁴ Accordingly, this provision in the Amended Adoption Act denies the father his constitutionally protected liberty interest in his child.³²⁵

317. See ILL. COMP. STAT. ANN. ch. 750, § 50/12.1.

318. Indeed, marriage was an option for Otakar Kirchner, the unwed father in the *Baby Richard* case. *In re Doe*, 627 N.E.2d 648, 657 (Ill. App. 1st Dist. 1993) (Tully, J., dissenting).

319. See *supra* part II.A-B.

320. This is consistent with the United States Supreme Court's language in *Lehr v. Robertson*, 463 U.S. 248 (1983), where the Court found that the unwed father had a unique opportunity to establish a relationship with his child that no other man possesses. See *supra* part II.B.2.

321. The unwed father in the *Baby Richard* case provides an example. Otakar's participation with the mother prior to the birth of their child alerted him to the impending birth. He was on notice that his child would be born within a certain time frame, and under the Amended Adoption Act could easily have secured his right to notice and consent. Indeed, this knowledge led to his actions which, after a long and protracted custody battle, won him the right to custody of his child.

322. See *supra* notes 240-42 and accompanying text.

323. ILL. COMP. STAT. ANN. ch. 750, §§ 50/20, 50/20b.

324. See *supra* notes 240-42 and accompanying text.

325. In fact, when ruling on the standing of the Does to seek a custody hearing under the Illinois Marriage and Dissolution of Marriage Act, the Illinois Supreme Court indicated in *Baby Richard II* that (1) when an adoption is vacated or denied, *and* (2) the unwed father wishes to retain custody, *and* (3) the father is unaware of his child's

C. *The Best Interests of the Child*

Illinois' Amended Adoption Act reinforces the policy that the best interests of the child³²⁶ are paramount, and provides protection for the child who has established a home with adoptive parents.³²⁷ First, the Amended Adoption Act protects the child from protracted contested adoption proceedings.³²⁸ By mandating an expedited trial and appeal process in contested adoptions,³²⁹ the Act ensures that a *Baby Richard*-type situation will not arise.³³⁰ Essentially, the child is less likely to end up in legal limbo, tentatively waiting to find out which parents will be his or her "real" parents.³³¹

existence due to the mother's deceit, a custody hearing pursuant to the Marriage and Dissolution of Marriage Act is improper. *Baby Richard II*, No. 78101, 1995 WL 80012, at *11. Because the court found that the Does lacked standing under the Amended Adoption Act, however, the court did not rule on the constitutionality of this provision. *Id.* at *15-*16.

326. The best interests of the child standard is difficult to define. However, one commentator proposes that:

a new perspective on generational justice that recognizes that meeting the needs of children is the primary concern of family law, and justice towards the next generation its motivating force. . . . Generism would place children, not adults, firmly at the center and take as its central values not adult individualism, possession, and autonomy, as embodied in parental rights, nor even the dyadic intimacy of parent/child relationships. It would value most highly concrete service to the needs of the next generation, in public and private spheres, and encourage adult partnership and mutuality in the work of family, as well as collective community responsibility for the well-being of children.

Woodhouse, *supra* note 7, at 1814-15.

327. See *supra* notes 235-39 and accompanying text.

328. See *supra* notes 235-39 and accompanying text.

329. ILL. COMP. STAT. ANN. ch. 750, §§ 50/20, 50/20b.

330. For example, if the *Baby Richard* case had been fully adjudicated within six months, few would have taken notice that an infant was being returned to his biological father. This may well be the heart of the issue in the *Baby Richard* case, as Public Guardian Patrick Murphy noted:

"We have a little boy who has lived his entire life with a phenomenal couple. He's got an older brother he's bonded with. This is a family. To take this kid out of the family will just tear this kid apart emotionally. It would just be a horrible thing to do."

Edward Walsh, *Controversial Illinois Adoption Ruling Upheld Without Comment, Supreme Court Affirms Biological Father's Right to "Baby Richard,"* WASH. POST, Nov. 8, 1994, at A6 (quoting Illinois Public Guardian Patrick Murphy).

The bond between the adoptive parents and a six-month-old child arguably could be more easily repaired when broken. See Korn, *supra* note 50, at 1327-28.

331. The child in these difficult cases functions essentially as chattel, waiting to see who owns the right to raise the child. *In re Doe*, 638 N.E.2d 181, 190 (Ill. 1994) (Heiple, J., writing in support of the denial of rehearing). Indeed, it may very well be that a child who has lived with adoptive parents for six, three, or even one month has established a bond which, if broken, will negatively impact on the child's development.

Additionally, the Amended Adoption Act protects the child's relationship with his or her biological parents. While many have suggested that the psychological relationship established between a child and a parent-figure is extremely important to the development of a healthy child,³³² the biological connection between a parent and a child is also significant.³³³ Children's attempts to eventually seek out their "real" or biological parents demonstrate the importance of this biological connection.³³⁴ By providing the unwed father with the ability to ensure his right to notice and to consent in adoption proceedings involving his child, the Amended Adoption Act protects the child's relationship with a father who is willing to care and to provide for him or her.³³⁵

D. Securing Adoptions

The Amended Adoption Act also provides the adoptive parents with a sense of security and finality in the adoption process. By providing more stringent and specific adoption procedures, the State of Illinois successfully protects the adoptive parents from future collateral attacks upon the custody of their adoptive children.³³⁶ For example, em-

See GOLDSTEIN ET AL., *supra* note 5, at 289. "Children, however, are not divisible, and their interests suffer when they are forced into a model that denies the reality that parenting takes place not only between parent and child but also in mutuality and support among adult care givers." Woodhouse, *supra* note 7, at 1812.

332. GOLDSTEIN ET AL., *supra* note 5, at 289.

333. The significance of this relationship has been recognized by the United States Supreme Court:

[T]he usual understanding of "family" implies biological relationships, and most decisions treating the relation between parent and child have stressed this element. . . . "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."

Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 843 (1977) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citations omitted)).

334. One commentator explains:

The biological family is the source of identity for a child. Children feel part of the biological family and its roots: they resemble their parents, possess some personality traits of their parents, and have the family health problems. What a child knows and imagines about the biological family helps to mold the child's self-perception.

Beyer & Mylniec, *supra* note 7, at 237-38. Another commentator has noted that "the child would benefit from developing a relationship with his biological father by learning about his genetic heritage. There is a strong psychological need for people to discover their biological identities and ancestries; this knowledge is essential for a full understanding of who we are." Zinman, *supra* note 131, at 998.

335. See *supra* notes 226-27 and accompanying text.

336. The Amended Adoption Act significantly narrows the category of an unwed father who retains the right to consent to the adoption of his child. Compare ILL. COMP.

powering the unwed father with the ability to control his right to notice protects an adoption from an unwed father who may not know the mother has placed the child up for adoption.³³⁷ If the unwed father registers, the adoptive parents can discover his identity and ensure that he receives notice of the adoption regardless of whether the biological mother reveals the unwed father's existence or identity.³³⁸ Indeed, had the unwed father in the *Baby Richard* case registered with a putative father registry, the Does could have discovered his existence regardless of the unwed mother's actions.³³⁹

Moreover, if an unwed father does not register with the Putative Father Registry and does not fit within the limited classifications listed in the Amended Adoption Act, he has not secured his right to notice of the impending adoption.³⁴⁰ By placing the responsibility to secure this notice with the unwed father, the adoptive parents can be sure that they have done everything possible to discover his existence by checking with the Registry.³⁴¹

V. PROPOSAL

Illinois' Amended Adoption Act provides protection for all parties in adoption proceedings. Nevertheless, certain aspects of the Amended Adoption Act remain vague, and the Illinois General Assembly must amend it to specifically provide complete protection to unwed fathers, their children, and adopting parents.

STAT. ANN. ch 750, § 50/8(b)(1)(B) to (c)(1)(B) (discussing when the consent of the unwed father is required) *with id.* § 50/8 (West 1993) (amended 1994) (setting forth the circumstances, prior to the Amended Adoption Act, when the consent of the unwed father was required). See also *supra* notes 328-35 and accompanying text discussing other significant changes which help protect adoptions from subsequent challenges.

337. For a discussion of how an unwed father may secure his right to notice by registering with the Putative Father Registry, see *supra* notes 228-29 and accompanying text.

338. ILL. COMP. STAT. ANN. ch. 750, § 50/12.1 (West Supp. 1995). The amendments specifically provide that "[a]n interested party, including persons intending to adopt a child . . . may request that the Department search the Registry to determine whether a putative father is registered in relation to a child who is or may be the subject to an adoption petition." *Id.*

339. Since the unwed father in the *Baby Richard* case suspected that his child had been born alive, under the Amended Adoption Act, he could have registered with the Putative Father Registry and ensured that the adoptive parents would be able to discover his existence regardless of the biological mother's actions. See *supra* notes 169-83 and accompanying text.

340. Bostick, *supra* note 163, at 657.

341. See *supra* part III.C (discussing the possibility that the statute provides the unwed father with rights if he has taken steps to provide for the child but has not registered with the Registry).

First, adopting parents should be required, in all circumstances, to search the Putative Father Registry, and should never be allowed to rely solely on the mother's affidavit.³⁴² For example, in cases where the unwed mother lies about her knowledge of the unwed father's identity, it seems clear that the adoptive parents should not be allowed to rely solely on the affidavit provided by the mother.³⁴³ Furthermore, notwithstanding the mother's affidavit, if the unwed father has attempted to provide the unwed mother with financial assistance for the birth and the support of the child, he has earned the right to consent to the adoption.³⁴⁴ If he does not know that the mother has placed the child for adoption and the adoptive parents do not check the Registry, the unwed father's constitutionally—or at least statutorily—protected interest in his relationship with his child will have been violated. Thus, the Amended Adoption Act should be interpreted to require the adoptive parents to search the Registry for every adoption in order to adequately safeguard the unwed father's rights.

Second, if the unwed father fulfills his obligation, but has not registered with the Putative Father Registry, the State has a duty to ensure that those adopting the child attempt to provide the best notice possible to the unwed father.³⁴⁵ The adoptive parents should not be relieved of the duty to notify the unwed father merely because his name does not appear in the Registry.³⁴⁶ The statute should not

342. As written, the Act is unclear whether the adoptive parents *must* search the Registry before proceeding without the unwed father in the adoption. Compare *supra* note 230 (discussing the amendment to § 50/11 which provides that the adoptive parents may "rely upon a sworn statement of the biological mother . . . identifying the father of her child.") with *supra* note 232 (discussing how the Amended Adoption Act also indicates that the adoptive parents may be required to search the registry if the biological father has not consented to the adoption or waived his right to consent).

343. See *supra* notes 230, 342 (discussing the amendment to the Adoption Act which purportedly allowed the adoptive parents to rely on the biological mother's sworn statement).

344. See *supra* part III.C.

345. ILL. COMP. STAT. ANN. ch. 750, § 50/8 (providing the unwed father with a statutory right to notice and to consent in an adoption of his child when he has fulfilled certain requirements).

346. One of the co-authors of the statute stresses the goal of the Amended Adoption Act:

To limit judicial discretion and thus prevent lengthy contested adoption litigation, the legislation clearly states that "[i]t is in the best interests of persons to be adopted that this Act be construed and interpreted so as to not result in extending time limits beyond those set forth herein."

For example, if a putative father registers on the 30th day after the child's birth, he has met the registration requirements of the Act. However, if he registers on the 57th day after the child's birth, he has failed to meet his burden regardless of other activities he may have undertaken and regardless of

provide that in one instance the unwed father has established the right to consent or to withhold consent to adoptions by attempting to pay for the medical expenses involving his child, and in the next instance, state that it will not notify him of the proceedings.³⁴⁷

Third, if an unwed father successfully contests an adoption of his child by showing a sufficient interest in his child and by requesting custody of his child, the Act must provide him with full parental rights and not merely the opportunity to participate in a hearing to determine the best interests of the child. The Illinois Supreme Court's holding in *Baby Richard II* commands this result.³⁴⁸ Moreover, if the unwed father establishes a relationship with his child, he establishes a constitutionally protected liberty interest in that relationship that cannot be deprived by the Illinois General Assembly.³⁴⁹ If, however, the unwed father successfully challenges an adoption petition—but does not request custody of his child—a custody hearing determining the best interests of the child would not violate the father's parental rights.³⁵⁰

Finally, the Putative Father Registry must be adequately publicized.³⁵¹ The protection provided by the Registry is moot if the

whether the mother lied to him about the pregnancy.

Bostick, *supra* note 163, at 658 (emphasis added). Arguably, this is inconsistent with other provisions of the Adoption Act because if the unwed father has attempted to provide financial support for the child, his consent is required under § 50/8. ILL. COMP. STAT. ANN. ch 750, § 50/8.

347. See *id.* § 50/8 (listing the requirements which must be met in order to gain the right to consent to the adoption); compare with *id.* § 50/12.1 (providing that if an unwed father does not register with the Putative Father Registry, he will not secure his right to notice). While § 50/12.1(i) of the Amended Adoption Act suggests that the adoptive parents must show that the biological father either waived his rights or consented to the adoption in order to avoid searching the Registry, it remains unclear what such a showing actually entails. *Id.* § 50/12.1(i). Arguably, the adoptive parents could simply claim, vis-a-vis the testimony of the mother, that the biological father had abandoned the child and, therefore, could establish waiver. See *id.* § 50/1(D) (West 1993) (amended 1994) (listing the grounds for a finding of parental unfitness).

348. See *supra* notes 252-53 and accompanying text.

349. See *supra* notes 94-141 and accompanying text.

350. In a custody hearing, the biological parents' parental rights to the child are not necessarily terminated. See *supra* note 143.

351. At least one commentator has noted the significance of publicizing the availability of putative father registries:

In order for a putative fathers' registry to be successful, its availability must be publicized. Some of the states that have registries provide for funding and statewide distribution of information as to the registry's existence, its purpose, procedures on how to register, and most importantly, the consequences of failure to register. Although lack of knowledge of the registry is not a valid defense to a putative father's failure to register, extensive publicity of a newly created registry would be appropriate to educate

unwed father does not realize he has an option. While some fathers will seek legal assistance within the statutorily mandated limits, many may not, simply because they are unaware of the Registry's existence. While ignorance of the law is no excuse, the law cannot serve its purpose without the unwed father's knowledge of its existence.

VI. CONCLUSION

The interests at stake in contested adoption proceedings are substantial. Adoptive parents require the security of knowing that their child will not be taken away from them years after they have adopted the child. The biological parents require protection from the State and third parties when proceedings involve the termination of their parental rights.

Perhaps most importantly, the innocent child requires protection from an unstable living arrangement, which could cause significant emotional harm to that child. Adoption laws must attempt to protect adequately and to balance these sometimes competing interests, and must be specific and comprehensive enough to succeed. Illinois' Amended Adoption Act, while in need of some revision, successfully balances these competing adoption interests.

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putative fathers about the registry and its function.
Dapolito, *supra* note 7, at 1025-26.

