THE BASIS FOR LEGAL PARENTAGE AND THE CLASH BETWEEN CUSTODY AND CHILD SUPPORT

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> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot(ing) a way of life" through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship.[1]

> If the genes don't fit, you must acquit; No DNA, No Pay.[2]

INTRODUCTION

During the year-long process of drafting a new paternity law for Oregon,[3] one of the most hotly contested issues was on what basis trial judges could disregard evidence that a legal father might not be the biological father. Some in the group that drafted the proposal—lawyers as well as fathers' rights advocates—fervently argued against allowing a trial judge to consider the child's best interests in making this decision.[4] Some of these advocates spoke for angry men who call

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1. Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 844 (1977) (internal citations omitted).

2. These slogans are posted on the U.S. Citizens Against Paternity Fraud website, http://www.paternityfraud.com/ (last visited May 31, 2009).

3. For a more complete discussion of this legislation and the process that produced it, see Leslie Joan Harris, *A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children's Interests, and Betrayal,* 44 WILLAMETTE L. REV. 297, 311-32 (2007) [hereinafter Harris, *A New Paternity Law*]; *see also* OREGON LAW COMMISSION UNIFORM PARENTAGE ACT WORK GROUP, ESTABLISHING, DISESTABLISHING AND CHALLENGING LEGAL PATERNITY 2 (2007), *available at* http://www.willamette.edu/wucl/pdf/olc/hb2382report.pdf. The work group, which consisted mostly of attorneys and judges, but also representatives from the state child welfare agency, state child support enforcement agency, and adoption agencies, was convened by the Oregon Law Commission. OREGON LAW COMMISSION UNIFORM PARENTAGE ACT WORK GROUP, *supra*, at 2. The commission is a legislatively-created entity that undertakes major law reform efforts for the state. College of Law: Oregon Law Commission, http://www.willamette.edu/wucl/oregonlawcommission (last visited May 31, 2009). I was a member of and reporter for the parentage work group.

4. *See* Harris, *A New Paternity Law*, *supra* note 3, at 318 (citing unpublished meeting

themselves victims of "paternity fraud" and argue that a man who can establish his biological nonpaternity has been betrayed by the mother and that her unfaithfulness inherently constitutes fraud.[5] These members of the work group understood paternity determination through the lens of child support determinations, which they said should be resolved solely only on the basis of what is fair as between the mother and the man alleged to be the father.

In a vain attempt to convince the work group to include the child's best interests as one factor for the judge to consider, another attorney compiled a chart showing the Oregon statutes that allow the best interests of the child to be considered in resolving other matters. She found thirty-three, including all the statutes governing custody and visitation (parenting time in Oregon parlance), as might be expected.[6] But for the fathers' rights advocates, the relationship of biological paternity to child support was overwhelmingly important.

This tale illustrates that in the United States today, there are two legal bases for parentage, biology and function. But it shows more than that: biological parenthood is usually controlling when the issue is liability for child support. Functioning as a parent is considered, if at all, only when the primary issue is custody or access to a child. These two strands of parentage law derive from what Jacobus tenBroek called the dual system of family law.[7] In the 1960s he

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minutes).

5. *See id.* at 319. Some of this group supported allowing the judge to deny a challenge to paternity based upon a showing that the party making the challenge should be estopped from denying paternity because he knew the child was not his and still assumed the paternal role (or because she had represented that the child was the husband's) and the other party had relied on this representation. *Id.* at 318-19. However, these members of the group opposed allowing the judge to consider the child's best interests in making the decision, believing that the matter should simply be an issue of equity between the adults. *See id.* at 319.

6. Ultimately the work group compromised, providing that the judge should consider what is "just and equitable to the parties and to the child" in making decisions. OREGON LAW COMMISSION UNIFORM PARENTAGE ACT WORK GROUP, *supra* note 3, at 13. The fathers' rights advocate carried his battle to the legislature, which rejected this standard. *Id.* at 13-14. As enacted, the law governing motions to set aside judgments and voluntary acknowledgments requires that, before a court denies such a motion, it must find that to do so is necessary to avoid "substantial inequity." H.B. 2382, 74th Legis. Assem., Reg. Sess. § 1 (Or. 2007); *id.* § 9(7). On the other hand, a judge may refuse to admit evidence to rebut the marital presumption or deny a request for genetic tests if it is "just and equitable, giving consideration to the interests of the parties and the child." *Id.* § 1; *id.* § 9(6).

7. tenBroek developed the distinction between public and private family law in a series of articles published in the 1960s. *See generally* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (Part I)*, 16 STAN. L. REV. 257, 284 (1964) [hereinafter tenBroek, *Part I*]; Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (Part II)*, 16 STAN. L. REV. 900 (1964) [hereinafter tenBroek *Part II*]; Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status (Part III)*, 17 STAN. L. REV. 614 (1965) [hereinafter tenBroek, *Part III*].

described a public system of family law that applies principally to poor people, especially recipients of public benefits, and focuses on conservation of public funds, and a private family law system that concentrates on distribution of family funds and the rights and responsibilities of family members to each other, which usually applied to middle and upper class people.[8]

While the divided law that tenBroek describes is centuries old, until fairly recently, the two strands ran in parallel and did not have much impact on each other. However, in the last several decades they have evolved and, as a result, are today on a collision course when the identity of a child's legal parents must be determined. Child support law has become predominantly welfare-driven; in tenBroek's terminology, it has taken on characteristics of "public law," regardless of whether it applies to the poor or to the upper classes.[9] The law that governs private disputes over custody, visitation and the like continues to have the characteristics of "private law."[10] The difference in these approaches is especially apparent in the law of parentage. If child support is the ultimate question, parentage will likely be determined according to biology, the principle favored by the "public law approach."[11] If custody or access is the main issue,

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When these articles were published, some questioned the existence of dual systems or at least attempted to justify some of the distinctions between them. *See generally* Thomas Lewis & Robert J. Levy, *Family Law and Welfare Policies: The Case for "Dual Systems,"* 54 CALIF. L. REV. 748 (1966). However, both tenBroek's terminology and his analysis became widely accepted and continue to be used today. *See, e.g.*, Tonya L. Brito, *The Welfarization of Family Law*, 48 KAN. L. REV. 229, 237-50 (2000); Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1211-15 (1999); Deborah Harris, *Child Support for Welfare Families: Family Policy Trapped in its Own Rhetoric*, 16 N.Y.U. REV. L. & SOC. CHANGE 619, 621-30 (1988-89); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 303, 357-71 (2002); Daniel L. Hatcher, *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*, 42 WAKE FOREST L. REV. 1029, 1043-44 (2007); Amy E. Hirsch, *Income Deeming in the AFDC Program: Using Dual Track Family Law to Make Poor Women Poorer*, 16 N.Y.U. REV. L. & SOC. CHANGE 713, 715-16 (1987-1988).

8. tenBroek, *Part I*, *supra* note 7, at 257-58.

9. *See generally* Leslie J. Harris, The Dual System of Family Law at the Turn of the New Century (1999) (unpublished paper, delivered at International Society of Family Law North American Regional Conference on file with author) (discussing the expansion of poor law principles into the law of child support that applies to middle class families); *see also* LESLIE JOAN HARRIS ET AL., FAMILY LAW 576-77 (3d ed. 2005) (discussing differences between private family law and welfare law regarding familial support obligations); Leslie J. Harris et al., *Making and Breaking Connections Between Parents' Duty to Support and Right to Control Their Children*, 69 OR. L. REV. 689, 716 (1990) [hereinafter Harris et al., *Making and Breaking Connections*]. Tonya Brito argues that remnants of the separate tracks remain, even in child support law, pointing out that welfare recipients must participate in the state-federal child support system while others have the choice. Brito, *supra* note 7, at 254-56, 265.

10. *See* Harris et al., *Making and Breaking Connections*, *supra* note 9, at 693.

11. *See id.* at 699.

private law principles, which tend to respect functional parenthood, are more likely to be invoked.[12] And yet, once legal parentage is determined, it applies to determine the rights and duties of the involved adults vis-à-vis the child, regardless of context.[13]

Until fairly recently, the parentage principles inherent in "private family law," particularly the presumption that a husband is the father of his wife's children, applied to most people. Since the 1970s, however, the "public law" approach, which privileged biology and applied to children of unmarried parents, has become much more important. First, over the last thirty years, the proportion of children born to unmarried mothers has trebled;[14] the marital presumption simply does not apply to them. Second, child support enforcement practices, including state-initiated determinations of paternity, have become much more aggressive during the same time period.[15] Finally, genetic testing for paternity has become cheap and readily available.[16]

This Article argues that as biology-based parentage becomes more pervasive, it threatens to displace rules based on functional parent-child relationships, which would harm many children and their families. To avoid this result, the Article argues that we need a substantive law of parentage that recognizes the importance of biology while preserving a realm in which functional relationships are protected. To make this law politically viable, we also should reject some child support rules and practices that treat men unfairly and, in so doing, suggest that biology is the only thing that matters for determining legal parentage.

The first two parts of this Article describe tenBroek's two systems of family law and show how they have evolved to create today's system for determining legal parentage. Part III examines evidence that biology-based principles of parentage threaten to crowd out functional principles, and Part IV proposes legal and policy changes that may help slow, if not reverse, this trend.

I. PARENTAGE UNDER THE TRADITIONAL TWO TRACKS OF FAMILY LAW

Traditional Anglo-American family law channeled childbearing into marriage by stigmatizing unmarried parents, especially mothers, and by stigmatizing and denying legal rights to the children of nonmarital unions.[17] The

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12. In 1996 I wrote that the law of parenthood, particularly paternity, was determined largely by biology for purposes of both custody and support and argued that the law should be based on functional relationships instead. *See* Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 462-63 [hereinafter Harris, *Reconsidering the Criteria*]. While I still think that in an ideal world, functional parenthood would be the most important criterion for legal parenthood, it does not seem likely that this view will be widely adopted any time soon.

13. *See, e.g.*, UNIF. PARENTAGE ACT § 203 (2002).

14. *See infra* Part II.A.1.

15. *See infra* Part II.A.3.

16. *See infra* Part II.A.2.

17. For a discussion of the treatment of nonmarital children at common law, see 1 WILLIAM

policy was quite effective. As late as the 1970s, about 90% of all children in the United States were born to married women.[18] Principles of private law, applicable to children born to married women, recognized the legal paternity of husbands. The picture was very different for nonmarital children. Well into the second half of the twentieth century, nonmarital children's legal relationships to their fathers were nonexistent or very limited in many states.

A. Children Born to Married Women

The main private law principle that determined paternity protected the functional family. The mother's husband was presumed to be the father of her children, a presumption that could be rebutted only by showing that the husband had been out of the kingdom of England for more than nine months.[19] Lord Mansfield's Rule, first articulated in 1777, prevented either spouse from giving testimony that cast doubt on the husband's biological paternity.[20] While some scholars have argued that the primary purpose and effect of these rules were to establish the legal parent-child relationship based on biology in an era when biological truth was often very uncertain,[21] the rules did much more. They kept highly reliable evidence that the husband was not the father of his wife's child out of court, and in the process protected the integrity of the marriage, shielded the child from stigma, and insured that responsible adults would be identified for most children.

In the eighteenth century, Blackstone wrote that parents had a moral duty to support their children, based on their having begotten the children and, by implication, voluntarily undertaken to care for them. However, children had no legally enforceable right to their fathers' care, protection, or support.[22] Fathers had rights in their children as against third parties, based on the fiction that the children were servants.[23] Nineteenth century American courts and legislatures turned parents' moral duty into a legal one, establishing that parents have a legal duty to support their children, enforceable indirectly through the necessaries

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BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *457 (Garland Publishing, Inc. 1978) (1783). Michael Grossberg discusses the law applicable in nineteenth century America. MICHAEL GROSSBERG, GOVERNING THE HEARTH ch. 6 (1985).

18. In 1970, about 10% of all births were to unmarried women. STEPHANIE J. VENTURA ET AL., CTRS. FOR DISEASE & PREVENTION, NONMARITAL CHILDBEARING IN THE UNITED STATES, 1940-99, NATIONAL VITAL STATISTICS REPORTS 1, 25, tbl. 4 (Oct. 18, 2000), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf.

19. 1 BLACKSTONE, *supra* note 17, at *457.

20. Goodright v. Moss, 98 Eng. Rep. 1257 (1777).

21. *See, e.g.*, June Carbone & Naomi Cahn, *Which Ties Bind?: Redefining the Parent-Child Relationship in an Age of Genetic Certainty,* 11 WM. & MARY BILL RTS. J. 1011, 1024 (2003). *But see* June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1305 (2005).

22. 1 BLACKSTONE, *supra* note 17, at *457.

23. tenBroek, *Part I*, *supra* note 7, at 287-88.

doctrine.[24] Some nineteenth century courts developed a new rationale for requiring parents to support their children, explaining it as a corollary to their right to custody.[25] Nineteenth century statutory code drafters also grounded the support duty in the parent's right to custody.[26] Custody includes not only physical custody—living with and caring for a child day to day—but also legal custody—the authority to determine how children will live and behave. Thus, these legal developments effectively linked parents' support duty to their right to exercise control over their children,[27] a relationship between parental rights and duties that continues to be popularly accepted today.[28]

B. Children Born to Unmarried Women

The position of nonmarital children at common law contrasted starkly to that of children born to married women. Originally, these children were *nullius filius*, the children of no one,[29] although by the early nineteenth century, these children were recognized as legally related to their mothers.[30] Unmarried fathers had no

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24. *See* Harris et al., *Making and Breaking Connections*, *supra* note 9, at 693-96 (tracing American developments).

25. *Id.* at 717-20 (noting development during nineteenth century of the law of parental obligations to support older adolescent children, linking duty to right to control the children).

26. tenBroek, *Part I*, *supra* note 7, at 314. For example, under the New York Field Code the parent who was obligated to support a child was the parent entitled to custody. N.Y. CODE COMM'RS, DRAFT OF A CIVIL CODE FOR THE STATE OF NEW YORK § 89 (1862) (final draft 1865). Fathers of children born in wedlock were entitled to custody. *Id.* § 90. Mothers were entitled to custody only if the fathers were dead, unable or unwilling to assume custody or had abandoned the family. *Id.* Mothers of nonmarital children were entitled to custody. *Id.* § 91. If the father was entitled to custody, he was primarily liable for the child's support, and the mother was secondarily liable if he could not support the child adequately. *Id.* § 89.

27. One nineteenth century family law author even conceived parental authority over children as part of a contract between parents and children:

> The parent shows himself ready, by the care and affection manifested to his child, to watch over him, and to supply all his wants, until he shall be able to provide them for himself. The child, on the other hand, receives these acts of kindness; a tacit compact between them is thus formed; the child engages, by acts equivalent to a positive undertaking to submit to the care and judgment of his parent so long as the parent, and the manifest order of nature, shall coincide in requiring assistance and advice on the one side, and acceptance of them, and obedience and gratitude on the other.

DAVID HOFFMAN, LEGAL OUTLINES (1836), *quoted in* GROSSBERG, *supra* note 17, at 235. Hoffman also said that parents must have authority to enable them to discharge their duties to care for their children.

28. *See generally* Harris et al., *Making and Breaking Connections*, *supra* note 9.

29. 1 BLACKSTONE, *supra* note 17, at *454–59.

30. GROSSBERG, *supra* note 17, at 207–15. This is not to say that poor parents had the same protections regarding custody vis-à-vis the state that middle and upper class parents enjoyed. tenBroek, *Part I*, *supra* note 7, at 279-80; *see also* GROSSBERG, *supra* note 17, at 226. Nineteenth

common law duty to support their children under English or American law.[31] However, at least since the time of the Elizabethan Poor Laws, the law has required unmarried fathers to support their children if they are receiving public assistance,[32] even though enforcement of this duty has varied greatly over time. Liability under the Poor Laws was founded on the father's having voluntarily caused the child to come into existence,[33] the same rationale that Blackstone gave for requiring parents to provide for their children.[34] Nineteenth century American legislatures enacted poor laws but did not impose a child support duty on unmarried fathers outside these laws.[35]

Under the poor laws, paternity was established through a quasi-criminal bastardy action, which did not create a full-blown parent-child relationship between the man and the child. Nonmarital children had no inheritance rights even if their paternity was established. In some states this rule extended well into the twentieth century. For example, the Supreme Court's 1977 decision in *Trimble v. Gordon*[36] held unconstitutional a statute that denied the right to inherit to a nonmarital child, even though paternity had been established during the father's lifetime.[37] Under the statute, the only way the child could have been "legitimated" (i.e., become entitled to inherit) was for her parents to marry and for father to acknowledge her.[38] Further, unmarried fathers had no custodial rights even if the mothers were unavailable.[39] As late as the 1960s, Illinois did not recognize the parental status of Peter Stanley, an unmarried father who had

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century courts rejected challenges to the poor laws, often holding that parents' poverty made them per se unfit. *Id.* at 263-66.

31. Simmons v. Bull, 21 Ala. 501, 501 (1852); Nixon v. Perry, 3 S.E. 253, 253 (Ga. 1887); Shelton v. Springett, (1851) 138 Eng. Rep. 549, 550 (C.C.P.); Mortimore v. Wright, (1840) 151 Eng. Rep. 502, 504 (Exch. Ct.); Furillio v. Crowther, (1826) 16 Eccl. 302 (C.C.P.); Cameron v. Baker, (1824) 171 Eng. Rep. 1190 (Assizes); Hard's Case, (1795) 91 Eng. Rep. 22 (K.B.); *see also* 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *446-54 (Christian ed. 1807).

32. tenBroek *Part I*, *supra* note 7, at 284; s*ee also* R.H. Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431, 432-33 (1977). Under the Poor Laws, local authorities could remove children from parents unable to support them and apprentice them to more financially capable members of the community. A master was obliged to support and teach an apprentice the master's craft. In return, the master received the benefit of the apprentice's labor. In addition, relatives of poor people unable to work to support themselves, including parents, grandparents and children, were obligated to contribute to the support of the poor person. tenBroek *Part I*, *supra* note 7, at 257-58.

33. *See* tenBroek *Part I*, *supra* note 7, at 283-84 (describing the Elizabethan Poor Laws); *see also* tenbroek *Part II*, *supra* note 7, at 973 (describing relative responsibility laws).

34. 1 BLACKSTONE, *supra* note 17, at *457.

35. GROSSBERG, *supra* note 17, ch. 6.

36. 430 U.S. 762 (1977).

37. *Id.* at 772, 776.

38. *Id.* at 764-65; *see also* HARRY KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 105-06 (1971).

39. WALTER C. TIFFANY, PERSONS AND DOMESTIC RELATIONS § 114 (1921).

lived with his children and their mother for many years, and denied that he had a parental claim to custody when the mother died.[40]

II. THE DEVELOPMENT OF MODERN PARENTAGE LAW

A year after the Supreme Court held in *Stanley v. Illinois*[41] that the common law rule denying parental rights to all unmarried fathers was unconstitutional,[42] the influential Uniform Parentage Act of 1973 (1973 UPA) proposed that once the parent-child relationship is established between an unmarried man and his child, the rights and duties attendant to that relationship should be the same as for all other parents and children.[43] This equality principle does not dictate a basis for assigning legal parentage status. The law could have developed so that a child's biological parents were the legal parents for all purposes. Or, at the other extreme, the governing principle might have been that the adults who voluntarily undertook to provide for a child became legal parents. But the law took neither route. Instead, it maintained two different parentage regimes; one for children born to married women, and the other for nonmarital children.[44] However, because of the equality principle, once legal paternity is established, the man has the same rights and duties, including custody rights and support duties, regardless of whether he and the mother were married and regardless of the kind of a social relationship, if any, that he actually has with the child.[45]

At roughly the same time the Supreme Court was dismantling the strict legal distinctions between "legitimate" and "illegitimate" children and their parents, other major social and legal revolutions began. Today's law of parentage was born from the convergence of these changes.

A. The Drivers of Change

As a result of three major developments over the last thirty to thirty-five years—one demographic, one scientific, and one political—the "public law" of child support has come to apply to all families when child support is at issue. These developments are the increase in the number of children born outside marriage, improvements in genetic testing, and creation of the federal-state child support enforcement program.

1. Demography: Increased Nonmarital Childbearing.—In 1970, about 10% of all children were born to unmarried women; by 2000, about one-third were.[46] About 40% of births to Latinas occur outside marriage, and among African

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40. *In re* Stanley, 256 N.E.2d 814, 815-16 (Ill. 1970), *rev'd*, Stanley v. Illinois, 405 U.S. 645 (1972).

41. 405 U.S. 645 (1972).

42. *Id.* at 657-58.

43. UNIF. PARENTAGE ACT §§ 1–2 (1973), 9B U.L.A. 387, 390 (2001).

44. *Id.* § 4.

45. *See id.* § 4; *see also* UNIF. PARENTAGE ACT § 203 (2002).

46. VENTURA ET AL., *supra* note 18, at 1-2.

Americans the figure is 70%.[47] Most nonmarital children are born to poor, young parents.[48] Using mothers' educational attainment as a proxy for class, Sarah McLanahan found that mothers in the upper quartile of educational attainment are likely to have their first child at age thirty-one and have a family income of $78,000 per year.[49] In 2000 only 7% of these mothers were single, and their divorce rate was 18%.[50] Of the least educated mothers, 42% were single, and they had a 32% divorce rate.[51] These mothers were also much younger at the time their first children were born and had lower family incomes.[52]

Thus, the number of children for whom parentage must be determined outside marriage has mushroomed. A disproportionate number of these children are born to poor single mothers and so are more at risk of needing public assistance and thus being drawn into tenBroek's public family law system.

2. Science: Genetic Testing.—By the 1990s, science had advanced to the point that in most cases a genetic test could not only exclude a man falsely identified as the biological father but could also positively identify a biological father to near-certainty.[53] Modern DNA testing traces its origins to a chance discovery by a British geneticist in 1984. In 1985 a DNA test based on his work was first used forensically to establish that a young boy was in fact closely related to adults with whom he was immigrating into the United Kingdom.[54] The test was first commercialized in 1987.[55]

Even before modern genetic testing was available, the Supreme Court held that blood testing was so important to paternity determinations that due process is violated if a man who contests paternity in an action brought by the state is denied access to the tests for lack of funds.[56] The Court said, "Without aid in

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47. *Id.* at 31.

48. Sara McLanahan, *Diverging Destinies: How Children Are Faring After the Second Demographic Transformation*, 41 DEMOGRAPHY 607, 614 (2004).

49. *Id.* at 609, 614.

50. *Id.* at 613, 615.

51. *Id.*

52. *Id.* at 610, 614.

53. For a discussion of the science behind the tests, see generally Christopher L. Blakesley, *Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel*, 57 LA. L. REV. 379 (1997).

54. Nick Zagorski, *Profile of Alec J. Jeffreys*, 103 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES 8918, 8919 (2006), *available at* http://www.pnas.org/content/103/24/8918.full.pdf. In 1986, the technique was used to prove that a man suspected of raping and murdering two girls was not guilty and to find the real murderer. In 1990, it was used to prove that skeletal remains were those of Nazi Josef Mengele. *Id.* at 8919-20.

55. The Royal Society, Sir Alec Jeffreys—DNA Fingerprinting, http://royalsociety.org/page.asp?id=1523 (last visited May 31, 2009).

56. Little v. Streater, 452 U.S. 1, 16-17 (1981) (quoting Boddie v. Connecticut, 401 U.S. 371, 377 (1971)). Federal and state law now guarantees this right. *See* 42 U.S.C. § 666(a)(5)(B) (2006). As a condition of receiving federal funds for their child support enforcement and Temporary Assistance to Needy Families (TANF) programs, States must make genetic testing available in

obtaining blood test evidence in a paternity case, an indigent defendant, who faces the State as an adversary when the child is a recipient of public assistance and who must overcome the evidentiary burden Connecticut imposes, lacks 'a meaningful opportunity to be heard.'"[57]

Reasonably cheap, accurate genetic testing has become the norm for resolving parentage disputes that arise when child support is at stake.[58] Under this regime, parentage is simply a matter of biology. Considerations of relationships among the adults and with the child are ordinarily irrelevant.

3. Politics: Aggressive Child Support Enforcement.—The Temporary Assistance for Needy Families (TANF) program requires states to seek to establish the paternity of children born to unmarried mothers for purposes of imposing child support obligations on the men.[59] If states do not meet federally-mandated paternity establishment goals, they will lose TANF funds,[60] and states with paternity establishment rates above 50% receive incentive payments that increase as the rate increases.[61]

The child support enforcement program encourages unmarried mothers and men believed to be fathers to establish legal paternity voluntarily. All states allow mothers and alleged fathers to do this by signing a voluntary acknowledgment identifying the man as the legal father and filing it with the state.[62] This has become the most common way that legal paternity of children born to unmarried mothers is established.[63] Most of the voluntary acknowledgments are signed at the time of birth at the hospital or other birthing facility, and they can be, and often are, signed without any genetic testing having

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contested paternity cases. *Id.* § 666(a)(5)(B)(i). The child and all other parties must submit to genetic testing upon the request of any party, accompanied by "a sworn statement by the party—alleging paternity, and setting forth facts establishing a reasonable possibility of the requisite sexual contact between the parties; or denying paternity, and setting forth facts establishing a reasonable possibility of the nonexistence of sexual contact between the parties." *Id.* The state must pay for the tests, though it may recoup the cost from the father if paternity is established. *Id.* § 666(a)(5)(B)(ii).

57. *Little*, 452 U.S. at 16 (citation omitted).

58. The number of paternity tests more than doubled between 1995 and 2003, while the cost was halved. Mireya Navarro, *Painless Paternity Tests, but the Truth May Hurt*, N.Y. TIMES, Oct. 2, 2005, at 91.

59. For discussions of how paternity law reforms were driven by welfare principles, see Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children,* 81 NOTRE DAME L. REV. 325, 346 (2005); Brito, *supra* note 7, at 256-60.

60. *See* 42 U.S.C. § 652(g) (2006). States must seek to attain a 90% paternity establishment rate. States with rates below that level must show steady improvement. *See id.* § 652(g)(1).

61. *Id.* § 658a(b)(6).

62. The federal requirements are set out in 42 U.S.C. § 666(a)(5)(C) (2006).

63. DEP'T OF HEALTH & HUMAN SERV., CHILD SUPPORT ENFORCEMENT, FY 2005 PRELIMINARY REPORT (2006), http://www.acf.hhs.gov/programs/cse/pubs/2006/reports/preliminary_report/ (last visited May 31, 2009).

been done.[64]

The other way that paternity of children born to unmarried mothers is commonly established is through an administrative or judicial process that establishes legal judgments of paternity. Blood testing is available, but orders are frequently entered when testing has not been done. This generally occurs because the man alleged to be the father does not contest the action, believing that he is the father, or because he does not respond and a default order is entered.[65]

A mother must cooperate in paternity establishment efforts if she and her child are receiving TANF, unless a relatively narrow exception applies.[66] While paternity establishment is optional for other parents, the hospital establishment procedures described above are available to all parents, as is the state machinery for establishing and enforcing child support orders. Moreover, commercial paternity testing services are widely available to resolve suspicions about biological paternity.[67]

For all these reasons, it is far more likely that paternity of a nonmarital child will be established today than it was thirty years ago and that the man identified as the biological father will be ordered to pay child support. Between 1992 and 2000, paternity establishment increased from 500,000 to 1.5 million children per year.[68] In fiscal year 2005, "[p]aternity was established or acknowledged for over 1.6 million children, a 1.5 percent increase from fiscal year 2004."[69]

The welfare-driven child support system, including its emphasis on biology as the basis for legal paternity, is directly applicable to many more children and parents than it was thirty years ago. Its biology-based principles of parentage affect many more families. The rest of this section describes the legal principles of parentage that prevail when custody or a related issue is at stake and contrasts them with the biology-based parentage law that has developed when child support is the main issue.

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64. Dep't of Human Services, Establishing Paternity, http://www.michigan.gov/dhs/0,1607,7-124-5453_5528_41278---,00.html (last visited May 31, 2009). In a study of 1660 unwed births at hospitals, paternity was voluntarily established in 78.5% of the cases, but in only 112 cases was a genetic test requested before an acknowledgment of paternity was signed. Harris, *A New Paternity Law*, *supra* note 3, at 302 n.25.

65. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH AND HUMAN SERVS., PATERNITY ESTABLISHMENT: ADMINISTRATIVE AND JUDICIAL METHODS 15 (2000).

66. 42 U.S.C. § 654(29)(A) (2006).

67. For example, conducting a search on Google with the term "paternity testing" brings up pages of labs offering tests.

68. PAUL LEGLER, LOW-INCOME FATHERS AND CHILD SUPPORT: STARTING OFF ON THE RIGHT TRACK 6 (2003), *available at* http://www.aecf.org/upload/PublicationFiles/starting%20off.pdf; *see also* Virginia Ellis, *Fathers' Legal Ties that Bind Children*, L.A. TIMES, Mar. 8, 1998, at A1 (highlighting the increase in paternity filings since the January 1997 enactment of a state law and finding a 600% increase in the number of fathers signing paternity declarations in 1997).

69. DEP'T OF HEALTH & HUMAN SERV., *supra* note 65.

B. Parentage Law for Custody—the Importance of Relationship

Generally, custody law focuses on the child. Protecting the child's best interests is the central goal. While "best interests" can be defined in many ways, for many years the child's interests have been examined primarily through the lens of psychological and emotional well-being. This means, among other things, that biological parentage is not a necessary element of an adult's claim for protection of his or her relationship with a child. Instead, the key claim is that if the adult and child share a caring, nurturing relationship, then protecting it will benefit the child.[70] An adult who seeks recognition as a child's legal parent must offer at least the promise of such a relationship.[71] The legal doctrines that recognize these principles have been developed, for the most part, through private litigation.[72] Thus, this law is private law, to use tenBroek's term, and it developed at the instigation of parents wealthy enough to be able to pay attorneys to litigate cases through the appellate system, though it applies to all families. In most cases, children's legal parents are their biological parents, but the emphasis on protecting children's functional parent-child relationships is reflected in various legal rules that can result in adults being designated as legal parents even though they are not biological parents.[73]

The first and most widely applicable of these rules is the marital presumption of paternity.[74] Although the conclusive presumption that a woman's husband is the father of her children is all but dead,[75] all states still recognize a rebuttable

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70. This emphasis on the child's relationship with caring adults is often traced to Joseph Goldstein, Anna Freud and Albert J. Sonit's book, BEYOND THE BEST INTERESTS OF THE CHILD (1973). About a decade later, Carl Schneider argued that over the previous twenty years American family law generally had shifted toward a psychological view of family affairs, largely abandoning moral discourse. *See* Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1805 (1985).

71. *See infra* notes 81-82 and accompanying text (discussing custodial rights of unmarried fathers).

72. A notable exception in the case law is a line of dependency cases from California holding that a man who is not the biological father of a child may nevertheless be the legal father because he held out the child as his own. These cases allow such men to be designated as legal fathers even in the face of clear evidence that they are not the biological fathers because to do so advances the child's best interests. *See, e.g.*, *In re* Jesusa V., 85 P.3d 2 (Cal. 2004); *In re* Nicholas H., 46 P.3d 932 (Cal. 2002).

73. Adoption establishes a legal parent-child relationship between an adult and child who is not the biological offspring of the adult, but adoption is not the focus of this section.

74. On the marital presumption generally, see Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547 (2000); *see also* Carbone, *supra* note 21, at 1304.

75. Two states, California and Oregon, retain a limited conclusive presumption that prevents third parties from challenging the husband's paternity when the marriage is intact if the spouses object. CAL. FAM. CODE §§ 7540, 7541 (West 2004); OR. REV. STAT. ANN. § 109.070(2) (West 2003 & Supp. 2009). The constitutionality of an earlier version of the California conclusive

presumption that a husband is the father of a child born to his wife or within a short period after the marriage ends.[76] If a woman's husband is not the biological father but the presumption is never challenged, then the husband will always be the legal father. If the presumption is challenged by the offer of genetic evidence, a number of states have held that a court can refuse to admit that evidence if contrary to the child's best interests.[77] Other courts have reached the same result on the basis that the party offering the rebuttal evidence is estopped to deny parentage because of the detrimental reliance of the other party or, sometimes, the child.[78]

The rule that a married woman's husband is presumed to be the father of her children has been adapted in a number of states allowing same-sex marriage, civil unions, or domestic partnerships, so that adult partners of legal parents are also

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presumption was upheld against a biological father's due process challenge in *Michael H. v. Gerald D.*, 491 U.S. 110, 118-30 (1989).

76. *See, e.g.*, UNIF. PARENTAGE ACT § 204 (2002).

77. *See, e.g.*, Ban v. Quigley, 812 P.2d 1014, 1018-19 (Ariz. Ct. App. 1990) (remanding for determination of whether allowing putative father's attempt to require blood test would be in best interests of child); Dep't of Health & Rehab. Serv. v. Privette, 617 So. 2d 305, 309-10 (Fla. 1993) (remanding for determination of whether admission of blood tests showing husband was not father, opposed by third party in child-support action against him, is in best interests of child); *In re* Marriage of Ross, 783 P.2d 331, 338-39 (Kan. 1989) (remanding for determination of whether allowing mother's attempt to require blood tests would be in best interests of child); Turner v. Whisted, 607 A.2d 935, 940 (Md. 1992) (remanding for determination of whether allowing putative father's attempt to require blood test would be in best interests of child); M.F. v. N.H., 599 A.2d 1297, 1302 (N.J. Sup. Ct. App. Div. 1991) (same); B.H. v. K.D., 506 N.W.2d 368, 378 (N.D. 1993) (refusing putative father's attempt to require blood test to determine paternity); Michael K.T. v. Tina L.T., 387 S.E.2d 866, 872-73 (W. Va. 1989) (remanding for determination whether admission of blood tests showing husband was not father, at husband's request in divorce action, was in best interests of child); *In re* Paternity of C.A.S., 468 N.W.2d 719, 729 (Wis. 1991) (applying statute and refusing putative father's attempt to require blood test to determine paternity); *In re* Adoption of R.S.C., 837 P.2d 1089, 1092-94 (Wyo. 1992) (holding that presumptive but not biological father's status could not be challenged later by mother in effort to have child adopted by another man); *see also In re* J.W.F., 799 P.2d 710, 716 (Utah 1990) (allowing child's guardian ad litem to challenge presumption where child had no relationship to husband).

78. *See In re* Marriage of K.E.V., 883 P.2d 1246, 1252-53 (Mont. 1994) (holding mother's actions estopped her from challenging husband's paternity of child); M.H.B. v. H.T.V., 498 A.2d 775, 779-81 (N.J. 1985) (holding father's actions estopped him from challenging his paternity of child); *In re* Adoption of Young, 364 A.2d 1307, 1310-13 (Pa. 1976) (holding mother's actions estopped her from challenging husband's paternity of child); Manze v. Manze, 523 A.2d 821, 824-26 (Pa. Super. Ct. 1987) (holding father's actions estopped him from challenging his paternity of child); Pettinato v. Pettinato, 582 A.2d 909, 912-13 (R.I. 1990) (holding mother's actions estopped her from challenging husband's paternity of child); *In re* Marriage of D.L.J. & R.R.J., 469 N.W.2d 877, 879-81 (Wis. Ct. App. 1991) (same), *abrogated by* Randy A.J. v. Norma I.J., 677 N.W.2d 630 (Wis. 2004); *In re* Adoption of R.S.C., 837 P.2d 1089, 1093-95 (Wyo. 1992) (same); *see also* Carbone, *supra* note 21, at 1308-09, 1318-21.

legal parents, even though they are clearly not biological parents. In several states, statutes provide that couples who enter into a civil union or domestic partnership have all the rights and duties of marriage that state law can bestow on them, including the presumption that each is the legal parent of children born to the other during the relationship.[79] While it is not certain how the presumption of parentage can be rebutted under these statutes, it is at least clear that proof of lack of a biological relationship is not sufficient. If it were, the whole enterprise of creating the presumption would have been futile.[80]

While traditionally the paternity of nonmarital children was based on biology, the 1973 UPA, promulgated to address the requirement that unmarried fathers be recognized as legal parents in some circumstances, created a limited functional paternity rule for unmarried fathers. The 1973 UPA provides that a man is presumed to be the child's father if he has taken the child into his home and held himself out as the father for two years.[81] A similar provision has been enacted in at least eleven states and most do not impose the two-year time limit.[82]

Finally, courts in a number of states have held that an adult caregiver who is not biologically related to a child may have custodial or visitation rights as to the child, using a "psychological parent" or "de facto parent" analysis.[83] These cases

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79. *See, e.g.*, CAL. FAM. CODE § 297.5(d) (West 2004 & Supp. 2009) (domestic partnership); CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2009) (civil union); VT. STAT. ANN. tit. 15, § 1204(f) (West 2007) (civil union); OR. LAWS 2007 ch. 99 § 9(3) (domestic partnership); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003). For a discussion of the extension of the marital presumption to same-sex couples, men as well as women, see generally Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006).

80. Appleton, *supra* note 79, at 290-91.

81. UNIF. PARENTAGE ACT § 4(a)(4) (1973). The 2002 UPA requires that the period of holding out occur for the first two years of the child's life and is, therefore, more limited than the 1973 version. UNIF. PARENTAGE ACT § 204(a)(5) (2002).

82. CAL. FAM. CODE § 7611(d) (West 2004 & Supp. 2009); DEL. CODE ANN. tit. 13, § 8-204(a)(5) (West 2006) (first two years); HAW. REV. STAT. ANN. § 584-4(a)(4) (LexisNexis 2005); IND. CODE § 31-14-7-2 (2008); MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(4) (West 2007); MINN. STAT. ANN. § 257.55 Subdiv. 1(d) (West 2007); MONT. CODE ANN. § 40-6-105(1)(d) (2007); NEV. REV. STAT. ANN. § 126.051(1)(d) (West 2008); N.M. STAT. ANN. § 40-11-5(A)(4) (West 2003); N.D. CENT. CODE § 14-17-04(1)(d) (2004); 23 PA. CONS. STAT. ANN. § 5102(b)(2) (West 2004); WYO. STAT. ANN. § 14-2-504(a)(v) (West 2007) (first two years).

83. Katharine T. Barlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984) (early and influential article discussing these theories); *see also* NANCY E. DOWD, REDEFINING FATHERHOOD (2000); Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231, 257 (2007) [hereinafter Dowd, *Multiple Parents/Multiple Fathers*]; Harris, *Reconsidering the Criteria*, *supra* note 12, at 469-70; Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 201, 209 (2007); Martha L. Minow, *Redefining Families: Who's In and Who's Out?*, 62 U. COLO. L. REV. 269, 270 (1991); E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence*

are especially likely to be invoked when a child is born through assisted reproductive technology[84] or is raised by lesbian co-parents.[85] In some states, the de facto parent is in effect a legal parent and stands on equal footing with other legal parents.[86] In others, the de facto or psychological parent is not a legal parent and must overcome the constitutionally-mandated assumption that the legal parent's decisions regarding the child should control.[87]

The foregoing examples all result in a person having the rights of a legal parent even though he or she is not the biological parent. Another important rule has the opposite result—a biological parent is denied the custody-related rights of a legal parent. In these cases an unmarried father whose biological paternity has not been established legally seeks some kind of custodial right. *Stanley v. Illinois*[88] was the first such case to reach the Supreme Court. In subsequent cases the Court refined the test for determining when an unmarried father's custodial rights are constitutionally protected so that now men only receive protection if

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of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child, 48 ARIZ. L. REV. 97, 110 (2006); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1786-90 (1993); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family,* 6 AM. U. J. GENDER SOC. POL'Y & L. 505, 518 (1998).

84. California has led the way in this analysis. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998). For discussions, see R. Alta Charo, *And Baby Makes Three—or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231, 231-34 (2000); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 341-44; Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 639-40 (2002). *See generally* Janet L. Dolgin, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE (1997).

85. *See generally* Nancy D. Polikoff, *This Child Does Have Two Mothers*: *Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

In California, the supreme court has adapted a statute drafted for paternity issues to support the judgment that a child raised by lesbian co-parents has two legal mothers, the one who bore the child and the one who lived with and held the child out as hers. K.M. v. E.G., 117 P.3d 673, 675-78 (Cal. 2005) (holding that a woman who donated her ova to lesbian partner who bore the children is a parent under California's version of the UPA, as her genetic relationship constitutes evidence of the mother and child relationship, just as the partner's giving birth to the children also evidences a mother-child relationship); Elisa B v. Superior Court, 117 P.3d 660, 662 (Cal. 2005) (holding that a woman who supported her lesbian partner's use of artificial insemination and received the children into her home and held them out as her children is a parent under the Uniform Parentage Act).

86. *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 173-76 (Wash. 2005); *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435-36 (Wis. 1995).

87. This requirement is imposed by *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

88. 405 U.S. 645 (1972).

they step forward to shoulder parental responsibilities, such as providing economic support, personal care, or both.[89] A number of states have accepted the Court's invitation to deny full parental rights to unwed fathers who have not acted in ways that establish willingness to assume parental responsibilities. However, courts in these states still tend to require that biological fathers have a substantial opportunity to exhibit such behavior, even when this opportunity disrupts children's lives in other families.[90] Several other states protect the custodial claims of unwed fathers to a far greater extent than is constitutionally necessary, even if the consequence is disrupting the family in which the child has been living with committed functional parents.[91]

C. Parentage in the Child Support Realm—Biology Rules

Child support law has taken on the characteristics of public family law, regardless of to whom it is applied, as described above.[92] A great deal of state child support legislation is dictated by federal TANF requirements, and state child support enforcement agencies do much of the implementation of the law. Child support law, including rules regarding parentage, is driven by the imperatives of the enforcement system, which needs simple, clear rules that are easy to administer. Nuanced, highly fact-specific standards such as "best interests of the child" do not work in this setting. This need, along with the traditional emphasis on biology as the basis for imposing child support obligations on unmarried men, makes biology an ideal basis for parentage determination in this system. While child support enforcement officials often argue that children deserve to know who their fathers are or that determining biological paternity protects the child's best interests, these were not the main motivations for the federal requirements that states ramp up their paternity

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89. *See* Lehr v. Robertson, 463 U.S. 248, 258-61 (1983); Caban v. Mohammed, 441 U.S. 380, 384-94 (1979); Quilloin v. Walcott, 434 U.S. 246, 247-48 (1978).

90. *See, e.g.*, C.V. v. J.M.J., 810 So. 2d 692, 697 (Ala. Civ. App. 1999), *rev'd and remanded with instructions*, *Ex parte* C.V., 810 So. 2d 700 (Ala. 2001); Adoption of Michael H., 898 P.2d 891, 895-96 (Cal. 1995) (en banc); Adoption of Kelsey S., 823 P.2d 1216, 1231-32 (Cal. 1992); Appeal of H.R., 581 A.2d 1141, 1162–63 (D.C. 1990); *In re* Adoption of Doe, 543 So. 2d 741, 746-47 (Fla. 1989); Smith v. Malouf, 722 So. 2d 490, 497 (Miss. 1998); *In re* Raquel Marie X, 559 N.E.2d 418, 419 (N.Y. 1990); *In re* Baby Boy K., 546 N.W.2d 86, 91 (S.D. 1996); Nale v. Robertson, 871 S.W.2d 674, 680 (Tenn. 1994); Kessel v. Leavitt, 511 S.E.2d 720, 747–50 (W. Va. 1998). For details and additional examples, see Harris, *Reconsidering the Criteria*, *supra* note 12, at 468-73.

91. *See, e.g.*, *In re* Petition of Kirchner, 649 N.E.2d 324, 332 (Ill. 1995) (Baby Richard case), *abrogated by In re* R.L.S., 844 N.E.2d 22 (Ill. 2006); *In re* B.G.C., 496 N.W.2d 239, 246 (Iowa 1992) (Baby Jessica case). After these two cases gained such notoriety, a number of states amended their laws to head off similar results. *See generally* David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father,* 41 ARIZ. L. REV. 753 (1999).

92. See supra notes 7-11 and accompanying text.

establishment programs.[93]

The principle of holding biological fathers responsible for supporting their children has resulted in some extreme judicial holdings, perhaps the most well-known of which are the "statutory rape" rule and the "lie about contraception" rule.[94] Applying the statutory rape rule, a number of courts have held that teenage and even pre-teen boys, all too young to be able to consent to sexual intercourse, were liable for child support for their children born to older girls and adult women.[95] One court reached this conclusion even though it expressly acknowledged that there was very little chance that any money would ever be collected.[96]

In the "lie about contraception" cases, biological fathers have argued that they should not be required to pay child support because the mothers intentionally misrepresented that they were using birth control.[97] To the author's

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93. Brito, *supra* note 7, at 259 (discussing the Personal Responsibility Act's token provisions regarding involvement of noncustodial fathers in children's lives).

As Tonya Brito has observed, the welfare-driven rhetoric that is so hostile toward fathers, such as the condemnation of deadbeat dads, emerged when child support became a central concern of the welfare system and spread to all fathers who owe child support. *Id.* at 263-64 (citing David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2576 (1995)). This rhetoric supports draconian child support enforcement measures, as well as justifying simplified stories of family relationships of unmarried parents and their children that give little or no consideration to the alternate views that some of these mothers and fathers actually have. *Id.*; Murphy, *supra* note 59, at 353-55.

94. *See* sources cited *infra* notes 96-99.

95. *See* sources cited *infra* note 96.

96. County of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843, 844-45 (App. 1996) (fifteen-year-old boy who had sex with a thirty-four-year-old woman); *see also* Dep't of Revenue v. Miller, 688 So. 2d 1024, 1025 (Fla. Dist. Ct. App. 1997) (fifteen-year-old boy and twenty-year-old woman); State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273, 1274, 1279-80 (Kan. 1993) (twelve-year-old boy held liable for support of child born to sixteen-year-old girl, even though the state welfare office conceded that there was very little chance any money would be collected; collecting cases from other jurisdictions).

97. *See, e.g.*, Erwin L.D. v. Myla Jean L., 847 S.W.2d 45, 46 (Ark. Ct. App. 1993); Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619 (Ct. App. 1980); Wallis v. Smith, 2001-NMCA-17, 130 N.M. 214, 22 P.3d 682, 686 (N.M. 2001); Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 245-46 (Sup. Ct. 1985); Hughes v. Hutt, 455 A.2d 623, 624 (Pa. 1983); Linda D. v. Fritz C., 687 P.2d 223, 224 (Wash. Ct. App. 1984).

These and related issues are discussed in Linda L. Berger, *Lies Between Mommy and Daddy: The Case for Recognizing Spousal Emotional Distress Claims Based on Domestic Deceit that Interferes with Parent-Child Relationships*, 33 LOY. L.A. L. REV. 449, 501-08 (2000); Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J. L. & PUB. POL'Y 29, 51-61 (2003); Niccol D. Kording, *Little White Lies that Destroy Children's Lives—Recreating Paternity Fraud Laws to Protect Children's Interests*, 6 J.L. & FAM. STUD. 237, 249-64 (2004); Pinhas Shifman, *Involuntary Parenthood: Misrepresentation as to the Use of Contraceptives*, 4 INT'L J.L. & FAM. 279, 280-86 (1990); Adrienne D. Gross, Note, *A Man's Right to Choose:*

knowledge, this claim has never been successful. Courts simply do not find this conduct to be fraud, or courts say that even if it is, excusing the man from the child support obligation is not the remedy.[98] In a more sophisticated attempt to avoid liability, the biological father in *In re L. Pamela P.*[99] argued that he had a constitutionally protected right to choose whether to be a parent and finding him to be the child's legal father for purposes of the support duty unconstitutionally infringed upon that right.[100] The New York Court of Appeals rejected his argument because although a man has a right to decide whether to be a *biological* parent, the constitution only protects individuals against governmental interference with private choice.[101] The court said that in this case Pamela, a private individual, interfered with Frank's choice, and the constitution provided no redress.[102] In contrast, the Sixth Circuit in *Dubay v. Wells*[103] agreed with the father that the critical question in such a case is whether the man is the child's legal father, an issue determined by state law, not by the mother.[104] However, the *Dubay* court rejected the man's equal protection argument, finding that the statutory provision making him the child's legal father was rationally related to the state's interest in "'ensur[ing] that the minor children born outside a marriage are provided with support and education.'"[105]

In addition to these cases holding men liable for child support despite the unfairness to them, the law's insistence that biology is the appropriate basis for child support also manifests itself in cases where mothers argue that men should be estopped from denying paternity because they represented that they would act as the children's fathers, and the mothers or children detrimentally relied on the

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Searching for Remedies in the Face of Unplanned Fatherhood, 55 DRAKE L. REV. 1015, 1021-25 (2007).

98. However, in *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579, at *5 (Ill. App. Ct. Feb. 22, 2005), the court held that a man had stated a cause of action for intentional infliction of emotional distress when a woman allegedly performed oral sex on him, saved the sperm in her mouth, and later used it to artificially inseminate herself and had his biological child. The man filed suit after the mother sued him to establish his paternity, a suit that was apparently successful. *Id.* at *1.

99. 449 N.E.2d 713 (N.Y. 1983).

100. *Id.* at 715. The biological father was Frank Serpico, a New York City police officer who testified about corruption on the police force before an investigatory commission appointed by then-Mayor John Lindsay after the *New York Times* published a front-page story about his allegations. A best-selling biography was made into a movie starring Al Pacino. Wikipedia.org, Frank Serpico, http://en.wikipedia.org/wiki/Frank_Serpico (last visited June 1, 2009).

101. *In re L. Pamela P.*, 449 N.E.2d at 716.

102. *Id.*

103. 2007 FED App. 0442P, 506 F.3d 422 (6th Cir.).

104. *Id.* at 430 n.4.

105. *Id.* at 430 (quoting Crego v. Coleman, 615 N.W.2d 218, 228 (Mich. 2000)). The court rejected the man's argument for increased scrutiny, denying that the man's right to avoid designation as the legal father was not analogous to the right of a woman to decide whether to bear a child or that the statute classified and treated people differently based on gender. *Id.* at 429-30.

representations. While some courts have held that these allegations state a claim for relief,[106] they typically require a very strong showing of detrimental reliance on the man's representations that he would act as the father. For example, in *Miller v. Miller*,[107] the court held that a stepfather would be liable only if he encouraged the child to rely on him for support and the child would suffer financial harm if the stepfather were allowed to repudiate the financial obligation.[108] Psychological reliance is rarely sufficient to justify imposing a support obligation.

Some courts go further, refusing to apply principles that they used to grant men rights to custody or visitation with children to disputes over child support. For example, the Nebraska Supreme Court held in *Hickenbottom v. Hickenbottom*[109] that a trial court has inherent authority to allow a stepparent to visit after a divorce if in the best interests of the child.[110] Five years later, in *Quintela v. Quintela*[111] the court refused to apply this analysis in a case concerning the child support obligation of a divorcing stepfather.[112] The court distinguished *Hickenbottom* on the basis that a nonparent can stand in loco parentis to a child only if he or she wants to.[113] However, the court remanded to the trial court to allow the mother to try to prove that the stepfather was estopped from denying parental status to avoid doing harm to the child.[114]

Finally, mothers typically do not even bother to argue that the best interests of the child should preclude a man from disclaiming the role of father, even though, of course, it might well be in the child's best interests if the man paid child support. Best interests is just not an issue when it comes to determining parentage for purposes of child support.

The American Law Institute's Principles of the Law of Family Dissolution (Principles) perpetuate the disparate rules regarding the custodial rights and child support duties of adults who have lived in caretaking roles with children, without

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106. *See, e.g.*, M.H.B. v. H.T.B., 498 A.2d 775, 778 (N.J. 1985); A.S. v. B.S., 354 A.2d 100, 102-03 (N.J. Super. Ct. Ch. Div. 1976), *aff'd*, 374 A.2d 1259 (N.J. Super. Ct. App. Div. 1977); Niesen v. Niesen, 157 N.W.2d 660, 663 (Wis. 1968); *see also* Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 40-60 (1984).

107. 478 A.2d 351 (N.J. 1984).

108. *Id.* at 357-58; *see also M.H.B.*, 498 A.2d at 777-78 (applying *Miller* test). Courts rarely find that the facts support a finding of estoppel. K.A.T. v. C.A.B., 645 A.2d 570, 573-74 (D.C. 1994); Portuondo v. Portuondo, 570 So. 2d 1338, 1342 (Fla. Dist. Ct. App. 1990); Markov v. Markov, 758 A.2d 75, 83 (Md. 2000); A.R. v. C.R., 583 N.E.2d 840, 843 (Mass. 1992); Murphy v. Murphy, 714 A.2d 576, 581 (R.I. 1998); E.H. v. M.H., 512 N.W.2d 148, 148-49 (S.D. 1994); Wiese v. Wiese, 699 P.2d 700, 702 (Utah 1985); Ulrich v. Cornell, 484 N.W.2d 545, 549 (Wis. 1992).

109. 477 N.W.2d 8 (Neb. 1991).

110. *Id.* at 16.

111. 544 N.W.2d 111 (Neb. Ct. App. 1996).

112. *Id.* at 117.

113. *Id.* at 115-16.

114. *Id.* at 120.

explaining why.[115]

The Principles allow child support duties to be imposed on one other than a legal parent only if:

> (a) there was an explicit or implicit agreement or undertaking by the person to assume a parental-support obligation to the child; (b) the child was born during the marriage or cohabitation of the person and the child's parent; or (c) the child was conceived pursuant to an agreement between the person and the child's parent that they would share responsibility for raising the child and each would be a parent to the child.[116]

A person who formerly lived with or was married to a child's parents does not automatically acquire support obligations under this section.[117] The Principles add that a support duty should be imposed only when the would-be obligor's actions have eliminated or greatly reduced the chance that support can be obtained from the child's absent parent.[118]

For purposes of custodial and access rights, the Principles provide that a "parent by estoppel" has full parental rights.[119] A person may become a parent by estoppel by: (i) being obliged to pay child support under the provisions described above, (ii) living with the child for at least two years while having a good faith belief that he is the child's biological father, based on marriage to the mother or the mother's representations, and he has accepted full parental responsibilities, (iii) living with the child since the child's birth and, pursuant to a co-parenting agreement with the child's legal parent or parents, holding out and accepting full and permanent parental responsibilities, and a court finds that recognizing the relationship is in the child's best interests, or (iv) living with the child for at least two years and, pursuant to an agreement with the child's parent or parents, holding out and accepting full and permanent parental responsibilities, and a court finds that recognizing the relationship is in the child's best interests.[120] In effect, the legal position of a parent by estoppel is the same as that of a legal parent; in most states, a parent by estoppel would simply be considered a legal parent.

The Principles also recognize the status of "de facto parent," which requires that the adult live with the child for at least two years and, for reasons other than financial compensation, regularly perform as much of the caretaking functions for the child as the child's parent(s), either with the agreement of the child's legal

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115. *See generally* Katherine K. Baker, *Asymmetric Parenthood*, *in* RECONCEIVING THE FAMILY: CRITICAL REFLECTIONS ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson ed., 2006).

116. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS OF RECOMMENDATIONS § 3.03(1) (2002).

117. *Id.* § 3.03.

118. *Id.* § 3.01(b).

119. *Id.* § 2.03(1)(b) cmt. b.

120. *Id.* § 2.03(1)(b).

parent(s) or because of the parents' inability to act as parents.[121] Unlike a parent by estoppel, who has rights equivalent to those of a legal parent,[122] a de facto parent's rights are subordinated to the rights of legal parents and parents by estoppel.[123] In addition, the de facto parent has standing to bring an action for custody or access only if he or she has lived with the child within six months of filing or has "consistently maintained or attempted to maintain the parental relationship" since ceasing to live with the child.[124] A parent by estoppel's standing is not so limited.[125]

As this brief survey shows, in the difficult cases where a social parent is not necessarily a biological parent or vice versa, whether a court will recognize the claimant as a legal parent may depend on whether the dispute concerns custody, visitation or a similar right, or whether it is about child support. If the dispute concerns custody and the adult not biologically related to the child prevails, that adult may be a full parent with support obligations, depending on the nature of the order.[126] On the other hand, if parentage is declared in the context of a child support dispute, the person becomes the legal parent for all purposes, custody as well as support.[127]

III. THE RISK: BIOLOGY COULD CROWD OUT FUNCTION

It is by now a cliché that most children do not live in the idealized family of a married mother and father with only their biological children. Between 1970 and 1990, the proportion of children living only with their mothers doubled from 11% to 22% of all children; since 1990, the changes have leveled off.[128] In 2001,

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121. *Id.* § 2.03(1)(c).

122. *Id.* §§ 2.08(1)(a), 2.09.

123. *Id.* § 2.18(1).

124. *Id.* § 2.04(1)(c).

125. *Id.* § 2.04(1)(b). The Principles were drafted before the Supreme Court decided *Troxel v. Granville*, 530 U.S. 57 (2000), and so do not take account of that case, which held that legal parents are constitutionally entitled to determine whether a child will visit an outsider to the residential family and that courts must give substantial weight to this decision. *Id.* at 65-66. Emily Buss argues that *Troxel* does not limit states' ability to determine the criteria for legal parenthood, but says that if a state does not recognize a caregiver as a legal parent, the *Troxel* rules require giving preference to the legally recognized parent. Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 638-40 (2002). This issue is also at the heart of *In re Nelson*, 825 A.2d 502 (N.H. 2003). Finally, David Meyer discusses cases from Maine, Massachusetts, and Rhode Island that have cited the de facto parent provisions of the Principles to support awarding custody to adults not biologically related to children. David D. Meyer, *Partners, Care Givers, and the Constitutional Substance of Parenthood*, *in* RECONCEIVING THE FAMILY 47, 52 (Robin Fretwell Wilson ed., 2006) (citing E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999); C.E.W. v. D.E.W., 2004 ME 43, 845 A.2d 1146, 1152 (Me. 2004); Rubano v. DiCenzo, 759 A.2d 959, 974-75 (R.I. 2000)).

126. *See supra* notes 12-13 and accompanying text.

127. *See, e.g.*, UNIF. PARENTAGE ACT § 203 (2002).

128. ROSE M. KREIDER & JASON FIELDS, U.S. DEP'T OF COM., LIVING ARRANGEMENTS OF

18.5 million children lived with only one parent; 2.2 million lived with their fathers, and 16.3 million with their mothers.[129] The 1997 National Survey of America's Families found an even higher rate of separation of parents and children. It reported that a third of all children younger than age eighteen live apart from a parent, and 83% of this group live with a mother rather than a father.[130] In 2001 almost fifteen million children lived in blended families (with stepparents, stepsiblings, or both), including 4.9 million who lived with a stepparent.[131]

In many situations involving these families, courts and other decisionmakers should be able to consider whether parental rights and duties should be based on proof of a functional parent-child relationship, rather than on biology. However, the increasing pervasiveness of the biology-based child support model of parenthood threatens the viability of this option. Some courts refuse to consider whether to apply a functional parenthood theory even in cases involving custody and visitation,[132] instead treating biology as the only basis for legal parenthood. An even more significant and recent development is the paternity disestablishment movement, which has blossomed over the last ten years.[133]

In paternity disestablishment cases, one of the legal parents, usually the father, seeks a court order declaring that he is not the legal father, based on genetic testing. Husbands have been allowed to disestablish paternity at the time of divorce in at least six jurisdictions, regardless of the children's ages and relationships to the men.[134] Statutes in several states require that paternity be

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CHILDREN: 2001, at 12 (2005).

129. *Id.* at 2. Children of color were more likely than white children to live with only one parent. In 2001, 51% of black children lived with only one parent, compared with 19% of non-Hispanic white children and 26% of Hispanic children. *Id.*

130. FREYA SONENSTEIN ET AL., STUDY OF FATHERS' INVOLVEMENT IN PERMANENCY PLANNING AND CHILD WELFARE CASEWORK (2002), *available at* http://aspe.hhs.gov/hsp/CW-dads02/#II.

131. KREIDER & FIELDS, *supra* note 128, at 2, 4, 6-7.

132. *See, e.g.*, Hughes v. Creighton, 798 P.2d 403, 405-06 (Ariz. Ct. App. 1990); Janice M. v. Margaret K., 948 A.2d 73, 74-75 (Md. 2008); Van v. Zahorik, 575 N.W.2d 566, 569 (Mich. Ct. App. 1998); Jefferson v. Jefferson, 137 S.W.3d 510, 512 (Mo. Ct. App. 2004); Alison D. v. Virginia M., 572 N.E.2d 27, 29-30 (N.Y. 1991); Ronald FF v. Cindy GG, 511 N.E.2d 75, 77 (N.Y. 1987); Cooper v. Merkel, 470 N.W.2d 253, 255-56 (S.D. 1991); *see also* Ronald K. Henry, *The Innocent Third Party: Victims of Paternity Fraud*, 40 FAM. L.Q. 51, 65-69 (2006).

133. *See* Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 193-94 (2004); Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35, 37-38 (2003); Paula Roberts, *Truth and Consequences: Part II. Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 58 (2003); Paula Roberts, *Truth and Consequences: Part III. Who Pays When Paternity Is Disestablished?*, 37 FAM. L.Q. 69, 69 (2003).

134. Appleton, *supra* note 79, at 236 n.36 (citing T.P.D. v. A.C.D., 981 P.2d 116, 120, 121 (Alaska 1999) (rejecting equitable estoppel and paternity by laches)); Cochran v. Cochran, 717 N.E.2d 892, 894-95 (Ind. Ct. App. 1999) (allowing disestablishment); Williams v. Williams, 01-

disestablished and a man relieved of the obligation to pay child support if he can prove at any time that he is not the child's biological parent.[135] The material consequences of allowing paternity disestablishment for the child may be very drastic, especially since there is no guarantee that legal paternity of the child's biological father will ever be established. But the emotional consequences for the child and the broader social consequences may be even more significant. As bioethicist Mary Anderlik has written:

> Parentage testing bears on important matters such as identity and health. Testing carries risks of psychological harm to the child tested and to adults whose beliefs may be at odds with the reality revealed by testing. Testing of a child by a man believed to be the child's father, or infidelity testing, may provide proof of betrayal and deception and set the stage for family discord and even violence. One respondent reported that a man with custody killed the child after learning that he was not the biological father . . . . Finally, individual decisions to seek testing, in the aggregate, may have profound social consequences. The promotion of testing as a natural and acceptable response to suspicion, combined with easy access to testing, may further erode already fragile family relationships.[136]

IV. STEPS TOWARD A SOLUTION

The beginning point for a system of legal parentage that recognizes the

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CA-OI666-SCT, 843 So. 2d 720, 722 (Miss. 2003) (en banc) (unfair if former husband can not disestablish paternity); *In re* Estate of Tytanic, 2002 OK 100, 61 P.3d 249, 252-53 (Okla. 2002) (brother of deceased common-law husband can disestablish paternity); Shell v. Law, 935 S.W.2d 402, 410 (Tenn. Ct. App. 1996); N.P.A. v. W.B.A., 380 S.E.2d 178, 180-82 (Va. Ct. App. 1989) (rejecting common law adoption, in loco parentis, implied contract, and equitable estoppel arguments)).

135. 2002 Ga. Laws 596, § 1 (codified at GA. CODE ANN. § 19-7-54 (West 2003)).

136. Mary R. Anderlik, *Assessing the Quality of DNA-based Parentage Testing: Findings from a Survey of Laboratories*, 43 JURIMETRICS J. 291, 305-06 (2003); *see also* Mary R. Anderlik, *Disestablishment Suits*, 4 J. CENTER FOR FAMILIES, CHILD. & CTS. 3, 4-5 (2003); Dena S. Davis, *The Changing Face of "Misidentified Paternity,"* 32 J. MED. & PHIL. 359, 362 (2007) (discussing risks of genetic testing: "Adults who discover that their genetic identity is not what they believed are often extremely disrupted" (citing Peggy Orenstein, *Looking for a Donor to Call Dad*, N.Y. TIMES, June 18, 1995; Kate Hilpern, *Family: My Father, Mr. X,* THE GUARDIAN (London), Jan. 20, 2007)).

The most comprehensive study to date shows that almost always the man identified as a child's legal father is the biological father, refuting the myth that 10% or more of children are not the biological offspring of the men believed to be their fathers. The analysis concluded that in the United States, 98% of the men raising children they believe to be their biological children are correct and that only 30% of the men who seek blood tests to confirm paternity are not the biological father. Kermyt G. Anderson, *How Well Does Paternity Confidence Match Actual Paternity? Evidence from Worldwide Nonpaternity Rates*, 47 CURRENT ANTHROPOLOGY 513, 516 (2006).

importance of biology while leaving room for protection of functional parent-child relationships is a set of statutes that includes these possibilities. The 2002 UPA is such a code. However, for the UPA or a system like it to be widely adopted, child support law and practice should also be restructured to eliminate rules that seem unfair to men and engender resentment that manifests itself in advocacy for the view that legal parentage should turn only on biology in all circumstances.

A. The Compromise of the 2002 UPA

The 2002 UPA, like the original 1973 UPA, provides that a determination of legal parentage carries with it all the rights and duties of parenthood.[137] Under the 2002 UPA, a parent-child relationship exists between a man and a child because: 1) he was married to the child's mother and the presumption of paternity arising from marriage was not rebutted,[138] 2) because he has lived with and held out the child as his for at least two years and the resulting presumption has not been rebutted,[139] 3) because he and the mother signed and filed a formal acknowledgment of his paternity,[140] or 4) because he was adjudicated to be the father.[141] All these means of establishing paternity except the last effectively allow paternity to be established in a man who is not the biological father, since genetic testing is required only in contested paternity proceedings.[142] The marital

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137. *See* UNIF. PARENTAGE ACT § 203 (2002).

138. Under the 2002 UPA, a man married to the child's mother is presumed to be the father if the child was born while the couple was married or within 300 days of the termination of the marriage. *Id.* §§ 201(b)(1), 204(a). If the alleged marriage is void or voidable, the presumption still applies. *Id.* §§ 204(a)(3)-(4). If the couple marries after the child is born, the man is presumed to be the father only if he voluntarily took steps to establish paternity, such as filing a voluntary acknowledgment with the state, allowing his name to be on the birth certificate, or promising in writing to support the child. *Id.* § 204(a)(4).

139. *Id.* §§ 201(b)(1), 204(5). The two-year period must have begun at birth. The corresponding section of the 1973 UPA, section 4(a)(4), provided that the presumption arose upon proof that the man received the child into his home and openly held the child out as his, without time limits. UNIF. PARENTAGE ACT § 4(a)(4) (1973).

140. UNIF. PARENTAGE ACT § 201(b)(2) (2002). UPA Chapter 3 provides details for the acknowledgment procedure. If the voluntary acknowledgment signed by the mother and the man alleged to be the biological fatter is filed with the state bureau of vital statistics, it has the legal effect of a judgment of paternity. *Id.* § 305. Either party to the acknowledgment may rescind it within sixty days or before a hearing regarding the child, whichever occurs sooner. *Id.* § 307.

141. *Id.* § 201(b)(3). If a husband and wife divorce and the divorce decree identifies a child as a child of the marriage or requires the husband to pay child support, the UPA provides that the decree is a determination of paternity entitled to res judicata effect. *Id.* § 637.

Section 201(b) also provides that a man is the legal father if he has adopted the child or if he satisfies the UPA requirements for determining paternity in cases of assisted reproduction. *Id.* §§ 201(b)(4)-(6).

142. *Id.* §§ 505(b), 631(2). If a party refuses to submit to genetic testing, the court may resolve

presumption and the presumption of paternity from holding out, like their common law antecedents, recognize and protect functional parenthood. As a practical matter, the provision allowing for paternity by voluntary acknowledgment may have the same effect.[143]

While the UPA allows legal paternity to be challenged on the basis of genetic tests that show the man is not the child's biological father, it places important limits on challenges. First, any challenge must be brought within two years of the time paternity was established.[144] Second, the UPA gives the court authority to block a challenge[145] based on a finding that the party bringing the challenge is estopped to deny paternity and that it would be inequitable to disprove the father-child relationship.[146] The court's analysis must take into account the child's age, the child's relationships to the husband and the man alleged to be the genetic father, and the facts surrounding the husband's discovery of his possible nonpaternity.[147] Thus, while biological paternity is the starting point for a determination of legal paternity under the UPA, both the statute of limitations and the court's discretion to invoke estoppel and best interests principles protect functional parent-child relationships.

The website of the Commissioners on Uniform State Laws lists only eight

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the case against him or her. *Id.* § 622(b), (c). A court may enter a default order against a party who fails to appear. *Id.* § 634.

143. The UPA says that for the voluntary acknowledgment to be valid, the man must be the biological father, *id.* § 301, but genetic testing is not a prerequisite to signing the acknowledgment and lack of genetic relationship does not make the acknowledgment void. *Id.* § 302. Therefore, a voluntary acknowledgment signed by a man who is not the biological father does establish legal paternity if it is never successfully challenged. Federal law prohibits states from making genetic testing a precondition to signing a voluntary acknowledgment. 45 C.F.R. § 302.70(a)(5)(vii) (2008).

144. If the child is born to a married woman, the challenge must be brought within two years of the child's birth. UNIF. PARENTAGE ACT § 607(a). The two-year statute of limitations does not apply if the husband and wife did not cohabit or engage in sexual intercourse during the time that the child was probably conceived and if the husband never openly acknowledged the child as his. *Id.* § 607(b).

If paternity was established by voluntary acknowledgment, a party may challenge the acknowledgment only on the ground of fraud, duress, or material mistake of fact, and then for only two years after the acknowledgment was filed. *Id.* § 308(a).

Someone who was not a signatory or the acknowledgment or, if paternity was established by adjudication, who was not a party to the litigation, and who has standing to contest paternity must bring the suit within two years of the date of the acknowledgment or judgment. *Id.* § 609(b).

145. The marital presumption and the presumption arising from holding out may be rebutted only by genetic test evidence, and only court-ordered tests are admissible unless all parties agree to the admission of other test results. *Id.* § 621(c)(2). The rules regarding judicial discretion to deny a challenge to the marital presumption also apply to challenges to adjudications of paternity. *Id.* § 609(c).

146. *Id.* § 608(a).

147. *Id.* § 608(b).

states as having enacted the 2002 UPA,[148] and at least two of these have not adopted some of the provisions that protect functional parenthood. Under the Alabama and Utah versions, there is no two-year limit on challenging presumptions of paternity,[149] and the Alabama legislature did not enact the provisions giving judges discretion to exclude evidence of biological paternity based on estoppel or other equitable considerations.[150] The Oregon paternity revision work group considered recommending adoption of the UPA but did not do so in part because of the group's inability to agree to recommend these provisions.[151] Convincing most state legislatures to enact the UPA or other statutes that strike a similar balance between biology and function as bases for legal parenthood may also require modification of some current rules regarding liability for child support.

B. Modifying Child Support Rules and Practices

Some of the rules that impose child support duties on biological fathers discussed above are excellent candidates for revision, given that they place liability on people who are considered legal victims of felonies, in the case of the underage boys,[152] or who have made their wishes to avoid parenthood clearly known and have taken reasonable steps to that end, as in the contraception fraud cases.[153] These legal rules treat the males unfairly, and, in the case of boys especially, may not even produce any financial benefit for the child.[154]

Lack of financial benefit to the child also undercuts the justification for some of the more austere aspects of child support enforcement in the welfare system that threaten positive father-child relationships, as Jane Murphy explains:

> The threat of DNA testing on demand destabilizes the relationships between parents as well as those between father and child and undermines all existing policies favoring fathers' continued involvement in children's lives. In many cases, particularly those involving older

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148. Uniform Law Commissioners, A Few Facts About the Uniform Parentage Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-upa.asp (last visited June 2, 2009). The states are Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. *Id.* The UPA was introduced in Colorado in 2009.

149. ALA. CODE §§ 26-17-5(b), -6 (1992 & Supp. 2008); UTAH CODE ANN. § 78B-15-607 (West 2008). In Colorado and Wyoming the statute of limitation is five years. COLO. REV. STAT. ANN. § 19-4-107(1)(b) (West 2005); WY. STAT. ANN. § 14-2-807(a) (West 2007).

150. ALA. CODE § 26-17-5; ALA. CODE § 26-17-21 (1992).

151. Harris, *A New Paternity Law*, *supra* note 3, at 317-18. The UPA is also organized differently than existing Oregon parentage statutes, and some attorney members of the work group believed that it would be preferable to retain the existing structure. *Id.* at 318.

152. *See supra* note 95 and accompanying text.

153. *See supra* note 97 and accompanying text. It should go without saying that the "sperm in the condom" fact pattern of *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579 (Ill. App. Ct. Feb. 22, 2005), should not result in the man's being liable for child support.

154. State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273, 1279 (Kan. 1993).

> children, there is no one "waiting in the wings" to be the child's father. Vacating the paternity judgment or acknowledgment leaves the child fatherless for life, with the attendant loss of emotional support, companionship, child support, inheritance rights, and other benefits. Even where the child has already lost contact with the legal father, the child's loss is further exacerbated by finding out that the only father she has ever known does not want to be her father anymore. Many fathers who would be willing and might prefer to stay in a child's life are forced to seek disestablishment of paternity or face loss of employment, credit standing, jail, or permanent poverty.
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> Increasing the number of paternity establishments may end up having some noneconomic benefits for children but it has done little to increase the number of support orders for children on welfare. Even if more orders were obtained and more support was collected from noncustodial fathers, one widely cited study predicted that, given the poverty of this population of obligor fathers, even full payment of child support would only reduce combined spending for cash assistance, food stamps, and Medicaid by eight percent.[155]

These changes could help modify the belief that biology is all that matters when it comes to determining a child's legal parentage. In the same spirit, when courts do grant visitation with a child to an adult not biologically related on a theory of estoppel, de facto, or psychological parenthood, or standing in loco parentis, that adult should be required to contribute to the child's support. Canadian law has allowed courts to order adults standing in loco parentis to pay child support for many years without an adverse effect on adults' willingness to form relationships that include stepchildren.[156] The amount and duration of the

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155. Murphy, *supra* note 59, at 368-70 (citations omitted). Murphy proposes that mothers not be required to cooperate in establishing paternity, that rights to child support not be assigned to the state, and that processes for establishing child support orders and the guidelines that determine amounts be revised to account for the circumstances of low-income obligators. *Id.* at 370-74. Daniel Hatcher makes similar arguments in support of eliminating welfare cost recovery and requiring that mothers receiving public assistance assign child support rights to the state. Hatcher, *supra* note 7, at 1055-66; *see also* Marsha Garrison, *The Goals and Limits of Child Support*, *in* CHILD SUPPORT: THE NEXT FRONTIER 16, 22, 24-25 (J. Thomas Oldham & Marygold Shire Melli eds., 2000).

156. Nicholas Bala, *Who Is a 'Parent'? 'Standing in the Place of a Parent' & the Child Support Guidelines*, at 20, ssrn.com/abstract=892958 (2006). The laws of England, New Zealand, and Australia also permit the imposition of child support obligations on adults standing in loco parentis, but the duty is rarely implemented because these jurisdictions' child support guidelines do not cover this situation, and their child support enforcement agencies do not take this kind of case. *Id.* at 8 (citing Carol Rogerson, *The Child Support Obligation of Step-Parents,* 18 CAN. J. FAM. L. 9, 37-49 (2001)).

obligation of the person standing in the place of a parent could be adjusted and need not necessarily be the same as that of full legal parents.[157]

A final possible reform is to revise the law so that a child who is the legal child of the man who has lived as the father can maintain that relationship even though another man's biological paternity is legally established. Justice Brennan, dissenting in *Michael H. v. Gerald D*,[158] observed that allowing Michael to establish the fact of his biological paternity would not necessarily have required that state law strip Gerald of his parental rights.[159] The Louisiana courts accepted the invitation, developing the doctrine of dual paternity, which allows a child born to a married woman to remain the legitimate child of the mother's husband while permitting the paternity of the biological father to be established.[160] In a similar vein, the California courts have held that the presumption that an adult who lives with a child and holds out the child as his or hers is not necessarily rebutted by evidence that the adult is not the child's biological parent.[161]

CONCLUSION

In the end, the most important force for encouraging lawmakers to preserve space for the legal protection of functional parenthood may simply be awareness that both biology and function are deeply rooted and longstanding criteria for legal parentage in our culture. Legislators and judges must keep children's interests at the forefront as they develop and apply rules for determining legal parentage for the many kinds of families that exist today.

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157. *Id.* at 5.

158. 491 U.S. 110 (1989).

159. *Id.* at 154-56 (Brennan, J., dissenting).

160. Smith v. Cole, 553 So. 2d 847, 854 (La. 1989); Griffin v. Succession of Branch, 479 So. 2d 324, 326 (La. 1985); Succession of Mitchell, 323 So. 2d 451, 457 n.6 (La. 1975); Warren v. Richard, 283 So. 2d 507, 508 (La. Ct. App.), *aff'd*, 296 So. 2d 813 (La. 1974). The state supreme court left open the question of whether both fathers would have the same rights and duties. *Smith*, 553 So. 2d at 854; *see* Carbone, *supra* note 21, at 1341. When the legislature codified the doctrine, it provided that if the second father is recognized, he has all the rights and duties of fatherhood. LA. CIV. CODE ANN. art. 197 cmt. (a) (2007). The legislation is discussed in Katherine Shaw Spaht, *Who's Your Momma, Who are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307 (2007).

161. *In re* K.M. v. E.G., 117 P.3d 673, 679-81 (Cal. 2005); Elisa Maria B. v. Superior Ct., 117 P.3d 660, 669 (Cal. 2005); *In re* Jesusa V., 85 P.3d 2, 12 (Cal. 2004); Nicholas H., 46 P.3d 932, 937 (Cal. 2002). These cases are discussed in June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 3 (2007). For more on the concept of multiple parenthood, see generally Dowd, *Multiple Parents/Multiple Fathers*, *supra* note 83; Harris, *Reconsidering the Criteria*, *supra* note 12; Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309 (2007).