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## Intercountry Adoption and the Flight from Unwed Fathers' Rights: Whose Right Is It Anyway?

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# INTERCOUNTRY ADOPTION AND THE FLIGHT FROM UNWED FATHERS' RIGHTS: WHOSE RIGHT IS IT ANYWAY?

*Alexandra Maravel\**

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## I. INTRODUCTION

In a truly global world the question “where do children come from?” asks for more than biological and theological answers. Approximately fifteen to twenty thousand children each year leave their nations of birth to be raised by adoptive parents in another country.<sup>1</sup> The U.S. is by far the largest recipient of this multicultural exchange of children.<sup>2</sup> The U.S. is, however, also a nation from which a small, unidentified number of children are removed each year to be adopted and raised in another country.<sup>3</sup> Personal and legal dilemmas arise when an unwed biological father wants to raise his child, but the unwed birth mother wants to place the child for adoption.<sup>4</sup> Faced with this conflict, some unmarried biological mothers are placing their children for adoption in provinces of Canada that are less likely to require the consent of biological fathers than the state from which the mother fled.<sup>5</sup> Whether such adoptions should proceed without the father’s consent is a concrete legal question that requires an immediate, concrete legal answer.

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1. Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q. 53, 75 (1994) (citing 1993 statistics).

2. *Id.* Canada is also a significant recipient. In 1991, approximately 2,448 intercountry adoptions occurred in Canada. As of 1992, it is estimated that for every two infants adopted from within Canada, three others were adopted from international origins. Mark Eade, *Intercountry Adoption: International, National and Cultural Concerns*, 57 SASKATCHEWAN L. REV. 381 (1993) (citing ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES, HIGHLIGHTS FROM “ADOPTION AS AN ALTERNATIVE FOR INFERTILE COUPLES: PROSPECTS AND TRENDS” 5 (1992)).

3. See Pfund, *supra* note 1, at 72.

4. Kim Lunman, *L.A. Lawyer Fast-Tracks Adoptions*, CALGARY HERALD, Mar. 13, 1994, at A8 (noting that five U.S. fathers unsuccessfully sought custody in Canada where their children had been placed with prospective adoptive parents). See *infra* text accompanying notes 161-69.

5. See Lunman, *supra* note 4, at A1 (citing admission of one U.S. attorney that he placed forty infants in Alberta when the unwed father opposed the unwed mother’s adoption decision, taking advantage of that province’s lesser protections for unwed fathers). See *infra* text accompanying notes 152-69.

Differences between adoption consent laws in the United States and Canada also raise larger questions about the role of international law. This concrete family law problem is a perfect example of the need for international legal perspectives and solutions when domestic problems take on global proportions. In a truly global world the question "where does law come from?" asks for answers in multiple dimensions that take into account both international and domestic law. We must define the appropriate relationship between international and domestic law. This is the cutting edge of legal change in a world where legal ideas must cross borders as freely as goods, services, and now babies.

When we recognize the relationship between different levels of protection given unwed fathers among nations and intercountry adoption, we can identify both practical legal problems and complex policy choices. Legal scholars and jurists in the U.S. have written extensively on the problem of the rights of unwed fathers in adoption.<sup>6</sup> There has been much less attention paid to the role of international law in this difficult area.

To address the problem of intercountry flight from unwed fathers' rights from the perspective of international law, this article first looks to the Hague Convention on Intercountry Adoption for solutions.<sup>7</sup> Solutions provided by the Hague Convention are helpful in the context of both intercountry and domestic adoption. They prevent intercountry flight and provide models for domestic law reform. Reform is necessary on a deeper level to move beyond outdated ideas about parental rights and children's "best interests." It is time to reframe the question in terms of the rights of children. International law gives us the material from which to forge a domestic right of a child to be raised by a biological parent who is willing, able, and fit to assume parenthood from the moment of birth. Recognition and protection of this international right in domestic law will avoid or lessen the effects of separation traumas that arise in contested adoptions. It will also generate momentum for a fusion of domestic and international law in a new, synergistic jurisprudence of children's rights. Just as families are connecting across borders, the law must make fundamental connections between domestic and international spheres to reflect the global nature of human rights. At the heart of any adoption is a child with an international legal persona that domestic law should not ignore.

The complex legal question of the rights of unwed fathers to consent to the adoption of their children reached the American public most dramatically in the case of "Baby Jessica" in 1993. A horrified public watched as a tearful toddler was wrenched from the arms of the only parents she had ever known.<sup>8</sup>

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6. See cases discussed in section II-A and articles discussed *infra* notes 317-19.

7. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter Hague Convention].

8. Desda Moss, *Anguished Goodbye/Jessica in Seclusion with Parents*, USA TODAY, Aug.

The legal system had awarded custody to the child's biological parents after a two year legal battle in two states between the biological and prospective adoptive parents.<sup>9</sup>

The scenario was repeated in 1994 when a sobbing four-year-old "Baby Richard" was returned to his biological parents.<sup>10</sup> The birth mother had consented to the adoption, but the biological father had not. Of course, the couple was not married at the time of the birth. The father, however, intervened in the adoption proceeding within two months of the birth. The prospective adoptive parents with whom the child had been placed fought long, arduous legal battles that they eventually lost.<sup>11</sup>

What many people in the U.S. did not know was that a similar scenario had been played out in Canada in 1993. "Baby Boy M," a child of unwed U.S. parents, had been placed for adoption by his biological mother in the province of Alberta.<sup>12</sup> His biological father, a resident of Mississippi, waged a long legal battle for custody in the Canadian courts, but the result was different.<sup>13</sup> The trial court decided that it was in the best interest of the child to remain in the only home he had ever known.<sup>14</sup> The Alberta Court of Appeal affirmed the decision.<sup>15</sup> The Supreme Court of Canada refused to hear the father's appeal, leaving the child in the custody of his adoptive family.<sup>16</sup>

Public awareness of the potential for emotionally scarring and financially crippling litigation over the issue of an unwed father's consent to an adoption in the United States has contributed to two new situations that raise two different but interrelated legal problems. First, biological mothers wishing to avoid obstacles to the speedy adoption of their children are fleeing the country either to give birth or place their child for adoption just after birth in foreign

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3, 1993, at 1A; Desda Moss, *Child's Painful Parting/Jessica Handed to Birth Parents*, USA TODAY, Aug. 3, 1993, at 3A; *Baby Jessica, Swap Case, Spotlight Legal Failures*, Ltd. Reuters N. Am. Wire, Aug. 3, 1993, available in LEXIS, News Library, Wires File.

9. *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992); *In re Clausen*, 502 N.W.2d 649 (Mich.), stay denied sub nom. DeBoer v. DeBoer, 509 U.S. 1301 (1993).

10. *Boy Moves In With Natural Parents*, ST. LOUIS POST-DISPATCH, May 1, 1995, at 1A.

11. *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied sub nom. Doe v. Kirchner, 115 S.Ct. 499 (1994); *In re Kirchner*, 649 N.E.2d 324 (Ill.), cert. denied sub nom. Doe v. Kirchner, 115 S.Ct. 2599 (1995) (amicus curiae granted).

12. For a narrative report of the case see Kim Lunman, "Would I Ever Want My Dad to Give Up on Me?," CALGARY HERALD, Mar. 11, 1994, at A10.

13. *U.S. Dad Wants Son Returned from Calgary*, TORONTO STAR, Jan. 1, 1994, at H7.

14. *S. (J.W.) v. M. (N.C.)*, 10 Alta. L. R. 3d 395 (Q.B. 1993).

15. *D. (H.A.) v. M. (N.C.)*, 145 A.R. 200 (C.A. 1993) (per curiam), aff'g sub nom. *S. (J.W.) v. M. (N.C.)*, 10 Alta. L. R. 3rd 395 (Q.B. 1993).

16. *D. (H.A.) v. M. (N.C.)*, 145 A.R. 200 (C.A. 1993) (per curiam), aff'g sub nom. *S. (J.W.) v. M. (N.C.)*, 10 Alta. L. R. 3d 395 (Q.B. 1993), appeal refused, Doc. 23915 (Can. Mar. 3, 1994), 1 R.F.L. 4th 60.

jurisdictions providing lesser protections to unwed fathers.<sup>17</sup> This, in effect, circumvents the levels of protection for paternal rights that U.S. states have chosen to grant in light of U.S. Supreme Court decisions on the constitutional status of paternal liberty interests outside of marriage.<sup>18</sup> A dramatic illustration of the problem was a December 1995 West Virginia jury award of over \$7 million in damages to an unwed father against an adoption attorney, the birth mother, and her family for conspiring to deprive the father of his rights by placing the extramarital child for adoption in Canada.<sup>19</sup>

The second situation involves prospective adoptive parents who temporarily leave the country to adopt children in foreign jurisdictions with lesser legal constraints on adoption. In particular, these prospective adoptive parents mean to avoid the rights of unwed fathers which might otherwise threaten the stability of the new family bond that they are trying to establish between themselves and a child.<sup>20</sup> This legal incentive to choose intercountry adoption pressures prospective adoptive parents to take a course of action that complicates the process with barriers of distance, language, culture, two legal systems, immigration hurdles, and all the attendant, additional costs. The pressured choice of intercountry adoption also takes prospective adoptive parents out of the pool of parents available to adopt children in need of homes in the United States.<sup>21</sup>

This article will focus first on two practical legal problems raised by international flight from unwed fathers' rights. The first is circumvention of U.S. law. To the extent that the United States is committed to the protection of paternal rights over alternative legal choices such as speedy adoption regardless of paternal consent, this article will address what measures exist in international law to prevent effective nullification of those rights through

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17. See Lunman, *supra* note 4.

18. See section II-A *infra*.

19. Jon D. Markman, *Jury Rules for Unwed Father in Landmark Adoption Case*, THE LOS ANGELES TIMES, Dec. 5, 1995, at B1. The father sued for damages after an unsuccessful attempt to gain guardianship of his child in Canada. See *id*.

20. According to U.S. Immigration and Naturalization Service statistics, U.S. parents adopting children from China rose from 28 in 1990 to 748 in 1994. The director of the National Adoption Clearinghouse in Maryland stated in an interview that many prospective adoptive parents did not want to adopt domestically because of the Baby Jessica idea and were choosing intercountry adoption to avoid the chance of becoming a Baby Jessica situation. Benjamin Marrison, *Americans Flock to Adopt in China*, THE TIMES-PICAYUNE, Aug. 27, 1995, at A18. See also Ellen Warren & Louise Kiernan, *New 'Richard' Laws Fail to Quell Doubts*, CHI. TRIB., May 3, 1995, at 1D (supporting above reasoning for choosing intercountry adoption).

21. A survey by the Michigan Federation of Private Child and Family Agencies found a decline in domestic adoptions in that state from 2194 in 1993 to 1918 in 1994. The associate director of the federation speculated that fears generated by the Baby Jessica case may have discouraged prospective adoptive parents, thus contributing to the 12.6% decline. *Around the Region*, DET. NEWS, Aug. 18, 1995, at D3.

intercountry adoption. The second problem surfaces in both domestic and intercountry adoption when an unwed father contests an adoption. The problem is the harm to the child posed by protracted litigation which everyone concedes is a traumatic event: separation from the prospective adoptive parents, home, and family. I propose that existing international measures to prevent this harm could be used as a model for domestic courts and legislatures grappling with the problem of paternal consent in the United States.

Broadening the discussion, this article will then address the extent to which international law can shed light on whether the United States should be committed to the protection of paternal rights over alternative legal choices. U.S. courts and legislatures have made a grave error in their resolution of the question of consent in the adoption of children born out of wedlock. Looking for the answer to adoptability in an analysis of the rights of unwed biological fathers has caused personal harm in individual cases and created systemic legal problems with domestic and international dimensions. Emerging international law on the rights of children in the context of adoption has developed a framework on which the U.S. can build better procedural and substantive legal structures that bypass domestic adoption problems, prevent international flight, and redirect domestic law toward the protection of children.<sup>22</sup>

The lens of paternal rights has distorted the two most essential questions in adoption: to what extent should the law protect the biological bond between parent and child and for what reasons? After looking directly at the rights of children emerging incrementally from international conventions and U.N. resolutions, it should become clear that nations can best recognize the biological bond with the least legal, social, and individual damage by building a domestic jurisprudence around the rights of children to be raised by biological parents if one or both are willing, able, and fit to assume that responsibility from the moment of birth. As adoption enters its third century in U.S. law, it is time to recalculate the rights equation.

## II. UNWED FATHERS' RIGHTS IN ADOPTION: THE COMPARATIVE PROBLEM

There is a spectrum of legal possibilities to consider when a jurisdiction is faced with the problem of what level of protection to afford unwed fathers in the adoption context. At one end, fathers could have an absolute right to veto mothers' choices to place their child for adoption. At the other end, mothers could have complete autonomy over the decision. These "absolute" positions create fewer legal uncertainties than intermediate choices along the

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22. Legal scholars and even the medical profession have called for "the exchange and sharing of experiences, knowledge, and ideas among countries." Panos Palmos, *quoted in* ADOPTION: INTERNATIONAL PERSPECTIVES xi-xii (Euthymia D. Hibbs ed. 1991). I argue here for a different remedy, but with the same conviction that domestic reform lies in the example of international law.

spectrum. The difficulty in choosing the level of protection to afford unwed fathers in adoptions is reflected in the vague and uncertain rules that have emerged in the last few years in the United States.<sup>23</sup>

Uncertainty as to status and power in the adoption process creates legal and personal problems for all parties involved. For biological mothers and prospective adoptive parents, there is the legal and emotional risk that the autonomy of their adoption decisions may be undercut if a biological father attempts to withhold consent. For the biological father, there is a similar problem of uncertainty as to what the law may require of him before it will recognize his right to withhold consent. The standards for measuring paternal behavior may not afford a ready answer as to whether the father has met the test.<sup>24</sup> Ignorance of the law at a critical juncture may strip him of everything but the mere status of biological fatherhood.<sup>25</sup> For the child, there is a dilemma of Biblical proportions. Caught between a biological father who wants to raise her and a biological mother who wants adoptive parents to raise her, she faces the pain of choices made by her elders. A speedy adoption may place her in a loving, stable home, but it may also place her, in most cases, beyond the possibility of a relationship with either of her biological parents.<sup>26</sup>

23. See *infra* section II-B.

24. Although filing a legal action requesting a declaration of paternity and custody may be clear evidence, recent tests also afford less obvious, less quantifiable actions by which unwed fathers may demonstrate sufficient commitment to a child to merit full parental rights, including the right to withhold consent. See, e.g., the discussion of the New York test in the text accompanying notes 63-71.

25. See, e.g., discussion regarding New York's six month period for vesting of inchoate paternal rights in the text accompanying notes 68-69. Failure to take action to vest full paternal rights differs from failure to take action to vest the right to notice and an opportunity to be heard in the adoption process. In *Lehr v. Robertson*, 463 U.S. 248 (1983), the Supreme Court refused to vacate an adoption because the biological father had failed to file a notice of paternity with the New York putative father registry. He was unaware of the registry, but his ignorance did not prevent application of the law that required notice and an opportunity to be heard only to certain classes of unwed fathers. See *id.* See discussion of this case in text *infra* accompanying notes 50-57.

26. Open adoption, whereby the state does not conceal the identity of the birth parents, or where birth parents retain some connection with their child after adoption, is a controversial exception, rather than the norm, in U.S. statutory adoption schemes. ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* § 14.21 (1993). For example, New York requires the sealing of adoption records. N.Y. DOM. REL. LAW § 114 (McKinney 1988 & Supp. 1997). It allows open adoption only in certain cases involving children in foster care whose parents would not grant consent without retaining the right to continue a relationship with the child. N.Y. SOC. SERV. LAW § 384-c (McKinney 1993 & Supp. 1997).

Another obstacle to a relationship arises from time limits for when a proceeding to open an adoption decree may be brought. If a father learns too late of his paternity or does not meet the statutory grounds for attacking the decree, he loses the opportunity for a relationship. For example, Oregon, like many states, places a one year time limit on direct or collateral attack on an adoption decree. OR. REV. STAT. § 109.381(3) (1995). In 1995, the Oregon Court of Appeals



Protracted custody litigation may result in the same end, but it also may result in custody for her biological parent(s) long after she has psychologically bonded to her adoptive parents.<sup>27</sup> Of course, protracted litigation has financial and emotional costs for all parties, but at least the adults have some control over those costs. The child has none.

In federal systems such as the United States and Canada, the different choices made by the individual states and provinces create additional problems. Biological mothers and prospective adoptive parents may shop for a jurisdiction which favors them in the adoption process. Favoritism may come in many forms, such as clearer rules as to when a biological father may contest the adoption,<sup>28</sup> fewer opportunities for a biological father to contest the adoption,<sup>29</sup> a preference for certain family configurations,<sup>30</sup> or a balancing of interests that favors the adoptive parents the longer the child stays with them pending litigation.<sup>31</sup>

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dismissed a filiation petition brought by an unwed father whose consent to the adoption had not been obtained, citing that statutory provision. *Chamberlain v. Williams*, 895 P.2d 805 (Or. Ct. App. 1995). *See also infra* text accompanying notes 42-77. For an exhaustive overview of statutory limits of this type extant in 1993 see Alexandra R. DaPolito, *The Failure To Notify Putative Fathers of Adoption Proceedings: Balancing The Adoption Equation*, 42 CATH. U. L. REV. 979, 999 n.126 (1993).

27. Baby Richard was four years old when he was transferred from his prospective adoptive parents to his biological parents. This was well after the point at which child psychologists recognize a tie between a child and a "psychological parent," the one who has assumed responsibility and continuity of care on a daily basis. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 17-20, 32-33 (1973).

28. Compare New York's case law discussed in the text accompanying notes 63-76 with Alberta's statutory law discussed in the text accompanying notes 142-43. The federal problem arises in a purely domestic context as well. New York gives unwed fathers six months prior to placement of a newborn to perfect their paternity rights. *See infra* text accompanying notes 69-70. Nebraska allows them five days to file a notice of intent to claim paternity with respect to newborns. NEB. REV. STAT. § 43-104.02 (1995); *Shoecraft v. Catholic Soc. Servs. Bureau*, 385 N.W.2d 448 (1986).

29. Compare N.Y. DOM. REL. LAW § 111-a (McKinney 1988 & Supp. 1997) and 750 ILL. COMP. STAT. ANN. 50/12a (West Supp. 1995) (requiring notice and an opportunity to be heard to various classes of unwed fathers regardless of eligibility to withhold consent) with Children & Family Services Act of 1990, S.N.S., ch. 5, §§ 67(1)(f), 68(8), 74(3) (1990) (right to notice and to withhold consent in Nova Scotia dependent on fitting legal definition of definition of "parent").

30. Compare *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995) (discussing evolution of N.Y. state statutory policy regarding adoption regardless of marital status or sexual orientation) with *State Dep't of Health & Rehabilitative Servs. v. Cox*, 627 So. 2d 1210 (Fla. Dist. Ct. App. 1993) (stating that statutory ban on adoption by homosexuals is not unconstitutional).

31. Compare *In re Clausen*, 502 N.W.2d 649 (Mich. 1993) (stating that child's interest in staying with prospective adoptive parents is not relevant) with *Re R*, 53 O.R.2d 54 (O. Dist. Ct. 1985) (dispensing with father's consent required at that time under Ontario law because it was not in the child's best interest).

This kind of forum selection has a legal impact on the biological father who contests such an adoption. The force of the impact is increased if the forum chosen by a biological mother is in another country. Biological fathers who wish to raise their children may be prevented from doing so by the complicating factors of distance, the expense and difficulty of litigating in a foreign jurisdiction, and the different legal rules in those jurisdictions. Even those who can afford the financial and emotional burdens of protracted international litigation may still lose the right to maintain a relationship with their progeny if the foreign jurisdiction affords fewer protections than U.S. law.

Forum selection also has an impact on the child placed for adoption in a jurisdiction remote from a biological parent wishing to raise her. Like the infant before Solomon, the child would be subject to the decisions of the potential parents and the adjudicator. The international aspect of the situation may amplify the possible pain of these decisions. If the child is placed with prospective adoptive parents who lose the legal battle after a lengthy period, she will be faced with separation from a culture and possibly even a language. This is in addition to the loss of an individual identity that is linked to the bond with her prospective adoptive parents. On the other hand, if her adoption becomes final, the severance from her biological parent becomes exacerbated by international distance. Upon attaining the age of majority, the child may attempt to locate her biological parent and pursue an adult relationship. She may be confounded in that attempt by the formidable barriers of two different and distant legal systems, the financial and physical difficulties of piercing the adoptive veil across borders, and the sheer obstacle of geography.

In recent years, the specter of intrusion by the biological father into the adoption decision and process has provided an incentive for intercountry adoption. Most cases involve U.S. biological mothers choosing to place their children for adoption in Canada. The geographical proximity and cultural affinity are convenient. Certain provinces, such as Alberta, provide fewer opportunities for the biological father to prevent the adoption.<sup>32</sup> In addition, there is a relative unavailability of certain Canadian infants for adoption.<sup>33</sup> While Canada is not the only jurisdiction posing a "haven" for international

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32. See *infra* at Part II-B-1.

33. See statistics cited by Eade, *supra* note 2. In Alberta, the waiting period for healthy, white newborns ranges from two to ten years, depending on whether the adoption proceeds through a private, licensed agency or the provincial government. See Lunman, *supra* note 4 at A1.

flight from the threats posed by U.S. law on unwed fathers' rights,<sup>34</sup> it is the nation to which U.S. parties most often look.<sup>35</sup>

This section will first briefly set out selected U.S. law on the rights of unwed fathers to withhold consent to adoption of their biological children, focusing most particularly on states where bitter legal battles have been waged over this issue. It will proceed to offer for the reader's comparison the differing approaches taken by some Canadian provinces. It will end with a brief discussion of alternative means to solve the problem before turning, in the next section, to a discussion of the better solution offered by the Hague Convention on Intercountry Adoption.

### *A. The United States*

#### *1. Unwed Fathers' Rights Under the Federal Constitution*

The rights of unwed fathers in adoption are rooted firmly in jurisprudence identifying the constitutional rights of parents and of unwed fathers outside the context of adoption. In 1923 the Supreme Court<sup>36</sup> articulated a fundamental right residing in parents, the liberty to direct the upbringing and education of children under their control. This parental liberty found protection in the Due Process Clause of the Fourteenth Amendment. Two years later, the Supreme Court reaffirmed this constitutional right by striking down a statute requiring parents to send children of a specified age to public school.<sup>37</sup> Almost twenty years later the Supreme Court announced that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents," before

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34. There are reports that the Cayman Islands serve a similar function. Kim Lunman, "Would I Ever Want My Dad to Give Up on Me?," *CALGARY HERALD*, Mar. 11, 1994, at A10. Although there have been no reports of the use of New Zealand as an "adoption haven," New Zealand presents another possibility. It is part of the English-speaking, common-law world to which an English-speaking, U.S. biological mother may logically turn despite its geographical distance. There is no clear test for unwed fathers' consents, with judges apparently being given discretion to require consent if it is "expedient," such as where the parents have a stable, rather than casual, relationship. [Commentary 1] *Fam. L. Serv.* (Butterworth, July 1995) § 6.707. Moreover, New Zealand was the haven for a famous case of flight from paternal rights, albeit outside the context of adoption. Michael Cromwell & Mark Vane, *Morgan Awarded Custody*, *THE WASH. TIMES*, Nov. 30, 1990, at B1. Dr. Morgan won custody of her daughter in a New Zealand court after being jailed in the U.S. for contempt for refusing to abide by court-ordered visitation for her ex-husband who she alleged was a child abuser and for refusing to reveal the child's whereabouts. *See id.* The New Zealand decision is unreported.

35. A California attorney specializing in private placement of infants placed forty infants whose mothers were from the U.S. with parents in Alberta before that province prohibited adoptions involving private intermediaries. *See* Lunman, *supra* note 4 at A1.

36. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (invalidating a statute prohibiting instruction in a foreign language).

37. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

finding that the state may restrict parental control through enforcement of child labor laws.<sup>38</sup>

Eventually, the Supreme Court was called upon to determine whether there was any difference between the liberty interest of a "parent" and that of an unwed father. In *Stanley v. Illinois*,<sup>39</sup> the Court's opinion defined the parental liberty interest as encompassing "the companionship, care, custody, and management of" one's children. The Court held that an unwed father has such an interest in the children he has sired and raised.<sup>40</sup> Justice White, writing for the majority, characterized Mr. Stanley's interest in retaining custody against a custodial claim by the state as "cognizable and substantial."<sup>41</sup>

Ensuing Supreme Court cases about the constitutional rights of unwed fathers actually arose in the context of adoption. All involved challenges to a mother's choice to have her child adopted by her husband (who was not the biological father). None involved the mother's choice to have the child adopted by strangers.<sup>42</sup> In *Quilloin v. Walcott*,<sup>43</sup> the Court upheld a Georgia statute allowing adoption of a child without the consent of the biological father. In that case the father had taken no action indicative of paternity prior to the adoption petition, which the mother's new husband filed over eleven years after the child's birth.<sup>44</sup> The father had neither supported nor legitimated the child or even become a de facto member of the child's actual family unit.<sup>45</sup> Ultimately, the Court rejected the father's due process claim.<sup>46</sup> In *Caban v.*

38. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (referencing *id.*).

39. 405 U.S. 645, 651 (1972). In *Stanley*, the state of Illinois had removed Mr. Stanley's children from his home under a statutory presumption that unwed fathers were unfit parents. The precise holding of the case was that the State of Illinois denied Mr. Stanley equal protection of the law in presuming him to be an unfit parent, while affording all other classes of parents a hearing on the issue of neglect before the state assumed custody of the children. *Id.* at 658.

40. *Id.* In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Court reined in the constitutional rights that earlier decisions had seemed to delineate for unwed fathers. It refused to recognize any fundamental liberty interest of an unwed father in his biological child born to a mother while she was married to a man who later claimed a paternal interest in the child, despite the intervening establishment of a relationship between the biological father and the child. The Court rested its decision on historical, legal protection for the marital family. *Id.*

41. *Stanley*, 405 U.S. at 652.

42. Although none of these cases involved adoption by strangers, in a note in *Lehr v. Robertson*, 463 U.S. 248, 262 n.19 (1983), the Court hinted that protection of a family unit already in existence undercut the paternal claims. It stated, however, that the father's right to object to both types of adoption, stepparent and stranger, was at least equal. *Id.*

43. 434 U.S. 246 (1978).

44. *Id.* at 247.

45. *Id.* at 252-53.

46. *Id.* at 254. "[T]his is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child . . . . [T]he result of the adoption in this case is to give full recognition to a family unit already in existence . . . ." *Id.* at 255. Thus, the situation was quite

*Mohammed*,<sup>47</sup> a biological father who had actually served as a parent challenged a judicial order of adoption, again by the mother's new husband. He prevailed, but the Court did not reach the question of a father's liberty interest in his children. Instead, the Court decided the case on the basis of equal protection. Requiring only an unwed mother's consent to adoption was held to be a violation.<sup>48</sup>

Later, in *Lehr v. Robertson*,<sup>49</sup> the Supreme Court reached the question of whether an unwed father's due process rights afforded him a liberty interest strong enough to defeat the adoption of his children. Jonathan Lehr, like the father in *Quilloin*, had not acted as a father in the two years between the child's birth and the order granting her stepfather's adoption petition.<sup>50</sup> The Court found the distinction between the parental behavior of Stanley and Caban, on the one hand, and the mere biological bond common to Quilloin, Lehr, and their children, on the other, to be dispositive.<sup>51</sup> The mere fact of biological paternity does not confer an interest in the child that the Constitution will protect.<sup>52</sup> The Court was persuaded that a biological father who has played a substantial role in rearing his children has a greater claim to constitutional protection than a mere biological parent.<sup>53</sup> Only when an unwed father grasps his unique opportunity to develop a relationship with his child and assumes some parental responsibilities will the Due Process Clause protect that father's interest in maintaining personal contact with his child.<sup>54</sup>

The issue in *Lehr* then became whether the state's legislation concerning notification of putative fathers that adoption proceedings were pending denied the biological father the opportunity to form a relationship that the Constitution would protect.<sup>55</sup> The decision was that New York had adequately protected an unwed father's constitutionally inchoate liberty interest in assuming a responsible role in his child's future by setting up a putative fathers registry.<sup>56</sup> That is, registration would automatically entitle a father to notice and an opportunity to be heard<sup>57</sup> concerning the adoption that would sever his hope of a relationship.

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different than that in *Stanley v. Illinois*, 405 U.S. 645 (1972).

47. 441 U.S. 380 (1979).

48. *Id.* at 394.

49. 463 U.S. 248 (1983). Mr. Lehr also made an equal protection claim. *Id.*

50. *Id.*

51. *Id.* at 261.

52. *Id.*

53. *Id.* at 262 n.18.

54. *Id.* at 262.

55. *Id.* at 262-63.

56. *Id.* at 264-65.

57. *Id.*

Due process for unwed fathers requires that state law provide an adequate opportunity for them to claim paternity and take responsibility for their children in a *timely* manner before adoption. The cases, thus, implicitly recognize that limits on procedural protections for unwed fathers are necessary from the perspective of the child who needs a prompt and stable start in life.

## 2. State Levels of Protection for Unwed Fathers' Paternal Liberty Interests

In *Lehr's* wake, there has been much litigation centered on exactly when an unwed father's inchoate parental interest matures into a full constitutional right, such that the father may withhold his consent and defeat any adoption of his child. Fathers have challenged state legislative choices setting various thresholds for the maturation of such veto power.<sup>58</sup> New York, in particular, became the site of groundbreaking common law adjudication regarding the constitutionality of these legislative thresholds.

New York had enacted varying legislative thresholds to govern when consent to an adoption is required.<sup>59</sup> Generally, the thresholds varied according to the age at which the child was placed for adoption.<sup>60</sup> For children born "out of wedlock"<sup>61</sup> and placed before the age of six months, New York required the unwed father's consent, but only if he had fulfilled

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58. Indiana's statutory scheme is an example of those which limit the rights of unwed fathers and invite challenge. Specifically, the Indiana Code requires that unwed fathers file with the putative father registry no later than thirty days after the birth of the child or the date of adoption, whichever is later, to preserve their right to withhold consent. See IND. CODE ANN. §§ 31-3-1.5 to -12, 33-3-16 (Michie Supp. 1996). On the other end of the spectrum, statutes like Pennsylvania's which require the unmitigated consent of unwed fathers in all cases, see 23 PA. CONS. STAT. § 2711(A)(3) (1995), would seem to avoid suits on the biological father's initiative. For a thorough review of the range of state statutes regarding consent extant in 1993 see Alexandra R. DaPolito, Comment, *The Failure To Notify Putative Fathers of Adoption Proceedings: Balancing The Adoption Equation*, 42 CATH. U. L. REV. 979, 990 & n.71 (1993).

In addition to the successful challenges discussed hereafter in the text and accompanying notes, unsuccessful challenges to such laws include, but are not limited to the following: *In re Appeal in Pima County Juvenile Severance Action* No. S-114487, 876 P.2d 1121 (Ariz. 1994) (en banc); *In re Baby Boy C.*, 581 A.2d 1141 (D.C. 1990), cert. denied sub nom. *H.R. v. E.O.*, 115 S.Ct. 58 (1994); *In re Adoption of Baby E.A.W. G.W.B.*, 658 So. 2d 961 (Fla. 1995), cert. denied sub nom. *G.W.B. v. J.S.W.*, 116 S.Ct. 719 (1996); *In re Adoption of Doe*, 543 So. 2d 741 (Fla.), cert. denied sub nom. *Roe v. Doe*, 493 U.S. 964 (1989); *Doe v. Attorney W.*, 410 So. 2d 1312 (Miss. 1982); *In re Baby Girl K.*, 335 N.W.2d 846 (Wis. 1983), appeal dismissed, sub nom. *Buhse v. Krueger*, 465 U.S. 1016 (1984). But see *In re Application of S.R.S.*, 408 N.W.2d 272 (Neb. 1987) (holding as unconstitutional the requirement of filing notice of intent to claim paternity within five days of birth as a predicate to consent, when applied to a developed relationship between an unwed father and his two-year-old child).

59. N.Y. DOM. REL. LAW § 111 (McKinney 1988 & Supp. 1996).

60. *Id.* at § 111(e) (f).

61. This is the terminology the statute employs. I prefer the terms "extramarital" or "nonmarital," as they are less anachronistic.

three criteria by which New York judged him to be an actual parent as opposed to a mere biological father:

(i) such father openly lived with the child or the child's mother for a continuous period of six months immediately preceding the placement of the child for adoption; and (ii) such father openly held himself out to be the father of such child during such period; and (iii) such father paid a fair and reasonable sum, in accordance with his means, for the medical, hospital and nursing expenses incurred in connection with the mother's pregnancy or with the birth of the child.<sup>62</sup>

The legislature had chosen these specific criteria in lieu of a less concrete criterion stated in terms of manifestation of parental interest and assumption of parental obligations.<sup>63</sup>

In 1990 the court of appeals decided *In re Raquel Marie X.*<sup>64</sup> and found the part of New York's consent statute requiring an unwed father to live with the unwed mother to be unconstitutional. The requirement was only tangentially related to the fully responsible parental relationship that *Lehr* placed at the heart of an unwed father's constitutional rights.<sup>65</sup> Moreover, it granted a mother the ability to block a father's willingness to become a responsible parent by refusing to live with him during their child's infancy.<sup>66</sup> While finding the other two statutory requirements to be in furtherance of a legitimate state objective, the court, nevertheless, declared the entire provision invalid.<sup>67</sup> The court then went on to fashion its own consent standard to be used until the legislature chose to act.<sup>68</sup>

62. N.Y. DOM. REL. LAW § 111(e) (McKinney 1988).

63. 1980 N.Y. Laws 1672, 1673-74 (stating the Recommendation of the Law Rev. Comm'n to the 1980 Legislature Relating to the Rights of Fathers in the Adoption of Children Born out of Wedlock).

64. 559 N.E.2d 418 (N.Y.), *cert. denied, sub nom. Robert C. v. Miguel T.*, 498 U.S. 984 (1990).

65. *Id.* at 426-27.

66. *Id.* at 426.

67. The court found that the legislative intent indicated that the two remaining criteria should not stand alone. *Id.* at 426-27.

68. The Supreme Court of California relied, *inter alia*, on *Raquel Marie X.* in finding an analogous California provision as to the necessity of consent of unwed fathers unconstitutional as applied. *Adoption of Kelsey S.*, 823 P.2d 1216, 1228-29 (Cal. 1992). California's adoption consent statutes distinguished between a "presumed father," who had received a child into his home and held it out as his natural child, and a "natural father," who did not meet this threshold for presumptive paternity. A presumed father's consent was required unless his parental rights had been terminated on the grounds of abandonment or unfitness. A natural father did not have the right to withhold his consent to an adoption; the court would simply have to determine if it was in the child's best interest that he be given custody rather than the prospective adoptive parents. The Supreme Court of California found this scheme constitutionally invalid. The court

The *Raquel Marie X.* consent standard in New York for an unwed father of a child placed for adoption within six months of birth is that a father must manifest his parental responsibility within the six month period preceding the child's placement by showing a willingness to assume full custody.<sup>69</sup> The court chose that six-month period mainly because the legislature had chosen it in the two constitutionally valid parts of the statute.<sup>70</sup> Relevant considerations are whether the father has publicly acknowledged paternity, paid pregnancy and birth expenses, taken steps to establish a legal relationship with the child, and other factors evincing a commitment to the child.<sup>71</sup> In the companion case of *Baby Girl S.*, the court found that the father had met this test by seeking to establish legal paternity and obtain custody, offering support to the mother and child, and doing everything within his means to establish a parental relationship as soon as he learned of the pregnancy, despite the mother's objections.<sup>72</sup>

Two years later the New York Court of Appeals applied this consent standard to a case in which the unwed father had been unaware of the existence of his child until well after the six month period for taking action had passed.<sup>73</sup> As soon as he learned of his paternity, however, the unwed father took legal steps to assert paternal rights.<sup>74</sup> At that point, the child, who

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stated that the correct standard was the prompt demonstration of a full commitment to parental responsibilities both before and after the birth as evidenced by any relevant factors including public acknowledgment of paternity, payment of pregnancy, and birth expenses within his means, and legal action to obtain custody. *Id.*

The supreme court clarified the *Kelsey S.* standard in *Adoption of Michael H.*, 898 P.2d 891 (Cal. 1995), *cert. denied sub nom. Mark K. v. John S.*, 116 S.Ct. 1272 (1996), in which the father's failure to demonstrate full parental commitment as soon as he knew of the pregnancy prevented him from having a veto over the adoption.

From *Kelsey S.* we see most sharply how the replacement of an easily applied, clearly delineated legislative test with a constitutionally sound but inherently amorphous judicial test leaves the public with less guidance as to what is expected of it and what it can expect from the legal system when an adoption is being considered. Practically, lower courts can be expected to differ greatly in their interpretation of what conduct is adequate to ensure that a father's rights vest and what conduct is inadequate to confirm that a father's rights have failed to vest. In both the New York and California cases, the major problem with the legislative test was that it gave the mother a veto power, the power to block the father's attempts to behave in the manner required to "grasp" his inchoate liberty interest. A better solution than the New York and California judicial fabrications would be a clearly delineated *legislative* test without a maternal veto. After all, a legislature, far more easily than a court, could craft clear and constitutionally permissible behavioral thresholds that give adequate notice to fathers and fair warning to mothers.

69. 559 N.E.2d at 428.

70. *Id.*

71. *Id.*

72. *Id.* at 428.

73. *In re Robert O. v. Russell K.*, 604 N.E.2d 99 (N.Y. 1992).

74. *Id.* at 101.



had been placed with his adoptive family within days of his birth, was already eighteen months old, and the order of adoption had been final for ten months.<sup>75</sup> Despite the father's prompt response, the court of appeals declined to vacate the final order of adoption. It held to a strict application of the time period announced in *Raquel Marie X*. The father plainly had not manifested his parental interest within the six months preceding the child's placement for adoption. The court declined to make an exception because he was unaware of his child's existence or the mother's pregnancy during that critical period. The court reasoned that there was a need to demand prompt action from fathers *measured in terms of the baby's life*, because the state had a legitimate interest in a child's need for early permanence and stability.<sup>76</sup> Thus, New York demands that an unwed father take action to vest his inchoate constitutional parental liberty interest within six months preceding placement. Mere unawareness of paternity will not preserve this constitutional right. The court found that the biological father's failure to take action to discover the pregnancy or birth, and not any fraud or concealment on the part of the mother, was at the heart of his problem.<sup>77</sup> It was not willing to uproot the then four-year-old child from the only home and family he had known.

The famous "Baby Jessica" was born to an unwed mother in Iowa in 1991.<sup>78</sup> The mother and the man she named as the father signed consents to adoption by a Michigan couple.<sup>79</sup> During the course of adoption proceedings, an Iowa court ordered termination of parental rights and awarded custody to the prospective adoptive parents.<sup>80</sup> Less than three weeks after the baby's birth, however, the mother informed the actual biological father of his possible paternity.<sup>81</sup> In response, he took immediate legal steps and ultimately intervened in the adoption proceeding less than two months after the child's birth.<sup>82</sup> By that time, the child's mother had changed her mind and joined in seeking to prevent the adoption. The juvenile court ruled, however, that termination of her parental rights was effective.<sup>83</sup> The prospective adoptive parents then sought termination of the biological father's rights.<sup>84</sup> The district court denied the adoption and ordered the prospective adoptive parents to surrender custody to the biological father, but the order was stayed pending

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75. *Id.*

76. *Id.* at 103-04 (emphasis supplied).

77. *Id.* at 104.

78. *In re B.C.G.*, 496 N.W.2d 239, 240 (Iowa 1992).

79. *Id.* at 241.

80. *Id.*

81. *Id.* at 246.

82. *Id.*

83. *Id.* at 241, 246.

84. *Id.* at 244.

appeal.<sup>85</sup> The Supreme Court of Iowa eventually held that the adoption could not take place, because Iowa's statute on termination set out specific grounds that had not occurred and could not be circumvented by the best interest of the child.<sup>86</sup> The court noted that Iowa statutes generally require a termination of parental rights prior to the filing of an adoption petition.<sup>87</sup> The court specifically found that failure to take action prior to the birth and failure to contribute to the expenses of the pregnancy and birth did not constitute abandonment of the child under the circumstances of the case and that to find otherwise would contravene a father's right to develop a parent-child relationship.<sup>88</sup> Without a termination of the father's parental rights on the ground of abandonment (or other possible ground), the adoption simply could not proceed.<sup>89</sup>

The prospective adoptive parents refused to abide by the Iowa decision and filed an action in their home state of Michigan seeking an order rejecting or modifying the Iowa court decision.<sup>90</sup> Eventually, the Supreme Court of Michigan decided that the Michigan courts had no jurisdiction over the claims asserted and that the Iowa judgment would be enforced.<sup>91</sup> The court rejected the prospective adoptive parent's argument that the Iowa judgment was unenforceable for failure to hold a hearing on the best interest of the child.<sup>92</sup> At the end of the entire litigation process<sup>93</sup> the child was two and one half

85. *Id.* at 241.

86. *Id.* at 245.

87. *Id.* at 245-46; IOWA CODE ANN. §§ 600.3(2), 600A.3 (West 1996). The current grounds for termination, contained in § 600A.8, rather than § 600A.3, are, *inter alia*, abandonment, release of custody, and failure to support without good cause. *Id.* at § 600A.8.

88. *In re B.C.G.*, 496 N.W.2d at 241 n.1, 246.

89. *Id.* at 246.

90. *In re Clausen*, 502 N.W.2d 649, 653 (Mich. 1993).

91. *Id.* at 652.

92. *Id.* at 660-62. The court declined to state whether a Michigan court would need to hold such a hearing in a similar situation, noting, however, that a best interests test would not apply in proceedings under the Michigan statute regarding termination of a putative father's parental rights. *Id.* at 661-62. That statute provides as follows:

if the putative father has established a custodial relationship with the child or has provided support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings [for abuse and neglect or for a stepparent adoption].

MICH. COMP. LAWS ANN. § 710.39(2) (West 1993 & Supp. 1996). If the father does not meet these statutory standards, then his rights may be terminated under the adoption code if the judge conducting the hearing finds that it would not be in the best interest of the child to be given into the custody of the father (even if the father appears at the hearing and objects to the adoption). *Id.* Amendments in 1994 did not change the substance of the above provision. *See id.* at § 710.39(2) (West Supp. 1996).

93. *DeBoer v. DeBoer*, 509 U.S. 1301 (1993) (denying applications to stay the enforcement

years old and had lived her entire small life with the couple who wished to adopt her.

The paternal consent standard at issue in the case concerning “Baby Richard”<sup>94</sup> lies in the Adoption Act of Illinois. That statute actually sets out two different standards under which an unwed father may lose the right to withhold his consent to an adoption.<sup>95</sup> Under section 8(a) the consent of the father of a child born out of wedlock and placed for adoption within six months of birth is required unless the father was informed of his paternity yet failed to take specific steps to show a bona fide interest in the child, such as openly living with the child, holding himself out as father of the child, paying for medical expenses, or visiting the child. Under section 8(a) the rights of a parent whose consent is required may not be terminated unless the parent is found to be unfit.<sup>96</sup> Section 1(D) of the Adoption Act defines when a parent may be unfit for this purpose.<sup>97</sup> Section 1(D)(1) declares a parent unfit where the parent fails to demonstrate a reasonable degree of interest, concern, or responsibility as to the welfare of a new born child during the first 30 days after its birth.<sup>98</sup> It was the latter provision that was at issue in Baby Richard’s case, decided under the name *In re Doe*.<sup>99</sup>

In *Doe*, the trial court terminated the biological father’s rights, because he had not acted within the thirty-day period, and the appellate court affirmed the decision.<sup>100</sup> The Supreme Court of Illinois reversed, however, by focusing on the fact that the father’s unawareness of the child’s existence and placement for adoption fifty-seven days after birth stemmed from the fraudulent actions of the mother and the attorney for the prospective adoptive parents, rather than from the father’s disinterest.<sup>101</sup> The father had inquired persistently with the mother and her family about the child and had made some attempts to locate the baby.<sup>102</sup> He was told that the child had died shortly

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of the Michigan Supreme Court order).

94. *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied sub nom. *Doe v. Kirchner*, 115 S.Ct. 499 (1994); *In re Kirchner*, 649 N.E.2d 324 (Ill.), cert. denied sub nom. *Doe v. Kirchner*, 115 S.Ct. 2599 (1995) (amicus curiae granted).

95. 750 ILL. COMP. STAT. ANN. 50/8(a) (West Supp. 1996). The legislative amendments of 50/8(a) after the Illinois Supreme Court decision in this case did not change the provisions at issue in the case, although they did change the legislative threshold for when an unwed father’s consent is necessary for adoption of an infant placed before six months of age. Section 50/8(a) still does not require the consent of an unfit parent. See *id.* The fitness of the father in *Doe* was the primary issue.

96. *Id.*

97. 750 ILL. COMP. STAT. ANN. 50/1(D) (West 1996).

98. *Id.*

99. 638 N.E.2d 181 (Ill. 1994).

100. *Id.* at 182.

101. *Id.*

102. *Id.*

after the birth.<sup>103</sup> The attorney for the adoptive parents made no effort to ascertain the father's name or address, despite requirements under Illinois law that he make a good faith effort to notify the father of an adoption proceeding.<sup>104</sup>

In fact, the evidence showed that the father had no opportunity to discharge his familial duty.<sup>105</sup> Thus, the trial court's termination of the father's rights due to unfitness was not warranted. The supreme court also found that the appellate court's focus on the best interest of the child was not appropriate because termination of parental rights was the only relevant issue.<sup>106</sup> In a much longer concurring opinion, the court indicated that the lower appellate court had thought that the father acted insufficiently in manifesting a reasonable interest in the child during the thirty day period after birth.<sup>107</sup> The lower court faulted the father for failing to make adequate inquiries. Specifically, the court of appeals noted that he did not force a confrontation to speak with the mother directly, contact the prenatal physician whose identity was known to him, or use the legal system.<sup>108</sup> The supreme court concurring opinion states that the father's efforts were neither so insufficient nor insincere that he should be deprived of his parental interests in his son.<sup>109</sup> The concurring justice did not attempt to define the lowest threshold for genuine efforts to manifest the statutorily required interest in a newborn. Both opinions by the supreme court rest heavily on the misrepresentations and attempts by the mother and the adoptive parents to block the biological father from asserting parental rights and interfering with the adoption.<sup>110</sup> Therefore, the actual standard for paternal behavior is unclear.

Baby Richard's father filed an appearance contesting the adoption of his son as soon as he discovered that the child was alive, fifty-seven days after the boy's birth.<sup>111</sup> The adoptive parents chose to litigate. When they lost, the child was over three years old. The effect on the child of separation had been addressed at the lower appellate level where a best interest analysis weighed heavily in favor of the adoption.<sup>112</sup> After rejecting the relevance of a best interest analysis the supreme court faulted the adoptive parents for litigating at the child's expense rather than relinquishing custody when the child was still very young.<sup>113</sup>

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103. *Id.* at 181, 187.

104. *Id.* at 182.

105. *Id.*

106. *Id.*

107. *Id.* at 183, 187.

108. *Id.* at 187.

109. *Id.*

110. *Id.* at 182, 187.

111. *Id.* at 182.

112. *In re Doe*, 627 N.E.2d 648, 653 (Ill. App. Ct. 1994).

113. *In re Doe*, 638 N.E.2d at 182. In one of its opinions denying petitions for rehearing,

The Baby Richard case illustrates the struggle of courts in dealing with issues left open by legislatures in this contentious area of the law. As the lone dissenter to a denied petition for rehearing noted, the decision whether the use of a parental rights doctrine over a best interest doctrine is appropriate in cases where a child has lived in a particular home for a significant period of time is a decision for the legislature, not the courts.<sup>114</sup>

### *B. Canada*

The Canadian Charter of Rights and Freedoms<sup>115</sup> accords fundamental liberties that bear upon the morass of “rights” that may be implicated in the context of adoption of children born outside of marriage. Persons of both sexes have the right to liberty in the context of rules of fundamental justice as well as the right to equality and equal protection before the law without discrimination based upon sex.<sup>116</sup> These rights are not absolute and may be subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>117</sup>

In contrast with the United States, the Supreme Court of Canada has not yet handed down its interpretation of how the rights delineated under the Charter shape the claims and interests of unwed fathers in the adoption context.<sup>118</sup> The issue of conflict between the Charter and provincial legislation concerning paternal consent to adoption of children born outside of marriage has, however, reached some provincial courts.<sup>119</sup>

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the supreme court again emphasized that the prospective adoptive parents were at fault, as they had wrongfully attempted to deprive a father of his child. *Id.* at 187, 188. That opinion reacted sharply to the sting of criticism in the media to the court’s decision. *Id.* at 189.

114. *Id.* at 191, 192.

115. CAN. CONST. pt. I (1982) (Canadian Charter of Rights and Freedoms) [hereinafter Charter].

116. *Id.* §§ 7, 15(1).

117. *Id.* § 1.

118. The court refused to hear the biological father’s appeal in the fairly recent case of *Baby Boy M. S. (J.W.) v. M. (N.C.)*, 10 Alta. L.R. 3d 395 (Q.B. 1993), *aff’d sub nom. D. (H.A.) v. M. (N.C.)*, 145 A.R. 200 (C.A. 1993) (per curiam), *appeal refused*, Doc. 23915 (Can. Mar. 3, 1994), 1 R.F.L. 4th 60.

119. Although the legislation differs among provinces, the allegations of Charter violations have rested largely on the differing treatment afforded men and women. In two cases, Ontario and Nova Scotia courts held that there was no violation of the equal protection provision, section 15 of the Charter. *T. (D.) v. Children’s Aid Soc’y & Family Servs.*, 92 D.L.R.4th 289 (NSSC, App. Div. 1992); *S.(C.E.) v. Children’s Aid Soc’y*, 64 O.R.2d 311 (OHC 1988). The Ontario court noted, however, that to the extent any violation of section 15 might be found, section 1 might authorize differing consent standards for mothers and fathers as a limitation reasonably based on the interests of the children. *S. (C.E.)*, 64 O.R.2d at 318. A court in British Columbia held, on the other hand, that the provincial consent provisions applicable to unwed fathers violated section 15 through distinctions based on sex and marital status. *Re MacVicar &*

As the following examples of decisional and statutory law will bear out, no province grants all unwed fathers the right to withhold consent to the adoption of their children. Likewise, no province absolutely denies unwed fathers any opportunity to withhold consent. Between these two points on the spectrum of possibilities there is a range of legal positions as to when an unwed father's consent is required. There are also varying standards for determining when an unwed father is entitled to notice and an opportunity to be heard in an adoption proceeding. In most provinces, however, provisions establishing the interest of the child as paramount allow, either explicitly or implicitly, for consideration of any relationship that may have developed between father and child.

The following very limited description of provincial law will highlight the difference between Canadian and U.S. legal approaches. It will also explain further the history of and potential for intercountry flight from unwed fathers.

In 1995 British Columbia completely revised its adoption law.<sup>120</sup> Prospective adoptive parents currently must make reasonable efforts to give notice of the proposed adoption to anyone who has registered in a birth fathers' registry created by the new law and anyone named by the birth mother as the birth father, if his consent is not required under the new law.<sup>121</sup> The prospective adoptive parents must also make reasonable efforts to obtain all necessary consents under the law.<sup>122</sup> The new law requires the father's consent to an adoption, but defines "father" for this purpose as anyone who: has acknowledged paternity by signing the birth registration; is or was the child's guardian or joint guardian with the mother; has acknowledged paternity and has custody or access rights to the child by court order or agreement; has acknowledged paternity and has supported, maintained or cared for the child, either voluntarily or under court order; has acknowledged paternity and is named by the birth mother as the birth (biological) father; or has been acknowledged by the birth mother as the birth father and has registered on the birth fathers' registry as the child's father.<sup>123</sup> However, if the child is placed under the guardianship of the Superintendent of Family and Child Services, only the Superintendent's consent is required, unless the child is of an age where her own consent is also required.<sup>124</sup> Moreover, if an adoption agency outside the province places the child within the province, and the law of the

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Superintendent of Family & Child Servs., 34 D.L.R.4th 488 (BCSC 1986).

120. Adoption Act, Bill 51—1995, S.B.C., ch. 48, §§ 1- 121 (royal assent granted, July 6, 1995).

121. S.B.C., ch.48, at § 9(d). The court may dispense with notice upon application, however, if it is in the child's best interest to do so or the circumstances justify dispensing with notice. *Id.* at § 11(1).

122. *Id.* § 9(d).

123. *Id.* § 13(1), (2).

124. *Id.* § 13(3).

other province requires only the agency's consent to the adoption, then British Columbia will require only the consent of that agency and the child if she is at least twelve, the age of consent for adoption.<sup>125</sup> The court may dispense with any required consent, including the father's, if the court is satisfied that it is in the child's best interests to do so or that the person whose consent is required is incapable of giving informed consent, cannot be located after reasonable search has been made, "has abandoned or deserted the child, . . . has not made reasonable efforts to meet their parental obligations to the child, . . . is [in]capable of caring for the child, or other circumstances justify dispensing with consent."<sup>126</sup> The adoption law sets out specific criteria for use by a court considering the best interests of the child.<sup>127</sup> These include, *inter alia*, the effect on the child of a delay in the decision, "the importance of continuity in the child's care," the importance of "a positive relationship with a parent and a secure place" in a family, and "the quality of the relationship [a] . . . child has [had] with a birth parent" and the effect of maintaining that relationship.<sup>128</sup> The new adoption law takes care of possible conflict with other child custody laws by transitional provisions.<sup>129</sup>

In a strikingly radical move British Columbia has also chosen to address intercountry adoption in its new law through reference to the Hague Convention on Intercountry Adoption.<sup>130</sup> The province has adopted the Hague Convention, providing for its immediate implementation as soon as the Convention enters into force for the province, *i.e.*, when it enters into force for Canada.<sup>131</sup> Part III of the present work will discuss the Hague Convention and suggest ways in which implementation of the Convention can alleviate the problem of intercountry flight from unwed fathers' rights. The suggestions complement British Columbia's statute as they are at a level of detail not addressed in the provincial law.

Prior to British Columbia's 1995 reforms, Saskatchewan appeared to offer the most protection for unwed fathers. The province requires the consent of "birth fathers" if they meet the legal definition of that term through their behavior.<sup>132</sup> Additionally, Saskatchewan explicitly addresses intercountry

125. *Id.* § 13(5).

126. *Id.* § 17(1)(a)-(d).

127. *Id.* § 3(1)(a)-(h).

128. *Id.* § 3(1)(c), (d), (e), (h).

129. *Id.* §§ 94-121.

130. *Id.* §§ 48-57. It must be noted that Prince Edward Island, a province not covered in this article's limited overview of Canadian law, was the first to adopt a model law implementing the Hague Convention on Intercountry Adoption. Intercountry Adoption (Hague Convention) Act, S.P.E.I., ch. 28 (1994) (royal assent granted, May 19, 1994). The model law resulted from the work of the Uniform Law Conference, Proceedings of the Seventy-Fifth Annual Meeting 35, 141-61 (1993).

131. *Id.* § 51.

132. See An Act Respecting Adoption, S.S., ch. A-5.1, §5(1)(a)(i)(B) (1989-90). The <https://scholarcommons.sc.edu/sclr/vol48/iss3/3>

adoption in its statutes, though not with respect to the Hague Convention on Intercountry Adoption which came into being after their enactment.<sup>133</sup> The relevant provisions of the Adoption Act deal with applications by residents of Saskatchewan to adopt children who are not residents of Canada.<sup>134</sup> The Adoption Act requires that the adoption must conform to the laws of both jurisdictions.<sup>135</sup> The applicants must file copies "of the foreign adoption legislation" with the Canadian court along with "an explanation disclosing how the applicant intends to comply with foreign legislation."<sup>136</sup> The act does not explicitly address the requirements of Canadian residence of the child for purposes of adoption. Nevertheless, this provision in the Adoption Act is a significant check on placement of children in Saskatchewan in contravention of foreign consent standards.

Nova Scotia, Newfoundland, and Ontario all define "parent" in the context of adoption to include unwed fathers only in certain circumstances.<sup>137</sup> The circumstances vary, but each definition requires some evidence of substantial connection between the father and child or between the father and mother at a time reasonably early in a child's life. If an unwed father is deemed a parent within the meaning of the relevant law, he must grant his consent for an adoption to proceed.<sup>138</sup> None of these provinces has addressed the problem of intercountry adoption in legislation, and therefore, they present a continuing potential for intercountry flight.

In Nova Scotia, a 1990 law excludes an unwed father from the definition of parent absent specific actions on his part.<sup>139</sup> One who qualifies as a parent

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Saskatchewan Adoption Act defines "birth father" as the father of the child who meets one of the following conditions: he lived with the birth mother at the time of the child's conception or birth; he registered the child's birth with the birth mother; he has access or custody by court order or agreement; he acknowledges paternity and has supported or maintained the child, the birth or the mother; or he has been judicially declared to be the father upon application prior to the birth or within 10 days thereafter. *Id.* §§ 2(1)(d)(i)(A)-(E), 3(1). The court may dispense with consent if it is in the best interests of the child. *Id.* § 6(1)(a).

133. *Id.* § 27.

134. *Id.* § 27(1).

135. *Id.* § 27(7).

136. *Id.* § 27(5)(b)(i)-(ii).

137. Children and Family Services Act of 1990, S.N.S., ch. 5, § 67(1)(f) (1990); An Act to Amend the Adoption of Children Act, 1972, N.F.L.D. R.S., ch. A-3, § 10(1)(b), (c) (1990); Child and Family Services Act, R.S.O., ch. 55, § 131(1) (1984).

138. S.N.S., ch. 5, § 73(3); N.F.L.D. R.S., ch. A-3, § 10(1)(b), (c); R.S.O., ch. 55, § 131(2). There are circumstances such as abandonment in which a court may dispense with consent even though the province's requirements for vesting the right to withhold consent have been met. S.N.S. ch. 5, § 75 (1990); N.F.L.D. R.S., ch. 20, § 11(1) (1990); R.S.O., ch. 55, § 132 (1984).

139. Children and Family Services Act of 1990, S.N.S., ch. 5, § 67(1)(f) (1990). Specifically, an unwed father is a parent only if he has legitimated the child; he has custody of the child; he has stood in *loco parentis* to the child for the twelve months before the adoption proceeding commenced; he has, by written agreement or court order, a duty to support the child



is entitled to notice from an adoption agency,<sup>140</sup> and a parent's consent is required before an adoption can be finalized.<sup>141</sup> In some degree derogating a biological father's rights, the best interest of the child may give a court statutory grounds to allow an adoption even if the father has taken the requisite steps to establish his status as a parent.<sup>142</sup> The best interest of the child, however, may not be argued in an opposite fashion: as a substitute for the statutory requirements that vest a right to withhold consent.<sup>143</sup>

An adoption in Newfoundland may likewise proceed without a biological father's consent unless the father takes certain steps to vest himself with rights.<sup>144</sup> Yet again, the right to withhold consent is not absolute even if an unwed father has taken the actions necessary to become considered a legal parent. Newfoundland courts may dispense with the father's consent where his conduct and the child's welfare merit it.<sup>145</sup>

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or a right of access to the child, and he has at any time during the two years before the adoption proceeding commenced provided support or exercised the right of access; or he has acknowledged paternity and either (1) has an application for custody, support or access pending before a court at the time the adoption proceedings commence, or (2) has supported the child or exercised access to the child within the two years before commencement of the adoption proceeding. *Id.*

140. Children and Family Services Act of 1990, S.N.S., ch. 5, § 68(8) (1990).

141. Children and Family Services Act of 1990, S.N.S., ch. 5, § 74(3) (1990).

142. See Children and Family Services Act of 1990, S.N.S., ch. 5, § 75 (1990). Under this provision a court may dispense with consent upon application, but only if the person whose consent would otherwise be required is dead, unable to consent, cannot be found, has had no contact with the child for the two years immediately preceding the adoption placement, or has failed to provide financial support for the child for the two years immediately preceding placement for adoption or if circumstances show that consent ought to be dispensed with, and it is in the best interests of the person to be adopted to dispense with consent.

143. A 1992 appellate decision mandated use of the adoption code, overturning a lower court's resort to *parens patriae* jurisdiction to hear an unwed father's application for custody. An adoption was pending, and the father had not met the code requirements that would have vested him with the power of consent. *T. (D.) v. Children's Aid Soc'y & Family Servs.*, 92 D.L.R.4th 289 (NSSC, App. Div. 1992).

144. According to the Adoption of Children Act, 1972, Nfld. R.S., ch. A-3, § 10(1)(b),(c) (1990), a biological father's consent is required only if a court has declared his paternity or granted him an order of custody or access, if he has filed an application for a declaration of parentage or order of custody or access with a court, or if his name is listed on the record of birth. *Id.*

145. Adoption of Children Act, 1972, Nfld. R.S., ch. 20, § 11(1) (1990). A court may dispense with a consent otherwise required by section 10(1) if it would be in the best interest of the child to do so, having regard for the circumstances of the case. Section 11(1)(b) specifically cites the situation where the person whose consent would be required is not a concerned parent. Section 11(2) defines "concerned parent" as (a) one who has actual care or legal custody of the child, (b) one who regularly exercises or attempts to exercise rights of custody or access, or (c) one who regularly provides financial support for the child.

Ontario's Child and Family Services Act<sup>146</sup> defines parent in a similarly restrictive but somewhat more elaborate fashion. Unlike Nova Scotia and Newfoundland, the Ontario definition includes an individual who has vested himself with a presumption of paternity under the Children's Law Reform Act,<sup>147</sup> unless it is proved that he is probably not the natural father.<sup>148</sup> Of course, a qualifying parent must consent to the adoption of his child.<sup>149</sup> As one court noted in construing the interrelationship of the relevant provisions, "the only natural father who is not by definition a 'parent' whose consent is required by [section] 131(1) of the Act, is a male person who by an act of casual sexual intercourse impregnates a woman and demonstrates no sense of responsibility for the natural consequences of the act of sexual intercourse."<sup>150</sup> The Ontario courts may dispense with any required parental consent if it is in the best interest of the child to do so and if the parent whose consent is required has received both notice of the adoption and a copy of the application to dispense with consent or if reasonable effort has been made to give such notice.<sup>151</sup>

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146. Child and Family Services Act, S.O., ch. 55, § 131 (1984).

147. Children's Law Reform Act, R.S.O., ch. 68, § 8(1) (1980). The rebuttable presumptions of paternity stem from the following situations: (1) marriage to the mother at the time of birth, (2) marriage to the mother terminated within 300 days prior to the birth, (3) marriage to the mother after the birth along with acknowledgment of paternity, (4) cohabitation with the mother in a permanent relationship at the time of birth or in a relationship that terminated within 300 days prior to the birth, (5) registration of the birth under the surname of the father in accordance with the Vital Statistics Act, or (6) judicial declaration of paternity. Paragraph (5) of subsection 8(1) as reflected by item (5) above resulted from a 1986 amendment. An Act to amend the Children's Law Reform Act, S.O., ch. 8, § 1 (1986).

148. Child and Family Services Act, S.O., ch. 55, § 131 (1984). The statutory definition also includes the biological mother; an individual having lawful custody; an individual who has, *in the twelve months before the child is placed for adoption*, (1) demonstrated a settled intention to treat a child as a child of his or her family or (2) acknowledged parentage and provided for the child's support; an individual required by court order to provide for the child or allowed by court order custody of or access to the child; and an individual who has acknowledged parentage of the child in writing under the Children's Law Reform Act. *Id.* (emphasis added) (referencing An Act to amend the Children's Law Reform Act, S.O., ch. 8, § 2 (1986)).

149. Child and Family Services Act, R.S.O., ch. 55, § 131(2) (1984) (dictating that consent is only necessary for adoptions of children under the age of sixteen).

150. *S.(C.E.) v. Children's Aid Soc'y*, 64 O.R.2d 311, 316 (OHC 1988).

151. Child and Family Services Act, R.S.O., ch. 55, § 132 (1984). *See, e.g., Re R.*, 53 O.R.2d 54 (Ont. Dist. Ct. 1985) (dispensing with consent under Child Welfare Act where father had only a casual relationship with mother, was unaware of pregnancy or birth, had taken no part in the care of the child, and court was convinced his consent was not required within the definition of parent extant at that time). *But see Re C.(H.L.)*, 23 A.C.W.S.3d 175 (Ont. Prov. Div. 1990) (holding that it would be contrary to child's best interests to dispense with consent where father maintained occasional contact with mother after birth of child, even though child had been placed with prospective adoptive parents for over two years).

In recent years Alberta had become a haven for U.S. birth mothers seeking to avoid paternal custody by placing their children through private adoptions.<sup>152</sup> Private adoptions arranged by unlicensed intermediaries were legal in Alberta for a period of about ten years<sup>153</sup> before a 1995 law, specifically aimed at the problem of cross-border adoptions, prohibited them.<sup>154</sup> Only the province and licensed agencies may now process adoptions.<sup>155</sup> One of the reasons that Alberta became an intercountry adoption magnet was its extremely limited paternal consent provision.<sup>156</sup> Under the Child Welfare Act only the consents of the child's guardians are required.<sup>157</sup> The guardianship of a child is determined under the Domestic Relations Act of 1980. That act confers sole guardianship to the mother where a child is born outside marriage and accords an unwed biological father no legal status concerning his child unless he has lived with the child's mother for at least one year immediately preceding the child's birth.<sup>158</sup>

Where a father does not meet this test it is still possible for his interests to be considered by the court in an adoption proceeding. The Child Welfare Amendments Act of 1988, which rewrote Part 6 concerning adoption, provided for notice to a biological father if there were no permanent guardianship agreement or order.<sup>159</sup> However, only the parties petitioning for adoption

152. Kim Lunman, *Unlicensed Trade in Babies Leaves a Path of Pain*, VANCOUVER SUN, Mar. 12, 1994, at A2. One U.S. attorney admitted to placing forty infants in Alberta in situations when the unwed father opposed the unwed mother's decision to place the child for adoption, taking advantage of that province's lesser protections for unwed fathers. *Id.*

153. *Id.* Under the Child Welfare Act, prior to amendment, any adult could apply to the prescribed court for an adoption order as long as either the child or the applicant was a resident in Alberta or the court waived the residency requirement. R.S.A., ch. C-8.1, § 56 (1984).

154. Under the 1995 amendments unlicensed intermediaries are prohibited under penalty of fine or imprisonment from arranging adoptions, and petitions for adoption are only permissible where the child is a Canadian citizen or lawfully admitted to Canada for permanent residence. Kim Lunman, *Adoption Reform Bill Will Put Baby Brokers Out of Business*, CALGARY HERALD, Mar. 31, 1995, at A8.

155. *Id.*

156. Lunman, *supra* note 4, at A8. In addition, the 1988 Adoption Act did not deal specifically with intercountry adoption other than to proclaim that an adoption effected according to the law of any other jurisdiction would be accorded the same effect in Alberta as an adoption under Alberta law. Child Welfare Amendments Act, R.S.A., ch. 15, § 61 (1988).

157. R.S.A., ch. 15, §§ 56(1). The court may dispense with the consent of a guardian if it is necessary or desirable to do so. *Id.* § 63(4).

158. Domestic Relations Act, R.S.A., ch. D-37, § 47(1)(b)(iii) (1980) (re-enacted by Family and Domestic Relations Statutes Amendment Act, S.A., ch. 11, §1(2) (1991)). A person declared to be a parent may be appointed as a joint guardian if the court finds that "it is in the best interest of the child and the [parent] is able and willing to assume the responsibility of a guardian." R.S.A., ch. D-37, § 47(2), S.A., ch. 11, §1(2).

159. Child Welfare Amendments Act, 1988, S.A., ch. 15, §§ 60(1)(d) (1988). The court may, however, dispense with any required notice except notice to the director of child and family services. *Id.* § 60(3)(c).

(and the child if at least twelve years of age) are entitled to be heard at the hearing before the court.<sup>160</sup>

The right to notice and an opportunity to have one's interests considered did not afford much protection or comfort, however, for the five biological fathers from the U.S. who opposed the adoption of their children in Alberta courts and lost in all five cases, including "Baby Boy M."<sup>161</sup> In the Baby Boy M case, the infant left the U.S. with the prospective adoptive parents who returned to their home in Alberta where they obtained a court order of guardianship and custody.<sup>162</sup> Four and one half months later the biological father petitioned the Alberta court for guardianship and custody and for return of his child under the Hague Convention on Civil Aspects of International Child Abduction.<sup>163</sup> Two and one half months later the prospective adoptive parents petitioned for an order of adoption.<sup>164</sup> At trial the father's counsel appeared to abandon his claim for return of the child under the International Convention, arguing solely for guardianship and custody.<sup>165</sup> The trial court refused the father's petition and granted the order of adoption.<sup>166</sup> The trial court found that the father's consent was required, but that the court could dispense with it which it did.<sup>167</sup> On appeal this decision was affirmed, although the appellate court disagreed with the trial court's determination that the father's consent was required.<sup>168</sup> The appellate court found ample evidence to support the trial judge's conclusion that adoption was in the best interests of the child.<sup>169</sup>

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160. *Id.* §§ 63(2). Prior to this amendment there was no provision for notice to the father under either the Child Welfare Act, 1980, or the Child Welfare Act, 1984, which repealed the earlier law. Child Welfare Act, S.A., ch. C-8.1, § 58(1) (1984) (notice). Nevertheless, under provisions of the 1980 Act notice was likely to be given where the father remained a "real presence" in the child's life as where he supported the child and exercised rights of access. *See Re L. and A.*, 26 D.L.R. 4th 615, 618-19 (Ct. App. 1986). The court based its decision on the requirement that an adoption be predicated on the welfare and interests of the child. It reasoned that the welfare of a child must include weighing the father's continuing presence and his willingness and ability to support the child. As the current law requires that adoption be in the best interests of the child, S.A., ch. 15, § 64(1)(b) (1988), the precedential value of this case may continue unimpaired.

161. Lunman, *supra* note 152, at A2.

162. *D. (H.A.) v. M. (N.C.)*, 145 A.R. 200 (C.A. 1993) (per curiam), *aff'g sub nom. S. (J.W.) v. M. (N.C.)*, 10 Alta. L.R. 3d 395 (Q.B. 1993), *appeal refused*, Doc. 23915 (Can. Mar. 3, 1994), 1 R.F.L. 4th 60.

163. *Id.*; *see infra* notes 170-75 and accompanying text (regarding the Convention).

164. *D. (H.A.)*, 145 A.R. at 202.

165. *Id.* The appellate court's decision with respect to the claim for return under the Convention will be discussed *infra* in Part II-C.

166. *S. (J.W.) v. M. (N.C.)*, 10 Alta. L.R. 3d 395 (Q.B. 1993).

167. *Id.*

168. *D. (H.A.)*, 145 A.R. at 206.

169. *Id.*

*C. Toward a Solution*

Many Canadian provinces and U.S. states allow for consideration in an adoption proceeding of a biological father's interest in obtaining custody and maintaining a relationship with his child. It is generally true that the power of consent is conferred sparingly on unwed fathers. It is also true, however, that recent law in the United States and Canada has begun to broaden the ability of unwed fathers to obtain legal recognition of their rights to raise their children by granting easier access to the zone of consent. Timely offers of support, interest, paternal acknowledgment, and applications for custody may suffice in certain states and provinces without the sometimes impossible obstacles of cohabitation or maternal acknowledgment of paternity that still exist in some Canadian jurisdictions, such as Alberta. The essential problem lies in the different legal approaches taken by individual provinces and states. A descriptive survey of the minutiae of consent laws in all fifty U.S. states and a subsequent comparison with those of the Canadian provinces is not necessary to set out the basic comparative law problem. To the extent that access to the zone of consent is wider or more easily reached by unwed fathers in one U.S. state than in a Canadian province, there exists the incentive for a birth mother to pursue intercountry adoption.

Placing a child in a Canadian province with narrower access to the zone of consent may be more attractive than U.S. alternatives such as paternal custody or the potentially complicated process of obtaining paternal consent that may protract and ultimately prevent an adoption. As noted above, only some provincial laws address this problem. The lack of an immediately available, uniform solution to the problem calls for further attention from the legal community.

In searching for an appropriate solution to the problem of intercountry flight, one might attempt a traditional conflict of laws analysis. However, a better solution lies in the establishment of a binding set of positive rules to govern both originating and receiving states specifically. In a fairly recent turn in international law, the Hague Convention on Intercountry Adoption provides such rules. Implementation of the Convention as discussed below would remove the impetus for intercountry flight. Such a preventive approach is a far broader solution than the mere return of a child in an individual case.

In contrast, other conventions do not adequately address the problem, even on a case-by-case basis. A parent with custodial rights may seek the return of a child under the Hague Convention on the Civil Aspects of International Child Abduction.<sup>170</sup> This Convention addresses the problem of the wrongful removal of a child from his or her habitual place of residence in

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170. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501.

breach of custody rights that were actually exercised under the laws of the place of habitual residence or would have been exercised but for the removal.<sup>171</sup> In the case of newborns removed immediately after birth by unmarried mothers, it is not clear that the biological father has custody rights or that the newborn is habitually resident in a contracting state within the meaning of the Convention.<sup>172</sup>

In fact, in the Baby Boy M case, the father made an argument under the Hague Convention on Child Abduction in his initial pleadings that he revived on appeal.<sup>173</sup> The appellate court rejected his argument because it was of the opinion that there had been no wrongful removal of a child habitually resident in the U.S. in breach of *existing rights* of custody.<sup>174</sup> The prospective adoptive parents took the child to Canada within days of his birth, and at that point the father merely had the right to apply for custody.<sup>175</sup>

In addition to offering a remedy for individual cases such as Baby Boy M, ratification of the Hague Convention on Intercountry Adoption would also create a need for specific legal mechanisms for implementation. These mechanisms could be tailored to particular problems such as circumvention of paternal consent and prevention of prolonged legal battles over parentage of children. The next section of this article develops a set of such mechanisms and poses them as a blueprint for national law reform.

### III. THE ROLE OF THE HAGUE CONVENTION ON INTERCOUNTRY ADOPTION

In May 1993, the Hague Conference on Private International Law unanimously approved the text of a convention on intercountry adoption formally titled Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, but universally known as the Hague Convention on Intercountry Adoption.<sup>176</sup> For more than one hundred years, the Hague Conference has been a forum for negotiation of questions of private international law among its membership, a small group of developed countries. Preparation and negotiation of the Convention on Intercountry Adoption took place between 1988 and 1993.<sup>177</sup> The process was unusual for the Hague

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171. *Id.* at arts. 3, 4.

172. *See supra* note 132.

173. D. (H.A.) v. M. (N.C.), 145 A.R. 200 (C.A. 1993) (per curiam), *aff'g sub nom.* S. (J.W.) v. M. (N.C.), 10 Alta. L.R. 3d 395 (Q.B. 1993), *appeal refused*, Doc. 23915 (Can. Mar. 3, 1994), 1 R.F.L. 4th 60.

174. *Id.* The court also found that it was not incumbent on the court to raise the issue without an actual application to the court for return of the child under the Convention.

175. *Id.*

176. Hague Convention, *supra* note 7.

177. For information on the process and participants summarized in this paragraph see Pfund, *supra* note 1, at 53-55.

Conference because participants included a large number of non-member developing nations and a significant number of non-governmental organizations. The subject matter of the negotiations shaped the contours of the process. Developing countries are usually the original homes of children adopted by residents of developed nations. In some countries, such as the United States, non-governmental organizations are the primary actors in both domestic and intercountry adoptions. The tensions and conflicting interests among these three main groups of participants dictated the eventual substantive form of the Convention.

As it stands, the Convention approves the concept of intercountry adoption but seeks to set up a system of minimum standards to govern the process. The purposes of the Convention are: (1) to ensure that intercountry adoptions take place in a manner which serves the best interest of the child and with respect for his or her fundamental rights as recognized in international law; (2) to establish a means to enforce safeguards designed to prevent the abduction, sale, or trafficking of children; and (3) to set up a means for legal recognition of adoptions made in accordance with the Convention's terms. The drafters of the Convention set the minimum standards by imposing substantive and procedural requirements on both countries of origin and receiving states where adopted children will be raised. Authorities designated by countries to carry out Convention functions must be accredited under the terms of the Convention. Once accredited, these authorities carry out particular functions in the state of origin and the receiving state to give effect to the adoption. Finally, if a competent authority of the state of the adoption certifies that an adoption has been made in accordance with the Convention, that adoption is to be recognized by operation of law in all other contracting states (unless a state refuses on the grounds that an adoption is manifestly contrary to its public policy).

The Convention entered into force on May 1, 1995.<sup>178</sup> Canada signed the Convention on April 12, 1994,<sup>179</sup> but has not yet ratified it. The United States signed the Convention on March 31, 1994, but it has not ratified it. Therefore, the Convention is not in force with respect to either country. The following discussion will address ways in which ratification and implementation by the United States may prevent international flight undertaken to avoid U.S. adoption law. Even if the U.S. fails to ratify the Convention, the mechanisms for its implementation suggested below may serve as models for the reform of domestic law.

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178. Hague Convention, *supra* note 7, at 1144 (referencing arts. 43, 46). Under Article 46, the Convention enters into force three months after the third instrument of ratification has been deposited with the Ministry of Foreign Affairs of the Kingdom of the Netherlands, the designated depositary under Article 43.

179. DEP'T OF STATE DISPATCH, July 4, 1994.

*A. How the Convention May Prevent International Flight*

As discussed earlier, the fact that the states of the United States and the provinces of Canada have different standards respecting an unwed biological father's consent has enabled cross border adoptions that take advantage of these differences.<sup>180</sup> Rather than dictating that contracting countries have identical laws on adoption, the Hague Convention seeks to regulate adoptions while recognizing that there are many different attitudes and legal standards regarding adoption. Therefore, the Convention does not dictate when an unwed father's consent is required for an adoption to take place. Instead, it imposes on the designated authorities of the state of origin certain obligations without the fulfillment of which an adoption may not take place. These obligations include:

- (a) to establish that the child is adoptable;
- (b) to determine that an intercountry adoption is in the child's best interest;
- (c) to ensure that all consents necessary under the law of the state of origin have been given freely in the required form, in writing, after notification of the effect of the legal consent, and in the case of the mother, only after birth of the child, without the inducement of payment and that the consents have not been withdrawn; and
- (d) to ensure that children of an appropriate age and maturity have been counselled and informed of the effect of the adoption; that consideration has been given to the child's wishes and opinions; and that if his or her consent is required, that it has been freely given in the required legal form, in writing, after notification of the effects of the consent, and without the inducement of payment.<sup>181</sup>

The procedural requirements for carrying out these obligations fall on the designated authority of the state of origin. Basic requirements include the preparation of a written report on the child to be adopted, including his or her adoptability. The authority must also gather the written consents outlined above. Based on reports on the child and reports on the prospective adoptive parents prepared and transmitted by the designated authorities in the receiving state, the authority in the state of origin must next determine that the adoption is in the best interest of the child. Finally, the authority transmits a report to

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180. There are other problems stemming from a lack of uniformity in adoption law among states in the United States, among provinces in Canada, and between the United States and Canada. One problem is how to implement the Hague Convention in different kinds of federal systems. See Vaughan Black, *GATT for Kids: New Rules for Intercountry Adoption of Children*, 11 CAN. FAM. L.Q. 253, 304-08 (1994) (offering Canadian perspective on the Convention).

181. See Hague Convention, *supra* note 7, at art. 4.



the receiving state that includes, *inter alia*, proof that the necessary consents have been obtained and the reasons for its determination on the placement.

Thus, if the United States and Canada were to ratify and implement the Convention, there would imminently be a means to avoid circumvention of paternal consent requirements. Both countries would have to develop or accredit bureaucracies to carry out the regulatory requirements, including the duty of the country of origin to verify domestic consents.

As both governments are federal systems, they might choose to create local authorities, such as one for each state or province (though they also would have a federal level authority through which intercountry transmissions of communication would be channeled). In any case, accredited authorities must be competent to conduct Convention tasks and must be directed and staffed by persons qualified through training or experience to work in the field of intercountry adoption. The Convention does not, however, dictate how accredited authorities in each country are to perform Convention requirements. This silence creates a bureaucratic vacuum.

In the context of the consent problem, accredited agencies will have to develop a means to verify that the consents required by law have been duly obtained in accordance with the Convention. This is essentially a two step process. First, the accredited authority will have to develop a process to determine whose consent is required. Next, once the persons have been identified, there must be a process to verify that the required consents meet Convention standards. Finally, there must also be a contingent third stage for cases in which an unwed father's assertion of paternity and the right to withhold consent are contested.<sup>182</sup>

Prior to any further discussion of such mechanisms, it must be noted that the Hague Convention may not afford universal protection against international flight posed by legal consent requirements. Under the Convention, prospective adoptive parents who are habitually resident in one contracting state, who wish to adopt a child who is habitually resident in another contracting state, must apply through the designated authority in their home state. This jurisdictional language creates a significant loophole. If a mother gives birth in the United States and immediately takes her child to Canada for adoption placement, it is unclear whether that child is a habitual resident of the United States for purposes of coverage under Convention requirements. Mainly, this is because the Convention does not define "habitually resident."<sup>183</sup> At least the Conven-

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182. Subsection III-B will set out this author's suggestions for mechanisms to achieve the verification of consent that the Convention requires. There is a model consent form developed for use under the Convention. Report of the Special Commission of October 1994 on the Implementation of the Hague Convention of May 29, 1993, Annex B (report published by the Permanent Bureau of the Hague Conference on Private International Law and on file with the SOUTH CAROLINA LAW REVIEW)

183. Convention on the Civil Aspects of International Child Abduction, *supra* note 170,

tion provides a contracting country with the means to avoid the problem. Article 28 allows countries to enact laws to prevent the transfer of a child who is habitually resident in that country prior to adoption. By enacting such a law, the United States could define "habitually resident"<sup>184</sup> to include newborns and thereby require that their adoptions proceed in the United States where domestic law on consent could be effectively overseen by a judicial system familiar with its requirements. An alternative solution allowed by the Convention would be a bilateral agreement under Article 39.

Another loophole within the jurisdictional language of Article 2 results when a pregnant woman crosses the border just prior to giving birth. Unless the United States were to enact a law defining "habitually resident" to include an infant who had never independently existed within its borders,<sup>185</sup> it is difficult to see how the Convention would prevent the consent circumvention problem described in section II above. International travel prior to birth would make the subsequent adoption an internal matter of the haven country, rather than an intercountry adoption subject to the requirements of the Convention.

A third loophole has nothing to do with the Convention's jurisdiction, but rather with human nature. It is foreseeable that a woman wishing for the speedy adoption of her child and wanting to avoid the obstacle of consent from the child's biological father<sup>186</sup> may not reveal the biological father's identity, or she may even present a "false" consent from a man other than the true father. The latter situation occurred in the famous "Baby Jessica" case.<sup>187</sup>

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at art. 4 (applying to children "habitually resident" in a contracting state, but also failing to define the term). The U.S. State Department's legal analysis of the Convention is likewise unhelpful. See 51 Fed. Reg. 10,494, App. C (1980). One commentator suggests that a child must have actually lived in a state for that child to be a "habitual resident"—neither citizenship nor domicile are relevant. See ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE, & ADOPTION CASES* § 2.32 (1993 & Supp. 1996). This is problematic in the case of newborns. Traditional conflict of law rules confer the domicile of the parent with whom a newborn is living upon the infant. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22 (1971).

184. The Parental Kidnapping Prevention Act of 1980 (PKPA), 28 U.S.C. § 1738A (1994), aimed at avoiding jurisdictional competition between state courts in child custody matters, defines a child's "home state" as the state in which the child lived with a parent or parents for at least six consecutive months or, in the case of a child less than six months old, the state in which the child lived from birth with a parent or parents. While this does not address the problem of infants being removed immediately after their birth to another country for adoption, the statute provides an available model for a federal, preemptive, and uniform approach to the problem. A statute addressed to the problem of intercountry adoption should adopt the national domicile of the mother as the definition of the "habitual residence" of a newborn.

185. The U.S. citizenship of the child of a U.S. mother giving birth in Canada has not been sufficient to confer "habitual residence" on children. See *supra* note 183.

186. One must acknowledge that there are many possible reasons for a woman to bypass the actual father, not the least of which is fear of violence.

187. *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992); *In re Clausen*, 502 N.W.2d 649 (Mich.), *stay denied sub nom.* DeBoer v. DeBoer, 509 U.S. 1301 (1993).

Of course, a false consent only creates a problem if the biological father comes forward. The accredited bodies under the Convention must be given proper authority and develop for themselves effective means to detect and deter false consents and to deal with biological fathers coming forward after the adoption process has begun. Without such effective mechanisms, the Convention does nothing to solve the problem of international flight toward intercountry adoption and away from domestic consent requirements. In fact, by regulating intercountry adoption, the Convention may make that option a more “normalized” choice for a woman who is unable or unwilling to raise her child.

Despite jurisdictional loopholes and practical problems, ratification and implementation of the Convention still present a promising means to prevent nullification of paternal consent through the verification requirements of the Convention. The bureaucratic vacuum left open by the Convention presents the legal community with an ideal opportunity to suggest ways to prevent protracted adjudication of consent issues that harm everyone involved, including the most vulnerable interested party, the child.

### *B. How to Invent Speedy Mechanisms for Adjudicating Consent Under the Convention*

Each country that implements the Hague Convention has an opportunity to create new mechanisms to avoid problems such as lengthy intercountry legal battles over consent. In the following subsections I suggest a plan of implementation tailored to the United States, but perhaps equally applicable to the Canadian federal form of government.

#### *1. Identification and Notification of Putative Fathers*

The first obstacle to obtaining consent, where the parents are not married, is the identification of the biological father. If the mother does not supply information adequate to effect notification and consent, the accredited bodies under the Convention must have a means to identify a father whose consent is required under applicable state law. To protect the privacy of the mother, however, the basic burden should be placed on the biological father to identify himself through the accredited authority in his state of residence. That authority should have a computer link with every other authority in the country so that one identification will suffice even if the mother has relocated to another state.<sup>188</sup> Further there must be a legislative restriction on the use of

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188. The idea of computerized, nation-wide registries of information is not a novel concept. The Brady Handgun Violence Prevention Act established a national computer system for instant checks of information on criminal backgrounds of potential gun purchasers to be made operational for use by gun sellers within five years. 18 U.S.C. § 922(t) (1994). Similarly, the federal government collects information on physicians subject to state disciplinary action for inclusion in a national database entitled the National Practitioner Data Bank for Adverse Information on

the information to protect the privacy of the men who identify themselves as putative fathers.

The establishment of a national computer registry with fifty nodes consisting of the accredited convention authorities of each state would improve upon the patchwork of existing state registries<sup>189</sup> and bypass some very real problems. Mothers, fathers, and children do not always reside in the same place, even where no "flight" exists. Even the 1994 Uniform Adoption Act does not adequately address these practical location problems (in the context of domestic adoption). In its section on notification of unknown fathers, the Uniform Act places the burden on the court hearing a petition for termination of parental rights prior to adoption to identify and notify the father, if possible.<sup>190</sup> The court must make certain inquiries to accomplish this purpose. The comment to this section makes clear that the birth mother may refuse to give the court information.<sup>191</sup> Faced with such a dilemma the court should examine "any putative father registry in a State where the alleged father might have been during the mother's pregnancy or at the time of the minor's birth."<sup>192</sup> There does not seem to be a direction to search all registries. Thus, if the court fails to find the father, it proceeds to give notice by publication or posting, unless neither method is likely to lead to notice.<sup>193</sup> The requirements I suggest build on the current, separate putative father registry system but make access to information much easier, swifter, and more likely to lead to identification and notification of fathers. Placing an affirmative, uniform burden of registration on men to preserve their rights for the purpose of intercountry adoption encourages action, but only where the registration system is indeed uniform and national in scope. A linked registry system would also provide more in the way of "due process" than the Constitution currently requires.<sup>194</sup> This improvement, in turn, would better

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Physicians and Other Health Care Practitioners. 54 Fed. Reg. 42,722 (Dep't HHS 1989). In the adoption context, many states maintain separate putative father registries. *See, e.g.*, N.Y. DOM. REL. § 111-a(2)(h) (McKinney 1988); N.Y. EST. POWERS & TRUSTS § 4-1.2 (McKinney 1991 & Supp. 1997). The latest Uniform Adoption Act contemplates sharing information among registries containing information about an adoptee's biological parents and genetic history by mandating that statewide registries for the filing and release of such information "cooperate with registries in other States to facilitate the matching of documents filed pursuant to this [article] by individuals in different States. . . ." UNIF. ADOPTION ACT § 6-106(4) (1994), 9 U.L.A. 84 (Supp. 1996). *See infra* note 335 (stating Uniform Act's position regarding the release of such information). While such national databases pose threats to privacy, the law has already recognized their social usefulness when coupled with appropriate protections.

189. *See, e.g.*, N.Y. PUB. HEALTH § 4138-c (McKinney Supp. 1996).

190. UNIF. ADOPTION ACT § 3-404 (1994), 9 U.L.A. 48 (Supp. 1996).

191. *Id.* § 3-404 cmt. at 49.

192. *Id.*

193. UNIF. ADOPTION ACT § 3-404 (1994), 9 U.L.A. 49 (Supp. 1996).

194. In *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court upheld the constitutionality of a

protect both the interest of fathers in their paternity and the interests of all others in a speedy process.

The establishment of a linked national registry requires further elaboration on its use. There must be strict time limits on the ability of a father to identify himself as someone whose consent is required. Putative fathers must file with the convention authorities just as they must now file with putative father registries in some states.<sup>195</sup> Failure to know that such a registry or intercountry adoption identification procedure exists would not excuse a putative father from timely identification requirements. Further, placing the burden on the father to know of the registry does not deny him due process.<sup>196</sup> An appropriate time limit would be no later than one month after birth of the child or one month after notification of the pregnancy, whichever occurs earlier.<sup>197</sup> Starting the clock at this point ensures a balance among the interest of a father in assuming parental responsibilities; the interest of a child in having a stable family at the earliest possible time; and the interests of the state, the biological mother, and the prospective adoptive parents in obtaining speedy, final adoptions.

Once a putative father timely registers his identity, he would be entitled to receive notice of a pending intercountry adoption and to take the next, essential step: filing a notice with the accredited authority that he intends to withhold his consent to the adoption. This latter filing would start the process of adjudicating paternity and consent that is discussed in subsection III-B-2, below.

The bottom line is that the putative father must protect his own interests. He must register his identity with the convention authority to preserve his right to receive notice of a pending adoption and his right to contest the adoption

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single state's paternal notification system (including an in-state registry) as a sufficient protection of a biological father's interest in developing a relationship with his child.

195. State filings are generally required to insure that fathers receive notice of pending adoptions. *See, e.g.*, N.Y. DOM. REL. LAW § 111-a (McKinney 1988) (stating registration entitles father to notice of pending adoption and that other classes of persons are also entitled to notice).

196. *See Lehr*, 463 U.S. at 264 (stating failure of father to register prior to adoption due to ignorance of registry was insufficient ground to challenge constitutionality of notice law).

197. There have been various suggestions in the literature as to what is timely assumption of parental responsibility. For example, in redefining parenthood in terms of responsibility in all contexts, Karen Czapanskiy posits a reasonable period of six months from birth as one in which both parents may have time to formulate, test, and resolve their commitment to parenthood or their choice to place a child for adoption; immediate and unwavering action is not consistent with mature assumption of a decision with life-long consequences. Karen Czapanskiy, *Volunteers and Draftees: The Struggle For Parental Equality*, 38 UCLA L. REV. 1415, 1479-80 (1991). I agree in principle that time for reflection and doubt honors both the nature of humanity and the gravity of the decision, but six months is too long *from the perspective of the child*. *See, e.g.*, GOLDSTEIN ET AL., *supra* note 27, at 46 (stating adoption should ideally be final upon placement and time for appeals should be limited with decisions rendered within days).

by withholding consent. It must be stressed that neither *knowledge* of pregnancy or birth, nor *knowledge* of a pending intercountry adoption, starts the clock. Timely identification of putative paternity cannot depend on these individual factors that are variable and unpredictable. The event of birth and pendency of adoption themselves must govern. Any other rule would run contrary to the interests of speedy, final adoption.

Once a putative father identifies himself and has his name posted on the national registry, the authority in the state of the putative father's residence should become responsible for notifying the father when an intercountry adoption process has started (with respect to the child he claims as his offspring). Official notice should be made by certified mail, return receipt requested. If the deadline for filing notice of intent to withhold consent is within one week of expiring, the convention authority should be obligated to inform the putative father by express mail service.

Where a convention authority has timely knowledge of the identity and whereabouts of a putative father through means other than the national filing procedure, the convention authority should be obliged to notify that man in the same manner as in other cases. This again accords more process than the Constitution currently requires,<sup>198</sup> but it is in accord with fundamental concepts of fairness.

When a biological father fails to identify himself to any convention authority and his identity is not otherwise known to the convention authority handling an intercountry adoption of his child, there should be no duty on the part of any convention authority to notify that father of the pending adoption. If the putative father learns of the process after the time limit for identification has run, he may still attempt to withhold his consent to the intercountry adoption, but the procedures and limits outlined in the next subsection will apply.

## 2. *Proposed Procedures for Adjudicating Paternity and Consent*

If a biological father comes forward or is identified and notified in a timely manner, an intercountry adoption bureaucracy must be ready with a means to adjudicate disputes concerning paternity and consent. As illustrated by painful litigation in the United States, the absence of a mechanism for speedy adjudication can cause much harm to the child. It is interesting that parental rights in the United States are a derivation of the concept of property,<sup>199</sup> yet our litigation system affords less protection than if the object

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198. In *Lehr*, 463 U.S. at 265, the Court found that the Due Process Clause was not offended by a family court's failure to notify a putative father known to the court who did not fall within the classes of putative fathers entitled to notice under state law.

199. See *WOMEN IN AMERICAN LAW: FROM COLONIAL TIMES TO THE NEW DEAL* 64, 86-88 (Marlene Stein Wortman ed., 1st vol. 1985) (discussing the treatment of children as parental property).

of the contest was actually property. Specifically, there are lesser protections for the maintenance and value of the “property” and the putative “owner’s” interest in it during the litigation when the fight is over human rather than non-human chattel. If parties were fighting over non-human assets with the potential for phenomenal growth, the system would afford parties the ability to petition the court for temporary and immediate relief *pendente lite* by way of a preliminary injunction. Commentators agree that expedited proceedings should be incorporated into the system of adoption consent and custody battles.<sup>200</sup> But few do more than simply call for expedition.<sup>201</sup> What is needed is an actual blueprint for a system of speedy adjudication of consent issues. The need exists in both domestic law and under the Hague Convention. The development of a blueprint for the system to be used under the Hague Convention could readily be incorporated into existing Convention practice by recommendation of the Special Commission.<sup>202</sup>

The accredited authorities under the Hague Convention should adopt a uniform two-stage process to determine in a matter of weeks whether the putative father’s consent is required. This determination would in turn fulfill the authorities’ obligations under the Convention to verify that all necessary consents have been obtained and to decide whether the child is adoptable.<sup>203</sup>

To start the process, a putative father would have to file a notice of intent to withhold consent. To prevent delay and the accompanying high human costs, the deadline for filing the notice of intent should be no later than one

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200. See, e.g., Mary L. Shanley, *Unwed Fathers’ Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 96 (1995).

201. Even the National Conference of Commissioners on Uniform State Laws does not recognize the need for expedition *at all points* of the adoption process. For example, there are no time limits on the investigation for, identification of, and notice to unknown fathers in § 3-404, and similarly, there are no time limits on determinations regarding interim placement of a minor in a contested adoption under § 3-204. UNIF. ADOPTION ACT §§ 3-204, 3-404 (1994), 9 U.L.A. 41, 48 (Supp. 1996). To its credit, the Uniform Adoption Act calls for explicit expedition in its time limits on petitioning for adoption and for the court to hear the petition (3-6 months after filing), as well as in its express six month limit on any proceeding to contest an adoption decree. *Id.* §§ 3-302, 3-701, 3-707 at 43, 58, 62.

202. Hague Convention, *supra* note 7, at 1144. The Special Commission convenes regularly regarding practical operation of the Convention. In its first meeting in 1994, the Special Commission developed a uniform consent form to be used in the verification of parental consent under Convention procedures, see *supra* note 182, as the Conference had requested at its seventeenth session when it first adopted the Convention, Hague Convention, *supra* note 7 at 1146.

203. This suggested procedural framework parallels the multi-stage proceeding envisioned under the Uniform Adoption Act in which there is interim placement, termination of parental rights, and a subsequent determination on the adoption petition. UNIF. ADOPTION ACT §§ 3-204, 3-501 to 506, 3-701, 3-703 to 705 (1994), 9 U.L.A. 41, 50-56, 58-62 (Supp. 1996). The variations stem from the different role of Hague Convention accredited authorities from domestic judicial bodies in adoptions.

month after birth or one month after the putative father receives notice of the mother's intent to place the child for adoption, whichever is earlier. In a fashion similar to that used to register his identification, the putative father should be able to file his notice with the accredited convention authority in the state of his residence regardless of the child's location. If the child is already in another state, the authority receiving the notice should forward it to the authority in the state where the child resides.

The authority in the state where the child resides should then have the obligation of serving the notice on the biological mother, the prospective adoptive parents, if any, and any adoption agency that has been involved. That authority also would have jurisdiction to make the eventual determination that the child is adoptable and that all necessary consents have been obtained in a manner consistent with the Convention. After completing service, the accredited convention authority should set up a schedule for completion of the decisional process. The expedited decisional process would take place in two stages. First, a preliminary hearing should take place, and the adjudicator should render a decision regarding temporary placement within one month of the father's filing of notice. Second, a final hearing should be held, and the adjudicator should give a determination regarding consent and adoptability within one month of the preliminary result.

Such a decisional scheme should avoid the delays, formality, and unnecessary complexity inherent in the typical custody litigation model. That is, the Convention process should not be a trial in miniature. What is more, compressing the process maintains the necessary balance among the interest of the father in assuming parental responsibilities, the interest of the child in having a stable family at the earliest possible time in development, and the interests of the state, the biological mother, and the prospective adoptive parents in speedy, final adoptions.<sup>204</sup>

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204. As noted earlier, *supra* note 201, the National Conference of Commissioners on Uniform State Laws recognizes the need for expedition in the adoption process. With respect to the situation of "thwarted fathers," *i.e.*, those who are prevented through no fault of their own from assuming parental responsibilities, the Conference recognizes the need to balance the father's rights against the interest of the child. UNIF. ADOPTION ACT § 2-401 cmt. (1994), 9 U.L.A. 28 (Supp. 1996). This recognition gives rise to more efficient notification procedures, but not to extensions of the necessarily tight time frames. A "thwarted father" may block an adoption by making proper showings in the termination proceeding, but the court must proceed with the hearing "expeditiously." Further, the court must terminate rights within 20 days after service of notice when an alleged father does not file a claim of paternity within that time. *Id.* at § 2-401 cmt., § 3-504(a) (c) (1994), 9 U.L.A. 28, 52-53 (Supp. 1996). No challenge to an adoption decree is allowed after six months, even one made by a "thwarted father." *Id.* at § 2-401 cmt., § 3-707 cmt. (1994), 9 U.L.A. 27, 62-63 (Supp. 1996). Adherence to this six month limit "minimizes the risks of serious harm to minor children and their adoptive families which arise if the finality of adoptions and termination orders is not secure." *Id.* at § 3-707 cmt. (1994), 9 U.L.A. 63 (Supp. 1996).



The constitutionality of this two-stage, “streamlined” process<sup>205</sup> rests on decisions as to unwed fathers’ rights discussed in subsection II-B, above. “The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication.”<sup>206</sup> Indeed, the Supreme Court has expressly recognized a child’s interest in prompt and certain adoption procedures.<sup>207</sup> The Court has also declared that if a biological father has not grasped his opportunity to develop an actual relationship with his child, a state need not listen to his opinion in an adoption proceeding.<sup>208</sup> Yet, there is no clear enunciation of the process due a putative father who does have a right to be heard. I argue that the need for promptness in the context of adoption demands that something less than full-blown litigation as we now know it is warranted.<sup>209</sup>

205. With respect to expeditious filing and completion of the adoption *see id.* at § 3-701 & cmt. (1994), 9 U.L.A. 59 (Supp. 1996). The Conference comment pointedly notes that prompt filing of adoption petitions and a six month deadline on final hearings is a dramatic change from current practice in most states. A move toward uniform, expeditious adoption laws is a goal of the utmost national importance. It should be of no less importance when the adoption is intercountry rather than domestic.

206. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (finding failure to provide any hearing on unwed father’s parental fitness unconstitutional).

207. *Lehr v. Robertson*, 463 U.S. 248 (1983). If a father such as Jonathan Lehr, who has taken action to notify the adoption forum that he is seeking to establish legal paternity, has no right to be heard at all, then it is constitutionally conceivable that a putative father’s right to be heard may be appropriately curtailed to protect the child’s interest and the state’s interest in prompt and certain adoption.

208. *Id.* *Lehr* was a case in which the biological father contested the failure of the state to notify him and allow him to be heard concerning the adoption of his child. It was not a case regarding whether his consent to the adoption was required. The Court decided that he had failed to grasp the adequate opportunity afforded by the state to file with a putative father registry. The Court ultimately upheld the adoption in which he had no opportunity to be heard. *See id.*

209. In *Santosky v. Kramer*, 455 U.S. 745 (1982), a non-adoption case involving termination of parental rights based on allegations of neglect, the Court held that the state must prove its case by clear and convincing evidence. In addressing what process is due a biological parent prior to termination, the Court weighed the state’s interest in the welfare of the child and in reducing administrative costs and burdens against the parents’ and child’s interest in avoiding erroneous termination. According to the Court, the overriding goal was the accurate determination of the necessity of breaking the parent-child relationship without substantial fiscal burdens. *See id.* It is not clear whether *Santosky*’s economic priorities are applicable to the adoption scenario. Not all states require a separate termination proceeding to precede an adoption. New York does not require the consent of certain persons (as discussed in section II-B-1), and no process is due such persons to determine whether their consent is required. *See Lehr v. Robertson*, 463 U.S. 248 (1983). On the other hand, family preservation was of great importance to the *Santosky* court, and if one does apply *Santosky*’s priorities in the adoption setting, it becomes unavoidable to realize how a more streamlined process would support, rather than undermine, the preservation of these “natural familial bonds.” After all, the existing judicial processes led to “Baby Jessica” situations which are less conducive to early establishment of such bonds.

In the streamlined Convention process that I propose, there also should be a limitation on which parties may participate. Allowed opponents of an adoption would include the putative father and the biological mother where their interests are aligned,<sup>210</sup> and allowed proponents would include the biological mother and the prospective adoptive parents where their interests are aligned. Of course, the child whose adoptability is at issue would have standing. The convention authority should have a staff member whose responsibilities include representing the interest of the child in all such adjudications. Such representation would diminish the possibility of delay caused by appointment of a guardian ad litem on an individual basis. The authority should similarly assign one person or group to handle all paternal consent cases. This structure would encourage efficiency stemming from expertise as well as consistency in decision-making.

The adjudication process I envision would be an informal meeting in which a decision-maker would hear from and question all parties and their representatives in a manner dictated by the decision-maker. It would not include trial-type testimony and cross-examination of witnesses. All evidence as to facts would enter the record by way of sworn affidavit, and there would be no right to present witnesses. The decision-maker would resolve conflicts as to relevant facts on the basis of the internal consistency and persuasiveness of the affidavits, the relationship of the affiant to either party, questions asked of counsel during oral argument, and questions directed to the parties themselves during the hearing.

At the outset of the process, the decision-maker would hold a pre-hearing conference to determine if paternity is an issue. If so, the decision-maker should instruct the parties as to what physical evidence would be necessary to decide that issue. If paternity is not contested and only the biological father's ability to withhold his legal consent is contested, the decision-maker would set up a schedule for receipt of written briefs and a date for the hearing. The issues to be briefed and argued will vary depending on the stage of the proceeding. As discussed in section III-B-3 below, the criteria for temporary placement would dictate the structure of the first stage of the proceeding. Once a temporary placement has been made, the decision-maker would instruct the parties as to the schedule for written briefs and oral argument for the second stage of the proceeding in which the questions of the father's legal ability to withhold consent and the child's adoptability will be the sole, interrelated issues for determination. Finally, the decision-maker should make a written decision within the two-month deadline but need not issue a detailed written opinion.

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210. In the interest of timely decisions, it is necessary to limit the parties to biological *parents*. Biological grandparents who want to raise the child should not have standing unless both birth parents are deceased or they are the child's legal guardians.

There should be a limited right of appeal which would serve as a check on individual error and bias on the part of the decision-maker. It would also avoid the possibility of outcry for failure to include what U.S. citizens have come to expect as part of due process: some form of appellate review. One could argue that such review would cause unnecessary delay and that there are many instances of non-reviewable governmental decisions. Nevertheless, if the review were extremely limited, it would serve the purposes of justice and politics without sacrificing the goal of speedy resolution.

A board set up by the accredited authority should conduct the review. To ensure proficiency, the board should consist of one social worker trained in intercountry adoption, one attorney with experience in family law but without any income stemming from the representation of parties in adoption proceedings of any sort,<sup>211</sup> and the director of the accredited agency whose sole function would be to break a tie vote between the other two members. To assure timely decisions, the review should be based solely on the transcription of the proceedings, which should be made available within one week of the final hearing. Further, review should be granted only when a party files a proper request within two weeks of the final hearing, and review should take place within two weeks of the request. The process should not be *de novo*; it should be a search for any material error of law or fact or element of bias that is visible in the record (including the written opinion if any was issued).

The original decision should stand unless error or bias is uncovered and then only if such error or bias were so material that a grave miscarriage of justice would ensue if the original decision were carried out. Unless the review panel were to differ with the original decision, there would be no need for a written decision by the review panel. In cases of error or bias, the review panel should conduct a new hearing appropriate to the second stage of the adjudication. That is, the panel should schedule briefs and oral arguments regarding the issues of consent and adoptability (temporary placement of the child having been decided). In these instances, the review panel should issue a final decision within one month of its determination to conduct a new proceeding. There would be no right of review of this decision. Finally, judicial review should be limited to extraordinary cases involving alleged errors of constitutional proportion. Only the most grievous deprivations of parental liberties under the Due Process Clause would qualify.<sup>212</sup> Without

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211. A retired attorney with much experience in adoption would be an ideal choice for this position on the board.

212. There is an analog to this procedure in antidumping and countervailing duty laws. Under provisions of the North American Free Trade Agreement (NAFTA) reflected in U.S. law, administrative decisions by the U.S. Department of Commerce and the U.S. International Trade Commission involving either Canadian or Mexican goods are not reviewable in U.S. courts if one party to the administrative proceeding requests review under NAFTA. Review under NAFTA consists of binational panel review. That is, the review panel is composed of members from the

<https://scholarcommons.sc.edu/sclr/vol48/iss3/3>

this very high threshold for constitutional review, automatic resort to judicial bypass would undercut the entire proposed scheme.

Assuming the United States ratifies the Hague Convention, actions to implement the Convention's explicit provisions will become necessary. For example, Congress will have to enact federal legislation to authorize creation of the required Central Authority.<sup>213</sup> Implementing legislation may, of course, go beyond Convention requirements to address related matters. In implementing the Convention's requirements, federal legislation should make clear that federal law as to *adjudication* of consent in intercountry adoptions would preempt state law. Requiring that convention authorities grant deference to local law standards for proving paternity and withholding consent would enhance the political feasibility of such a preemption measure. The applicable local law would be that of the state in which a convention authority sits. Legislative preemption is crucial. Without it a putative father could circumvent any of the Convention's speedy adjudication mechanisms by requesting that a state court enjoin the convention authority until the court decides the issues of paternity, consent, and custody.

Federal legislation should also clearly indicate the penalty for failure to resort to Convention procedures. A father wishing to contest an intercountry adoption who chooses not to proceed under the Hague Convention would automatically and without exception lose any right he might have had under state law to withhold his consent. Once the deadline for filing notice of intent to withhold consent had passed, without any notice having been filed with respect to the child, the convention authority would be able to assert legally under Article 4 that all necessary consents had been obtained.

### 3. Proposed Criteria for Deciding Temporary Placement

One of the most important ways in which procedures under the Hague Convention may improve upon existing domestic law is to revise the standards for deciding temporary placement. The interim placements of "Baby Jessica" and "Baby Richard" with their prospective adoptive parents created misery for all involved. Prior to the final custody award, the biological parents suffered, and afterwards, when the children were taken from their adoptive homes additional lives were shattered. The Uniform Adoption Act does not adequately address this most important issue.<sup>214</sup> The Act leaves interim placements

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two countries involved in the dispute. The only exception is for constitutional challenges. 19 U.S.C. § 1516a (1994).

213. See Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L.J. 243 (1994); Pfund, *supra* note 1, at 66-74. Many other changes will be necessary, such as those concerning immigration, or desirable, such as requirements for converting a simple adoption (in those countries in which adoption does not cut off parental rights) into a full adoption (as in the United States where adoption terminates prior parental rights).

214. The Act merely authorizes a judge in a contested adoption or in a termination

under the traditional “best interest of the child” standard. I suggest a different standard for use under the Hague Convention and ultimately in domestic law, because the best interest of the child standard usually favors continuity,<sup>215</sup> as it did in the Baby Richard and Baby Jessica cases. As this is a complete break with current approaches in adoption and other child custody disputes, there follows a detailed model of a temporary placement hearing with specific direction as to the standard for placement. The heart of this new standard is a placement that poses the least risk of separation trauma for the child upon final decision.

In Hague Convention proceedings, if a putative father files a timely notice of intent to withhold consent to an intercountry adoption, the first step of the expedited proceedings should be a temporary placement hearing akin to a preliminary injunction hearing. The classic criteria for affording such extraordinary relief are: (1) petitioner’s likelihood of success on the merits; (2) the likelihood that petitioner will suffer irreparable harm absent preliminary relief; (3) whether the harm to the petitioner absent such relief outweighs harm to the respondent from granting such relief; and (4) whether relief is in the public interest.<sup>216</sup> These criteria are easily adaptable to the adoption situation and are suitable guides for a temporary placement decision. Surely they are more effective for making placement decisions than the ubiquitous, elusive standard known as “the best interest of the child.” The adaptation to the temporary child placement hearing would not, of course, ignore best interest concerns. Rather, the adaptation simply parses the analysis in more concrete terms. Furthermore, the adaptation combines the best interest standard with all other relevant factors. This combination is in stark contrast to some commentators’ views which suggest that the best interest of the child standard be removed from consent determinations.<sup>217</sup> Such a combination is also contrary to some decisional law which treats consent as a very separate issue from the question of which placement is in a child’s best interest.<sup>218</sup>

Specifically, child placement decisions should be governed by the following standards:

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proceeding to make an interim placement order in the best interest of the child. The comment clearly recognizes the need for the court to take an active role to protect the welfare of the child, but gives no direction whatsoever. UNIF. ADOPTION ACT § 3-204 & cmt. (1994), 9 U.L.A. 41 (Supp. 1996) (authorizing interim placement in uncontested proceeding).

215. See, e.g., *In re Adoption of Michelle T.*, 117 Cal. Rptr. 856 (Cal. Ct. App. 1975).

216. See 11A CHARLES ALAN WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2948 (2d ed. 1995).

217. See, e.g., Shanley, *supra* note 200, at 80-81.

218. See, e.g., *In re B.C.G.*, 496 N.W.2d 239 (Iowa 1992). It is interesting in this, the Baby Jessica case, that the interim placement did not reflect the Supreme Court of Iowa’s firm belief that the child’s interest could not be part of its decision. See *id.*

- (1) the likelihood that the putative father would prevail in arguing his right to withhold his consent under the applicable state law;
- (2) the balance of harm to the putative father if relief is not granted and to the prospective adoptive parent(s), if any, with whom the child has already been placed;
- (3) the harm to the child posed by placement with either the putative father or the prospective adoptive parent(s); and
- (4) whether public policies concerning adoption favor one placement over another.

In this legal framework factors one and three should be predominant. Evidence as to the likelihood that the father will prevail on the merits would also indicate which placement would be more harmful to the child. If the father is likely to prevail, the probability of psychological harm to the child from separation trauma after placement with prospective adoptive parents is high. Conversely, if the father is not likely to prevail, placement with him pending a final determination would pose a greater risk of harm to the child. Thus, the decision-maker should focus primarily on the temporary placement that is most likely to be the permanent placement.

A decisional framework that puts risk of harm to the child in the foremost position is a very different legal inquiry than one that seeks to determine which parent or set of parents is better suited to raising the child. In the suggested standards for consent adjudications under the Hague Convention, the interest of the child is paramount, but the analysis is limited to deciding which placement poses the least risk of separation trauma upon final decision of the consent issue. If a biological father can prove that he has the right under the relevant domestic law to withhold his consent to adoption, then his *relative* suitability as a parent (compared with the prospective adoptive parents) is irrelevant. His child is not adoptable within the meaning of the Convention which leaves the definition of that term to local law.<sup>219</sup> Of course, most jurisdictions in the United States do not require the consent of a biological parent who has abandoned the child or is otherwise an unfit parent.<sup>220</sup> The

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219. See Hague Convention, *supra* note 7, art. 4(a), at 1139.

220. See, e.g., N.Y. DOM. REL. § 111(2)(a), (d) (McKinney 1988) (providing that consent is not required if able parent fails to visit and communicate with child or if mental illness or retardation disables the parent from providing proper care). The Uniform Adoption Act sets out several situations in which a court may dispense with consent. One exists for individuals whose parental relationship has been judicially terminated. The comment makes clear that the termination may have occurred previously under a state's general termination statute or under the Adoption Act's termination provision. The latter provides for termination for a variety of reasons including one relatively new ground, violence demonstrating unfitness to maintain a parental relationship. UNIF. ADOPTION ACT §§ 2-402 & cmt., 3-504 (1994), 9 U.L.A. 28-29, 52-54 (Supp. 1996).

father's suitability as a parent is, therefore, an implicit factor in application of the relevant consent law.

The avoidance of separation trauma as a decisive criterion for temporary placement does not exist in a psychological or social vacuum. Vast literature exists regarding the damage children suffer when they are removed from a parent.<sup>221</sup> The negative effects can take many forms. In general, one must distinguish between separation from a biological parent and separation from a psychological parent in assessing the literature.<sup>222</sup> There is no need, however, to take sides in the on-going debate about the relative importance of these two sets of relationships<sup>223</sup> because the suggested Hague Convention

221. See, e.g., David M. Brodzinsky, *A Stress and Coping Model of Adoption*, in *THE PSYCHOLOGY OF ADOPTION* 3, 6-10 (David M. Brodzinsky & Marshall D. Schechter eds., 1990); Vera I. Fahlberg, *A Developmental Approach to Separation/Loss*, in *ADOPTION: INTERNATIONAL PERSPECTIVES* 27 (Euthymia D. Hibbs ed., 1991); JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973) [hereinafter GOLDSTEIN, *BEYOND THE BEST INTERESTS*]; JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* (1979) [hereinafter GOLDSTEIN, *BEFORE THE BEST INTERESTS*]; Marshall D. Schechter & Doris Bertocci, *The Meaning of the Search*, in *THE PSYCHOLOGY OF ADOPTION* 62, 72-74 (David M. Brodzinsky & Marshall D. Schechter eds., 1990); Leon J. Yarrow & Marion S. Goodwin, *The Immediate Impact of Separation: Reactions of Infants to a Change in Mother Figures*, in *THE COMPETENT INFANT* 1032 (L. Joseph Stone et al. eds., 1973). There is even a standard psychological test called the "Separation Anxiety Test" that measures attachment and its impairment. See, e.g., Lori J. Horlacher, *Attachment Impairment: A Comparison of Adopted and Nonadopted Adolescents in Therapy With Those Not in Therapy* (1989) (unpublished Ph.D. dissertation, United States International University) (abstracted in *DISSERTATION ABSTRACTS INTERNATIONAL*, vol. 50/05-B, 2624).

222. The concept of a psychological parent is well set forth in the work of Joseph Goldstein, Anna Freud, and Albert Solnit. These authors define the psychological parent-child relationship based on provision for the day-to-day needs of the child. GOLDSTEIN, *BEYOND THE BEST INTERESTS*, *supra* note 221, at 16-20. Only by providing this care may a biologic parent become the psychological parent. *Id.* at 17. It is the resulting tie to the psychological parent, however, that is key. *Id.* at 31-32.

Importantly, these experts *do not* distinguish between birth parents, adoptive parents, and other longtime caregivers in positing the need to protect any established familial ties from state intrusion. GOLDSTEIN, *BEFORE THE BEST INTERESTS*, *supra* note 221, at 10-11. The announced purposes behind preventing unnecessary state intrusion are to provide parents with an opportunity to meet the developing physical and emotional needs of their child (such an opportunity is essential in the establishment of familial bonds critical to every child's healthy growth and development), and to continuously maintain a psychological parent-child relationship. *Id.* at 9-10. The child's needs are paramount. *Id.* at 5.

223. Compare, e.g., GOLDSTEIN, *BEFORE THE BEST INTERESTS*, *supra* note 221, at 41 (stressing importance of avoiding separation from psychological parent) with Carl Schoenberg, *On Adoption and Identity*, 53 J. CHILD WELFARE LEAGUE AM. 549 (1974) (stressing inherent identity problems in families based on psychological rather than blood ties).

The rationales posited by both sides do, however, shed light on the need for the present proposal from both perspectives. Focusing first on the trauma of separation from a birth parent with whom the child has not had an opportunity to develop a relationship, there is some evidence that closed adoption interferes with a child's identity formation. Depriving an adoptee of the

knowledge of biological parentage creates conflicts that result in feelings of shame, embarrassment, and low self-esteem. Arthur D. Sorosky et al., *Identity Conflicts in Adoptees*, 45 AM. J. ORTHOPSYCHIATRY 18-27 (1975). See also JOHN TRISELIOTIS, IN SEARCH OF ORIGINS (1973) (giving empirical data from one study regarding connections between an adoptee's search and low self-esteem). Adoptees may suffer from a deep fear of loss and separation. Annette Baran & Reuben Pannor, *Perspectives on Open Adoption*, 3 THE FUTURE OF CHILDREN 119, 120 (1993). In childhood, adoptees may suffer from uncertainty as to their family status, fearing loss of place with their adoptive family and reconnection with their birth family. David M. Brodzinsky et al., *Psychological and Academic Adjustment in Adopted Children*, 52 J. CONSULTING & CLINICAL PSYCHIATRY 582 (1984). Adoptees have a high incidence of emotional disturbance and need for mental health services in adolescence. Marianne Berry, *Risks and Benefits of Open Adoption*, 3 THE FUTURE OF CHILDREN 125, 127 (1993) (citing to the mental health literature). A review of sixty-six published studies showed that adoptees had a significantly higher level of maladjustment. Michael Wierzbicki, *Psychological Adjustment of Adoptees: A Meta-Analysis*, 22 J. CLINICAL CHILD PSYCHOL. 447-454 (1993).

Some critics of this literature focus on its flaws in empirical design, such as inadequate sampling and clinical bias. See, e.g., ELIZABETH BARTHOLET, FAMILY BONDS 174-86 (1993). Others merely cite the need for further empirical work. See, e.g., Berry, *supra* at 125. A current review reveals that some recent research is focusing on a multidimensional model that seems to respond to the earlier criticism of methodology. David M. Brodzinsky, *Long-Term Outcomes in Adoption*, 3 THE FUTURE OF CHILDREN 153, 160-62 (1993) (formulating a stress and coping model which incorporates many variables).

Focusing next on the trauma of separation from a parent with whom a child has developed a relationship, short-term and long-term detriments to the child became clear. "So long as a child is a member of a functioning family, his paramount interest lies in the preservation of his family." GOLDSTEIN, BEFORE THE BEST INTERESTS, *supra* note 221, at 5. Effects on children of separation differ depending on age. *Id.* at 45. Short-term detriments often include disturbances in sleep, behavior, attention, and school performance. *Id.* at 43-44. Long-term effects of disruption in the continuity of care range from impairments of emotional development (infants and toddlers) to breakdowns in verbal skills (young children) to behavior disorders (school-age children). GOLDSTEIN, BEYOND THE BEST INTERESTS, *supra* note 221, at 32-34. Even where the "replacement" parent is ideal, he or she may not be able "to heal completely, without emotional scarring, the injury sustained by the loss [of the first psychological parent to a young child]." *Id.* at 40-41. Many theoretical perspectives come into play including psychoanalytic theory, trauma theory, and attachment theory. See, e.g., K. Gilmore, *Gender Identity Disorder in a Girl: Insights From Adoption*, 43 J. AM. PSYCHOANALYTIC ASS'N 39-59 (1995) (identifying clear evidence of separation trauma from a late adoption in one case of gender identity disorder); Dennis Drotar & Edward R. Stege, *Psychological Testimony in Foster Parent Adoption: A Case Report*, 17 J. CLINICAL CHILD PSYCHOL. 164, 165-66 (1988) (giving testimony indicating that separation of 13-month-old infant would pose significant psychological stress based on attachment theory); S. Wells, *Post-Traumatic Stress Disorder in Birth Mothers*, 17 ADOPTION & FOSTERING 30-32 (1993) (noting recent work on profound, long-term effects on mothers and children). To promote continuity of relationships, surroundings, and environmental influences that are essential to a child's normal development and to prevent the damage caused by disruptions, Goldstein, Freud, and Solnit, preeminent experts in the area of the "best interest of the child" standard, propose that adoptions should be final from the moment of placement. GOLDSTEIN, BEYOND THE BEST INTERESTS, *supra* note 221, at 31-32. "When infants and young children find themselves abandoned by the parent, they not only suffer separation distress and anxiety but also setbacks in the quality of their next attachments, which will be less trustful." *Id.* at 33.



criterion seeks to avoid the trauma of separation in any form, whether from a birth or other parent.

The risk of harm to a child from separation trauma must be evaluated in light of the length of time a child has been living with a parent or set of parents.<sup>224</sup> The criteria for a temporary placement decision must make it clear, however, that the risk of separation trauma at the end of the decisional process is the primary concern. It is easy to foresee that a decision-maker may be loathe to inflict separation trauma on a child before a final decision for fear that the ultimate result may not require any separation at all. The new framework must, therefore, state that separation at an early stage of the process is considered as a matter of law to be less harmful to a child than separation at a later date after further bonding between child and parent(s) has occurred. Correct decisions made early in the process should be the goal.

In the hierarchy of suggested factors, this author proposes that the effect on the adult parties be given relatively little weight except in extreme circumstances. That said, the decision-maker should likewise consider the length of time a child has been placed with prospective adoptive parents as relevant to the harm a change in placement would cause them. The decision-maker should likewise evaluate the harm to the father that continued placement with the prospective adoptive parents would cause him. For purposes of illustration, consider a situation in which the child is living at a considerable distance from the biological father's home and place of work. This situation might create an extremely difficult choice for him: maintaining a stable home and economic future should he be allowed to raise his child versus developing and maintaining a relationship with his child who is at a crucial stage in development. The latter option, of course, would only be possible if the father were to be allowed visitation. Again, the decision-maker should consider these matters, but the temporary placement decision should rest primarily on where permanent placement is likely to fall. Allowing evidence of harm to the adults is merely an escape valve for the pressure on the decision-maker in very unusual situations. It should be understood that separating a child from the prospective adoptive parents *pendente lite* will hurt them but that this potential for harm does not rise to the same level of legal cognizance as the risk of harm to the child caused by separation from them later after formation of a significant familial bond.

Similarly, consideration of whether public policy favors one placement over another should not merit the same weight as the risk assessment and probability of eventual adoptability of the child. Giving the public policy factor equal weight would pose a threat to the critical importance of individualized risk assessment. It could, on the one hand, give far too much discretion to the decision-maker who may, as a person trained to facilitate intercountry

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224. See GOLDSTEIN, BEFORE THE BEST INTERESTS, *supra* note 221, at 48.

adoption, have an attitude favoring adoption. On the other hand, it could constrain the decision-maker if temporary placements in analogous prior domestic adoption cases seem to present a policy favoring a particular placement. As in the factor allowing consideration of harm to the adults involved, our new decisional framework should clearly define adoption policy as less determinative. If, for example, domestic adoption policy were to favor two-parent families, disfavor homosexual parents, or encourage religious matching, it would not be prudent to allow these factors to displace the single legal criterion meant to guide the expedited pre-adoption proceeding: whether the child is adoptable by virtue of the required legal consents having been duly obtained.

Then why include policy as a criterion at all? Public policy is included in the decisional framework because the Hague Convention does not attempt to set up standards for adoptability and consent or other substantive legal norms. It leaves such matters to each contracting party. Thus, if a state has a policy that speaks clearly and directly to the question of whether a child should be placed with the putative biological father or the prospective adoptive parents pending resolution of consent litigation, there must be room in the Convention's decisional framework to consider it. It should not, however, be decisive. If the Convention is ratified and implemented in the United States, it will have a legal status equal to federal law and should preempt state law on this particular matter. That is, placement decisions in intercountry adoptions in which consent is an issue should be based on placement procedures invented specifically for use under the Convention. Those procedures should rest on assessment of the risk to the child in each case and consider public policy only to the extent that it speaks to the issue of relative risk of separation trauma.

The Hague Convention creates a legal space in which procedures for regulating intercountry adoption may grow in new directions avoiding pitfalls encountered in current domestic law. Deference to domestic law on the matter of temporary placement of a child pending resolution of a consent conflict would be a grave error. The Convention keenly allows states to maintain domestic standards on adoptability and consent, but it does not forego the opportunity to prevent the manifest harm that has already occurred from domestic failures to invent speedy mechanisms to adjudicate consent in adoption.

### *C. How Hague Convention Consent Mechanisms Provide a Domestic Law Model*

The problem of international flight gives a powerful reason for the U.S. Senate to ratify the Hague Convention and implement it with the procedural mechanisms outlined above. Regardless of whether the U.S. Senate ratifies the Hague Convention, the administrative adjudication process outlined above can still serve as a model for solving the problems of protracted consent litigation

in purely domestic adoption scenarios. In fact, cases such as the Baby Jessica case with its interstate dimension serve as analogs to the intercountry adoption conflict. Thus, the Hague Convention mechanisms suggested above are also suitable for domestic consent battles. Domestic legislatures must face the reality of crowded court dockets, the possibility of sequential litigation in multiple states, and the probability that a child's fate and psychological development may be put in a dangerous state of indeterminate suspension. Such situations call for adoption by all states of a uniform law on consent and its adjudication. The 1994 Uniform Adoption Act is one model, but the author respectfully submits that the Hague Convention mechanisms would be a better option.<sup>225</sup>

Again, states may adopt the suggested mechanisms with or without ratification of the Convention. It would be advisable, however, for legislatures to confer jurisdiction over paternal consent adjudications on a special tribunal, such as the Hague Convention's accredited authorities, similar in nature to the appointment of a master in federal court. This tribunal would act within the domestic court structure and budget, but without the constraints of judicial

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225. The 1994 Uniform Adoption Act recognizes the importance of uniformity in domestic adoption:

At present, the legal process of adoption is complicated not only by the different kinds of children who are adopted and the different kinds of people who seek to adopt, but also by an extraordinarily confusing system of state, federal, and international laws and regulations. Despite allegedly common goals, state adoption laws are not and never have been uniform, and there now appear to be more inconsistencies than ever from one state to another. There are no clear answers to such basic questions as who may place a child for adoption, *whose consent is required and when is consent final*, how much money can be paid to whom and for what, how much information can or should be shared between birth and adoptive families, what makes an individual suitable as an adoptive parent, and what efforts are needed to encourage the permanent placement of minority children and other children with special needs who languish in foster care. Hundreds of thousands of children in this country need permanent homes, and hundreds of thousands of adults have at least some interest in adoption but are often discouraged by the confusing laws and procedures as well as by high financial and emotional costs.

UNIF. ADOPTION ACT, Prefatory Note, 9 U.L.A. 2 (Supp. 1996) (emphasis added).

In furtherance of its goals, the Act contains uniform standards and procedures for obtaining parental consent and terminating parental rights. UNIF. ADOPTION ACT §§ 2-401 to 409, 3-501 to 506 (1994), 9 U.L.A. 27-38, 50-56 (Supp. 1996). However, the Act does not adequately address that most important decision of temporary placement of the child while consent and termination are being adjudicated. *See supra* notes 214-15 and accompanying text. Similarly, the Act acknowledges that expedition is desirable, but it does not place time limits on the consent/termination decision. UNIF. ADOPTION ACT § 3-504(c) (1994), 9 U.L.A. 53 (Supp. 1996); *see also supra* note 202. The uniformity sought by the National Conference of Commissioners on Uniform State Laws should be supplemented by a uniform approach to the problem of temporary placement like the preceding proposals for Hague Convention mechanisms.

procedures. The procedures of the special tribunal would be those outlined in section III-B above.

The Constitution's guarantee of notice and an opportunity to be heard prior to the termination of parental rights<sup>226</sup> is in apparent conflict with tribunal jurisdiction. The conflict disappears, however, when one recalls that Supreme Court decisions have limited the process due unwed fathers.<sup>227</sup> In the end, the need for a prompt and stable adoption justifies a quasi-judicial approach with procedures specially tailored to the situation.<sup>228</sup>

Joan H. Hollinger, the drafting committee reporter for the 1994 Uniform Adoption Law, has noted that the current widespread interest in achieving uniformity in adoption law depends on a reconstruction of the institution in six contentious areas, one of which is parental consent.<sup>229</sup> In Hollinger's opinion, the resistance of the law to uniformity rests upon the lack of a sufficient consensus regarding how the legal system should respond to the changing psychological and social characteristics and needs of today's birth parents, adoptive parents, and adoptees.<sup>230</sup> Reaching consensus on adoption law as a whole may depend on incremental agreement on particularly troublesome issues such as extensive litigation of paternal consent at the expense of young children. It is hoped that the suggested Hague Convention mechanisms will provide just such an incremental step towards consensus.

Creating a new quasi-judicial body for the limited purpose of deciding consent and temporary placement issues would avoid the delay inherent in traditional adjudication.<sup>231</sup> The use of trained administrative officials for this

226. See *Stanley v. Illinois*, 405 U.S. 645 (1972); HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 862-65 & n.63 (2d ed. 1988).

227. See discussion of the decisions *supra* Part II-A.

228. For a discussion of the constitutionality of such a tribunal and its streamlined procedures, see *supra* notes 205-09 and accompanying text. A biological father who has not developed a relationship with his child has no parental rights and is due no process at all as long as the state has not denied him an opportunity to "vest" his right. It is true that the decision in *Lehr v. Robertson*, 463 U.S. 248 (1983), does not address precisely what process is due a biological father who has acquired parental rights by grasping his opportunity to develop a relationship with his child. See *Santosky v. Kramer*, 455 U.S. 745 (1982) (terminating parental rights in a non-adoption case only upon clear and convincing evidence of statutory ground). It is also true, however, that the Constitution allows the decision as to the existence of parental rights of men such as Jonathan Lehr to be made with no judicial process at all; Lehr had no "day in court" on the issue of his paternal rights because he was not entitled to notice and an opportunity to be heard in the adoption under New York's statute.

229. Joan Heifetz Hollinger, *Adoption Law*, 3 *THE FUTURE OF CHILDREN* 43, 55-56 (1993).

230. *Id.* at 46-47.

231. It is interesting to note here the historic evolution of courts dealing with family matters. The creation of special juvenile courts was premised on much the same intention as my "consent tribunal," to take certain types of sensitive family matters from the traditional judicial realm. See Lee E. Teitelbaum, *Family History and Family Law*, 1985 *WIS. L. REV.* 1135, 1153. Over time, however, family courts have become part of the traditional legal structure with much of the delay

type of decision-making is preferable to the use of judges who are accustomed to the extensive trial procedures that the streamlined tribunal process intends to avoid. Despite their high profile, there are relatively few reported cases of the Baby Jessica type.<sup>232</sup> It stands to reason that the tribunal's work would be limited to a small number of contested consents. With a small "docket," a streamlined process, and the use of the interim placement standards described in subsection III-B-3 above, the special tribunal would accomplish its task with more speed and less pain to all concerned.

On the other hand, if the U.S. Senate *does* ratify the Hague Convention with the above suggestions incorporated in its implementing legislation, there would be two additional avenues of possible influence upon domestic law. First, there would be the possibility of incorporating less than the entire set of Hague mechanisms into individual state law. For example, the computer-linked, putative father registry among all accredited convention authorities could provide a model for a similar linkage horizontally between state agencies and even vertically among state agencies and accredited authorities. Further, the sharing of information between accredited convention and state authorities would be one of the limited uses allowed for information provided by putative fathers identifying themselves. This shared information would benefit everyone involved in both domestic and intercountry adoptions when paternal consent poses a potential problem.

On a more substantive and important level, ratification of the Convention could provide an incentive for a more radical restructuring of domestic law. In implementing the Convention, the Senate could choose to adopt one, uniform national standard for when an unwed father may withhold consent to an *intercountry adoption*. This would enable all accredited convention authorities to be trained in and apply the same substantive law regarding when a putative father may block an adoption and obtain custody. Such a standard would necessarily preempt the various state standards that currently exist. That is, in the intercountry adoption process, a convention authority would have to apply the national standard in adjudicating whether all consents required by domestic law had been duly obtained.

Presumably the federal standard could also be made to apply to interstate conflicts and thereby serve to discourage a biological mother's flight from her own domestic jurisdiction to another with lesser protections for putative fathers. Moreover, the enactment of a uniform consent standard and uniform consent adjudication procedures would facilitate the intercountry adoption

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and procedural complexity of other courts. Part of my aim in setting out *explicitly expeditious, non-judicial procedures* is to prevent the evolution of this new body into a judicial forum. The evolution of arbitration into an entity with many of litigation's trappings that it was intended to avoid presents a cautionary example.

232. See *supra* Part II-A.

process while protecting the interests of putative fathers. In the expedited Convention adjudication process, there would be no need to waste precious time arguing for the application of a particular consent standard. The standard would be readily extracted from the federal legislation and immediately applied in the adjudication process.

Given the relative rarity of intercountry adoption of children born to U.S. parents,<sup>233</sup> the enactment of a federal uniform consent standard directed at intercountry adoptions would have much less impact on domestic law than the enactment of a uniform consent standard applicable to purely domestic adoptions. The federal standard could, however, serve as a model for a uniform domestic law on paternal consent standards to complement the uniform procedural reforms. States would be given a well-thought-out solution on which to base their legislative decisions. Enactment of a federal intercountry adoption consent standard without any consequent changes in domestic adoption law, however, would further fragment an already complex web of legal rules. Today, it is unlikely that either judges or unwed fathers know exactly what behavior will cause inchoate paternal rights to become complete and vest. The domestic standards are too vague and vary too much across jurisdictional lines.<sup>234</sup> In the interest of more concrete laws by which citizens may order their lives and by which adjudicators may reach fair and consistent decisions, the Senate should enact a national adoption consent standard for all adoptions.<sup>235</sup> This standard would preempt substantive state law as to when and how an unwed father may withhold his consent to *any* adoption, whether domestic or intercountry.

Adopting a national consent standard would be justified on the basis of facilitating administration of an international treaty to which the United States is a party. It would also have the beneficent effect of avoiding interstate conflicts and interstate flight during contested adoptions. It would prevent any harm to future Baby Jessicas that might result from the inevitably long time it could otherwise take for a significant number of jurisdictions to adopt a uniform standard. If we can prevent even one more case of unnecessary separation trauma, then concerted federal action is worth the political effort it would take to make a national standard palatable to the states.

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233. See Pfund, *supra* note 1, at 72. Actually, it is known that the United States is a major "receiving nation," but the lack of exit statistics makes exact characterization of the nation's status as a "sending nation" difficult. *Id.*

234. Compare IND. CODE ANN. §§ 31-3-1.5-12 to -16 (Michie Supp. 1996), and NEB. REV. STAT. § 43-104.02 (1993) (setting forth clear but limited standards for right to veto adoption), with *In re Raquel Marie X.*, 559 N.E.2d 418 (N.Y. 1990) and 750 ILL. COMP. STAT. ANN. 50/8(a) (West Supp. 1996) (imposing more inclusive but less clear standards for determining right to veto adoption and gain custody).

235. See discussion *supra* Part II-C.

One may well ask whether national uniformity is really necessary to prevent future cases such as those of Baby Jessica and Baby Richard? There are several reasons why federal action may be desirable even though it would come at the expense of lost local autonomy. The first is that individual state legislatures may be pressed to act quickly in the intense glare of the public spotlight which illuminates the relatively infrequent but extremely dramatic cases such as Baby Jessica or Baby Richard. A rapid response may be politically necessary, yet it may not yield an adjustment in the law that is appropriate. The public may believe that children such as Baby Jessica should not have to leave their adoptive families,<sup>236</sup> but it does not follow that the appropriate legal solution is to keep such children in their adoptive homes rather than prevent their placement for adoption in the first place.

Public pressure in the wake of the Baby Richard decision compelled the Illinois legislature to enact various amendments to the adoption laws,<sup>237</sup> one of which required a custody hearing, based on the best interests of the child, to be held promptly after an adoption was vacated.<sup>238</sup> The Illinois Supreme Court held that this provision was not retroactive with respect to Baby Richard.<sup>239</sup> Nonetheless, the initial, hasty legislative response was ill-advised. It prolonged litigation devastating to everyone involved, especially the child. It created an incentive for delay in all contested adoption cases that would reward (albeit perhaps only temporarily) marathon litigants with whom the child initially resided. The Illinois Legislature has yet to correct its inappropriate response to public pressure.<sup>240</sup> Thus, local autonomy gave way to political grandstanding rather than reasoned lawmaking. Just as children need a suitable, stable home, they also need a well-considered, settled adoption law that provides a rational, predictable basis for their permanent placement.

236. Sandra Sanchez, *Sentiment Strong Against Jessica Ruling*, USA TODAY, Aug. 4, 1993, at 1A (citing poll in which 78% of 672 persons stated that toddler should have been able to stay with people who raised her).

237. Carmen D. Caruso, *Baby Richard Cases: A Legislative Solution*, CHIC. LAW., July 1995, at 12 (arguing that "nature provides nine months to settle such disputes and that there should be no painful litigation after birth").

238. Uniform Interstate Family Support Act, Pub. Act 88-550, § 975, 1994 Ill. Laws 368, 410-11 (amended 1995). The applicable provision is now codified in the Illinois Adoption Act, 750 ILL. COMP. STAT. ANN. 50/20 (West Supp. 1996) (mandating that a hearing be held in accordance with Part VI of the Illinois Marriage and Dissolution Act which in turn requires custody determinations to be made in the best interest of the child, 750 ILL. COMP. STAT. ANN. 5/602 (West Supp. 1996)).

239. *In re Kirchner*, 649 N.E.2d at 336-37.

240. The provision for a custody hearing following a vacated adoption order remains intact. Amendments to the Adoption Act in 1995 afforded an opportunity for correction, but the legislature chose only a clerical approach. See Act of May 19, 1995, Pub. Act 89-315, 1995 Ill. Laws 3430, 3441-42.

Politically pressured action is the first reason why federal rather than local action may be the best course. The second reason stems from local inaction. Some legislatures have been unable to respond to the thorny problem of paternal consent. The New York Court of Appeals invalidated its state's statute in 1990 and created a judicial standard for paternal consent, expressly intended as an interim measure pending legislative response.<sup>241</sup> It is now 1997, and the New York Legislature has not revised the statute. This inaction does not represent social experimentation so much as legislative paralysis. Local autonomy deserves little protection where it is not exercised.

Another area of inaction presents the third reason in favor of federal preemption. States have failed to respond quickly to the need for uniformity across the entire spectrum of adoption law, a need that has long been recognized by adoption professionals and the public.<sup>242</sup> Although uniformity is needed beyond the small class of cases such as Baby Jessica and Baby Richard, their judicial spectacle has tended to obscure the need for broader reform. A linkage between prevention of such cases and a comprehensive, national approach to adoption law is the first step toward reforming the institution of adoption itself.

Finally, the constitutional nature of the interests at stake merits a federal response. Evidencing this fact, many state court decisions interpreting state law in this area of parental rights rest on Supreme Court interpretations of constitutional requirements.<sup>243</sup> On the other hand, some recent legislative responses show a lack of sensitivity to the constitutional parameters. For example, attempts to require birth mothers to name biological fathers<sup>244</sup> run the risk of trampling privacy rights. In contrast, the Uniform Adoption Act specifically protects a woman's right to remain silent when asked to name the biological father.<sup>245</sup> The Uniform Act's approach reflects a careful and thoughtful balancing of the interests of mothers, fathers, and children.<sup>246</sup> Federal reliance on the Uniform Act's approach to paternal consent would insure a calm, well-reasoned national standard. It would also insure a standard that actually reflected federal *and state* constitutional decisions on the status

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241. *In re Raquel Marie X.*, 559 N.E.2d 418, 427 (N.Y. 1990); *see also supra* notes 64-72 and accompanying text.

242. *See* Charles Ornstein, *Lawmakers' Attempts to Reform Adoption Laws Stall: Six States Introduced Act; None Passed It*, DALLAS MORNING NEWS, July 23, 1995, at 4A; Hollinger, *supra* note 229, at 45-46.

243. *See, e.g., In re Raquel Marie X.*, 559 N.E.2d 418 (N.Y. 1990).

244. One example is a recent Illinois bill to require single mothers to name fathers on the state putative father registry except in cases of rape, incest, or danger to the mother. S.B. 1140, 89th Gen. Ass'y, 1995-96 Sess., (Ill. 1995). The Senate deleted this bill before its passage as an amendment to the Adoption Act.

245. UNIF. ADOPTION ACT § 3-404 & cmt. (1994), 9 U.L.A. 48-49 (Supp. 1996).

246. *Id.*



of unwed fathers in adoption proceedings as well as state statutes on the termination of parental rights.<sup>247</sup>

There is precedent for the federal government setting national standards in the area of family law where there is an interstate or intercountry dimension to a problem warranting a federal response.<sup>248</sup> Such action has not opened a floodgate of federal intrusion into family autonomy. While the problem of intercountry flight from paternal rights may be solved without federal preemption of state law in either intercountry or domestic adoptions, this discrete problem may be a unique opportunity to harmonize state law.

#### IV. REWORKING THE U.S. RIGHTS EQUATION IN THE CONTEXT OF INTERNATIONAL LAW

If we were to leave the matter here, we would be losing a precious chance to use international law as a catalyst to reform domestic law on an even deeper level. There is more to be found in international law on this issue than the mere solution to the problems of cross-border flight or the use of new international models of adjudication to ease the vexing domestic problem of

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247. UNIF. ADOPTION ACT §§ 2-401 & cmt., 3-504 & cmt. (1994), 9 U.L.A. 27-28, 52-55 (Supp. 1996). Section 2-401 requires the consent of a man who did not marry the mother prior to the birth if he has been judicially determined to be the father or has signed a document that establishes his parentage and he: (1) has provided support for the child within his means and has visited or communicated with the child; (2) has married (or attempted to marry) the mother prior to placement of the child; or (3) has received the child into his home and openly held the child out as his own. Section 3-504 allows termination of the rights of men who have notice of the termination proceeding and fail to file a claim for paternity within 20 days and of men who assert parental rights over children under six months of age at the time of the adoption petition but have failed to: (1) pay reasonable prenatal, natal, and postnatal expenses within their means; (2) make reasonable support payments for the child; (3) visit regularly with the child; and (4) manifest an ability and willingness to assume legal and physical custody if the child was not in the custody of the other parent. Fathers may show that there were compelling reasons for not meeting these behavioral standards, but courts may still terminate parental rights upon clear and convincing evidence that termination is in the best interest of the child and one of the following grounds for termination exists: (1) inability or unwillingness to assume prompt legal and physical custody of the child if the child is not in the custody of the other parent and to pay for the child's support; (2) inability or unwillingness to maintain contact with and support a child living with the other parent and a step-parent; (3) custody would pose a risk of substantial harm to the physical or psychological well-being of the child based on behavior of the respondent indicating unfitness to maintain a parent-child relationship; or (4) failure to terminate would be detrimental to the child. Section 3-504 builds on state laws and judicial decisions but adds a significant provision: conviction for serious and violent offenses against the other parent may demonstrate that a parent is unfit. Only a few states currently recognize this as a ground for termination. *Id.* § 3-504 cmt. at 55.

248. *See, e.g.*, Child Support Recovery Act of 1992, 18 U.S.C. § 228 (1994); Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1994); International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11610 (1994).

protracted custody litigation in the context of adoption. The issue of unwed fathers' rights is currently in flux. The problem is in the public eye which is focused by the national media with each appearance of a Baby Jessica or Baby Richard. Courts are inventing ad hoc solutions. The legislatures that are daring enough to deal with the problem are struggling to find publicly acceptable solutions. We must grab this legal moment to demonstrate that the focus is too narrow and completely wrong. By looking to international law, we find a new perspective and an evolving jurisprudence: the rights of children. If we use international law as a vehicle to see this problem in a new light, we may find new solutions that go far beyond the adoption context.

We should use this moment of outrage, uncertainty, and impending change to rework the rights equation. Scholars of international law must offer emerging international norms as a means to accomplish this task.

#### *A. The Continuing Validity of a Rights Analysis*

Before we rework the domestic rights equation in the adoption context, we must address the reasons why it remains a good idea to devise solutions that depend on a definition and a balancing of rights. Scholarship in family law, as well as other areas of the law, has found the use of a rights analysis to be unproductive. Scholars have argued that a narrow focus on rights obstructs what society is trying to accomplish through law. For example, Katharine Bartlett argues passionately and eloquently that grounding child custody disputes predominantly in notions of responsibility rather than individual rights (whether of parent or even child) will foster the more selfless values of *relationship* that an inordinate emphasis on rights obscures.<sup>249</sup> Another scholar's radical call for a child-centered perspective on family law specifically refuses to substitute children for adults as "autonomous rights-bearers in an adversarial system."<sup>250</sup> Feminist critiques of children's rights focus on the patriarchal consequences<sup>251</sup> and the excessive intervention in female privacy and autonomy.<sup>252</sup> On the other hand, rights analysis still

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249. Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293-95 & n.9 (1988) (also offering a review of other critiques of existing rights doctrines for other reasons).

250. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1756 (1993). Woodhouse argues that a child-centered perspective on parental authority would distinguish between parental obligation as a "corollary of procreation" responsibility and parental authority as a "corollary of stewardship" over the next generation. *Id.* at 1818. She purposefully avoids couching her argument in terms of children's rights "because a child-centered perspective calls for a rhetoric that speaks less about competing rights and more about adult responsibility and children's needs." *Id.* at 1841.

251. See Carol Smart, *Power and the Politics of Child Custody*, in CHILD CUSTODY AND THE POLITICS OF GENDER 1, 8-10 (Carol Smart & Selma Sevenhuijsen eds., 1989) (advancing the theory that children's interests in fathers prompt a patriarchal reconstruction).

252. Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of*

pervades recent family law scholarship.<sup>253</sup> While the vast literature on the role of rights in the law is of tremendous intellectual interest (and well beyond the scope of this article),<sup>254</sup> there are two basic reasons for the continuing validity of a simple rights analysis.

The first is that legal scholarship must stay grounded in practical realities if it is to have an impact beyond the academic realm. In the United States, our history has shaped a public consciousness that is firmly rooted in individual rights. Citizens of the United States have been taught, usually from a very tender age, that the *raison d'être* of government in this country is the existence of certain inalienable rights. We learn from our Constitution that we have rights that no entity or person may take from us. One may well argue that such legal concepts appropriate to the eighteenth century are constraining a society struggling to deal with twenty-first century problems. Nevertheless, we must recognize that we are still a society steeped in this legal brew.

Whether one is debating gun control as an issue of the right to bear arms or school codes of behavior as an issue of the right to express one's beliefs freely, however publicly offensive they may be, one sees that the debate is still framed in terms of rights and their infringement. Does it matter that these are issues that arguably fit within specific constitutional rights? It matters only if one is a constitutional scholar, a judge, or an advocate using the Constitution to bolster one's argument. Outside the academy and the realm of lawyers is a public that is not as finely attuned to such distinctions. In considering problems of public policy, the layperson's trained response is to consider the question as a matter of individual rights. Having carefully schooled our citizenry in rights and correlative duties, we in the academy can ignore this perspective, but only at our peril.

Any solution to a problem that ignores the U.S. public obsession with individual rights will not be acceptable across the broad spectrum of public opinion, and a solution for which there is not a broad consensus will, in the long run, fail. This author posits that what seems to be a reactionary return to an overly legalistic debate framed in terms of rights is actually a forward-looking, pragmatic approach for a legalistic society grounded in the protection of individual rights.

Just as we must accept the reality of a public focus on rights, we must also accept the reality of a common-law system shaped by citizens litigating from just this perspective. Judges deal with issues framed in terms of rights. The resulting holdings are expressed in terms of rights. The adoption litigation

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*Privacy*, 23 CONN. L. REV. 955, 964 (1991).

253. See, e.g., Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16-17 (1987).

254. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE (Marshall Cohen ed., 1984).

at the heart of the present inquiry centers on rights. It would be a mistake to pretend that rights are irrelevant to solving this thorny problem. The best way to persuade a public, sympathetic to the miseries of children torn crying from the arms of people they think are their parents, is to convince the public that there are rights that are more important than the paternal rights being asserted by biological fathers.

The second reason that we should continue a rights analysis is that the legal debate is currently framed in terms of the rights of unwed biological fathers. We must now deal with the holdings of cases that protect paternal rights based on biology. As will be discussed below, we must recognize the potentially dangerous effect this elevation of paternal rights has on other aspects of family law. If we simply argue that rights are the wrong approach, we risk too much. These rights now exist. We must deal with rights arguments directly in their own arena and win. The problem is how best to reach the correct policy result in the adoption context without reaching the wrong policy result in other contexts. To do this, we must parry the property-based rights of fathers in their biological children with the rights of children to be raised by biological parents who want them and who demonstrate the desire to be a nurturing parent at the appropriate time. We must develop an acceptable jurisprudence of children's rights to offset the dangerous legal reality of biological rights expressed as a privilege of paternity.

### *B. The Dangers of Unwed Fathers' Rights in Domestic Law*

The level of protection that U.S. law affords to the rights of unwed fathers creates other problems besides cross-border flight of biological mothers and prospective adoptive parents. It protects the unique biological connection between parent and child for the wrong reason, and this threatens the well-being of children in non-adoption contexts by amplifying the power of the biological parent. As a case in point, the failure of laws governing artificial insemination to deal adequately with births that result from donated semen leaves a child born from donated sperm in a precarious position.<sup>255</sup> In a high-profile New York case, a sperm donor (and homosexual friend of the lesbian mother) sought legal status as a parent when the biological mother refused to grant him visitation on his own terms.<sup>256</sup> The father had been visiting with the child on the mother's terms since the child was three.<sup>257</sup>

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255. For example, New York statutes simply do not address the legal status of the father-child relationship where the mother was not married at the time of insemination. N.Y. DOM. REL. LAW § 73 (McKinney 1988).

256. *Thomas S. v. Robin Y.*, 599 N.Y.S.2d 377 (N.Y. Fam. Ct. 1993), *rev'd*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994).

257. *Thomas S.* acceded to an oral prenatal agreement with Robin Y. that he have no contact or relationship with the child. Later, Robin Y. allowed him limited visitation. *Thomas S.*, 599

The agreement regarding limited visitation broke down and litigation ensued. By this time, the child was over ten years old. At trial, an expert testified that detrimental emotional and psychological impact on the child would likely result from the father's intrusion into her stable, two-parent, two-child family.<sup>258</sup> Nevertheless, the father won an order of filiation and, thus, the right to seek court-ordered visitation (and theoretically custody). The father's statutory and constitutional rights of paternity dictated the result.<sup>259</sup> If the law recognized a child's right to be raised and to maintain a relationship with her biological father only when he asserted full parental responsibility at the appropriately early stage of the child's life, then the harm to this child, this family, and this father would have been avoided, and this conflict would not have arisen.<sup>260</sup>

The dominance of biological rights poses harm to children in other ways. For example, in New York, a biological parent can use that connection to preempt a parental connection based on the realities of caring for a child. There is no standing in New York for a *de facto* parent (without the connections of biology, marriage, or a legal order of adoption) to seek legal custody or even visitation with respect to a child who has developed and depended on a parent-child relationship with that person.<sup>261</sup> The child suffers most from the loss of this relationship. If we look at the situation from the

N.Y.S.2d at 378-79, 618 N.Y.S.2d at 357-58.

258. The court-appointed psychiatrist recommended that there be no declaration of paternity and no order of visitation. *Thomas S.*, 599 N.Y.S.2d at 380. It must be noted that the family court which refused to grant the petition for filiation stressed this part of the psychiatrist's testimony describing the negative effect on the child. *Id.* The family court also deferred to the expert's opinion that maternal influence on the child's views did not mean she had been "brainwashed." *Id.* On the other hand, the appellate court which mandated the order of filiation stressed that part of the expert testimony that established a connection between the child's expressed wish to sever contact with her father and maternal concerns expressed to her that visitation posed an immediate threat to the stability of the household. *Thomas S.*, 618 N.Y.S.2d at 362 (stating that if visitation were to occur, family therapy may ease the negative effects on the child). This case happens to be a good example of quite different readings of the same testimony by different jurists.

259. *Thomas S.*, 618 N.Y.S.2d at 362 (concluding also that by fostering a relationship between the child and her biological father, the mother was equitably estopped from denying the father his parental rights).

260. His failure to assert parental responsibility from the moment of birth, even though by agreement, would have taken him out of the class of biological parents to whom a child could maintain a right of attachment. Regardless of the influence of this child's mother on her state of mind, the intrusion of her father into her life through litigation posed what the child perceived to be a serious threat. At that point, assertion of paternal rights was detrimental. If the right belonged to the child, the guardian ad litem's recommendation (in concert with the court-appointed psychiatrist's recommendation) that the child not be forced to maintain a relationship with her father against her will would have been controlling.

261. *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (per curiam); N.Y. DOM. REL. LAW § 70 (McKinney Supp. 1997).

perspective of the rights of the child, we see the possibility for a better outcome. If it is the child who has the rights, it is the child whose standing is at issue (through a next friend or guardian ad litem). The child's right to be raised by a biological parent should not necessarily translate into the extinguishment of other rights such as the right to be protected from the trauma of unnecessary separation from an actual but non-biological parent.<sup>262</sup>

If it is the child who has the rights, then her access to a relationship with her biological parent is not dependent on any constitutional assessment of that parent's liberty interests under the Due Process Clause of the Constitution. In 1989, the Supreme Court refused to recognize any fundamental liberty interest of an unwed father in his biological child born to a mother while she was married to another man who himself claimed a paternal interest in the child, despite the confirmed relationship between the biological father and the child.<sup>263</sup> The plurality opinion rested its decision on historical, legal protection for the marital family. The plurality then addressed the child's assertion of a due process right to maintain filial relationships with both her legal and biological fathers. The plurality rejected that right and then addressed, *arguendo*, her assertion of a liberty interest in maintaining a filial relationship with her biological father regardless of her relationship with her legal father. The latter claim failed as well. Justice Scalia reasoned that any rights asserted by the child to a filial relationship with her unwed father were merely the obverse of her biological father's. If he did not have a liberty interest in her, then she could not have a liberty interest in him. By resting on historical parental liberties, the plurality denied a child a relationship with a biological father who had assumed a parental role since her birth.<sup>264</sup> In an age of redefinition of the family,<sup>265</sup> one can see the dangers that such an analysis poses to new family configurations.<sup>266</sup>

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262. The earliest secular acknowledgment that I have found of the importance of the bond between a child and those who have actually raised her is in the letters of Elizabeth I. When she was fifteen she wrote to protest the imprisonment of her governess, Katheryn Ashley. She considered it her duty to speak for Ashley, reflecting upon Saint Gregory's admonition that "we are more bound to them that bring us up well, than to our parents, for our parents do that which is natural to them, that is, bringeth us into the world, but our bringers up are a cause to make us live well in it." Letter from Princess Elizabeth to Protector Somerset (1547), in R. WEIGALL, *AN ELIZABETHAN GENTLEWOMAN* (1911), *reprinted in 800 YEARS OF WOMEN'S LETTERS 172-73* (Olga Kenyon ed., 1992).

263. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

264. The facts of the case are unusually complicated, as the changing nature of the adults' relationships caused the situation to shift several times. Throughout the changing circumstances, Michael H. held himself out as the child's father, visited with the child, contributed to her support, and even lived with the child and her mother for a time. *Id.* at 113-14.

265. *See, e.g., In re Jacob*, 660 N.E.2d 397 (N.Y. 1995) (recognizing validity of adoption by nonmarital partner of biological parent in both heterosexual and homosexual relationships).

266. The dissent criticized the plurality's "pinched conception of 'the family'" as being out

Reworking the U.S. rights equation from the vantage of international law and the rights of children offers a measure of protection not only against constrained definitions of the family but also against recently proposed parental rights legislation at the state and federal levels and proposed amendments to state constitutions in twenty states.<sup>267</sup> Such amendments aim to use parental liberties to insulate parental actions and decisions from government interference. There are two situations in particular that are highly relevant to this paper. The first is adoption-specific. An amendment that reads “[t]he right of parents to direct the upbringing and education of their children shall not be infringed,”<sup>268</sup> could be interpreted as settling the problem of unwed paternal consent in favor of an absolute veto. Thus, the father need not be willing to raise the child himself but could prevent the adoption and shunt responsibility for the child onto another. This is a patently unacceptable situation with threats of tremendous detriment to the child. If, however, we recognize a child’s right to be raised by a parent who can and does assume full responsibility at a time in the child’s life when it is essential to development, we avoid the pitfalls of the father’s rights perspective, yet we protect the relationship of father and child.

The second danger posed by proposals to elevate parental rights, possibly including unwed paternal rights, has to do with political rhetoric. It may take years to amend a state constitution and legislation may never pass. Nevertheless, such proposals may create a legal momentum and cause popular sentiment to swing towards fathers’ rights.<sup>269</sup> As the scales of public opinion tilt upwards for fathers’ rights, popular respect for the biological mother’s freedom of decision and the importance of the child’s perspective may swing downward. To steer clear of this potential outcome, we must focus on the rights of children as the fulcrum for decision-making. That fulcrum must bear the weight of many forces but it cannot do so from a traditional best interest analysis. Such an analysis is simply too indeterminate. Any legal movement that diverts attention from this solution at best delays legal reform and at worst results in the wrong reform.

While the courts have addressed various rights of children under our Constitution, they have not recognized the right to be raised by or to have a relationship with a biological parent (much less a *de facto* parent). We must

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of tune with prior decisions. *Id.* at 145 (Brennan, J., dissenting).

267. Mike Allen, *Conservatives Lobby for Parental Rights*, N.Y. TIMES, Jan. 15, 1996, at A10.

268. *Id.*

269. Popular sentiment was with the prospective adoptive parents in the Baby Jessica and Baby Richard cases. Sanchez, *supra* note 236, at 1A (citing poll in which 78% of 672 persons surveyed stated that Baby Jessica should have been able to stay with people who raised her). It is not difficult to speculate that popular sentiment might turn to favor biological fathers with a change in political climate or media portrayal.

look elsewhere for fundamental human rights that belong specifically to children. In the realm of international law, with its firm emphasis on individual human rights, children have found protection.

*C. The Hope of Emerging International Jurisprudence on the Rights of Children*

It is certainly possible to look at the problems of unwed fathers' consents through an analysis of parental rights under international law. Having already established reasons for abandoning the perspective of paternal rights, this article will look instead to children's rights under international law. By recognizing international protections of the biological bonds between parents and children from the perspective of children's rights,<sup>270</sup> we find a basis for reforming domestic law to attain a just result without risking unnecessary damage to helpless infants or evolving family structures.

The task before us is to build a domestic jurisprudence of the rights of children to be raised by biological parents if one or both are willing, able, and fit to assume that responsibility from the moment of birth. The question is whether such a right exists under international law. To answer it we must look to an array of international instruments of varying authority. Although international instruments on children's rights date back to the Declaration of the Rights of the Child, otherwise known as the Declaration of Geneva adopted by the League of Nations in 1924,<sup>271</sup> there are more recent instruments that directly address current norms regarding the rights of children. The right of a child to be raised by his or her biological parents as far as is possible is apparent from the major international instruments. None of these instruments, however, states unequivocally that a child has the right to be raised by a biological parent *as long as that parent is willing, able, and fit to do so from birth*. This is, nevertheless, the standard that I seek to establish. I

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270. My argument differs from one recent article on children's rights in the context of intercountry adoption which argues that a child's right to choose a caring family "trumps" biological ties that may prevent adoption. Stacie I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT'L L.J. 163 (1995). Ms. Strong argues that a child's right to terminate biological parental rights, as recognized in some Western countries, should be "introduced" into other non-Western nations to give children languishing in institutions without hope of adoption in their own countries a chance to become part of a family. *Id.* at 186-89. Ms. Strong addresses a very different situation than the one I address. She looks to children's rights for an answer to the problem of parents who cannot or will not raise their children yet refuse to allow adoption. I look to children's rights for an answer to the problem of choice where both a biological parent and prospective adoptive parents wish to raise a newborn child. I aim to strengthen biological ties that are real and viable, not those that exist in name and law alone.

271. Declaration of the Rights of the Child, League of Nations O.J. (1924), *reprinted in* THE RIGHTS OF THE CHILD: INTERNATIONAL INSTRUMENTS 3 (Maria Rita Saulle & Flaminia Kojanec eds., 1995).



find support for this particular right in international law. From modern international instruments on children's rights, we may draw strands that, when woven together, constitute this very proposition.<sup>272</sup>

Three major, recent international instruments addressing the rights of children are the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, With Special Reference to Foster Placement and Adoption,<sup>273</sup> adopted by the General Assembly of the United Nations (without vote) in 1986, the United Nations: Convention on the Rights of the Child,<sup>274</sup> adopted by the General Assembly (without vote) in 1989 and entering into force in 1990, and the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption,<sup>275</sup> adopted by the Hague Conference on Private International Law in 1993 and entering into force in 1995. The U.N. Declaration is a non-binding statement of principles<sup>276</sup> adopted while the U.N. Convention was in the midst of its almost ten year drafting process.<sup>277</sup> The U.N. Convention, however, is a document that binds states that become parties and, in certain circumstances, states that sign but have not yet ratified it.<sup>278</sup> The Hague Convention is also a binding

272. "In cumulative impact, agreements between states play a crucial role in the development of customary international law." LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 361 (1989).

273. G.A. Res. 41/85, U.N. GAOR, 41st Sess. (1986), *reprinted in* 26 I.L.M. 1096 (1987) [hereinafter U.N. Declaration].

274. Convention on the Rights of the Child, *opened for signature* Jan. 26, 1990, G.A. Res. 44/25, U.N. GAOR 61st plen. mtg. at 166, U.N. Doc. A/44/736 (1989), *reprinted in* 28 I.L.M. 1448 (1989), *revised by* 29 I.L.M. 1340 (1990) (entered into force Sept. 2, 1990) [hereinafter U.N. Convention].

275. Hague Convention, *supra* note 7.

276. While the traditional view is that U.N. resolutions in general are not binding and do not themselves constitute law, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103, cmt. c (1987), one must recognize that there is considerable debate concerning this point. *See* MYRES S. McDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 272 & n. 359 (1980). For example, the policy-oriented "New Haven School" takes the position that General Assembly resolutions have the status of law as functional equivalents of legislation when an analysis of a particular resolution's history, support, and expression yields a conclusion of consolidated community expectations and commitment. *Id.* at 272-73. An example of a resolution with the force of law is the Universal Declaration of Human Rights. *See infra* note 312. The Restatement takes the more conservative position that resolutions may state customary international law and that circumstances of adoption may entitle them to substantial weight. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103, cmt. c (1987).

277. The model text for the U.N. Convention was a 1979 draft submitted by Poland to the Commission on Human Rights, the U.N. agency to which responsibility for drafting the Convention had been delegated. The Working Group established by the Commission completed the first draft of the Convention in 1988. Cynthia Price Cohen, *Introductory Note to United Nations: Convention on the Rights of the Child*, 28 I.L.M. 1448, 1550 (1989).

278. Canada is a party. Recent Actions Regarding Treaties to Which the United States is Not

instrument in the same sense as the U.N. Convention. Moreover, under accepted rules of international law, certain aspects of conventions may bind even non-signatories to the extent that some or all of their provisions reflect customary international law,<sup>279</sup> *i.e.* legal norms to which states adhere through a sense that they are legally bound to do so.<sup>280</sup> Although the United States may not be bound by a mere U.N. resolution adopting a declaration of principles, to the extent that such principles reflect a general consensus on a legal matter, they may constitute customary norms of international law by which the U.S. would then be bound. Canada is a party to the U.N. Convention on the Rights of the Child but has only signed the Hague Convention.<sup>281</sup> The United States has signed both the U.N. Convention and the Hague Convention but has not ratified either.<sup>282</sup>

Whether the United States is bound by the norms enunciated in these three documents is not the point. The point is that the United States should find reason to respect and protect the right of a child to be raised by his or her biological parent when that parent is willing, able, and fit to do so from birth. This international norm is reflected by a *combined reading of these three documents*. The existence of the international norm provides the United States with a solid foundation of over seventy years of international children's rights jurisprudence on which to base a safer, better domestic approach to protection of the bond between biological parents and their children.

All three of the above instruments reflect a consensus that the best place for a child is within his or her biological family. There are also various expressions that support my formulation that a child's right to be raised by a

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a Party, *Status on Convention on the Rights of the Child*, Jun. 23, 1993, 32 I.L.M. 1469 (entered into force Sept. 2, 1990) [hereinafter Recent Actions]. The United States has signed but not ratified. Under the Vienna Convention on the Law of Treaties, U.N. Conf. on Treaties, 2d Sess., May 23, 1969, art. 18, at 291, U.N. Doc. A/Conf.39/27 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention], a state that has signed a treaty subject to ratification is obliged to refrain from acts which would defeat the object and purpose of the treaty.

279. Only states that consent to be bound are obligated under a convention. Vienna Convention, *supra* note 278, at 291. However, an agreement, in whole or in part, may codify customary international law or become customary law over a period of time. States that have not consented to be bound by a convention are nonetheless bound by customary international law. For example, the United States is not a party to the Vienna Convention, yet its provisions bind the United States as customary norms of international law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324, cmt. e (1987). The Vienna Convention itself recognizes in Article 38 that third parties may be bound by a rule set forth in a treaty that is a customary rule of international law.

280. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (defining customary international law).

281. See DEPT. OF STATE DISPATCH, *supra* note 179 and accompanying text; Recent Actions, *supra* note 278.

282. See DEPT. OF STATE DISPATCH, *supra* note 179 and accompanying text; Recent Actions, *supra* note 278.

biological parent depends on the parent's willingness, ability, and fitness to raise the child from the moment of birth. The wording in each instrument differs, but each acknowledges that the parent-child bond is not absolute. Each contains language limiting the primacy of the parent-child bond in some way, indicating that it is not always possible or appropriate for a child to be raised by biological parents. The following discussion of the three major children's rights instruments will address how each supports the right of a child to be raised by a biological parent and then how each supports my formulation that the right depends upon willingness, ability and fitness to care for the child from the moment of birth.

The U.N. Declaration states in Article 3 that "[t]he first priority for a child is to be cared for by his or her own parents."<sup>283</sup> This language establishes both the primacy of the biological relationship and the fact that it is not absolute. Only when care by the child's own parents is unavailable or inappropriate should alternative care such as adoption be considered.<sup>284</sup> Of course, one may argue that biological parental care is inappropriate where a child has lived for a significant period of time with prospective adoptive parents and has developed attachments that would cause pain and detriment if broken. The answer to that argument lies elsewhere in the Declaration. In addition to the biological primacy reflected in Article 3, Article 13 states that "[t]he primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family."<sup>285</sup> While domestic law adherence to these principles would not necessarily avoid conflicts between biological and prospective adoptive parents, it would greatly lessen the chances of prolonged interim placements, which raise conflicts that undermine the integrity of a child's biological familial identity. Moreover, aspects of the U.N. Convention protect against interim placement with prospective adoptive parents when a biological parent asserts parental status.

The U.N. Convention has several articles creating legal protection *from the child's perspective* for the bond between child and biological parent. These articles present the strongest case for my formulation that a child has the right to be raised by a biological parent who is willing, able, and fit to do so from birth. Article 7(1) recognizes that a child has the right, if possible, to know and be cared for by his or her parents.<sup>286</sup> This recognition establishes the primacy of the biological bond as well as limitations on the child's right. The right to be cared for by one's parents *only if they are willing, able, and fit to care for them* derives from the language "as far as possible."<sup>287</sup>

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283. U.N. Declaration, *supra* note 273, at 1099.

284. *See id.* art. 4.

285. *Id.* at 1100.

286. U.N. Convention, *supra* note 274, at 1460.

287. As reflected in Convention history, the language "as far as possible" refers to many

Article 3(1) declares that the best interests of the child shall be a primary consideration in all actions concerning children; this principle extends to all of the provisions of the Convention.<sup>288</sup> The right to be cared for by a biological parent must give way where it would be detrimental to the child. Under the best interest standard in Article 3, the right cannot extend to situations where biological parents do not wish to raise children, are not able to raise them, are not fit to raise them, or do not assume their parental obligations and responsibilities from the initial point that a child needs care, the moment of birth. In addition, without this crucial time limit on parental assumption of care, a state party would, arguably, be in derogation of its commitment to ensure, to the maximum extent possible, the survival and *development* of the child.<sup>289</sup>

Finally, Article 2 mandates that state parties respect and ensure rights set forth in the Convention without discrimination and irrespective of a child's birth or other status.<sup>290</sup> From Article 2 and my interpretation of Article 7 within the context of Article 3, I conclude that legal protection of a child's right to be raised by biological parents who can and will care for them promptly and adequately must apply equally to children born within and outside of marriage. Where biological parents do not wish to raise children, are not able to raise them, are not fit to raise them, or do not assume their parental obligations and responsibilities from the moment of birth, the state must provide alternative care.<sup>291</sup>

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potential situations. The United States, together with the other nations comprising the drafting group for this article, proposed the addition of this language. One reason was that some national law (including U.S. law) did not allow adoptees in general to know their biological parents. When the proposed language was challenged, the United States suggested changing it to "in the best interest of the child." Although this was not accepted, some delegations joined in the consensus on Article 7 with the understanding that the provisions should be interpreted in the best interest of the child. *Question of a Convention on the Rights of the Child: Report of the Working Group*, U.N. Hum. Rts. Comm., 45th Sess., art. 7, at 278, U.N. Doc. E/CN.4/48 (1989). While none of the drafters expressed the meaning I am espousing, none of the drafting history excludes this interpretation either. By "willing, able and fit" I mean a parent who is available, willing and capable of providing a child with adequate care from birth.

288. U.N. Convention, *supra* note 274, art. 3(1), at 1459. The fact that this principle reaches across all the Convention's provisions rests in its identification as a "general principle" applicable to the entire Convention by the Committee on the Rights of the Child, established by Article 43 to evaluate state party reports to assess implementation of the Convention as per Article 44. *Report of the Committee on the Rights of the Child*, U.N. GAOR, 47th Sess., Annex III, at 16, U.N. Doc. A/47/41 (1992). Recourse to this extrinsic key to interpretation is recognized by the Vienna Convention, *supra* note 278, art. 32.

289. U.N. Convention, *supra* note 274, art. 6, at 1460 (emphasis added).

290. *Id.*, art. 2, at 1459 (1989).

291. Neither Article 20 on parentless children/orphans nor Article 21 on adoption sets out what that alternative should be. Somewhat contrary to other clear emphasis on family, Article 21, for example, allows that intercountry adoption is to be considered only if suitable care (not

Other articles in the U.N. Convention support the primacy of the biological family bond and give direction as to its implementation in domestic law. Article 9(1) mandates that state parties must not separate a child from his or her parents *against their will* without a determination under applicable law and procedure that such a separation is necessary for the best interests of the child (as where parents have neglected or abused a child or are living separately, thus, necessitating a choice of residence for the child).<sup>292</sup> Article 8 respects the right of the child to preserve his or her identity, including family relations, without unlawful interference.<sup>293</sup> Article 16 affords children, *inter alia*, the right to legal protection from arbitrary interference with their families.<sup>294</sup> These three provisions provide support for the proposition that domestic law should not allow a domestic authority to place (or prolong placement of) a child with prospective adoptive parents where a biological parent is in the process of assuming legal and actual responsibility for the child.<sup>295</sup> This interpretation as to placement would prevent the conflict between the interest of the child in maintaining well-developed psychological bonds with *de facto* parents and the child's right and interest to be raised by a biological parent. The best interest principle in

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limited to family care) is not available in a child's country of origin. One could argue that a child has a right to grow up in an alternative *family* environment. Preamble paragraph 6 states that a child should grow up in a family environment. *See id.* at 1457. Numerous other articles addressing aspects of the parent-child relationship also evidence the Convention's overwhelming pro-family stance and lead one to infer that the last resort status of intercountry adoption is an exception to the child's right to develop in a family environment. *See Cynthia Price Cohen, The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 19-20 (1993). This anomaly may be explained by the twin aims of the Convention to establish rights of identity as well as rights of care and protection. *Id.* at 6, 8.

It is interesting to note that the hierarchy of alternative care in Article 21 of the U.N. Convention that places intercountry adoption as a last resort even arguably after institutional care in the country of origin does not appear in the Hague Convention on Intercountry Adoption. An intercountry adoption may take place after the "competent authorities" determine, after giving due consideration to possibilities for placement in the state of origin, that an intercountry adoption is in the child's best interest. Hague Convention, *supra* note 7, art. 4(b), at 1139. I support the Hague Convention position on the primacy of family care which does not relegate intercountry adoption to a last resort.

It is also interesting to note that the United Nations World Conference on Human Rights in calling for ratification and implementation of the Convention on the Rights of the Child also pointedly stressed "that the child for the full and harmonious development of his or her personality should grow up in a *family environment* which accordingly merits broader protection." United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, June 25, 1993, 32 I.L.M. 1661, 1668-69 (emphasis added).

292. U.N. Convention, *supra* note 274, at 1460 (emphasis added).

293. *Id.*

294. *Id.* at 1462.

295. *Id.*, art. 18(1), at 1463 (providing, *inter alia*, that parents or legal guardians have the primary responsibility for the upbringing and development of the child).

Article 3(1) provides an internationally recognized structure on which to rest the further, inherent safeguard: a biological parent must assume parental responsibility *from the moment of birth*.<sup>296</sup> Article 3(2) further supports this reading by stating that the child has a right to protection of his or her well-being by the state.<sup>297</sup> I argue that it is necessary to condition the right to be cared for by biological parents on the parent's willingness, ability, and fitness to raise the child from the moment of birth in order to protect a child's well-being from the moment he or she needs care and protection.

One must acknowledge that Article 21, concerning adoption in those states that recognize the practice, makes no explicit mention of any right to be raised by a biological parent.<sup>298</sup> One may, however, infer this right from Article 21, paragraph (a). Under that provision, a competent authority must determine that the adoption is permissible in view of applicable law and the child's status concerning parents, relatives, and legal guardians and that informed consents, if required, shall have been given.

This provision in Article 21 must be read in conjunction with the cluster of rights set out in preceding articles.<sup>299</sup> As the U.N. Convention establishes protections for links between child and family and between child and community, these links create a contextual penumbra which applies to the entire Convention, including Article 21. These protected bonds comprise rights of membership in one's original family and national identity.<sup>300</sup> Penumbral rights of membership stem from all the previously discussed articles that protect a child's link to his or her family, nationality, and identity, including Articles 7-9 and 16.<sup>301</sup> The fact that Article 21 places intercountry adoption as a last resort behind a foster or adoptive family or suitable care in the

296. This safeguard, inherent in Article 3, attaches even before the protections of Article 9 which apply only to certain legal separations of parent and child.

297. See U.N. Convention, art. 3(2), *supra* note 274, at 1459.

298. U.N. Convention, *supra* note 274, at 1464.

299. See Vienna Convention, *supra* note 278, art. 31(1) (providing that good faith interpretation of a treaty rests on the ordinary meaning of its terms in their context and in the light of its object and purpose) and art. 31(2) (specifying that context includes the entire text).

300. One sees the identification of membership rights in recent political science scholarship on the Convention. See LAWRENCE J. LEBLANC, *THE CONVENTION ON THE RIGHTS OF THE CHILD 94-122* (1995). While I strongly concur in Professor LeBlanc's characterization of a group of rights in the Convention as "membership rights," I would add the right to identity as expressed in Article 8 which he does not choose to address in his work. Surely, the right to preserve one's identity, including nationality, name, and family relations is central to the Convention's recognition of rights inherent in membership in particular groups.

301. Article 7 gives the child the right to acquire a nationality and to know and be cared for as far as possible by his or her family. Article 8 protects the child's right to preserve his or her identity, including nationality, name, and family relations. Article 9 protects a child's right not to be separated from his or her parents against the child's will unless it is in the best interest of the child. Article 16 protects a child from arbitrary interference with his or her family. U.N. Convention, *supra* note 274, at 1460-63.

country of origin lends support for a reading that a child's nationality and membership in his or her original family is implicit in the article.<sup>302</sup> Although Article 21 makes the best interest of the child the paramount consideration in adoption, the explicit and implicit requirements of the rest of the article lead one to conclude that it is in the best interest of a child to be raised by a biological parent if that parent can provide suitable care.<sup>303</sup> On this last hook, one can hang the need to restrict the right of the child to membership in his or her biological family to situations in which the biological parent comes forward immediately to assume parental duties.<sup>304</sup>

The Hague Convention on Intercountry Adoption directly addresses the status of a child's relationship with biological parent(s). "[E]ach state should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin."<sup>305</sup> Unfortunately, this language appears in the preamble and does not rise to the status of explicit obligation.<sup>306</sup> Nevertheless, it gives contextual meaning to those provisions that do contain explicit obligations.<sup>307</sup> Article 4 requires, *inter alia*, that a child be adoptable, that possibilities for placement in the country of origin have been given due consideration, that intercountry adoption is in the child's best interest, and that all persons whose consent is necessary for the adoption have given it freely, in writing, and in the required legal form.<sup>308</sup> These requirements when read in the context of the preamble lead to the conclusion that the Convention gives due and binding protection to a child's place in its biological family. More importantly, Article 1 gives primacy to the fundamental rights of children. One of the objects of the Convention as set out in Article 1, paragraph (a), is "to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and *with respect for his or her fundamental rights as recognized in international law*."<sup>309</sup> The

302. *Id.* at 1464.

303. Compare Article 21 on adoption with Article 20 on parentless children/orphans. The latter provides that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, is entitled to alternative care, including adoption. Based on the language of Article 20, one may argue that adoption under Article 21 comes into play only when a biological parent is unavailable or unfit. One may build on this proposition to argue that availability and fitness must be measured in a timely fashion or the child's right to state protection for his or her survival and *development* under Article 6 would be compromised. *Id.* at 1464 (emphasis added).

304. For a discussion of situations in which the biological parent does not know of the birth, see *infra* text accompanying notes 333-34.

305. Hague Convention, *supra* note 7, preamble, at 1139.

306. While parties are bound by the language of the entire Convention, one must recognize that the preamble sets out Convention goals and the text includes specific objects and obligations.

307. Vienna Convention, *supra* note 278, art. 31(2).

308. Hague Convention, *supra* note 7, at 1139-40.

309. *Id.* at 1139 (emphasis added).

preamble specifically mentions the 1986 U.N. Declaration and the 1989 U.N. Convention.<sup>310</sup> Although these are certainly not definitive sources for a child's fundamental rights as recognized in international law, they are greatly persuasive positivist expressions. To the extent that these two U.N. instruments set out a right to be raised by one's biological parents, albeit circumscribed as discussed above, that right is incorporated by reference in the Hague Convention.<sup>311</sup>

There are other sources in international law that recognize fundamental rights of children relevant to the present discussion. The Universal Declaration of Human Rights recognizes that all children, whether born in or out of wedlock, shall enjoy the same social protection.<sup>312</sup> To the extent that consent standards favor married men over unmarried men and give children born outside of marriage a lesser chance of being raised by a biological parent, there is disparate treatment that is at odds with this right of equal social protection. The International Covenant on Economic, Social and Cultural Rights contains a similar non-discrimination provision,<sup>313</sup> which supports a similar argument. Article 24 of the International Covenant on Civil and Political Rights also specifically addresses the rights of children.<sup>314</sup> Each child has the right to such measures of protection as are required by his status as a minor without discrimination based, *inter alia*, on birth. The non-discrimination part of this article lends itself to arguments similar to those discussed above. Another argument arises, however, from a reading of Article 24 in conjunction with Article 17. The latter guarantees, *inter alia*, a right of legal protection against arbitrary interference with one's family.<sup>315</sup> The state must afford special protection to minors from arbitrary interference with their family status. What is arbitrary in the context of the adoption of infants? Domestic courts grappling with the issue of timely consent from unwed fathers most often balance the interests of the father against the child's interest in developing in a stable family from birth, regardless of the biological connection to that family. In the context of international law, however, one can easily define the child's interest more broadly from a rights perspective. This, in turn, would require that the calculation of what is arbitrary include

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310. *Id.*

311. *See id.*

312. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), art. 25(2), U.N. Doc. A/810, at 71 (1948). "[T]he Universal Declaration is widely acclaimed as a Magna Carta of humankind, to be observed by all the participants in the world arena." CHEN, *supra* note 272, at 367.

313. *International Covenant on Economic, Social and Cultural Rights*, adopted Dec. 16, 1966, art. 10(3), 993 U.N.T.S. 3, 7 (entered into force Jan. 3, 1976).

314. *International Covenant on Civil and Political Rights*, adopted Dec. 19, 1966, art. 24, 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976).

315. *Id.* at 177, 179.



consideration of a child's right to be raised by his or her own parent(s) as far as possible as well as a right to state protection of other aspects of his or her well-being such as a stable environment in which to develop fully as a human being.<sup>316</sup>

The importance of the biological connection between parent and child is not a terribly controversial proposition.<sup>317</sup> Even those who minimize its ultimate importance deal with it as a serious issue.<sup>318</sup> Alone, the best interest of the child, an equation with infinite variables and outcomes, is not controversial either. What is controversial is how to reconcile these two important concerns in the context of the adoption of children born outside of marriage. There has been much scholarly debate in the domestic law context in the search for an answer.<sup>319</sup> Compounding the problem with intercountry

316. See U.N. Convention, *supra* note 274, arts. 3(2), 7(1), at 1459-69, 1464 (1989) (providing the right to protection of well-being and right to know and be cared for by parents).

317. What is often controversial is the reason why the biological connection is deemed important or which connection is more important. See, e.g., BARTHOLET, *supra* note 223, at 164-86 (1993) (recognizing the importance of biological families but arguing that idealizing biological relationships stigmatizes adoptive relationships and undermines adoption); Mary E. Becker, *The Rights of Unwed Parents: Feminist Approaches*, 63 SOC. SERV. REV. 496 (1989) (supporting traditional rules favoring maternal control of adoption).

318. See, e.g., John Lawrence Hill, *What Does it Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991) (rejecting biology in favor of parental intent in the context of surrogacy and sperm donation).

319. See, e.g., Karen Czapansky, *Volunteers and Draftees: The Struggle For Parental Equality*, 38 UCLA L. REV. 1415, 1476-80 (1991) (applying a broad redefinition of parenthood in terms of mutual responsibility of parents to each other and to the child in adoptions and other situations); Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913, 933-34 (1994) (advancing the proposition that where birth parents are not in a committed relationship, mother-child relationship is the primary unit, and birth mother's decision regarding adoption should be supported regardless of father's choice, unless birth mother opts to include him in decision) (reviewing ELIZABETH BARTHOLET, *FAMILY BONDS* (1993)); Nancy S. Erikson, *The Feminist Dilemma Over Unwed Parents' Custody Rights: The Mother's Rights Must Take Priority*, 2 J.L. & INEQ. 447 (1984) (favoring statutes that do not require the consent of unwed fathers to adoption because they protect the best interest of the child and the reproductive freedom of women); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 72-84 (1994) (emphasizing that the "best interest" standard could not encompass Baby Jessica's multiple interests as a child, only the state's politicized interests); Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 1013 (1994) (supporting the theory that the parental rights perspective can incorporate child's interests); Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60 (1995) (deciding custody of child should rest on judicial inquiry into father's timely assumption of parental responsibility and mother's reasons for opposing custody with the best interest of the child standard being inapposite); Daniel C. Zinman, Note, *Father Knows Best: The Unwed Father's Right to Raise His Infant Surrendered for Adoption*, 60 FORDHAM L. REV. 971 (1992) (rejecting best interest evaluation of alternative custody arrangements in favor of primary right of paternal custody absent showing of unfitness).

adoption in contravention of the parenting pursuits of unwed fathers leads us paradoxically out of the forest.

In a world of differing standards as to all aspects of adoption, there exists a core of international legal principles shaping a body of law concerning children's rights. From this perspective, we find a reason and basis to protect the biological bond between the parent and child, because it is in the child's best interest where the parent is willing, able, and fit to assume his role from the moment of birth. This is not merely a circuitous international journey to the same result we have reached in the United States from the paternal rights perspective. By establishing the right of a child to be raised by a biological parent who is willing, able, and fit to assume parental responsibility from the moment of birth, the law resolves an *apparent* conflict between the constitutional rights of unwed fathers and the best interests of their children. This apparent conflict has prompted challenges to the institution of adoption.<sup>320</sup> By showing how the rights and interests of fathers and children coincide, rather than conflict, I reinforce the institution of adoption to achieve its basic purpose: providing permanent homes for children who would otherwise be homeless.<sup>321</sup> By solving a domestic adoption law problem through the norms of international children's rights, I also achieve a broader purpose: generating momentum for a fusion of international and national law that may surpass the limitations of each realm and create a stronger set of children's rights. The use of international law as a springboard for a newly energized domestic jurisprudence of children's rights avoids the limitations and pitfalls of domestic parental rights analysis and offers hope for a set of newly defined children's rights that are equal to the complexity of life, yet free from the confines of traditional family structures and national boundaries.<sup>322</sup>

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320. See Hollinger, *supra* note 229, at 55-56.

321. See *id.* at 56 (stating this as the explicit purpose of adoption).

322. For a theoretical basis for children's rights as well as a defense of their importance, see John Eekelaar, *The Importance of Thinking That Children Have Rights*, in CHILDREN, RIGHTS AND THE LAW 221 (Philip Alston et al. eds., 1992). "The strength of the rights formulation is its recognition of humans as individuals worthy of development and fulfillment . . . And to recognize people as having rights from the moment of their birth continuously into adulthood could turn out, politically, to be the most radical step of all." *Id.* at 234. Eekelaar sees rights as consistent with responsibility between persons and between generations, two of the most common criticisms of rights-based thinking. *Id.*; see Bartlett, *supra* note 249; Woodhouse, *supra* note 250.

For a critique of children's rights as politically useless to a powerless group that is fundamentally different than oppressed adult groups that may use rights to apply rhetorical pressure, see Onora O'Neill, *Children's Rights and Children's Lives*, in CHILDREN, RIGHTS AND THE LAW 24, 39-40 (Philip Alston et al. eds., 1992) (arguing theoretical difficulties of fundamental rights theories).

*D. The Possible Contours of a Child's Right Inherent in the Biological Bond Before and After Adoption*

In attempting to define through international law a child's right to be raised from birth by a willing, able, and fit biological parent, we merely begin to shape a set of rights inherent in the biological bond. In the adoption context of the present article, we can sketch broad contours around which further work can develop a more focused image.

To understand the fundamental nature of the right inherent in the biological bond, we must first explore the dimensions of that bond. Why is it of fundamental importance and due the most sensitive and solicitous legal protection? Leaving aside the mystery of the bond in the religious sense that is really up to each individual to define, I would define the secular importance of the bond in one word: "history." A child's biological parents embody his or her history. They represent the child's cultural, social, genetic, religious, political, ethnic, and racial identity. They are one key to his or her sense of place in the world. Children, like adults, have individual and group identities. Unlike adults, children must develop their understanding of their identities as they develop in other ways. They must learn their history in order to make informed choices about their adult paths through life. They may embrace it or reject it, but they must be allowed to know it. The law must not underestimate the importance of a sense of place to a child's development.

When a child is adopted he or she becomes a member of a unique, ever growing group: individuals with two identities. One identity stems from adoptive parents, and the other flows from birth parents. It is the failure of adoption, that statutory creature of the modern, western, industrial era,<sup>323</sup> to give full recognition to this fact that has caused so much trauma to many adoptees and *all* of their parents. It is admittedly difficult for a child to deal with the complexities of such a unique situation. Growing up is sufficiently difficult for children with only one set of parents. It is understandable that the law has chosen attachment to one set of parents, one family, one group, and one identity as the best course. Adoptees, however, do not spring from the head of Zeus.

The right to one's history encompasses the right to be free of the psychological and developmental trauma created by separation from it. The right to develop fully as a human being<sup>324</sup> also encompasses the right to be

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323. While adoption predates the nineteenth century, it was first introduced in the United States as a statutory departure from the English common law in Massachusetts in 1851. Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 Nw. U. L. REV. 1038, 1041-45 (1979). In contrast, certain Islamic societies today do not recognize adoption in the same sense. See, e.g., discussion of a paper submitted by a representative of Bangladesh during the drafting of the *Question of a Convention on the Rights of the Child: Report of the Working Group*, *supra* note 287.

324. U.N. Convention, *supra* note 274, art. 6(2), at 1463 (providing that states shall ensure <https://scholarcommons.sc.edu/sclr/vol48/iss3/3>

free of the trauma of other separations such as those from one's actual, as opposed to historical or biological, family. The law must evolve to prevent or lessen, as far as is possible, any conflicts between these twin strands of the right to develop. Adoption is an institution of enormous social, individual, and group benefit. Intercountry adoption, if properly handled and insulated from its potential and actual abuses through, for example, the Hague Convention's rules, presents both added cross-cultural benefits and threats. The loss of a child's name, family relations, and other attributes of individual identity protected under the U.N. Convention<sup>325</sup> assumes greater proportions when it includes the loss of one's nationality, culture and language as well. The benefits to the receiving culture and family are increased and the loss to the child is lessened if the child's history is protected and preserved in some manner after adoption.<sup>326</sup>

The fundamental importance of one's history has been recognized in international instruments. In fact, a preeminent expert on the U.N. Convention on the Rights of the Child has noted one radical departure by that Convention from previous expressions of children's rights: the inclusion of what she terms "individual personality rights" in addition to previously recognized rights to care and protection.<sup>327</sup> Cynthia Price Cohen characterizes Article 8's right to identity as an expression of a newly formulated individual personality right.<sup>328</sup> Though some human rights instruments contain clauses aimed

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to the maximum extent possible the survival and development of the child).

325. *Id.* at art. 8.

326. In her passionate arguments against the myth of the superiority of biological families and the inferiority of adoptive families, Elizabeth Bartholet, *supra* note 223, at 164-86, acknowledges the importance of biological families but deplores the stigmatization of adoptive families. She holds adoptive families out as unique and valuable on many levels. "Adoption creates a family that is *connected* to another family, the birth family, and often to different cultures and to different racial, ethnic, and national groups as well. Adoptive families might teach us something about the value for families of connection within the larger community." *Id.* at 186. Much of her description of the stigmatization of adoption centers, however, on the "search movement," which she characterizes as ignoring the benefits of adoption in its zeal to pierce the adoptive veil. Together with the psychological literature which Bartholet claims is based on negative assumptions about adoption, the movement condemns the "flawed institution" over which Bartholet rejoices. Earlier in the book Bartholet had taken a cautious stand toward the sealed record system in adoption, arguing for a system of open records in which the parties may request closure upon showing good cause (the opposite of the current system prevailing in most states). *Id.* at 60. Her caution stemmed from her desire to save adoption as an institution from the dangerous extreme politics of the search movement. *Id.* Thus, even adoption's most prominent, scholarly champion seeks an accommodation between the values inherent in ties built upon biology and those built upon adoption. Like Bartholet, I seek a world in which diversity of families is recognized as innately valuable and in which the special nature of each kind of family is recognized.

327. Cohen, *supra* note 291, at 6-8.

328. *Id.*

specifically at preserving minority group language, culture, and religion,<sup>329</sup> other clauses (such as Article 8 of the U.N. Convention) exist, which are of a more general applicability.<sup>330</sup> The Hague Convention on Intercountry Adoption specifically requires that state authorities preserve information held by them concerning the child's origin, particularly the identity of the biological parents.<sup>331</sup> The Hague Convention further requires only that a state provide access to this information insofar as is permitted by that state's laws.<sup>332</sup>

In situations where the biological parent such as an unwed father does not know of the birth and cannot come forward to assume his responsibilities at birth, protections exist for the child's right to maintain a connection with his or her father even though an adoption may proceed. Article 7 of the U.N. Convention safeguards the child's right to know his or her parents as far as possible.<sup>333</sup> The Convention does not require that information about birth parents be made public, but it does not prohibit disclosure.<sup>334</sup> National legislation allowing an adoptee access to information about the identity of her biological parents would carry out the spirit of Article 7. If the state wished to protect the privacy of any parent desiring nondisclosure, it could do so while allowing unwed fathers who learn of their paternity too late to assume parental duties in the best interest of the child to register their wish to allow their children to know them when they reach adulthood. This balance would protect the child's interests in the stability of his or her adoptive family which may be threatened by the intrusion of the biological father at an earlier time. Of course, the law could allow the adoptive family to choose earlier disclosure as they are in the best position to know how such knowledge of the child's biological father would affect the individual child's development.

Most adoption law in the United States currently favors non-disclosure, absent a compelling reason or mutual consent.<sup>335</sup> Through recognition of the

329. See, e.g., International Covenant on Civil and Political Rights, *supra* note 314, art. 27, at 179.

330. It is interesting to note that the Canadian delegation to the Working Party for the U.N. Convention on the Rights of the Child accepted the language of what became Article 21 on adoption (previously Article 11) during the second reading in 1988-1989 with the explicit proviso that it be interpreted to incorporate language in Article 20 (previously Article 10) requiring that due regard be given to the child's ethnic, religious, cultural, and linguistic background. *Question of a Convention on the Rights of the Child: Report of the Working Group*, *supra* note 287, art. 8, at 278.

331. Hague Convention, *supra* note 7, art. 30(1), at 1143.

332. *Id.* art. 30(2).

333. U.N. Convention, *supra* note 274, at 1460.

334. The U.S. delegation to the drafting sessions withdrew its proposal to permit access to adoption records *only* under court order in light of the absence of a disclosure requirement in the draft convention. *Question of a Convention on the Rights of the Child: Report of the Working Group*, *supra* note 287.

335. See, e.g., N.Y. DOM. REL. LAW § 114 (McKinney Supp. 1997) (opening of sealed

centrality of the child's right to his or her history under international law, the United States should move toward adoption that mandates access to information regarding an individual's history prior to adoption.<sup>336</sup> If a child has the right to know her birth parents at an appropriate time and to learn the history, culture, and group identity that flows through them, we must start with access to information. We should move toward a system that conditions adoption on the birth parents' willingness to waive their privacy rights and allow their biological children to know their identities. Of course, much more thought must be given to the ramifications of such an approach and the appropriate protections that may be needed.<sup>337</sup> Nevertheless, if we look at adoption from the perspective of children's rights inherent in the biological bond both before and after adoption, we see that access to identity is the best possible course.

Summarizing the possible contours of the rights inhering in the biological bond, one sees at the very least that a child should have the right to the following before adoption:

(1) to be raised by a biological parent but only if that parent is ready, willing, and able to assume parenthood from the moment of birth;

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records and intermediary access to biological parent only upon showing of serious medical or psychiatric need); N.Y. PUB. HEALTH LAW § 4138-c (McKinney 1985 & Supp. 1996) (establishing registry for disclosure by mutual consent of biological parents and adoptees). The 1994 Uniform Adoption Act is consistent with the law of every state concerning (1) confidentiality of adoption proceedings, (2) confidentiality of all records pertaining to the proceedings after the final decree, (3) sealing of court records, (4) sealing original birth certificates and issuing new ones, and (5) allowing a limited exception to the general rule of confidentiality through a judicial finding of good cause. UNIF. ADOPTION ACT, § 6 & cmt. (1994), 9 U.L.A. 79-84 (Supp. 1996).

336. I am arguing for far more than mere access to health-related information which is, of course, a minimum objective. Although states are moving toward reform of the sealed record system for the purposes of disclosure of health-related information in limited circumstances, even this limited reform is controversial. D. Marianne Brower Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information in Adoption*, 70 N.C. L. REV. 681 (1992) (providing a comprehensive overview and program for reform). I am *not*, however, arguing for the transition to open adoption as the norm. "Open adoption" refers to arrangements in which the birth parents are known to the adoptive family or they maintain an ongoing role in the child's life. See HARALAMBIE, *supra* note 26. While open adoption should be a choice, it is a system fraught with potential dangers for everyone involved, most notably the child. See, e.g., Berry, *supra* note 223, at 128-29 (postulating risks of open adoption).

337. I am aware of the possible disincentive this may prove to be for women contemplating placing their children for adoption. For this reason alone, further work is needed to explore this direction in the law. Feminist critics of open adoption stress that society must remove the stigma attached to unwed pregnancy before it removes anonymity of the mother from the process. Frances Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, in CHILDREN, RIGHTS AND THE LAW 192-220, 201 (Philip Alston et al. eds., 1992). Children may not be better off if anonymous adoption is cut off as an option for young, relatively powerless women. *Id.*

(2) to state assistance in avoiding separation trauma from biological parents;

(3) to state assistance in maintaining a connection with biological parents; and

(4) to maintain his or her own history through his or her biological parents.

A child should have the right to the following after adoption:

(1) to maintain a connection to his or her own history through the identity of his or her biological parents; and

(2) to know the identity of his or her biological parents at an appropriate time.

## V. CONCLUSION

The use of intercountry adoption to avoid the delay and uncertainty inherent in the state of the law on paternal rights of unwed fathers presents a specific subset of the problem in this unsettled area. If the United States ratifies the Hague Convention on Intercountry Adoption, we will be taking one step toward eliminating the problem by foreclosing the incentives for intercountry flight created by differing subnational approaches to the issue of an unwed father's consent to the adoption of his biological child. The receiving state would have to verify that the consents required by the law of the originating state accompany the intercountry adoption. If the United States ratifies the Hague Convention, we have a unique opportunity to forge new mechanisms to adjudicate consent in a speedy manner to avoid unnecessary trauma to the child. The arguments about unnecessary bureaucracy<sup>338</sup> recede in persuasive force when weighed against the benefits offered by such mechanisms. These mechanisms offer benefits not only to intercountry adoption but also to domestic adoption. Domestic law may draw on the Hague model, as suggested in this article, to travel a considerable distance toward solving the difficult, emotional and politically fraught problem of how and when an unwed father must consent to an adoption. In this way, international law presents a platform for domestic law reform.

This is not the only role for international law in this area. Regardless of whether the United States ratifies the Hague Convention, there still remains more distance to travel toward resolution of the legal and social problem. Uncertainty in U.S. domestic law as to just when an unwed father has the right to veto an adoption by withholding his consent provides incentive to consider how to settle the law and perhaps even harmonize it, at least in this hemi-

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338. See, e.g., BARTHOLET, *supra* note 223, at 160-62. This 1993 work predates the final Hague Convention and does not assume that the Convention will itself create unnecessary bureaucracy.

sphere. By looking to the rights of children under international law, rather than the competing rights of parents under domestic law, we refocus adoption on its primary beneficiaries, avoid the dangers to children and society of elevating parental rights, and infuse the domestic jurisprudence of children's rights with global insights. Under international law, children have rights inhering in the biological bond with their parents and the national, cultural, and historical identity they represent. They also have rights to develop fully as human beings. If we combine those rights in the domestic context of adoption, we find that the law should prevent or lessen the trauma of separation from one's biological parents at various stages, both before and after adoption. Arbitrary destruction of an individual's history violates a fundamental human right. The best interest of the child will *always* be to preserve that history as an inalienable, irreplaceable resource for human development. Access to one's history should not prevent adoption, nor should adoption prevent access to one's history. The law must protect both.



