"MAMA'S BABY, PAPA'S MAYBE": DISESTABLISHMENT OF PATERNITY

*Vanessa S. Browne-Barbour**

"It is a wise father that knows his own child."[1]

I. INTRODUCTION

Families have remained the foundation of society for centuries. Although what constitutes a family has changed over time, societal interests in protecting and promoting the family unit remain constant.[2] Consequently, domestic relations laws, including paternity establishment rules and procedures, facilitate societal interests in protecting families. Many of these paternity-related rules and procedures rely on antiquated presumptions and legal fictions rather than biological facts. Given the state of modern science, a biological relationship can be established with nearly 100 percent certainty,[3] making reliance on centuries-old presumptions neither necessary nor effective.[4] Disestablishment legally severs the parent-child relationship based on after-discovered evidence.[5] Increasingly, presumed and legally established fathers seek to disestablish paternity by asserting fraud, material mistake of fact, or

---

* Associate Professor of Law, South Texas College of Law, teaching Torts, Family Law, and International Family Law. Prior to teaching law, Prof. Browne-Barbour was a litigation associate at Reed Smith LLP, in Pittsburgh, PA, and also served as an appellate law clerk with the Pennsylvania Superior Court. The author is most appreciative of the support from Dean Donald Guter and Associate Dean John Worley, as well as the comments of many faculty colleagues, including Professors Tobin Sparling, Geoffrey Corn, Mark Siegel, and Shelby A. D. Moore. Finally, the author expresses gratitude for constructive comments received from law faculty attending the Lutie B. Lytle Writing Workshop, in Las Vegas, NV, and the diligent research assistance of Meghna Patel.

1. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, act 2, sc. 2, lines 79-80 (1598), *available at* http://www.shakespeare-online.com/plays/merchant_2_2.html.

2. Barbara Glesner Fines, *Fifty Years of Family Law Practice–The Evolving Role of the Family Law Attorney*, 24 J. AM. ACAD. MATRIMONIAL LAW. 391, 391 (2012).

3. DNA research and technology "has provided a means to distinguish all individuals, except identical twins, by simply analyzing a tiny piece of biological material." E. Donald Shapiro et al., *The DNA Paternity Test: Legislating The Future Paternity Action*, 7 J.L. & HEALTH 1, 29 (1993). "When combined with other genetic marking tests, such as standard blood grouping tests and HLA tests, the Probability of Paternity can be raised to a Paternity Index of over a hundred million to one, or above 99.999999 percent." *Id.*

4. *See* SUSAN PAIKIN, CTR. FOR THE SUPPORT OF FAMILIES, EMERGING ISSUES IN PATERNITY ESTABLISHMENT SYMPOSIUM SUMMARY 4 (2007), *available at* http://aspe.hhs.gov/hsp/07/paternity/report.pdf; Shapiro et al., *supra* note 3, at 5.

5. Paula Roberts, *Truth and Consequences: Part III. Who Pays When Paternity Is Disestablished?*, 37 FAM. L.Q. 69, 69-70 (2003-04) [hereinafter *Truth and Consequences: Part III*].

misrepresentation.[6] The right to disestablish paternity is recognized by the United States and other countries.[7] Universally, the disestablishment of paternity raises many questions: What is the potential adverse impact on the child's welfare, particularly if the child's biological father is not identified? Who will fill the void caused by the loss of an emotional bond with the established father? Most importantly, who will assume financial responsibility for the child after the non-father's legal obligation of child support has been extinguished? Moreover, disestablishment does not affect only the child. In disestablishment proceedings, courts may consider, in addition to the interests of the child, the respective interests of the biological father, the established father, the mother, and the family unit as a whole.[8] Thus, disestablishment typically affects each member of the family unit, often at great emotional and financial cost.[9]

Mandatory genetic testing, performed at birth or soon thereafter, would verify the paternity of the putative father sooner rather than many years after the child's birth, thereby making disestablishment actions unnecessary. More importantly, by this simple procedure, society could avoid many of the harmful consequences that too often accompany disestablishment of paternity – the irreparable emotional harm to the lives of children and others, the devastating disruptions to family life,

6. *See* Paula Roberts, *Truth and Consequences: Part I. Disestablishing The Paternity Of Non-Marital Children*, 37 FAM. L.Q. 35, 37-38 (2003) [hereinafter *Truth and Consequences: Part I*] (commenting on the availability of paternity disestablishment for non-marital children where paternity is established by genetic testing, voluntary acknowledgment, and conduct); Paula Roberts, *Truth and Consequences: Part II. Questioning The Paternity Of Marital Children*, 37 FAM. L.Q. 55, 59 (2003) [hereinafter *Truth and Consequences: Part II*] (commenting on the availability of paternity disestablishment for marital children).

7. *See Truth and Consequences: Part I*, *supra* note 6, at 35-36; *Truth and Consequences: Part II*, *supra* note 6, at 58 nn.10, 59; D. MARIANNE BLAIR ET AL., FAMILY LAW IN THE WORLD COMMUNITY: CASES, MATERIALS, AND PROBLEMS IN COMPARATIVE AND INTERNATIONAL FAMILY LAW 27 (2d ed. 2009) (observing that European Court of Human Rights opinions mandate that men have an "opportunity to establish and disestablish paternity").

8. *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, 239-40 (2004) (arguing for short time limitations on paternity challenges with greater weight to be placed on the established parent-child relationship); T. Vernon Drew, *Conceiving The Father: An Ethicist's Approach To Paternity Disestablishment*, 24 DEL. LAW. 18, 20-21 (2006) (an interview with Profs. Nadia N. Sawicki and Arthur L. Caplan and other bioethicists, academics, lawyers, and federal and state administrators at the 2006 U.S. Health and Human Services symposium on Emerging Issues in Paternity Establishment) (positing that preserving the child's established relationship with a non-biological parent may best meet the child's need for love and support).

9. *See* Drew, *supra* note 8, at 20; *Truth and Consequences: Part I*, *supra* note 6, at 54; *Truth and Consequences: Part II*, *supra* note 6, at 57; *Truth and Consequences: Part III*, *supra* note 5, at 80.

and the critical loss of financial support.[10]

Part II of this Article provides a general historical overview of paternity rules. Part III summarizes the laws addressing paternity and its disestablishment in the United States and the European Union. It discusses related cases from the high courts of both jurisdictions, which highlight the broad range of issues, interests, and consequences associated with issues of paternity. Part IV considers the adverse effects of disestablishment of paternity on a child. It recommends nationally mandated genetic testing at birth or soon thereafter. This would eliminate altogether the need for paternity disestablishment procedures, thereby avoiding their harmful effects. Part V acknowledges that mandatory genetic testing may raise significant privacy concerns deserving of further study. However, it argues that, while privacy considerations may need to be accommodated, they should not foreclose mandatory genetic testing in light of the substantial benefits it would provide.

II. THE HISTORY OF PATERNITY ESTABLISHMENT

Parenthood bestows upon parents certain legal rights and obligations, which the United States Supreme Court has deemed "fundamental."[11] These include the rights of care, custody, and control of the child, and all that such encompasses.[12] To varying degrees, these rights are essentially universal.[13] Among the legal obligations incident to parenthood is the responsibility to provide financial support, or maintenance, for a minor child.[14] This principle applies both in the

10. *See* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 7 (2004); *Truth and Consequences: Part III*, *supra* note 5, at 75; Drew, *supra* note 8, at 20.

11. The U.S. Supreme Court recognizes a constitutionally protected liberty interest of parents in the care, custody, and control of their children. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65-68, 73-74 (2000).

12. *Id.*

13. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, Jun. 1, 2010, 213 U.N.T.S. 221, E.T.S. No. 5, art. 1 [hereinafter ECHR], *available at* http://conventions.coe.int/Treaty/en/Treaties/Word/005.doc.

14. Baker, *supra* note 10, at 45 (parental status is accompanied by an obligation to provide financial support that is not based upon a relationship with the child, but the "obligation is rather a simple function of one's income—a raw percentage—and attaches absolutely and regardless of one's relationship with the child"). *See also* 2 WILLIAM BLACKSTONE, COMMENTARIES *447 ("The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation, . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world; for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish.").

United States[15] and in certain member states of the European Union.[16]

Prior to recent developments in reproductive technology, the maternity of a child was indisputable – a child's mother was the woman who had given birth to it.[17] The paternity of a child, however, was not always so certain. The maxim *mater semper certa est pater semper incertus est* dates at least to the time of early Roman law.[18] Literally, it translates as "mother is always certain, and father is always uncertain," or as stated colloquially, "mama's baby, papa's maybe."[19] The importance of establishing paternity dates back to antiquity. Bloodlines and the status of a child as legitimate or illegitimate affected the child's rights to citizenship, succession, and inheritance.[20] The significance of these interests has not diminished over time.

There are numerous ways to establish the paternity of a child.[21]

---

15. Baker, *supra* note 10, at 45.

16. Currently, the European Union is comprised of twenty-eight member states: Austria (1995), Belgium (1952), Bulgaria (2007), Croatia (2013), Cyprus (2004), Czech Republic (2004), Denmark (1973), Estonia (2004), Finland (1995), France (1952), Germany (1952), Greece (1981), Hungary (2004), Ireland (1973), Italy (1952), Latvia (2004), Lithuania (2004), Luxembourg (1952), Malta (2004), Netherlands (1952), Poland (2004), Portugal (1986), Romania (2007), Slovakia (2004), Slovenia (2004), Spain (1986), Sweden (1995) and the United Kingdom (1973). *EU Member Countries*, EUR. UNION, http://europa.eu/about-eu/countries/member-countries/index_en.htm (last visited Jul. 8, 2014). Countries seeking membership in the European Union include Iceland, Montenegro, Serbia, the former Yugoslav Republic of Macedonia, and Turkey. *On the Road to EU Membership*, EUR. UNION, http://europa.eu/about-eu/countries/on-the-road-to-eu-membership/index_en.htm (last visited Jul. 8, 2014). *See generally* ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, SOCIAL POLICY DIVISION, PF1.5: CHILD SUPPORT 2-4 (2010), *available at* http://www.oecd.org/els/family/41920285.pdf (comparing child support systems among the European Union (EU), the United States, Australia, Canada, and other OECD member nations); BLACKSTONE, *supra* note 14, at *447 ("The civil law obliges the parent to provide maintenance for his child; and, if he refuses, "*judex de ea re cognoscet*[,]" translated as "the judge shall take cognizance of that matter.").

17. *See* Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 468 (2009) (in the surrogacy context, contrasting state recognition of maternity and paternity); Hortense J. Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 DIACRITICS 65 (1987) (critically acclaimed feminist essay on gender, ethnicity, and culture).

18. *See generally* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 331 (2005) (providing an overview of paternity establishment).

19. Hofman, *supra* note 17, at 468.

20. Camille M. Davidson, *Mother's Baby, Father's Maybe!—Intestate Succession: When Should A Child Born Out of Wedlock Have a Right to Inherit From or Through His or Her Biological Father?*, 22 COLUM. J. GENDER & L. 531, 531 (2011); Lee-ford Tritt, *Sperms and Estates: An Unadulterated Functionally Based Approach to Parent-Child Property Succession*, 62 SMU L. REV. 367, 369 (2009); Megan Pendleton, *Intestate Inheritance Claims: Determining A Child's Right To Inherit When Biological and Presumptive Paternity Overlap*, 29 CARDOZO L. REV. 2823, 2824-25 (2008).

21. Some scholars suggest there are three models of establishing paternity: (1) presumption of paternity based on Roman law, (2) intent-based model based on the conduct of the parties, which

Another Roman maxim remains relevant today: *pater est quem nuptiae demonstrant*, meaning, the "father is to whom marriage points."[22] In an overwhelming majority of countries, the birth of a child during a marriage presumptively establishes the mother's husband as the child's father.[23] This rebuttable presumption of legitimacy posits that the husband is the father of a child born to his wife during their marriage.[24] Early English common law, however, was more restrictive. The presumption only applied when the marriage preceded the birth of the child.[25] The presumption of paternity, whenever it was applied, served to protect the marital family unit and to affirm the line of succession and inheritance.[26] Thus, this presumption of legitimacy became deeply entrenched in the common law and has since been codified in many jurisdictions. Today, it remains a viable means of establishing paternity.[27]

The paternity of children born outside of marriage typically required establishment by more challenging and unreliable means. These included "steadfastness of the mother's word, the mother and alleged father's relationship, and the physical resemblance of the child to the

---

is akin to parentage based on contract, and (3) genetic model based upon the biological relationship. Drew, *supra* note 9, at 19; *see also* Baker, *supra* note 10, at 22 (arguing that, historically, contract rather than biology determined paternity: "The law of legitimacy (which lets the marital contract determine paternal relationships) predates the law of paternity by at least a thousand years.").

22. *See, e.g.*, BLACKSTONE, *supra*, note 14, at *446 (observing: "*Pater est* '*quem nuptiae demonstrant*,' is the rule of the civil law; and this holds with the civilians, whether the nuptials happened before, or after, the birth of the child.").

23. BLAIR ET AL., *supra* note 7, at 27.

24. Baker, *supra* note 10, at 12 (quoting LESLIE J. HARRIS & LEE E. TEITELBAUM, FAMILY LAW 995 (2d ed. 2000)) (citing CAL. FAM. CODE § 7611(a) (West, Westlaw through 2014 Reg. Sess. laws), a statutory provision governing the presumption of paternity). The presumption of legitimacy, also known as the presumption of paternity, applies also when the child is born within nine to ten months following the termination of the marriage, whether by death or divorce. *See, e.g.*, TEX. FAM. CODE ANN. § 160.204 (West, Westlaw through the end of the 2013 Third Called Sess. of the 83rd Legislature); UNIF. PARENTAGE ACT § 204(a)(2) (amended 2002).

25. BLACKSTONE, *supra* note 14, at *446 (stating that "[i]n England the rule is narrowed, for the nuptials must be precedent to the birth").

26. Brandon James Hoover, *Establishing the Best Answer to Paternity Disestablishment*, 37 OHIO N.U. L. REV. 145, 147 (2011) (commenting on the primary purpose of the marital presumption of legitimacy, and further noting that the presumption protected the child from the social stigma of illegitimacy).

27. Veronica Sue Gunderson, *Personal Responsibility in Parentage: An Argument Against the Marital Presumption*, 11 U.C. DAVIS J. JUV. L. & POL'Y 335, 366 (2007). Despite the availability of DNA evidence to establish with certainty the paternity of a child, certain jurisdictions will adhere to the marital presumption of paternity, ignoring biological facts. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1988) (protecting the intact marital family unit and upholding California's presumption of legitimacy against the interest of the biological father who had established a relationship with the child).

alleged father."[28] Relying on physical resemblance to the alleged father to establish paternity was commonly referred to as "bald eagle" evidence.[29] "Bald eagle evidence can be traced to the ancient city of Carthage where children, upon reaching the age of two, were examined by a special committee; if their resemblance to the father was not great, they were killed."[30] In other cases, a strong resemblance to another man, such as mother's paramour, was used to prove non-paternity.[31] Historically, the law considered a child born to an unwed mother to be *filius nullius*, or "the son of no one," thereby making the child ineligible for inheritance.[32] Early child support laws discriminated against children born outside of marriage.[33] Modern Anglo-American support laws find their origins in the Tudor era poor laws, where biological fathers were required to provide financial support for their non-marital children.[34] Thus, under modern child support and maintenance laws, the marital status of the parents has no effect on a child's legal right to financial support.[35]

The social stigma associated with bearing children while unmarried has declined. At the same time, the number of children born to unwed mothers has steadily increased.[36] The evolution of non-traditional

28. Kirstin Andreasen, Little v. Streater *and the State Investment in Fatherhood*, 14 J. CONTEMP. LEGAL ISSUES 283, 287 (2004).

29. Shapiro et al., *supra* note 3, at 16.

30. *Id.*

31. *Id.* (citing Morris v. Davies, [1827] 172 Eng. Rep. 393).

32. *See, e.g.*, BLACKSTONE, *supra* note 14, at *459 (observing that "[t]he rights are very few, being only such as he can *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody; and sometimes called *filius nullius*, sometimes *filius populi* [son of the people or public]."); Gage Raley, *The Paternity Establishment Theory of Marriage and Its Ramifications for Same-Sex Marriage Constitutional Claims*, 19 VA. J. SOC. POL'Y & L. 133, 142 (2011) (citing Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 553 (2000)) ("From Ancient Roman law to the development of English common law, children born to unmarried parents were filius nullius, no one's son.").

33. Baker, *supra* note 10, at 6 (discussing a contractual model of paternity).

34. *See id.* ("A biological father's duty to support his non-marital children originated in England in 1576, as part of the British Poor Laws."); Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1133-34 (1999) ("The Elizabethan Poor Law of 1601 authorized local parishes to recover the money they spent in aiding single mothers and children from a nonsupporting father."); Katherine C. Pearson, *Filial Support Laws in The Modern Era: Domestic and International Comparison of Enforcement Practices for Laws Requiring Adult Children to Support Indigent Parents*, 20 ELDER L.J. 269, 271 (2013) (tracing U.S. support laws to Elizabethan Poor Laws).

35. Baker, *supra* note 10, at 6-7 (commenting that "[t]he Federal Child Support Act of 1984 required all states to allow children to sue for paternity until their eighteenth birthday").

36. In the United States, the National Center for Health Statistics (NCHS) reports that "the birth rate for unmarried women in 2007 was 80 percent higher than it was in 1980 and increased 20 percent between 2002 and 2007. RACHEL M. SHATTUCK & ROSE M. KREIDER, U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY REPORTS: SOCIAL AND ECONOMIC CHARACTERISTICS

models of family life – cohabitation, domestic partnerships, and civil unions – has further augmented the number of children born outside marriage.[37] These developments have created a greater need for the availability of an efficient process to establish the paternity of these children in order to protect their interests and those of fathers, mothers, and society.[38]

III. PATERNITY ESTABLISHMENT IN THE UNITED STATES AND THE EUROPEAN UNION TODAY

A. The United States

1. United States Paternity Laws and Principles

Domestic relations law is principally governed by state law.[39] However, the United States Constitution and other federal laws also affect family law matters.[40] Federal law requires states to develop,

---

OF CURRENTLY UNMARRIED WOMEN WITH A RECENT BIRTH*:* 2011, at 1 (2013) (citing STEPHANIE J. VENTURA, U.S. DEP'T OF HEALTH & HUMAN SERV., NCHS DATA BRIEF NO. 18: CHANGING PATTERNS OF NON-MARITAL CHILDBEARING IN THE UNITED STATES (2009), *available at* http://www.census.gov/prod/2013pubs/acs-21.pdf); *see also Global Children's Trends*, SUSTAINABLE DEMOGRAPHIC DIVIDEND, http://sustaindemographicdividend.org/articles/international-family-indicators/global-childrens-trends (last visited Jul. 7, 2014) (reporting a "high and rising" non-marital birth rate in the United States at 41 percent). In 2011, the highest percentage of non-marital births occurred in the District of Columbia (50.8 percent) and the lowest percentage was in Utah (14.7 percent). SHATTUCK & KREIDER, *supra*, at 5; *see also* Gretchen Livingston & D'Vera Cohn, *The New Demography of American Motherhood*, PEW RES. CTR. (May 6, 2010), http://www.pewsocialtrends.org/2010/05/06/the-new-demography-of-american-motherhood/ (reporting that the "share of births that are non-marital is highest for black women (72%), followed by Hispanics (53%), whites (29%) and Asians (17%), but the increase over the past two decades has been greatest for whites—the share rose 69%.").

37. *See* SHATTUCK & KREIDER, *supra* note 36, at 1 (citing an increase in cohabiting households as a factor in the rise in non-marital births); Fines, *supra* note 2, at 393 (predictably, as cohabitation without marriage increases, so does the number of children born out of wedlock). Generally, worldwide the number of unmarried women giving birth to children increased dramatically in recent years. *Global Children's Trends*, *supra* note 36. Among the target countries, the highest percentages of non-marital births in the report occurred in Colombia (74 percent), Peru (69 percent), Chile (68 percent), South Africa (59 percent), and Sweden (55 percent). *Id.* Target countries with the lowest percentages include China, India, Saudi Arabia, and Egypt (<1 percent), Indonesia (1 percent), South Korea (2 percent) and Taiwan (4 percent). *Id.*

38. *Truth and Consequences: Part I*, *supra* note 6, at 54.

39. *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2691 (U.S. 2013) (regulating domestic relations is within the "virtually exclusive province of the States"); Sosna v. Iowa, 419 U.S. 393, 404 (1975).

40. *See* Ankenbrandt v. Richards, 504 U.S. 689, 689 (1992) (citing Barber v. Barber, 62 U.S. 582, 584 (1858)) (discussing the domestic relations exception to diversity jurisdiction); Vaughan v. Smithson, 883 F.2d 63, 63 (10th Cir. 1989) (holding a breach of contract action for failure to pay child support fell within the domestic relations exception and thus could not be tried in federal

implement, and maintain procedures to establish the paternity of a child born to an unwed mother.[41] The establishment of paternity is necessary to ensure the child receives financial support from *both* birth parents without regard to their marital status.[42] These paternity establishment procedures give states the option in cases where the mother, alone, cannot support the child to shift financial responsibility from the state to the father when that is possible. This commonly occurs when the mother depends upon public benefits for support.[43]

Currently, states routinely establish paternity by requiring parents to complete a voluntary acknowledgement form in the hospital at the time of their child's birth.[44] States also admit results of genetic tests as evidence in the adjudication of paternity contests.[45] Genetic tests offer an efficient, accurate, unobtrusive, and inexpensive means of establishing paternity that could allow states to shift the potential financial responsibility for a child to the biological father.[46] DNA analysis in genetic testing yields such accurate results that rarely will

court).

41. During the past several decades, Congress enacted various welfare reform statutes to address the federal government's increasing burden of providing financial support for children born to unwed mothers in need of public assistance. *See, e.g.*, 42 U.S.C. § 666(a) (2006); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (federal law that facilitates establishing paternity of a child born to an unwed mother by mandating genetic tests in contested cases); Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (requiring states to develop and implement voluntary acknowledgement forms for hospitals to provide to unwed fathers to establish paternity). *See also* UNIF. PARENTAGE ACT § 201(b)(1)-(6) (amended 2002) (providing six ways of establishing a father-child relationship, including (1) an unrebutted presumption, (2) voluntary acknowledgement, absent rescission and successful challenge, (3) adjudication, (4) adoption, (5) consent to assisted conception resulting in the birth of a child, and (6) adjudication of an enforceable gestational agreement confirming paternity, respectively).

42. Baker, *supra* note 10, at 7.

43. *Id.*; *see also Truth and Consequences: Part III*, *supra* note 6, at 69-70; Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 477 (2003) (observing that the U.S. has the highest child poverty rate among 16 industrialized nations).

44. "Signing a voluntary acknowledgment has become the most common way that legal paternity of children born to unmarried mothers is established." 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, 308 (2007). "Most of the voluntary acknowledgments are signed at the time of birth at the hospital or other birthing facility." *Id.* Moreover, "federal law requires that, prior to signing a voluntary acknowledgement, mothers and purported fathers must be clearly informed of the legal consequences." Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 251-52 (2006).

45. *Truth and Consequences: Part I*, *supra* note 6, at 45.

46. Drew, *supra* note 8, at 19. *See also* Jäggi v. Switzerland, 2006-X Eur. Ct. H.R. 19, 29, *available at* HUDOC, http://www.echr.coe.int/Documents/Reports_Recueil_2006-X.pdf (regarding the use of DNA as a universally unobtrusive means for paternity testing).

paternity be deemed uncertain.[47] Today, DNA testing provides a universally unobtrusive means of establishing paternity.[48]

In addition to voluntary acknowledgment[49] and use of genetic tests,[50] the Uniform Paternity Act (UPA) provides a comprehensive, although non-exhaustive, list of additional methods by which the paternity status of an unwed man may be established in the United States. Although only nine states have adopted the current version of the UPA, a majority of states either have adopted or were influenced significantly by earlier UPA versions.[51]

The UPA employs legal presumptions for certain categories of unmarried men. For example, the UPA presumes an unwed man is the father of a child with whom he resided during the first two years of the child's life and held out openly as his own.[52] An unmarried man is also the presumed father of a child who is born within 300 days after the termination of his marriage to the child's mother.[53] In addition, the UPA presumes fatherhood even when a marriage is later declared invalid or is subsequently terminated so long as the man had entered into that marriage before the child was born.[54] The UPA further defines a presumed father as a man who marries the mother after the birth of the child, voluntarily asserts his paternity of the child with an agency responsible for maintaining official birth records, and either agrees to be and is named the father on the child's birth certificate or voluntarily agrees to provide financial support for the child as a parent in an official record.[55]

Alternatively, paternity may be established under the equitable doctrines of paternity by estoppel and of equitable parent. Both doctrines involve a judicial determination that seeks to achieve a fair and just result based on the conduct of the parties. Paternity by estoppel overrides genetic test results when the man has provided support for the child and held the child out as his own.[56] The finding of paternity by estoppel precludes any individual – mother, father, or third party – from denying

47. Hoover, *supra* note 26, at 147.

48. *Jäggi*, 2006-X at 29.

49. UNIF. PARENTAGE ACT art. 3 (amended 2002).

50. *Id.* § 204 cmt.

51. *Id.* § 201(b).

52. *Id.* § 204(a)(5).

53. *Id.* § 204(a)(2). The presumption applies whether the marriage "terminated by death, annulment, declaration of invalidity, or divorce[, or after a decree of separation]." *Id.*

54. *Id.* § 204(a)(3). Again, the presumption applies irrespective of the method of termination of the marriage. *Id*.

55. *Id.* § 204(a)(4). The presumption applies even if the marriage is or may be declared invalid. *Id*.

56. Hoover, *supra* note 26, at 153.

the man's paternity.[57] The equitable parent doctrine also disregards a man's genetic relationship to the child and recognizes another man as the child's father.[58] The equitable parent doctrine, as with the presumption of paternity, applies when there is a husband and a non-biological child born or conceived during the marriage, and when certain other factors coalesce.[59] The first factor is when "the husband and child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce."[60] The second factor is that "the husband desires to have the rights afforded to a parent."[61] The final factor is that the husband is willing to accept financial responsibility for the child.[62] The determinative factor under both equitable doctrines is conduct by one or more parties that is consistent with paternity.[63] The court also considers the best interests of the child and examines whether the presumed father and the mother have conducted themselves in a way that interferes with ascertaining another man as the child's biological father.[64]

The primary means used to establish paternity are currently biology, conduct, legal presumptions, and contract.[65] Once established, paternity gives rise to legally protected interests, including the right to financial support or maintenance.[66] Other legally protected interests incident to paternity include medical and dental insurance, military dependent benefits, social security benefits, succession and inheritance,[67] family medical history,[68] and the status allowing for

57. *E.g.*, K.E.M. v. P.C.S., 38 A.3d 798, 807 (Pa. 2012); Hausman v. Hausman, 199 S.W.3d 38, 41-43 (Tex. App. 2006).

58. J.P.M v. T.D.M., 932 So.2d 760, 767, 770, 779, 785 (Miss. 2006) (adopting the equitable parent doctrine).

59. Carolee Kvoriak Lezuch, *Michigan's Doctrine of Equitable Parenthood: A Doctrine Best Forgotten*, 45 WAYNE L. REV. 1529, 1529-30 (1999).

60. *Id* at 1529.

61. *Id.*

62. *Id* at 1529-30.

63. *Truth and Consequences: Part I*, *supra* note 6, at 36.

64. Mary R. Anderlik, *Disestablishment Suits: What Hath Science Wrought?*, 4 J. CTR. FOR FAM., CHILD. & CTS. 3, 6 (2003).

65. *See* UNIF. PARENTAGE ACT § 201 (amended 2002); *Truth and Consequences: Part I*, *supra* note 6, at 35-37; Baker, *supra* note 10, at 8-10.

66. Early support laws distinguished between the obligation to support children born during marriage and children born to unwed mothers. *See, e.g.*, Baker, *supra* note 10, at 6-10 (citing 18 ELIZ., c. 2, 3 (1575-6) (Eng.) and LAWRENCE P. HAMPTON, 1 DISPUTED PATERNITY PROCEEDINGS § 1.02(1)-(3) (Valerie E. Sopher rev. 1996)) (noting that England recognized a biological father's duty to support his child born to an unwed mother in 1576 and that, until recently, certain states imposed no duty to support on unmarried fathers).

67. *See* Anderlik, *supra* note 64, at 3 (observing that "[t]he first wave of DNA-based identity testing coincided with an aggressive program of paternity establishment for non-marital children

relatives to enter the country of the child's citizenship.[69] Considering the importance of the interests that paternity brings, it is surprising that the United States and many other countries persist in establishing it through non-determinative factors like conduct, contract, and presumptions now that biological proof of paternity can be determined with certainty, by DNA analysis.

2. Paternity Issues in the United States Supreme Court

The United States Supreme Court addressed the establishment of paternity in *Lehr v. Robertson*[70] and *Michael H. v. Gerald D.*[71] Together, these opinions graphically demonstrate the uneasy coexistence of genetic testing and the traditional indicia of paternity that prevails when questions of paternity are adjudicated in the United States today. In a nutshell, biology alone is not always determinative of paternity.[72]

In *Lehr v. Robertson*, the U.S. Supreme Court rejected a biological father's Fourteenth Amendment due process and equal protection claims.[73] The mother and biological father cohabited but were not married when the child was born.[74] The biological father visited the mother and his daughter in the hospital but never provided the child with

receiving federal welfare"); PAIKIN, *supra* note 4, at 4.

68. PAIKIN, *supra* note 4, at 4.

69. Martin G. Weiss, *Strange DNA: The Rise of DNA Analysis for Family Reunification and its Ethical Implications*, 7 GENOMICS, SOC'Y & POL'Y 1, 2 (2011) (noting that 17 nations utilize DNA for identification and reunification and immigration, including "Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Italy, Lithuania, the Netherlands, New Zealand, Norway, Sweden, Switzerland, the UK, and the USA"). DNA testing in immigration cases has resulted in reunification of some families and separation of others. During a ten-year period beginning in 1985, the UK excluded approximately 18,000 individuals seeking to immigrate. *Id.* "Of these, more than 95 per cent produced results that showed they were blood relatives of UK citizens and were therefore entitled to British citizenship." *Id.* (quoting Robin McKie, *Eureka Moment That Led to the Discovery of DNA Fingerprinting*, THE GUARDIAN, May 23, 2009). In contrast, a naturalized U.S. citizen from Ghana was permitted to bring only one of his four children to the U.S. because DNA testing revealed only one son was his blood relative. *Id.* at 1 (quoting Rachel L. Swarns, *DNA Tests Offer Immigrants Hope or Despair*, N.Y. TIMES, Apr. 10, 2007, at A1). *See also id.* at 5 (noting the potentials for misuse of "genetic data are extensive, ranging from the denial of private medical insurance to disadvantages on the labour market").

70. Lehr v. Robertson, 463 U.S. 248 (1983).

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

72. Baker, *supra* note 10, at 9 (observing that biology is not always determinative of paternity). There are four general categories in which states routinely disregard the biological relationship between father and child: (1) termination of parental rights, whether voluntary or involuntary; (2) assisted reproduction; (3) legal presumptions, voluntary acknowledgments, or other procedures used to establish a parent-child relationship, without evidence of a biological relationship; and (4) conduct of a man who establishes a relationship with the child, with whom he knows he has no biological connection. *Id.*

73. *Lehr*, 463 U.S. at 248-49.

74. *Id.* at 252.

any financial support.[75] Nor did he record his paternity with the State's putative father registry.[76] The mother subsequently married another man when the child was approximately eight months old.[77] The husband sought to adopt the child when she was a little over two years old.[78]

The biological father received no notice of the pending adoption and only learned of it after he had filed a paternity and visitation action.[79] If the biological father had registered with the putative agency, he would have been entitled under New York law to receive notice of the intent to adopt and an opportunity to be heard and object to the adoption.[80] The trial court handling the adoption and the mother both knew of the father's paternity and visitation action and the father's whereabouts.[81] Still, neither notified him of the petition for adoption, and the trial court signed the adoption order.[82] The biological father subsequently filed suit, alleging violations of his Fourteenth Amendment due process and equal protection rights.[83]

The U.S. Supreme Court upheld the New York Court of Appeals order rejecting the biological father's Fourteenth Amendment claims.[84] The Court reasoned that the Constitution does not afford an absolute right to notice and an opportunity to be heard to a biological father who fails to establish "any significant custodial, personal, [or] financial relationship" or legal ties with his child during the first two years of her life.[85] Thus, the biological father's disinterested conduct during the early years of the child's life trumped the undisputed fact of his paternity, depriving him of the right to notice and an opportunity to object to the adoption of his child.[86]

In *Michael H. v. Gerald D.*, the United States Supreme Court declined to recognize a biological father's interest in maintaining a relationship with his daughter, born as a result of an adulterous affair with the mother who was married to another man.[87] Shortly after the birth of the child, the mother informed the biological father that he, and

75. *Id.*
76. *Id.* at 248.
77. *Id.* at 250.
78. *Id.*
79. *Id.* at 252-54.
80. *Id.* at 250-51.
81. *Id.* at 253.
82. *Id.*
83. *Id.* at 255.
84. *Id.* at 248, 268.
85. *Id.* at 251, 262.
86. *Id.* at 267-68.
87. Michael H. v. Gerald D., 491 U.S. 110, 110 (1989).

not her husband, had fathered the child.[88] When the child was approximately five months old, the mother, biological father, and child submitted to blood tests.[89] The results established him to be the child's father with a 98.07% probability of certainty.[90]

In contrast to the father in *Lehr*, the biological father in *Michael H.* had provided some financial support for the child.[91] The child and her mother also had lived occasionally with the biological father during the first few years of the child's life.[92] When the mother denied the biological father visitation access to the child, he filed a filiation action in California to establish paternity and obtain a visitation order.[93] The mother and the child resumed living with her husband and two additional children were born to the marriage.[94]

The mother's husband intervened in the filiation action, noting that he was the presumptive father since the child had been born during his marriage to her mother and that California law allowed only a husband or wife the right to challenge the statutory presumption of legitimacy within a limited period of time and under limited circumstances.[95] However, neither he nor his wife chose to do so within the relevant time period, even though the statute of limitations had not run.[96] The California courts agreed with the husband.[97]

The United States Supreme Court affirmed the California Supreme Court's determination.[98] In its plurality opinion, the Court balanced the state's interests in preserving and protecting an intact family unit against the parental interests of a man who became a father through adultery.[99] The Court declined to recognize a protected Fourteenth Amendment due process or liberty interest of the biological father's paternity and the maintenance of a relationship between him and his child.[100] The birth of the child during the mother's marriage to another man proved the disabling factor.[101]

Lehr demonstrates that the biological father's conduct remains a

88. *Id.* at 113-14.
89. *Id.* at 114.
90. *Id.*
91. *Id.* at 159.
92. *Id.* at 114.
93. *Id.*
94. *Id.* at 115.
95. *Id.*
96. *Id.*
97. *Id.* at 114-115.
98. *Id.* at 132.
99. *Id.* at 121-25.
100. *Id.* at 127.
101. *Id.*

potent factor in parental establishment. For its part, *Michael H.* illustrates the remaining power of the parental presumption and, to some extent, the stigma of sexual conduct outside the marital relationship. Scholars criticize both opinions for evincing too great a disregard for the undisputable biological evidence of paternity and worry that they encourage resistance to biological evidence at the state level.[102] They further argue that states must consider the significant relationship between the biological father and his child, including financial, personal, and custodial relationships.[103] Whether by statute or common law, states must provide for rebuttal of the well-established presumption of legitimacy.[104]

B. The European Union

1. European Union Paternity Laws and Principles

The benefits that accrue from the establishment of paternity in the European Union mirror those in the United States. They include child support or maintenance payments, access to family history, dependent benefits, and succession and inheritance rights.[105] As discussed in the next section, European Union member nations, like American states, establish paternity through legal presumptions, voluntary acknowledgements, and judicial determinations. Respect for privacy, family life, and human dignity are among the fundamental rights encompassed in the Charter of Fundamental Rights.[106] The Charter of

102. Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (and Other Parenthood) After* Lehr *and* Michael H., 43 U. TOL. L. REV. 225, 265 (2012).

103. *Id.*

104. UNIF. PARENTAGE ACT art. 2-3, 5-6 (amended 2002).

105. *See, e.g.*, Katharina Boele-Woelki & Dieter Martiny, *The Commission on European Family Law (CEFL) and its Principles of European Family Law Regarding Parental Responsibilities*, ERA FORUM, no. 1, 2007, at 137 (parental responsibilities include care, protection, education, maintenance of personal relationship, and determination of residence); BLACKSTONE, *supra* note 14, at *459 (observing that "[t]he rights are very few, being only such as he can *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody; and sometimes called *filius nullius*, sometimes *filius populi* [son of the people or public]"); Shapiro et al., *supra* note 3, at 10.

106. OFFICIAL JOURNAL OF THE EUROPEAN UNION, CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (2010); *see also Charter of Fundamental Rights*, EUROPA: SUMMARIES OF THE EU LEGISLATION, http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/l33501_en.htm (last updated June 5, 2010). The ECHR, adopted in 2000 and given binding effect in 2009, opens with a preamble and has seven chapters governing dignity, freedoms, equality, solidarity, citizens' rights, justice, and general provisions. *Id.* Essentially creating more legal certainty in the EU, "[t]he charter brings together in a single document rights previously found in a variety of legislative instruments, such as in national and EU laws, as well as in international conventions from the Council of Europe, the United Nations (UN) and the International Labour Organisation (ILO)." *Id.*

Fundamental Rights is broader in scope than the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[107] Many of the same rights are also protected by the Council of Europe's Social Charter, which complements the ECHR's social, economic, and cultural rights.[108] In addition, the Social Charter guarantees certain social and economic rights, including the right to legal and social protection.[109] The right to legal and social protection encompasses the legal status of children, legal protection of the family, the right to childcare, and protection from poverty and social exclusion.[110]

Domestic relations in the European Union are governed primarily by the laws of the member states. Citizens of the member nations enjoy rights provided by the constitutions and laws of their respective states.[111] They also benefit from protections afforded by the laws, charters, conventions, and treaties of the European Union and ECHR.[112] The ECHR protects the core values of the European Union – human rights,

107. *See* ECHR, *supra* note 13.

108. Nuala Mole, *The Complex and Evolving Relationship Between the European Union and the European Convention on Human Rights*, 4 EUR. HUM. RTS. L. REV. 363, 364 (2012).

109. European Social Charter (revised), Jan. 7, 1999, C.E.T.S. No. 163. (additional rights, each containing separate subtopics, include housing, health, education, employment, free movement of persons, and nondiscrimination).

110. *Id.* (the Social Charter's right to legal and social protection also includes the right to social welfare, social services, social security, protection from abuse, elder care services, treatment for young offenders, and prohibitions of all forms of exploitation). *See also* Baker, *supra* note 10, at 4-5 n.4 (noting that child care subsidies are provided in all industrialized nations, except the U.S. and China, and such subsidies are not based on economic status).

111. *Fundamental Rights*, EUR. JUST., https://e-justice.europa.eu/content_fundamental_rights-176-en.do (last updated Nov. 7, 2014); *see also Charter of Fundamental Rights*, *supra* note 106 (the 28 member states are governed by their own constitutions and laws, as well as the governing authorities of the European Union, including: the European Convention on Human Rights, which protects human rights, democracy, and the rule of law; Charter of Fundamental Rights (announced in 2000, revisited in 2007, and given binding legal effect in Dec. 2009, on the entry into force of the Treaty of Lisbon), which incorporates into EU law the recognition of individual rights of EU citizens, including personal, civil, economic, and social rights; and Treaty of Lisbon (signed in 2007, and entered into force 2009), which defines the powers, limitations, structure, and functions of the EU). *See How the EU Works*, EUR. UNION, http://europa.eu/about-eu/index_en.htm (last visited Mar. 22, 2015) (providing links to relevant European Union treaties, charters, and conventions). "[N]ot all Member States have ratified all the protocols to the ECHR; not all participate in the EU measures adopted in areas falling within the scope of the ECHR; and not all have accepted the jurisdiction of the Court of Justice of the European Union . . . ." Mole, *supra* note 108, at 363. One of the EU's main goals is to promote human rights both internally and around the world. Human dignity, freedom, democracy, equality, the rule of law, and respect for human rights: these are the core values of the EU. Since the 2009 signing of the Treaty of Lisbon, the EU's Charter of Fundamental Rights brings all these rights together in a single document. The EU's institutions are legally bound to uphold them, as are EU governments whenever they apply EU law. *How the EU Works*, *supra*.

112. ECHR, *supra* note 13, art. 1.

democracy, and the rule of law.[113]

Relevant provisions of the ECHR in paternity matters include Article 6 (guaranteeing the right to a fair trial),[114] Article 8 (governing an individual's right to respect in private and family life),[115] Article 12 (regarding one's right to marry and have a family),[116] and Article 14 (protecting against discrimination).[117] Thus, in matters of domestic relations, the relationship between the European Union and its member states parallels to some degree the relation between the federal government of the United States (with its Constitution and overriding laws) and the fifty states (with their individual constitutions and laws). Likewise, many of the methods and rationales for establishing paternity in the European Union are comparable to those employed in the United States. Thus, the European Union jurisdictions nearly universally apply the presumption that a woman's husband is the father of the child.[118]

Litigants seeking redress for paternity issues under European Union law or pursuant to European Union rights must first exhaust their remedies in the courts of their respective member states. Thereafter, they may appeal to the European Court of Human Rights (ECtHR), a branch of the Council of Europe.[119] When reviewing these appeals, the ECtHR

113. *The Council of Europe In Brief*, COUNCIL OF EUR., http://www.coe.int/en/web/about-us/who-we-are (last visited Jul. 8, 2014). The Council of Europe, Europe's primary human rights organization, is comprised of "47 member states, 28 of which are members of the European Union." *Id.* "The European Union is preparing to sign the European Convention on Human Rights, creating a common European legal space for over 820 million citizens." *Id.* With accession and integration into the ECHR, the EU citizens will obtain both internal and external safeguards under the ECHR's fundamental rights protection system. *Accession of the European Union to the European Convention of Human Rights*, COUNCIL OF EUR, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp (last visited Jul. 8, 2014). "This will enhance consistency between the Strasbourg and the Luxembourg Courts and will afford citizens protection against the action of the EU, similar to that which they already enjoy against the action of Council of Europe member states." *Id.*

114. ECHR, *supra* note 13, art. 6 ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.").

115. *Id.* at art. 8 ("Everyone has the right to respect for his private and family life, his home and his correspondence."). Section 2 of this article provides certain limitations on an individual's family and privacy rights. *Id.*

116. *Id.* at art. 12 ("Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.").

117. Article 14 protects individuals against discrimination and provides as follows: "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." *Id.* at art. 14.

118. BLAIR ET AL., *supra* note 7, at 27 (citation omitted) ("[I]t is almost universal that a woman's husband is considered, at least presumptively, the father of her children.").

119. *Fundamental Rights*, EUR. JUST., https://e-justice.europa.eu/content_fundamental_rights-

accords a degree of deference to the member state courts. In particular, it recognizes that similar issues in different national environments sometimes require different results.[120]

Non-marital births have risen in the European Union, as they have in the United States.[121] In the U.K., for example, the Office of National Statistics reports that unmarried mothers accounted for 47.5 percent of the births in 2012, compared to only 25 percent in 1988.[122] By 2016, if this trend continues, more children will be born to unmarried parents in the U.K. than are born to married parents.[123] Moreover, the rate of non-marital births currently exceeds the rate of marital births in other European Union member states.[124] In 2012, non-marital birth rates exceeded 54 percent in France, Sweden, Estonia, Slovenia and Bulgaria, with Iceland reporting a non-marital marital birth rate of 66.9 percent.[125] As in the United States, the increase in non-marital births logically

176—maximize-en.do (last updated Nov. 7, 2014) ("[A]s a last resort, and after exhausting all remedies available at the national level, individuals may bring an action at the European Court of Human Rights in Strasbourg for violation by a Member State of a fundamental right guaranteed by the European Convention on Human Rights.").

120. *See, e.g.*, Rasmussen v. Denmark, No. 8777/79, Eur. Ct. H.R. at 11 (1984), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57563. The ECtHR has pointed out in several judgments that the "Contracting States enjoy a certain 'margin of appreciation' in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law (see the judgment of 23 July 1968 in the 'Belgian Linguistic' case, Series A no. 6, p. 35, para. 10; the National Union of Belgian Police judgment of 27 October 1975, Series A no. 19, p. 20, para. 47, and pp. 21-22, para. 49; the Swedish Engine Drivers' Union judgment of 6 February 1976, Series A no. 20, p. 17, para. 47; the above-mentioned Engel and Others judgment, Series A no. 22, p. 31, para. 72; and the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 87, para. 229). The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, mutatis mutandis, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 36, para. 59)." *Id.*

121. *Marriage and Divorce Statistics*, EUR. COMM'N: EUROSTAT, http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics#A_rise_in_births_outside_marriage (last updated Feb. 26, 2015) [hereinafter EUROSTAT] (compiling data on the twenty-seven member states of the European Union).

122. *Summary Tables – England and Wales, 2012*, OFFICE NAT'L STATISTICS, http://www.ons.gov.uk/ons/search/index.html?newquery=unmarried+births (last visited Jul. 6, 2014).

123. Steven Swinford, *Most Children Will Be Born Out of Wedlock by 2016*, TELEGRAPH (Jul. 10, 2013), http://www.telegraph.co.uk/news/politics/10172627/Most-children-will-be-born-out-of-wedlock-by-2016.html.

124. EUROSTAT, *supra* note 121.

125. *Id.* The Commission acknowledges the difficulty in comparative analysis "[d]ue to differences in the timing and formal recognition of changing patterns of family formation and dissolution . . . . Demographic statistics therefore have access to relatively few complete and reliable data sets with which to make comparisons over time and between or within countries." *Id.*

results from the significant decline in the societal stigma associated with these births and the availability of legal alternatives to marriage such as registered partnerships, civil unions, and cohabitation.[126]

This increase in non-marital births necessitates efficient and timely methods of establishing paternity to ensure the child receives financial support from his or her biological father. When the ECtHR adjudicates paternity issues, it considers, through the prisms of private life, family life, or both, whether the paternity or filiation laws of the affected member state violate the ECHR.[127] The court also considers whether the state procedures were fair and just under Article 6 of the ECHR.[128]

According to ECtHR jurisprudence, "the fact of birth, and the genetic connection if proved, does not lead automatically to a legal relationship between a man and a child and does not establish per se family life for purposes of the [ECHR]."[129] Given the significant ramifications of paternity, "it [is] a matter of some concern that there is no systematic attempt to establish paternity in every case of childbirth and certainly no universal right on the part of children to derive, from birth, kinship links from a father which are taken for granted on the maternal side."[130]

2. Paternity Issues in the European Union Court of Human Rights

A review of domestic law cases in European Union member states found that, in an overwhelming majority, an unmarried mother of a child must consent before the putative father can even acknowledge his paternity.[131] This may inadequately consider the rights of the child and conflict with Article 7 of the United Nations Convention on the Rights of the Child (UNCRC). Article 7 propounds the right of the child to "know and be cared for by his or her parents."[132] However, if such member state cases are appealed to the ECtHR, that court not only takes

126. *Id.*

127. *Discrimination: Citizenship-Discrimination on Basis of Legitimacy*, 1 EUR. .HUM. RTS. L. REV. 107, 109 (2012) [hereinafter *Discrimination*] (for paternity establishment case, "[i]n the absence of a family life, the only way that the applicant could succeed under art. 14 in conjunction with art. 8 was through the prism of private life.").

128. *Id*. at 108.

129. Andrew Bainham, *Whose Sperm Is It Anyway?*, 62 CAMBRIDGE L.J. 525, 569 (2003).

130. *Id.*

131. Kautzor v. Germany, App. No. 23338/09, Eur. Ct. H.R. at 6 (2012) *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109809 (surveying twenty-six member states and finding "that in twenty-one of those States acknowledgment of the paternity of a child born out of wedlock requires the mother's consent").

132. Bainham, *supra* note 129, at 569 (observing that the United Nations Convention on the Rights of the Child has a "strongly genetic flavour" in the child's right to care from "mother and the genetic father").

the best interest of the child into consideration, but often gives it decisive weight.[133]

The ECtHR recently held that the limitations period for establishing paternity should not be applied automatically, even if the affected member state imposed time limits on paternity claims.[134] The four cases originated in Finland. Finnish children born out of wedlock before the implementation of a new parentage act were required to establish the paternity of their putative fathers within five years after its enactment.[135] Each case involved a child who had missed the deadline.[136] As background, the ECtHR noted that policies of member states concerning the timing of paternity claims varied greatly.[137] In states that imposed time limits, the periods ranged from one to thirty years.[138] On the other hand, a significant number of states set no time limits for children to bring a paternity claim.[139] Despite having reviewed the cases from the perspective of Finland's individual character, the EctHR rejected in each case the Finnish Supreme Court's strict application of the statutory, five-year time limit. The ECtHR observed that the law lacked any alternative means of redress.[140] The court found Finland had failed to strike a fair balance of competing interests. The Finnish Supreme Court had thereby violated the applicants' rights of privacy and family life and, ultimately, their right to respect protected by Article 8 of the ECHR.[141]

---

133. *See, e.g.*, X v. Latvia, App. No. 27853/09, Eur. Ct. H.R. at 19 (2011), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-138992. "In order to determine whether the contested measure was 'necessary in a democratic society,' the Court has emphasised the national authorities' role in striking a fair balance between the competing interests of the child and the parents in matters of this kind . . . . In the balancing process, particular importance must be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents." *Id.* (citing Sommerfeld v. Germany, App. No. 31871/96, Eur. Ct. H.R. (2003)).

134. *ECtHR Confirms Child's Interest in Establishing Paternity, Parent's Right to Enforcement of Visitation*, INT'L JUST. RES. CTR. (Feb. 6, 2013), http://www.ijrcenter.org/2013/02/06/ecthr-confirms-childs-interest-in-establishing-paternity-parents-right-to-enforcement-of-visitation/.

135. Backlund v. Finland, App. No. 36498/05 Eur. Ct. H.R. at 4 (2010), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99784.

136. Röman v. Finland, App. No. 13072/05, Eur. Ct. H.R. at 12 (2013), *available at* HUDOC, http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-115864; Laakso v. Finland, App. No. 7361/05, Eur. Ct. H.R. at 2 (2013), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115861; *Backlund*, App. No. 36498/05; Grönmark v. Finland, App. No. 17038/04, Eur. Ct. H.R. (2010), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99828.

137. *Backlund*, App. No. 36498/05 at 10.

138. *Id.*

139. *Id.* (noting the absence of a uniform approach to establishing paternity).

140. *Röman*, App. No. 13072/05, at 56.

141. *Id.* at 60-61.

In *Jäggi v. Switzerland*, an adult appellant complained that Swiss law had violated his rights under Articles 8 and 14 of the ECHR by preventing him from obtaining DNA from the dead body of a man he believed to be his biological father.[142] The ECtHR balanced the vital interest of the applicant in establishing his parentage against the right of respect for the dead. It also considered the public interest in legal certainty or finality.[143] The court stated that, although paternity establishment cases typically involve minors, "an individual's interest in discovering his parentage did not disappear with age."[144] The court found the decedent's family had failed to provide any philosophical or religious reasons for opposing the DNA testing, which the court characterized as "a relatively unintrusive measure."[145] It also observed that the private life of the deceased person from whom it was proposed to take a DNA sample could not be impaired by such a request since it was made after his death.[146] The court "note[d] that the protection of legal certainty alone [could not] suffice as ground[s] for depriving the applicant of the right to [discover] his parentage."[147] Ultimately, the ECtHR agreed with the appellant that his European Union rights to private life entitled him to obtain DNA analysis of the remains of his putative biological father.[148]

Kroon and Others v. Netherlands involved a mother, biological father, and their child who sought review of the Netherlands' refusal to recognize the paternity of the biological father.[149] The Netherlands' court had based its decision on marital presumptions, discounting evidence that, for several years before the child's birth, the mother had been out of contact with her legal husband.[150] The applicants also argued they had suffered inequitable treatment, pointing out that the mother's right to challenge her former husband's paternity was significantly more

142. Jäggi v. Switzerland, 2006-X Eur. Ct. H.R. 19, 25, 30, *available at* HUDOC, http://www.echr.coe.int/Documents/Reports_Recueil_2006-X.pdf.

143. *Id.* at 29.

144. *Id*.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id*. at 24.

149. Kroon v. Netherlands, App. No. 18535/91, Eur. Ct. H.R. at 3 (1994), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57904. The Civil Code of the Netherlands governs family law and is codified in Book 1, Natural Persons and Family Law. *See Dutch Civil Code: Book 1 Law of Persons and Family Law*, DUTCH CIVIL LAW, http://www.dutchcivillaw.com/civilcodebook01.htm (last visited Mar. 22, 2015).

150. *Kroon*, App. No. 18535/91 at 3. The relevant statute provides as follows: "The husband shall be the father of a child born in wedlock. Where a child is born before the 307th day following dissolution of the marriage, the former husband shall be its father, unless the mother has remarried." *Id.* at 6.

limited than her former husband's right to do the same.[151] The court considered the Dutch setting and reasoned that "'respect' for 'family life' required that biological and social reality prevail over a legal presumption."[152] In the case at hand, the presumption "[flew] in the face of both established fact and the wishes of those concerned without actually benefiting anyone."[153] The ECtHR held the Netherlands court had violated the applicants' rights to a family life and to protection from discrimination, guaranteed by Articles 8 and 14 of the ECHR.[154]

In *Genovese v. Malta*, the ECtHR reviewed the application of a son born in Scotland to an unwed British mother and a Maltese father.[155] The son complained of discrimination and a violation of his right to family life, resulting from Malta denying him citizenship.[156] A Scottish court adjudicated the Maltese man as the biological father.[157] On the discrimination claim, the ECtHR determined there was no evidence of family life. The father did not recognize his son on his birth certificate, did not maintain a relationship with the child, and even had failed to acknowledge him as his son.[158] Given the lack of the father's involvement with his son, the court found no family life to support a claim.[159] However, it did find that Malta's discrimination could adversely impact the son's right to private life.[160] A Maltese court subsequently determined the Maltese man to be the biological father and ordered him to pay maintenance.[161]

In another paternity action, *Mikulić v. Croatia,* the ECtHR reviewed Croatia's paternity establishment procedures.[162] The case involved an unmarried mother and her child filing an application to contest alleged violations of Article 6, § 1 (access to fair and timely civil procedures), Article 8 (protection of family and private life), and Article 13 (right to an effective remedy), when the putative father failed to attend numerous paternity hearings and comply with court ordered DNA testing.[163] The

151. *Id.* at 14.
152. *Id.*
153. *Id.*
154. *Id.*
155. Genovese v. Malta, App. No. 53124/09, Eur. Ct. H.R. at 2 (2011), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106785.
156. *See id.* at 1; *Discrimination supra* note 127, at 107.
157. *See Genovese*, App. No. 53124/09 at 2; *Discrimination*, *supra* note 127, at 108.
158. *Id.* at 2, 7-8.
159. *Id.* at 7-8.
160. *Id.*
161. *Id.* at 3.
162. Mikulić v. Croatia, 2002-I Eur.Ct. H.R. 141, *available at* HUDOC, http://www.echr.coe.int/Documents/Reports_Recueil_2002-I.pdf.
163. *Id.* at 147.

court observed that Croatia had neither the means to compel submission to DNA testing nor a penalty for failure to comply.[164] Accordingly, the ECtHR found a lack of proportionality for failure to provide either a means to compel compliance with court ordered DNA testing or an alternative means to establish paternity.[165] The court also found the state had failed to provide an effective, efficient remedy by not balancing the interest of the child in having her personal identity resolved against the putative father's interest in avoiding DNA tests.[166] The court ultimately held Croatian law had violated the applicants' rights pursuant to Article 6 § 1, Article 8, and Article 13.[167]

The ECtHR in *A.M.M. v. Romania* found that proceedings in Romania to establish paternity of a disabled child born to an unmarried severely disabled woman had violated Article 8 of the ECHR, governing the right to respect for private and family life.[168] The child's birth certificate designated the father as unknown; however, the putative father had signed a handwritten letter acknowledging paternity and agreeing to provide maintenance for the child.[169] Notwithstanding his acknowledgment, the putative father had refused to submit to genetic tests, from which the Romanian court drew no inference.[170] The Romanian court rejected the father's handwritten letter acknowledging paternity and the maternal grandmother's testimony as insufficient, found the paternity claim unsubstantiated, and dismissed the action.[171] The ECtHR concluded that Romania had violated Article 8 of the ECHR because the "domestic courts had not struck a fair balance between the child's right to have his interests safeguarded in the paternity proceedings and the right of his putative father not to take part in the proceedings or to refuse to undergo a paternity test."[172]

Interestingly, as recently as March 2012, Germany upheld a legal presumption of paternity over biology in two separate cases. *Ahrens v.*

164. *Id*. at 144.

165. *Id*.; *see also* Jäggi v. Switzerland, 2006-X Eur. Ct. H.R. 19, 28-29, *available at* HUDOC, http://www.echr.coe.int/Documents/Reports_Recueil_2006-X.pdf ("At the same time, it must be borne in mind that the protection of third persons may preclude their being compelled to make themselves available for medical testing of any kind, including DNA testing . . . .").

166. *Mikulić*, 2002-I Eur. Ct. H.R. at 144.

167. *Id.* at 143-44. "Making an assessment on an equitable basis, as required by Article 41 [just satisfaction], the Court award[ed] the applicant 7,000 euros." *Id.* at 158.

168. Chamber Judgment, A.M.M. v. Romania, App. No. 2151/10, Eur. Ct. H.R. at 1 (2012), *available at* HUDOC http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3844592-4417275.

169. *Id.* at 2.

170. *Id.* at 2.

171. *Id.*

172. *Id.* at 3.

Germany involved a biological father seeking to establish paternity of a child.[173] Another man, who had cohabited with the mother after the child's birth, had previously established paternity with the mother's consent.[174] In rejecting the biological father's complaint, the German Court of Appeal in Berlin disregarded genetic evidence demonstrating a 99.99 percent probability that the third party was the child's biological father.[175] It concluded that he "did not have the right to challenge paternity because of the existence of a social and family relationship between [the legal father] and the child" since the child's birth.[176]

A former husband sought to establish paternity of a child born subsequent to his separation and divorce from the child's mother in *Kautzor v. Germany*.[177] Approximately one year later, when the former husband expressed interest in acknowledging paternity and having access to the child, the man with whom the mother then cohabited acknowledged the child as his with the mother's consent.[178] The mother and legal father subsequently married and, at the time of the proceedings, had given birth to two additional children.[179] The parties acknowledged the existence of a social and family life between the legal father and the child. Accordingly, the German courts rejected the former husband's request to establish paternity of the child.[180] The German Court of Appeal concluded that the legislature was "entitled to let the interests of the child and of her legal parents prevail over the biological father's interest to have his paternity legally established and to preclude the biological father from contesting paternity."[181] The ECtHR found no violation of the biological husband's rights pursuant to Article 8 (right to protection of family and privacy) either alone or in conjunction with Article 14 (right to equal protection).[182]

The foregoing sampling of paternity cases decided by the ECtH

173. Ahrens v. Germany, App. No. 45071/09, Eur. Ct. H.R. (2012), *available at* HUDOC, http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-109815.

174. *Id.* at 2.

175. *Id.* at 3.

176. *Id.* at 2.

177. Kautzor v. Germany, App. No. 23338/09, Eur. Ct. H.R. at 2 (2012), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109809.

178. *Id.*

179. *Id.*

180. *Id*. at 3.

181. *Id.* at 4 (affirming that the grant of legal status based on assumptions related to factual and social situations). "Such an assumption existed if a man declared in a legally binding way and with the express consent of the mother of a child born out of wedlock that he was willing to assume parental responsibility," and that "the child's rights were sufficiently protected by her own right to challenge paternity upon reaching the age of majority." *Id.*

182. *Id.* at 17, 19.

demonstrates that, as in the United States, paternity can be established in different ways – adherence to legal presumption; voluntary acknowledgements, typically with the mother's consent; genetic testing; and the establishment of a social and family life, with or without marital status. These ways of establishing paternity have, in different circumstances, proved successful so long as they have not upended the best interests of the children involved. However, in each of these cases, it is clear that if genetic testing had been performed at the time of the respective children's births, considerable personal and legal costs could have been avoided.

IV. DISESTABLISHMENT

As with establishing paternity, methods of disestablishing paternity vary by jurisdiction. Their derivation ranges from ancient common law rules of law and equity to more contemporary statutory rules and procedures.[183] Under the common law, presumptions of paternity are rebuttable. Generally, disestablishment of paternity requires proof of fraud, material mistake of fact, or some other misunderstanding, and involves a balancing of diverse interests.[184] The same genetic technology used to establish paternity also disestablishes paternity.[185] Legal fathers have used DNA evidence obtained many years after their children's births to disestablish paternity initially established by presumption, court decree, or conduct.[186]

Prior to DNA evidence, paternity could be rebutted through evidence of a presumed father's lack of access to the mother for sexual intercourse near the relevant time of conception.[187] A man's inability to father a child resulting from sterility or impotence provided a further ground for rebuttal.[188] However, to successfully rebut the presumption of fatherhood, evidence of impossibility or incapacity had to be particularly strong; mere supposition could not dislodge the link between marital status and the legal responsibilities of fatherhood.[189]

183. Hoover, *supra* note 26, at 146.

184. Jacobs, *supra* note 8, at 239-40 (arguing for short time limitations on paternity challenges with greater weight to be placed on the established parent-child relationship).

185. Hoover, *supra* note 26, at 147 (quoting Singer, *supra* note 44, at 253: "[a]lthough DNA technology was envisioned as a tool to establish paternity without the need for judicial involvement, it has been eagerly embraced by litigants who seek to disestablish their status as legal parents.").

186. *See Truth and Consequences: Part I*, *supra* note 6, at 45; *Truth and Consequences: Part II*, *supra*, note 6, at 60; BLAIR ET AL., *supra* note 7, at 27.

187. *See, e.g.*, Shapiro et al., *supra* note 3, at 12-16; Baker, *supra* note 10, at 12-13.

188. Baker, *supra* note 10, at 12 ("Lord Mansfield's Rule prohibited either spouse from giving testimony that would cast doubt on whether the husband was the child's father.").

189. Michael H. v. Gerald D., 491 U.S. 110, 124-25 (1989), in which the U.S. Supreme Court

Disestablishment legally severs the parent-child relationship based on after-discovered biological facts.[190] If successfully rebutted, the parent-child relationship ends.[191] A disestablishment of paternity order not only severs permanently a child's legally recognized relationship with a man previously deemed to be her father, but also terminates the financial support obligation associated with that parent-child relationship.[192] Thus, the disestablishment of paternity not only may harm the child emotionally, but also can detrimentally impact her financial wellbeing.[193]

Paternity disestablishment affects many areas, including "child well-being, marriage and family formation, health promotion, and the interaction between science and society." [194] Although commentators agree that disestablishment requires the balancing of the interests of the affected parties, how best to achieve that balance remains a matter of some dispute. Among the chief concerns raised regarding paternity disestablishment is the issue of fairness in relieving a man from an obligation to financially support a child with whom he has no biological connection.[195] Another concern considers the fairness or justice in maintaining a parent-child relationship that is based upon fraud, a material mistake of fact, or other misrepresentations.[196] These two concerns focus on the interests of the established father and are the primary reasons paternity disestablishment is granted. Some commentators argue that biological proof of non-paternity should cause the balancing process to favor the non-biological father's interests over others, including the best interests of the child.[197]

---

protected the intact marital family unit and upheld the presumption of legitimacy against the interest of the biological father who had established a relationship with the child.

190. *See generally Truth and Consequences: Part I*, *supra* note 6, at 49; *Truth and Consequences: Part II*, *supra*, note 6, at 56-57; Jeffrey A. Parness, *New Federal Paternity Laws: Securing More Fathers at Birth for the Children of Unwed Mothers*, 45 BRANDEIS L.J. 59, 103 (2006) ("Public policy (and at times, perhaps, due process and equal protection) demands that American lawmakers, both federal and state, more vigorously promote the early, accurate, informed, and conclusive designation of fathers in law around the time children are born."). Prof. Parness further argues that "[p]ublic policy also demands that where paternity designations do not accurately reflect the requisite genetic ties with children, paternity laws should be more fair and just in allowing disestablishment." *Id.*

191. *See Truth and Consequences: Part II*, *supra* note 6, at 57; UNIF. PARENTAGE ACT § 601 (amended 2002).

192. *Truth and Consequences: Part III*, *supra* note 5, at 70-71; Anderlik, *supra* note 64, at 4.

193. *Truth and Consequences: Part III*, *supra* note 5, at 75; Anderlik, *supra* note 64, at 4.

194. Drew, *supra* note 8, at 18.

195. *See generally Truth and Consequences: Part I*, *supra* note 6, at 47; *Truth and Consequences: Part II*, *supra* note 6, at 62; Drew, *supra* note 8, at 20.

196. *See* UNIF. PARENTAGE ACT § 201 (amended 2002); Drew, *supra* note 8, at 21.

197. *See supra* note 190.

Other commentators argue that, when balancing the interests of the child and the non-biological father, the child's right to have a relationship with his or her paternal family should be comparable to the child's right to have a relationship with his or her maternal family.[198] Rather than allowing biological facts to be dispositive, courts should place more weight on maintaining stability in an established parent-child relationship, despite the potential for a loving and supportive relationship with the biological father.[199]

Bioethicists have developed several models for paternity disestablishment, two of which are utilitarian based.[200] The pure utilitarian model offers a mathematical approach. It balances the interests of all affected parties and grants or denies the disestablishment request based upon satisfying the interests of more, rather than fewer, affected parties.[201] The rule-based utilitarian model also balances the interests of affected parties but takes into account rules that the law or society deems most significant, such as the best interests of the child.[202]

The final paternity disestablishment model espouses three ethical principles – "fairness or justice, beneficence and lack of maleficence, and the linked principles of autonomy, liberty, and privacy."[203] The fairness or justice principle places a higher value on the interests of the innocent individual, namely the child, and grants disestablishment if it promotes the child's best interests. However, this principle places a lower value on the interests of affected parties who have engaged in some form of misconduct.[204] The beneficence or maleficence principle seeks to maximize satisfaction of interests, while minimizing harm to the affected parties.[205] The objective of the principles of autonomy, privacy, and liberty seeks to protect these individual interests from excessive government interference.[206]

Other bioethicists argue that the use of simple bright-line genetic tests to create a parent-child relationship is less than ideal.[207] Severing an established parent-child relationship based on after-discovered evidence of the absence of a biological tie may be harmful to the child, the parents, and other family members. Thus, public policies should

198. *Truth and Consequences: Part II*, *supra* note 6, at 55, 60.
199. Drew, *supra* note 8, at 20.
200. *Id.* at 20-21.
201. *Id.* at 21.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 19.

recognize the harmful effects of severing the relationship between a child and a man with whom the child has developed a meaningful paternal relationship, notwithstanding their lack of a genetic connection.[208] These bioethicists acknowledge that the state has a compelling interest to place financial responsibility for a child with his or her natural parents, but caution that a state's efforts to avoid potential financial responsibility may be to no avail. Some biological fathers may be unable to provide any financial support due to poverty or minimum income.[209] The biological father also may have support obligations for multiple children from relationships with other women.[210] Thus, these bioethicists argue that, as a matter of public policy, the superficial appeal of a facile and reliable means to establish paternity must be balanced with the value and strength of an established non-biological parent-child relationship.[211]

Policies and procedures for disestablishment affect the interests of the non-father, the child, and the interrelated interests of others – the real father, the mother, other family members, and the state.[212] Current practice, however, fails to account for the breadth of interests involved. Non-biological values are disregarded in the disestablishment process, which typically places greater weight upon the fraud, material mistake of fact, and misrepresentation on which the non-biological father's relationship was based. Indeed, some scholars argue that prevailing disestablishment policies, by favoring the interests of the non-father over all others, undermine the integrity of state interests in protecting the welfare and stability of families in society as a whole.[213] They urge greater consideration of the best interests of the child in disestablishment proceedings.[214] The best interests of the child analysis, notwithstanding its name, actually takes into account factors that touch upon interests of those beyond the child herself. It considers a wide range of issues, including the physical, emotional, medical, religious, and educational needs of the child (and, by extension, her associates), along with her need for a safe and stable home environment.[215] Thus, balancing

208. *Id.* at 20.

209. *Id.*

210. *Id*.

211. *Id.* (commenting that public policy should be shaped "so as to maximize the protection of the interests of each child, which may mean that a fine-tuned rather than a blunt set of protections is requisite"). *But see supra* note 190.

212. Anderlik, *supra* note 64, at 3.

213. Drew, *supra* note 8, at 19-20.

214. *Id.*

215. *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT § 402 (amended 1974) (recommending several best interest factors including the wishes of the parents and child, mental and physical health

interests in paternity disputes from the standpoint of the best interests of the child would view the circumstances at hand through a wider lens. However, at present, these arguments are the outliers. In most disestablishment adjudications today, particularly in the United States, the more narrowly framed interests of the non-father generally prevail.[216]

A. Paternity Disestablishment in the United States

The disestablishment process in the United States typically involves judicial or administrative determinations based upon common law decisions and legislative enactments. Section 666 (a) of Title 42 of the United States Code mandates procedures for the disestablishment of paternity.[217] Accordingly, the Federal Rules of Civil Procedure provide for the termination of a parent-child relationship established by court order, judgment, or proceeding.[218] Specifically, Rule 60(b)(1) authorizes relief from a final judgment, proceeding, or order that is based upon a "mistake, inadvertence, surprise, or excusable neglect."[219] Rule 60(b)(2) provides for relief when there is proof of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial."[220] Rule 60(b)(3) further provides for relief based upon proof of "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party."[221] Rule 60 incorporates a one year limitation of action period for claims based upon fraud, mistake, inadvertence, surprise, excusable neglect, or newly discovered evidence.[222] The time limitation on the remaining subsections of Rule 60(b) merely requires a motion for relief to be filed

---

of parents and child; and the interrelationship between parents, child, and siblings); MICH. COMP. LAWS ANN. § 722.23(a)-(l) (West, Westlaw through P.A.2015, No. 6, of the 2015 Reg. Session, 98th Legislature) (providing a list of factors for best interest determinations that considers moral fitness and domestic violence, as well as the ability to meet the physical, emotional, medical and educational needs of the child).

216. Anderlik, *supra* note 64, at 18 (citing Theresa Glennon, *Expendable Children: Defining Belonging in a Broken World*, 8 DUKE J. GENDER L. & POL'Y 269, 281-82 (2001) (arguing that a child is an innocent victim of a failed relationship and should not be treated as expendable)) ("[T]he best interest of the child would trump adult interests.").

217. *See* 42 U.S.C. § 666(a)(2) (2006) (requiring "[e]xpedited administrative and judicial procedures . . . for establishing paternity and for establishing, modifying, and enforcing support obligations"); 42 U.S.C. § 666(a)(5) (mandating procedures to establish, rescind or challenge paternity); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

218. FED. R. CIV. P. 60 (providing for relief from judgment or order).

219. *Id.* § 60(b)(1).

220. *Id.* § 60(b)(2).

221. *Id.* § 60(b)(3).

222. *Id.* § 60(c)(1) (time limitation for Rule 60(b), subsections (1)-(3) is "no more than a year after the entry of the judgment or order or the date of the proceeding").

within a "reasonable time."[223] What constitutes a "reasonable time" is not defined in the statute and, thus, must be determined on a case-by-case basis.[224] Relief from a final judgment, order, or proceeding is also available when "applying it prospectively is no longer equitable"[225] or for "any other reason that justifies relief."[226]

Federal law provides financial incentives for states to comply with the federal disestablishment policies. Indeed, the linkage of block grants to state participation resulted in a rapid response by states to adopt statutes to facilitate disestablishment procedures.[227] Some states adopted provisions that mirror those of the Federal Rules of Civil Procedure.[228] Other states enacted variations of the model provisions in the Uniform Parentage Act (UPA).[229] The UPA authorizes a paternity challenge based on "fraud, duress, or material mistake of fact."[230]

The majority of jurisdictions require disestablishment actions to be brought within a stipulated period of time. These statutory limitations range from a requirement to file a petition within three years of the birth of the child or, alternatively, within three years of the time that the presumptive or legal father knew or reasonably should have known that

223. *Id.*

224. *See generally* Weeks v. Wallace, No. 4:94-CV-1704 CAS, 2013 WL 812112 (E.D. Mo. Mar. 5, 2013) (holding ten years was not within a reasonable time); Nucor Corp. v. Nebraska Pub. Power Dist., 999 F.2d 372 (8th Cir. 1993) (holding three years was not within a reasonable time).

225. FED. R. CIV. P. 60(b)(5). *See, e.g.*, *In re* Paternity of Cheryl, 746 N.E.2d 488, 490-93, 496-97 (Mass. 2001) (pursuant to MASS. DOM. REL. P. 60(b)(5), governing relief where "it is no longer equitable that the judgment should have prospective application," the Supreme Court of Massachusetts affirmed a determination denying a father relief from judgment, holding that the father did not seek relief in a reasonable period of time when he waited five years to request relief after signing acknowledgement of paternity and rejecting genetic testing, even though he entertained doubts that he was the child's father).

226. FED. R. CIV. P. 60(b)(6). "Relief under Rule 60(b)(6) is reserved 'only [for] truly "extraordinary circumstances."'" United States v. Jordan, No. 3:05cr17, 2013 WL 5933481, at *2 (E.D. Va. Nov. 5, 2013) (quoting Aikens v. Ingram, 652 F.3d 496, 500 (4th Cir. 2011)). *See also* A.P. v. Gov't *ex rel.* C.C., 961 F.Supp. 122 (V.I. 1997) (court required to hold evidentiary hearing to determine whether the requisite "extraordinary circumstances" exist to grant established father's disestablishment request and relief from child support payments; fraud claim time barred). The Federal Rules of Civil Procedure specify that Rule 60(b) has no effect on a court's "other powers to grant relief," including by filing an independent action, for lack of notice, and for fraud on the court. FED. R. CIV. P. 60(d)(1)-(3).

227. *See supra* note 217.

228. *See, e.g.*, In re *Cheryl*, 746 N.E.2d 488; *A.P.*, 961 F. Supp. 122.

229. The American Law Institute's principles on family law provide for disestablishment. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §§ 2.03(1), 3.03 (1)-(3) (2002) (disestablishment is not determined by biology alone, but must consider numerous factors, including the father-child relationship, evidence of hindrance of a relationship between biological father and child, and future support of the child); Hoover, *supra* note 26, at 156 (summarizing select ALI parenting provisions).

230. UNIF. PARENTAGE ACT § 308(a) (amended 2002).

another man is the father of the child.[231] Other states require action within a "reasonable" period of time. Colorado employs a hybrid period that limits the time for filing a disestablishment action to a reasonable time that must not exceed five years.[232] On the other hand, Georgia and Ohio do not impose any time constraints.[233]

In addition to statutory limitations, the equitable doctrines of laches and estoppel may also preclude an established father from denying paternity of his child, even if he has DNA evidence that he is not the father.[234] Although a court cannot order a man to continue a relationship with the child under these circumstances, the court most certainly can mandate continued payment of financial support for the child.[235]

Thus, federal and state laws recognize a right to and provide the means for disestablishing paternity - however such paternity may initially have been established.[236]

---

231. ALASKA STAT. ANN. §§ 25.27.166(b)(2), 25.27.166(c) (West, Westlaw through the 2014 2d. Reg. Sess. Of the 28th Legis.).

232. COLO. REV. STAT. ANN. § 19-4-107(1)(b) (West, Westlaw through Ch. 2 of the 1st Reg. Sess. of the 70th Gen. Assembly (2015)).

233. *See* OHIO REV. CODE ANN. § 3119.961(A) (West, Westlaw through the 130th GA (2013-2014). *But cf.*, Hittle v. Palbas, No. 2003 CA 52, 2003-Ohio-5843, 2003 WL 22462141, ¶ 21 (Ct. App. Oct. 31, 2003) (quoting Van Dusen v. Van Dusen, 151 Ohio App. 3d 494, 2003-Ohio-350, 784 N.E.2d 750, ¶ 15-16) (holding § 3119.961 is an unconstitutional violation of the separation of powers by which "'[t]he legislature has in effect ordered the courts to enter new judgments taking away the only father a child has ever known if a DNA test indicates that the father and child are not genetically linked'"). *See also* GA. CODE ANN. § 19-7-54 (West, Westlaw through Acts 2-8, & 10 of the 2015 Reg. Sess. of the GA Gen. Assembly).

234. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

235. *See, e.g.*, Baker, *supra* note 10, at 37; *Truth and Consequences: Part III*, *supra* note 5, at 79.

236. *See, e.g.*, ALA. CODE §§ 26-17A-1, 26-17-307-309 (West, Westlaw through Act 2015-2 of the 2015 Reg. Sess.) (challenge, rescission, and reopening and paternity case); ALASKA STAT. § 25.27.166 (West, Westlaw through the 2014 2d Reg. Sess. of the 28th Legislature) (disestablishment of paternity); ARIZ. REV. STAT. ANN. § 25-812 (West, Westlaw through legis. eff. Feb. 24, 2015 of the 1st Reg. Sess. of the 52nd Legis.) (acknowledging and disestablishing paternity); ARK. CODE ANN. § 9-10-115 (West, Westlaw through the 2015 Reg. Sess. of the 90th AR Gen. Assembly) (modification of orders or judgment regarding disestablishment paternity); CAL. FAM. CODE §§ 7575-7577, 7635.5, 7646, 7647, 7647.7, 7648, 7648.3 (West, Westlaw through 2014 Reg. Sess. laws) (disestablishing paternity by rescission of voluntary declaration, rebuttable of presumption, or setting aside adjudication); COLO. REV. STAT. §§ 19-4-107.3, 19-4-119 (disestablishing paternity); CONN. GEN. STAT. ANN. §§ 46b-171, 46b-172, 46b-174 (West, Westlaw through Gen. Statutes of CT, revision of 1958, revised to Jan. 1, 2015) (disestablishing paternity); DEL. CODE ANN. tit. 13, §§ 8-302, 8-307, 8-312, 8-505, 8-602, 8-606, 8-610, 8-631 (West, Westlaw through 80 Laws 2015, ch. 3) (disestablishing paternity); D.C. CODE § 16-909.01 (Westlaw through Mar. 6, 2015) (disestablishing paternity); FLA. STAT. ANN. § 742.18 (West, Westlaw through Ch. 255 of the 2014 2d Reg. Sess. and Sp. "A" Sess. of the 23rd Legis.) (disestablishing paternity); GA. CODE ANN. § 19-7-54 (disestablishing paternity); IDAHO CODE ANN. §§ 7-1106 (West, Westlaw through Ch. 58 of the 2015 1st Reg. Sess. of the 63rd ID legis.) (disestablishing paternity); 750 ILL. COMP. STAT. ANN. 45/4.1, 45/5, 45/6, 45/7, 45/8, 45/16 (West, Westlaw through P.A. 98-1174 of the 2014 Reg. Sess.) (disestablishing paternity); KAN. STAT. ANN. §§ 23-2209, 23-2218 (West,

Westlaw through Ch. 1 of the 2015 Reg. Sess. of the KS legis.) (disestablishing paternity); KY. REV. STAT. ANN. § 406.111 (West, Westlaw through the end of the 2014 legis.) (disestablishing paternity); LA. REV. STAT. ANN. §§ 9:399.1, 9:406, 13:4231 (West, Westlaw through the 2014 Reg. Sess. 1991); LA. CIV. CODE ANN. art. 186, 187, 189, 191, 192, 193, 194 (West, Westlaw through the 2014 Reg. Sess.) (disestablishing paternity); ME. REV. STAT. ANN. tit. 19-A, §§ 1562, 1564, 1616 (West, Westlaw through Ch. 1 of the 2015 1st Reg. Sess. of the 127th Legis.) (disestablishing paternity); MD. CODE ANN. FAM. LAW §§ 5-1038-1039 (West, Westlaw through the 2014 Reg. Sess. of the Gen. Assembly) (disestablishing paternity); MICH. COMP. LAWS ANN. §§ 722.1431-1443 (West, Westlaw through P.A.2015, No. 6, of the 2015 Reg. Session, 98th Legislature) (revocation of paternity); MINN. STAT. ANN. §§ 257.75 (West, Westlaw through laws of the 2015 Reg. Sess. through Ch. 4) (revocation of recognition of paternity); MISS. CODE ANN. §§ 93-9-9, 93-9-10, 41-57-23 (West, Westlaw through end of 2014 Reg. & 1st & 2d extra. Sess.) (rescission of paternity); MO. ANN. STAT. § 210.854 (West, Westlaw through the end of the 2014 2d Reg. Sess. of the 97th Gen. Assembly); MONT. CODE ANN. §§ 40-6-108, 40-6-118 (West, Westlaw through the 2014 gen. election); NEB. REV. STAT. ANN. § 43-1412.01 (West, Westlaw through end of 2014 Reg. Sess.) (paternity set aside); NEV. REV. STAT. ANN. § 440.287 (West, Westlaw through end of 28th special sess. (2014)) (rescission of voluntary acknowledgement of paternity); N.H. REV. STAT. ANN. §§ 5-C:27, 5-C-28, 522:5 (West, Westlaw through Ch. 330 (end) of the 2014 Reg. Sess.) (rescission); N.J. STAT. ANN. §§ 9:17-56 (West, Westlaw through L.2015, c.21) (continuing jurisdiction to modify or revoke a judgment); N.M. STAT. ANN. §§ 40-11A-303, 40-11A-304, 40-11A-305, 40-11A-307, 40-11A-308, 40-11A-309, 40-11A-310, 40-11A-311, 40-11A-312, 40-11A-313, 40-11A-301-637, 40-11A-640 (West, Westlaw through the end of the 2d Reg. Sess. of the 51st Legis.) (rescission); N.Y. FAM. CT. ACT § 544 (McKinney, Westlaw through L.2015, chs. 1-13) (vacating acknowledgment or abrogating order of paternity); N.Y. SOC. SERV. LAW §§ 111-k, 372-c; N.C. GEN. STAT. ANN. §§ 49-7, 49-14, 52C-7-701, 110-132-132.2 (West, Westlaw through the end of the 2014 reg. sess. of the gen. assembly) (rescission of paternity); N.D. CENT. CODE ANN. §§ 14-20-13, 14-20-14, 14-20-15, 14-20-17, 14-20-18, 14-20-19, 14-20-22, 14-20-44, 14-20-58, 14-20-63 (West, Westlaw through ch. 522 (end) of the 2013 reg. sess. of the 63rd legis. assembly) (challenge to or rescission of paternity); OHIO REV. CODE ANN. §§ 3111.02, 3111.03, 3111.16, 3111.27, 3111.28, 3111.49, 3111.821 (disestablishing paternity); OKLA. STAT. ANN. tit. 10, §§ 7700-302, 7700-303, 7700-304, 7700-305, 7700-307, 7700-308, 7700-309, 7700-312, 7700-505, 7700-606, 7700-607, 7700-608, 7700-637 (West, Westlaw through ch. 430 (end) of the 2d sess. of the 54th legis. (2014)) (disestablishing paternity); OR. REV. STAT. ANN. §§ 109.072, 432.088, 416.430, 416.433 (West, Westlaw through ch. 3 of the 2015 reg. sess.) (disestablishing paternity); 23 PA. CONS. STAT. ANN. § 5103 (West, Westlaw through end of the 2014 reg. sess.) (disestablishing paternity); R.I. GEN. LAWS ANN. § 15-8-24 (West, Westlaw through ch. 555 of the Jan. 2014 sess.) (disestablishing paternity); S.C. CODE ANN. § 63-17-50 (Westlaw through end of 2014 reg. sess.) (disestablishing paternity); S.D. CODIFIED LAWS §§ 25-8-7.1, 25-8-9, 25-8-64 (Westlaw through the 2014 reg. sess.) (disestablishing paternity); TENN. CODE ANN. §§ 36-2-309, 68-3-203, 36-2-315 (West, Westlaw through end of the 2014 2d reg. sess.) (disestablishing paternity); TEX. FAM. CODE ANN. §§ 160.303 160.304, 160.305, 160.307, 160.308, 160.309, 160.312, 160.602, 160.603, 160.606, 160.608, 160.609, 160.622, 160.631, 233.028 (West, Westlaw through the end of the 2013 Third Called Sess. of the 83rd Legislature) (disestablishing paternity); UTAH CODE ANN. §§ 78B-15-306, 78B-15-307, 78B-15-308, 78B-15-311, 78B-15-404, 78B-15-505, 78B-15-603, 78B-15-608 (West, Westlaw through 2014 gen. sess.) (disestablishing paternity); VT. STAT. ANN. tit. 15, §§ 307, 668 (West, Westlaw through the 2013-2014 VT Gen. Assembly (2014)); VA. CODE ANN. § 20-49.10 (West, Westlaw through the end of the 2014 reg. sess.) (relief from legal determination of paternity); WASH. REV. CODE ANN. §§ 26.26.310, 26.26.315, 26.26.320, 26.26.330, 26.26.335, 26.26.340, 26.26.355, 26.26.420, 26.26.540 (West, Westlaw through ch. 4 of the 2015 reg. sess.) (disestablishing paternity); W. VA. CODE ANN. § 48-24-101 (West, Westlaw through the 2015 reg. sess.) (establishing paternity); WIS. STAT. ANN. §§ 69.15, 767.80, 767.805, 767.895, 806.07 (West, Westlaw through 2013 Act 380) (disestablishing paternity); WYO. STAT. ANN. §§ 14-2-602, 14-2-603, 14-2-607, 14-2-608, 14-2-609, 14-2-806, 14-

B. Disestablishment of Paternity in the European Union

European member states also provide a process for presumed and legal fathers to disestablish paternity.[237] Recent decisions by the ECtHr make clear that member states must afford men an opportunity to challenge paternity "in light of new biological evidence."[238] The failure to do so may infringe upon the respect of private life guaranteed by Article 8 of the ECHR.[239] Although supporting a man's right to challenge paternity, generally, the court also recognizes the need for appropriate time limits.[240]

ECtHR jurisprudence reflects the lack of uniformity among member states regarding paternity proceedings.[241] In at least seventeen European Union states, a presumed biological father may contest the legal paternity of a man that is established by acknowledgement.[242] However, the existence of a social and family relationship between the child and legal father may limit a paternity challenge brought by a third party.[243] Courts are reluctant under such conditions to recognize any interests of a biologically related father. Moreover, in at least nine member states, a biological father lacks standing to challenge a legal father's paternity, even if it would be in the best interest of the child.[244]

In *Ostace v. Romania*, a man sought to introduce DNA evidence to

---

2-807, 14-2-808, 14-2-809, 14-2-817, 14-2-823 (West, Westlaw through the 2014 budget sess.) (disestablishing paternity); P.R. LAWS ANN. tit. 31 §§ 461, 464, 465, 505 (2011).

237. *See, e.g.*, BLAIR ET AL., *supra* note 7, at 27.

238. *Id.*

239. Chamber Judgment, Ostace v. Romania, App. No. 12547/06, Eur. Ct. H.R. 1 (2014), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4681299-5677495.

240. *See, e.g.*, BLAIR ET AL., *supra* note 7, at 27. In contrast to the limitations periods imposed on fathers, "a significant number of States did not set a limitation period for children to bring an action aimed at having paternity established," and "[i]ndeed, a tendency could be observed towards a greater protection of the right of the child to have its paternal affiliation established." Backlund v. Finland, App. No. 36498/05, Eur. Ct. H.R. at 10 (2010), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99784.

241. *Backlund*, App. No. 36498-05 at 10-11 (citing Phinikaridou v. Cyprus, App. No. 23890/02, Eur. Ct. H.R. (2007)) (noting the absence of a uniform approach to establishing paternity and that time limits varied widely).

242. Kautzor v. Germany, App. No. 23338/09, Eur. Ct. H.R. at 6 (2012), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109809 ("namely Azerbaijan, Croatia, Cyprus, Estonia, France, Georgia, Ireland, Italy, Lithuania, Moldova, Romania, Russia, San Marino, Spain, Turkey, Ukraine and the United Kingdom").

243. *Id.* (noting limitations on the right to challenge paternity when the legal father and child have lived together forming a family and social relationship). Further, "[i]n France and Spain, the biological father may not challenge paternity if the child has lived in a social and family relationship with the legally acknowledged father for a period of at least five or four years, respectively (*la possession d'état conforme au titre*)." *Id.*

244. *Id.*

disestablish his paternity of a non-marital child approximately twenty years after he had been legally established as the father.[245] In March 1981, blood tests on the mother, child, and the man had proved inconclusive; nonetheless, the court had established the man as the father based, in part, on evidence of his relationship with the mother.[246] In 2003, the now-established father received permission from the adult child to undergo DNA testing to unequivocally determine his paternity status.[247] The DNA test ruled out the man as the biological father.[248] Romanian courts, however, denied the man's requests for a hearing to disestablish his paternity.[249] The man argued that accurate genetic testing had not existed when his paternity was established in 1981.[250] He also asserted his "the need to restore the truth about his paternity of the legal point of view and preserve the inheritance of his legitimate family interests."[251]

Because the mother, child, and established father all sought the disestablishment of paternity, the ECtHR determined the Romanian courts had violated the established father's Article 8 rights to respect for family and private life.[252] Despite a lapse of more than twenty years since paternity was established, the ECtHR found the Romanian courts had failed to strike a fair balance between private individual interests and public interests when it failed to provide access to a mechanism or legal process for disestablishment.[253]

Shofman v. Russia involved an applicant who complained that Russia had violated his Article 8 rights.[254] It had denied him an opportunity to contest the paternity of a child born during his marriage despite DNA tests demonstrating he was not the child's father.[255] As justification, the Russian court had cited his failure to challenge paternity within the one-year statutory limitation running from the date

245. Chamber Judgment, Ostace v. Romania, App. No. 12547/06, Eur. Ct. H.R. at 1 (2014), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4681299-5677495.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* § 11.

252. *Id.* at 36, 45-52.

253. *Id.* at 43, 52.

254. Shofman v. Russia, App. No. 74826/01, Eur. Ct. H.R. (2006), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71303.

255. *Id.* at 2-3. The ECtHR observed that Russia applied the one-year limitations period of the Russian Soviet Federalist Socialist Republic (RSFSR) Marriage and Family Code of 30 July 1969 because the child had been born before enactment of the new law in March 1996. *Id.* at 2. The Marriage and Family Code of 1996 imposes no time limit to contest paternity. *Id.*

he was registered as the child's father.[256]

The ECtHR used the case as a vehicle to summarize the current status of disestablishment law in the member states. Its survey of the states' legislation pertaining to the disestablishment of paternity action revealed no universally adopted standard.[257] Policies of the member states differed in regard both to the duration of their limitations periods and to the events that triggered their running.[258] In some member states, the limitations period began "from the moment the putative father knew or should have known that he had been registered as the child's father."[259] An equal number of states measured the time period from the date the putative father learned or should have learned "of circumstances casting doubt on the child's legitimacy."[260] Putative fathers residing in these states could challenge paternity only "when the child [was] still young."[261] The same limitation of action also occurred in the few member states "in which time starts to run from the child's birth, irrespective of the father's awareness of any other facts."[262]

The ECtHR recognized the legitimacy of time limits on disestablishment actions "to ensure legal certainty in family relations and to protect the interests of the child."[263] Regarding the latter, "once the limitation period for the applicant's own claim to contest paternity had expired, greater weight was given to the interests of the child than to the applicant's interest in disproving his paternity."[264] A state has both positive and negative obligations concerning the protection of those rights.[265] Accordingly, a fair balance had to be struck "between the competing interests of the individual and of the community as a whole."[266] In light of the foregoing, the court sought "not to substitute itself for the competent domestic authorities in regulating paternity disputes at the national level, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation."[267]

Notwithstanding the margin of appreciation accorded to member

256. *Id.*
257. *Id.* at 7.
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 7-8.
264. *Id.*
265. *Id.* at 6-7.
266. *Id.*
267. *Id.*

states, the ECtHR concluded that Russia had not struck a fair balance "between the general interest of the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of the biological evidence."[268] The court further concluded that Russia had violated the applicant's right of respect for private life.[269] Most significantly, the ECtHR enunciated the need for consideration of the best interests of the child as part of the balancing of interests employed in the disestablishment process. By so doing, the court charted a path different from that of many courts in the United States, which continue to place less emphasis upon the children's needs in their zeal to rectify the wrongs done to the non-biological fathers.

In the European Union, marital presumptions and estoppel doctrines also factor into disestablishment cases. In *Rasmussen v. Denmark*, a former husband sought review of the Danish courts' refusal to allow him to challenge the marital presumption of his paternity of a child born during his marriage.[270] The Danish courts cited his failure to challenge his paternity within the statutory time limits.[271] The former husband based his appeal before the ECtHR on alleged gender discrimination. Although Danish law had circumscribed his paternity challenge through a statute of limitations, the law granted his former wife an unlimited right to mount an equivalent challenge."[272] The ECtHR noted that other member states also treated husbands and wives differently in terms of access to disestablishment. It held that Denmark reasonably could have considered that disestablishment policies regarding husbands "would be most satisfactorily achieved by the enactment of a statutory rule, whereas [regarding mothers], it was sufficient to leave the matter to be decided by the courts on a case-by-case basis."[273]

In another case, a DNA test established that the husband was not the father of a child born while the couple were legally married but physically separated.[274] Pursuant to Maltese law, the marital presumption of paternity could be challenged only by proof of the wife's adultery and through evidence of her attempt to conceal the birth from

268. *Id.* at 9.

269. *Id.*

270. Rasmussen v. Denmark, App. No. 8777/79, Eur. Ct. H.R. at 3 (1984), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57563.

271. *Id.*

272. *Id.* at 7.

273. *Id.* at 11-12.

274. Mizzi v. Malta, 2006-I Eur. Ct. H.R. 103, *available at* HUDOC, http://www.echr.coe.int/Documents/Reports_Recueil_2006-I.pdf.

her husband.[275] The husband's appeal contended that these narrow grounds had in his case created an "irrefutable presumption of paternity," which "amounted to a disproportionate interference with his right for respect of private and family life."[276] The ECtHR found the law lacked proportionality to the state's legitimate aims because it had denied the husband at least one opportunity to challenge his paternity.[277] Moreover, "a fair balance had not been struck between the general interest of the protection of legal certainty of family relationships and the applicant's right to have the legal presumption of his paternity reviewed in the light of the biological evidence."[278]

In *Krušković v. Croatia,* the ECtHR considered the complaint of a biological father from Croatia whose paternity had been disestablished following a court determination that he lacked legal capacity as a result of long-term drug abuse.[279] As a consequence, the father's status as the biological father of the child had been removed from both the state registry of births and from the child's birth certificate.[280] More critically, the father's lack of legal capacity precluded his ability to institute proceedings to re-establish his paternity.[281]

Following a review of the relevant provisions of the Croatian Family Law Act, the ECtHR concluded that Croatia had failed to strike a fair balance "between the public interest in protecting persons divested of their legal capacity from giving statements to the detriment of themselves or others, and the interest of the applicant in having his paternity . . . legally recognized."[282] Indeed, the ECtHR rejected Croatia's position that the state's disestablishment of paternity on grounds of lack of legal capacity had served the best interests of the father and the child. Croatia had injured the father, having "failed to discharge its positive obligation to guarantee the applicant's right to respect for his private and family life."[283] It had also neglected the interests of the child.[284] As the court noted, even a child born out of

275. *Id.* at 110.

276. Chamber Judgment, Mizzi v. Malta, App. No. 26111/02, Eur. Ct. H.R. at 2 (2006), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-1551378-1623734.

277. *Id* at 3.

278. *Id*.

279. Krušković v. Croatia, App. No. 46185/08, Eur. Ct. H.R. at 1-2 (2011), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105197.

280. *Id.* at 2.

281. *Id.* at 7 (the gravamen of father's argument is that he was placed in a "legal void" and was unable to testify as to the paternity of his biological child).

282. *Id.* at 8.

283. *Id.*

284. *Id.*

wedlock "has a vital interest in receiving the information necessary to uncover the truth about an important aspect of their personal identity, that is, the identity of their biological parents."[285]

Chavdarov v. Bulgaria demonstrates the continued strength of the marital presumption, notwithstanding conclusive and contradictory DNA evidence of another man's paternity.[286] For more than a decade, a man cohabited with a woman with whom he had three biological children.[287] During this period, the woman remained legally married to another man.[288] At birth, each of the three children received the surname of the woman's legal husband, who also was identified as the father on their birth certificates.[289] Eventually, the cohabitation of the mother and the biological father ended, and she left the three children in his care.[290] The biological father, however, was unable to establish legally his paternity of the three children because the marital presumption of paternity applied to the mother's legal husband.[291]

The ECtHR found the relationship between the complainant and the three children sufficiently demonstrated family life within the meaning of the ECHR.[292] Observing that there was no consensus in the European Union among member states concerning the ability of a biological father to rebut the marital presumption of paternity, the court found no violation of Article 8, which governs the right to respect for family life.[293] Although Bulgarian law prevented the biological father from challenging the marital presumption of paternity, it provided other means for him to establish a paternal relationship with the children – through adoption or by obtaining guardianship "as a close relative of abandoned underage children."[294] After determining that Bulgarian law adequately protected the legitimate interests of the children, and that the father had failed to avail himself of other means to secure his paternal relationship with them, the court unanimously found no violation of Article 8.[295]

---

285. *Id.*

286. Chamber Judgment, Chavdarov v. Bulgaria, App. No. 3465/03, Eur. Ct. H.R. (2010), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3380482-3789900.

287. *Id.* at 1.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 2.

293. *Id.*

294. *Id.*

295. *Id.*

V. MANDATORY TESTING AT BIRTH TO OBVIATE THE NEED FOR PATERNITY DISESTABLISHMENT

The bottom line in any discussion of best practices in the establishment and disestablishment of paternity is that advances in DNA testing have rendered obsolete the suppositions and presumptions on which prior policies were largely based. Current genetic tests establish or disestablish paternity with nearly 100 percent certainty.[296] With DNA testing having reached an almost infallible threshold of accuracy, it is surprising that its application in paternity cases has not kept pace with its increasing efficacy in a number of other judicial settings. For example, when paternity is uncertain in child support cases, courts have authority to order all relevant parties to submit to genetic testing to establish paternity.[297] Rather, what has hindered the wider application of DNA technology in jurisprudence is that courts find themselves hamstrung from compelling its use. Courts generally have no enforcement mechanism to compel parties to submit to such testing.[298] They cannot forcibly detain and compel withdrawal of blood or other genetic material for testing purposes.[299]

In many jurisdictions, failure to appear and participate in paternity proceedings, as well as failure to submit to genetic tests, may result in a default judgment of paternity.[300] In other jurisdictions, when an alleged father fails to submit to court ordered genetic tests, the courts must rely on other evidence to establish paternity, including testimony of the mother that she engaged in sexual intercourse with the alleged father at the relevant time of conception.[301] With such evidence, courts may establish paternity and, accordingly, order support.[302] However, these "alternatives" effectively turn back the clock and nullify the scientific achievements of DNA research that can best address the precise paternity questions facing the courts. Accordingly, the current system of establishing paternity continues to rely on centuries old presumptions and legal fictions, with often little, if any, consideration of biological facts that today can be ascertained by an efficient, inexpensive, and most importantly, accurate means.[303] As illustrated by the discussions above

296. *See supra* note 3.

297. *See supra* note 217.

298. *Truth and Consequences: Part I*, *supra* note 6, at 47-48.

299. *Id.*

300. *See supra* note 217.

301. *See, e.g.*, OHIO REV. CODE ANN. § 3111.10(A) (West, Westlaw through the 130th GA (2013-2014)).

302. *See, e.g.*, *id.* § 3111.13.

303. *See* Jeffrey A. Parness, *Systematically Screwing Dads: Out of Control Paternity Schemes*,

of American and European Union case law, a surfeit of DNA evidence has resulted in too many paternity establishment determinations being "made inconsistently, fortuitously, inconclusively, and without involving all interested parties."[304]

Federal law should mandate genetic testing at birth or soon thereafter to establish paternity and also should develop uniform procedures for the implementation of these tests and associated procedures by the states. Given the accuracy of DNA tests, the legal effect of such test results should constitute a conclusive paternity determination in support of federal and state interests in ascertaining paternity sooner rather than later.

Nor can mandatory genetic testing at birth properly be deemed a radical measure, considering that, historically, biology has served as the basis for a parent's duty to support a child. As Blackstone stated several hundred years ago, the duty of child support springs from bringing your "issue" into the world.[305] As noted previously, the ECtHR has opined that "'respect' for 'family life' requires that biological and social reality prevail over a legal presumption which . . . flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone."[306] If biology serves as the basis of the duty of child support, and given that biology now can be determined accurately and inexpensively, then domestic relations laws should no longer rely on presumptions and other legal fictions to create or destroy parent-child relationships. Mandatory genetic testing for paternity at birth removes doubts and questions concerning paternity. Even in those instances where DNA testing traces paternity to a man other than the presumptive father, biological facts should not be ignored. Indeed, biological facts should prove determinative.

A. The Mechanics of DNA Testing

The current state of paternity testing technology offers an accurate, efficient, and relatively inexpensive means of establishing paternity. DNA testing may be conducted on relatively small samples of blood or cells. Tests kits marketed to consumers are readily available online and

---

54 WAYNE L. REV. 641, 641 (2008); Jeffrey A. Parness, *Designating Male Parents at Birth*, 26 U. MICH. J.L. REFORM 573, 591-92 (1993); Jacobs, *supra* note 8, at 206-08; Diane S. Kaplan, *Immaculate Deception: The Evolving Right of Paternal Renunciation*, 27 WOMEN'S RTS. L. REP. 139, 151 (2006).

304. Parness, *Designating Male Parents at Birth*, *supra* note 303, at 576.

305. BLACKSTONE, *supra* note 14, at *447.

306. Kroon v. Netherlands, App. No. 18535/91, Eur. Ct. H.R. at 14 (1994), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57904.

in local pharmacies at diverse price ranges.[307] These at-home kits typically utilize a buccal swab to collect cheek cells from inside of the mouth.[308] However, DNA collection need not be restricted to blood samples and cheek cells. DNA also can be extracted from hair and other biological material, with or without the donor's consent or knowledge.[309] The collected cells are then sent to a laboratory for test results.[310] Thus, the current genetic tests are less expensive, less invasive, and yield more accurate results.

With few exceptions, mandatory genetic testing should be performed when the child is born or soon after birth. With the mother's consent, many hospitals already draw a small sample of blood from newborns for routine tests to detect genetic, metabolic, and other disorders.[311] DNA testing of the child for paternity could be conducted at the same time with minimal or no personal intrusion. Medical

307. A recent online search revealed numerous outlets for at-home paternity test kits for less than $35. *See, e.g.*, WALGREEN'S, http://www.walgreens.com/q/home-dna-paternity-testing-kit (last visited Mar. 22, 2015) ($30.99); WALMART, http://www.walmart.com/ip/Identigene-DNA-Paternity-Test-Kit/10740658 (last visited Mar. 22, 2015) ($26.88); CVS PHARMACY, http://www.cvs.com/shop/product-detail/IDENTIGENE-DNA-Paternity-Test?skuId=420841 (last visited Mar. 22, 2015) ($24.99). These DNA tests kits require only a few swabs of cheek cells.

308. Anderlik, *supra* note 64, at 4.

309. *Id.* (explaining how to obtain without consent or knowledge).

310. Paternity testing has become a cottage industry, and some have called for greater regulatory standards for laboratory testing facilities. *See generally* Mary R. Anderlik, *Assessing the Quality of DNA-Based Parentage Testing: Findings from A Survey of Laboratories*, 43 JURIMETRICS J. 291, 313 (2003).

311. In the EU, routine screening tests are conducted on newborn babies in the EU. *See, e.g.*, *EURORDIS Policy Fact Sheet – Newborn Screening*, EURORDIS RATE DISEASES EUROPE (2013), http://www.eurordis.org/sites/default/files/publications/fact-sheet-new-born-screening.pdf (discussing newborn screening tests and the lack of uniformity on types and number of tests among member nations ranging from as few as two to as many as twenty-nine tests, typically by pricking the newborn's heel and drawing a small sample of blood); Press Release, SCIEX Disagnostics, Newborn Screening Solution from AB SCIEX Provides Early Detection Indicators of Metabolic Disorders to Help Doctors in Europe Make Babies' Health More Predictable (Apr. 1, 2014), *available at* http://www.sciexdiagnostics.com/newsroom/newborn-screening-solution-from-ab-sciex-provides-early-detection-indicators-of-metabolic-disorders-to-help-doctors-in-europe-make-babies'-health-more-predictable (discusses newborn screening tests by country in EU). In the U.S., the tests conducted on newborns screen for, among other things, amino acid metabolism disorders, biotinidase deficiency, congenital adrenal hyperplasia, congenital hypothyroidism, cystic fibrosis, fatty acid metabolism disorders, human immunodeficiency virus (HIV), hemoglobinopathy disorders and traits, such as sickle cell, and toxoplasmosis. *Newborn Screening Tests*, MEDLINE PLUS, http://www.nlm.nih.gov/medlineplus/ency/article/007257.htm (last updated May 10, 2013). According to the National Institute of Health, "[t]he types of newborn screening tests that are done vary from state to state[,] with [m]ost states conducting three to eight tests." *Id.* "[T]he March of Dimes and the American College of Medical Genetics suggest more than two dozen additional tests." *Id.* The most comprehensive set of tests checks for approximately 40 different genetic, metabolic, and development disorders. *Id.* Only a few drops of blood, which are taken from the newborn's heel, are sent to a laboratory. "All 50 states screen for congenital hypothyroidism, galactosemia, and phenylketonuria (PKU)." *Id.*

professionals in hospitals, birthing centers, and other medical facilities should inform the mother and father of the nature of these additional genetic tests. These disclosures should include notice that the legal effect of genetic testing will be either to confirm or repudiate putative father's paternity.[312]

In order to secure DNA samples from putative fathers for comparison with those of the newly born, testing could be made a prerequisite for obtaining a birth certificate that includes the name of a man as the child's father. Alternatively, the putative father could forego genetic testing and execute an attestation of paternity in its stead. However, before the father is permitted to follow the latter option, he should be informed that, upon doing so, he forfeits any right to seek disestablishment of his paternity of the child in the future.[313]

In instances where paternity is contested at birth or where a mother seeks a court order establishing a man as the father of her newly-born child, courts should also be given subpoena power to compel DNA testing in the interest of obtaining a biologically conclusive result. Ascertaining the relevant fact of biology sooner rather than later should be preferred, and the use of genetic tests should become a standard procedure at birth.

Nevertheless, under a mandatory genetic testing at birth policy, states could not compel a mother against her wishes to disclose the name of the child's father or the names of likely candidates. Some mothers may feel pressured by the father not to reveal his name, may fear that revelation of the father will lead to social stigmatization or shame, or simply have no idea of the father's identity if, around the period of conception, they suffered rape or engaged in sexual activity with multiple partners.[314]

---

312. Required disclosure forms for mandatory paternity testing at birth may be modeled after voluntary acknowledgement forms that currently are routinely used to establish paternity of non-marital children. In compliance with federal law, hospitals and other birthing facilities must offer parents of newborns voluntary acknowledgment forms. Harris, *supra* note 44, at 313. "The state cannot condition the validity of the acknowledgment on any kind of proceeding, and a voluntary acknowledgment can be signed without genetic testing having been done; indeed, federal law provides that states may not require blood testing as a precondition to signing a voluntary acknowledgment of paternity." *Id.*

313. With voluntary acknowledgements, "[e]ach party must be given oral and written notice of the alternatives to, legal consequences of, and rights and responsibilities arising from the signed acknowledgment." *Id.* As with voluntary acknowledgements, mandatory paternity testing at birth should require oral and written notice of the legal effects of such tests, as well as the legal consequences of failure to submit to paternity testing at birth. *Id.*

314. *See, e.g.*, Cynthia R. Mabry, *Who Is the Baby's Daddy (and Why Is It Important for the Child to Know)?*, 34 U. BALT. L. REV. 211, 223 (2004) ("Some mothers will not be able to identify the child's father because they have had multiple sexual partners during the time that the child was conceived.").

That said, some states even now exert pressure on mothers to reveal paternal information. A number of state governments link disclosure of paternity to the availability of full public assistance benefits for mothers and their children.[315] Currently, "[p]arental failure to cooperate in establishing paternity mandates at least a twenty-five percent reduction in [Temporary Assistance For Needy Families]" benefits.[316]

Finally, state and federal governments should share the costs of mandatory testing with families. For families living at or near poverty, these expenses, though inexpensive, would pose a significant burden. An additional cost savings for families is that they will be spared the expense of more costly litigation or administrative proceedings in later paternity contests, as the relatively inexpensive costs of mandatory testing should be shared with state and federal governments.

B. Benefits of Mandatory Genetic Testing at Birth

Mandatory DNA testing at birth is not only fully consonant with the judiciary's fundamental goal to seek out the truth, it also advances the more nuanced balancing of the interests of the affected parties that one sees occurring with greater frequency, particularly in the paternity/disestablishment decision-making of the ECtHR. Indeed, the appropriateness of mandatory testing becomes even more apparent when examined in connection with the different interests of the respective parties such testing would affect.

1. Non-Biological Fathers

Mandatory genetic testing at birth directly advances the long-

315. William P. Quigley, *Backwards Into The Future: How Welfare Changes In The Millennium Resemble English Poor Law Of The Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 106 (1998).

316. *Id.* at 106 (citing Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105); *see also* Kindra L. Gromelski, *You Made Your Bed . . . Now You Are Going to Pay for It: An Analysis of the Effects Virginia's Mandatory Paternal Identification in AFDC Cases Will Have on the Rights of Unwed Fathers*, 5 WM. & MARY J. WOMEN & L. 383, 410 (1999) (reviewing Virginia law and noting "[i]f, after six months of receipt of AFDC, paternity has not been established and the local department determines that the caretaker-relative is not cooperating in establishing paternity, the local department shall terminate the entire grant for a minimum of one month and until cooperation has been achieved"). When a mother receives public welfare benefits, her failure to cooperate with state efforts to identify the father of a non-marital child could subject her to a fine or imprisonment for contempt. Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 77, 79 (2004) (discussing Little v. Streater, 452 U.S. 1 (1981) and CONN. GEN. STAT. § 46b-169 (West, Westlaw through Gen. Statutes of CT, revision of 1958, revised to Jan. 1, 2015)).

standing policy behind paternity disestablishment – that a man should not be tethered to the burdens of fatherhood when they have been attached to him through fraud, mistake, or misunderstanding.[317] No interest of the non-biological father is served by withholding from him the knowledge that he is not the child's biological father. On the one hand, the non-father's sense of betrayal and deceit is likely to become enhanced when this knowledge is attained after the passage of time. On the other hand, immediate knowledge of lack of paternity does not necessarily foreclose a determination by the non-father to maintain a parental relationship with the child and to support her needs. Thus, there appears to be no upside to shielding the non-father from the biological facts of the child's parentage.

If, indeed, the non-father wishes to assume the responsibilities of paternity notwithstanding the lack of a genetic connection to the child, state laws currently provide an opportunity for him to become the legal father of the child through adoption or other means.[318] As an initial matter, however, termination of the biological father's parental rights should be required before a non-genetically related man can become the child's legal father. As with adoption, a man who assumes legal responsibility for the care and support of a child with knowledge that he has no biological connection to the child should not be permitted to disestablish paternity at a later date.

2. Biological Fathers

Biological fathers fall into two categories – those who desire to establish their paternity and assume their parental obligations and those who would prefer to shirk their parental obligations by "letting sleeping dogs lie." Mandatory genetic testing at birth plainly favors the interests of the fathers in the former category. The accuracy of genetic test results should effectively erode and batter down the legal fiction of paternity created by the marital presumption and related non-biological constructs. Whenever feasible, biology should win out, permitting the biological father to assume his rightful paternal status and allowing him to undertake its accompanying responsibilities. By contrast, there can be little doubt that mandatory genetic testing disfavors the interests of "shirker dads" desiring to escape the burdens of fatherhood. Their interests, however, warrant no respect in light of society's far stronger interest in ensuring that parties responsible for the birth of a child

317. UNIF. PARENTAGE ACT § 308(a) (amended 2002).

318. *See, e.g., id.* § 201 (providing that presumed father includes a man living with mother at the time of birth who subsequently married mother).

assume, to the extent they are able, the financial obligations attendant to the child's upbringing and livelihood.[319]

3. Mothers

Mothers also fall into two categories – those who desire to compel the biological father of their children to provide his fair share of child support and those who, for a variety of reasons, would prefer that the burdens of paternity fall on the shoulders of a non-biological parent.

Mandatory DNA testing, by virtue of its nearly absolute accuracy, strongly advances the interests of the mother who seeks the support owed to her and the child by an unwilling biological father. Genetic testing, on the other hand, disfavors the mother who would prefer the true biological father of her child to remain unidentified. Shame, fear of the social stigma associated with adultery, fear that the truth will destroy the marriage and its associated family unit, realization that the non-biological father will likely prove the better provider – all provide a motivation for concealing the biological facts of the birth.[320] And yet, although fair-minded people may sympathize to varying degrees with this mother's predicament, at bottom, she seeks to subvert the biological foundations upon which family and domestic relations laws are based. Allowing such a mother to, in effect, commit a fraud on the court, however well-meaning her intentions, should not be deemed an acceptable alternative to the ascertainment of biological fact.

4. The Child

As noted above, in traditional paternity disestablishment proceedings, the best interests of the child rarely took center stage if they were even allowed to enter into the light at all.[321] However, more recently, a trend has emerged in paternity jurisprudence, which recognizes that given the critical effects of disestablishment upon the child, the interests of the child are worthy of at least some consideration.[322] Thus, it must be determined, as an initial matter, how mandatory genetic testing at birth would play into this ongoing dynamic.

Biological truth, at first glance, might appear to have very little to

319. *See* Baker, *supra* note 10, at 6 ("A biological father's duty to support his non-marital children originated in England in 1576, as part of the British Poor Laws."); Hansen, *supra* note 34, at 1133-34 ("The Elizabethan Poor Law of 1601 authorized local parishes to recover the money they spent in aiding single mothers and children from a nonsupporting father.").

320. *See, e.g.*, Parness & Townsend, *supra* note 102, at 265; *see supra* note 190.

321. Parness, *supra* note 190, at 76-77; Drew, *supra* note 8, at 20.

322. Drew, *supra* note 8, at 21.

do with the best interests of the child. Indeed, as discussed above, it ties most directly to the ferreting out of the very fraud, misrepresentation, or mistake that typically lies at the heart of the non-biological father's interest in disassociating himself from the parent-child relationship.[323] However, if one takes a step back, it is clear that the circumstances leading up to disestablishment lay the seeds of harm for both the non-biological father and the child. Indeed, both have forged together an intensely intimate relationship based on a lie. The revelation of that lie often has disastrous consequences for both. The non-father's sense of anger and betrayal may be so strong that he may literally "throw the baby out with the bath water," severing altogether a formerly rewarding relationship with the child.[324] For her part, the child loses perhaps the only father she has known and very likely loses his financial support, as well, on which she had instinctively come to depend.[325] In short, neither the non-father nor the child really comes out of disestablishment as a winner.

The question then arises whether the likely after-effects of disestablishment are so bad that avoiding disestablishment altogether through mandatory genetic testing ultimately serves the best interests of the child. In other words, would the child still be better off in the long run had she never experienced the positive aspects of her pre-disclosure relationship with the non-biological father? The answer here may well vary from case to case. However, it must be noted that mandatory genetic testing would have revealed the "lie" at birth, giving the non-father an opportunity to exit the relationship before the child had any opportunity to develop an emotional or financial reliance upon it.[326] It is possible that an alternative relationship could have been forged between the child and the biological father at that time or at a later time with another third party cognizant of the child's paternity.[327] Finally, the ECtHR's position on genetic testing in regard to the best interests of the child bears reiteration – a child's knowledge of her biological truths is an inherent part of her own personal story and personhood.[328]

323. *See Truth and Consequences: Part I*, *supra* note 6, at 42 n.49; *Truth and Consequences: Part II*, *supra* note 6, at 63.

324. *See, e.g.*, Drew, *supra* note 8, at 18-21.

325. *Id.*

326. Parness, *supra* note 190, at 86-87.

327. *See Truth and Consequences: Part III*, *supra* note 5, at 72; Anderlik, *supra* note 64, at 4.

328. *See, e.g.*, Shofman v. Russia, App. No. 74826/01, Eur. Cr. H.R. at 9 (2006), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-71303.

5. Society

Numerous reasons exist for states to consider routinely mandating genetic tests to establish paternity. First, as a matter of public policy, states have an interest in the accurate determination of paternity. States have an obligation to maintain accurate birth records. Accurate paternity data is critical to ensuring the child receives support and protecting the child's right to a relationship with both parents, with its attendant benefits.[329]

Second, mandatory testing for paternity at birth should eventually obviate the need for disestablishment proceedings. One impetus for the fathers' rights movement was an appeal to fairness in seeking relief from paternity establishment that was based on deceit or mistake. In fact, the UPA and state statutes have incorporated fraud, material mistake of fact, and misrepresentation as bases for relief in the disestablishment statutes.[330] If the necessity for disestablishment is primarily based on fraud, material mistake of fact, or misrepresentation as to the biological facts of paternity, it follows that the harmful effects of such factors can be avoided, or at least minimized, with mandatory paternity testing at birth.

Third, the significant emotional and psychological harm a child suffers from severing an established parent-child relationship through disestablishment of paternity can be avoided by the certainty DNA evidence offers. States have an obvious interest in promoting the mental and emotional wellbeing of their citizens. Although there are no long-term studies on the impact of disestablishment, the probability of emotional and psychological harm is significant.[331] In this regard, studies of the harm incurred by children reared in a single parent home after the loss of a parent or divorce, though different, may be informative.[332] The legal father, putative father, or mother may wait years to challenge the legal or presumed father's paternity, during which

329. Parness, *Designating Male Parents at Birth*, *supra* note 303, at 574, 583.

330. UNIF. PARENTAGE ACT § 201 (amended 2002).

331. Rather than focus on the obvious economic impact of paternity disestablishment, a recent national symposium began the process of investigating "the emotional, social, and financial well-being of a child; the societal and legal implications of paternity disestablishment, including maintaining integrity of the paternity establishment process; and the [e]ffect of child support enforcement and other federal programs, especially child welfare." Drew, *supra* note 8, at 18.

332. Hoover, *supra* note 26, at 162-64 (summarizing deleterious effects of being raised in a fatherless household, which include the increased likelihood of committing crimes, being imprisoned, committing suicide, dropping out of high school, being involved in substance abuse, and suffering serious physical abuse). *See also* Glennon, *supra* note 32, at 560; Matthew B. Firing, *In Whose Best Interests? Courts' Failure to Apply State Custodial Laws Equally Amongst Spouses and its Constitutional Implications*, 20 QUINNIPIAC PROB. L.J. 223, 253 (2007).

time the parent-child emotional bond develops and strengthens, only to be abruptly severed when the biological truth is later discovered and the non-biological father's paternity is disestablished. Mandating genetic testing at birth provides an opportunity to identify the biological father sooner rather than later and to avoid the needless delay and expense resulting from the use of presumptions and other legal fictions.

Fourth, disestablishment often sends impoverished children to the care of the state. Not only does the child suffer the emotional and psychological harm from the loss of a father, she also loses current and future financial support.[333] One legal effect of disestablishment is that the formerly legal father is no longer obligated to provide financial support. The child may suffer loss of additional financial support if the obligation to pay arrearages is vacated or if the mother must repay past support payments.[334] The mother also may become liable under tort law for fraud or intentional infliction of emotional distress, which judgments would further reduce the financial resources the mother has available to support her child. The resulting financial impact on family funds for food, clothing, and shelter could be devastating, particularly if the family is already living at or below the poverty level. The loss could potentially cause a family living on the brink to fall into poverty or make it more difficult for an impoverished family to become free from poverty and its attendant ills. States, as a matter of public policy, have an interest in the health, safety, and welfare of their citizens, all of which are implicated in paternity disestablishment decisions.

C. Privacy Implications of Mandatory Genetic Testing at Birth

Mandatory paternity testing at birth implicates privacy interests. In the United States, some might object that such testing violates tenets of individual and family privacy law pursuant to the federal and state constitutions.[335] Constitutional family privacy rights have limits, though, as state governments currently routinely order genetic tests in contested paternity cases.[336]

Likewise, in the European Union, mandatory genetic testing could implicate rights relating to individual and family privacy.[337] Yet,

333. *Truth and Consequences: Part III*, *supra* note 5, at 75.

334. *Id.*

335. Parness, *supra* note 190, at 63-64.

336. *See also* Weiss, *supra* note 69, at 19-20.

337. *Charter of Fundamental Rights*, *supra* note 106 (essentially creating more legal certainty in the EU, "[t]he charter brings together in a single document rights previously found in a variety of legislative instruments, such as in national and EU laws, as well as in international conventions from the Council of Europe, the United Nations (UN) and the International Labour Organisation

European Union family and privacy rights are not limitless, as member nation courts also routinely order parties to submit to tests in contested paternity cases. In fact, Article 8 of the ECHR includes a provision that expressly subjects the family and privacy rights to certain limits.[338] In addition to objections based on rights protected by the ECHR, privacy rights of the twelfth Article of the Universal Declaration of Human Rights also might be raised.[339]

It is beyond the scope of this paper to address in depth the real and significant privacy concerns that genetic testing at birth might implicate. It should be noted, however, that related concerns have been raised in other contexts with which genetic testing is associated – criminal law, employment law, medical privacy law, insurance law, etc.[340] In none of these contexts has genetic testing been banned outright; rather, courts and legislatures have strived to craft an accommodation between the positive benefits DNA technology offers and the attendant concerns its raises. Likewise, many personal and social benefits would accrue from mandatory genetic testing at birth. At the very least, it is time for national and state governments to begin a similar accommodation process to reconcile those substantial benefits with the privacy concerns they raise.

VI. CONCLUSION

Disestablishment of paternity, particularly when it occurs after a strong parent-child bond has been formed, inflicts unnecessary

(ILO)."); Röman v. Finland, App. No. 13072/05, Eur. Ct. H.R. at 13 (2013), *available at* HUDOC, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-99784.

338. ECHR, *supra* note 13, at art. 8, § 2 protects the private and family life of its citizens, unless such interference "is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Paternity establishment and disestablishment cases require a careful balancing of the interests of mother, legal father, alleged father, child, and society. *Id.*

339. Universal Declaration of Human Rights, G.A. Res. 217 (XII) A, U.N. Doc. A/RES/217(XII) (Dec. 10, 1948) ("No one shall be subjected to arbitrary interference with his privacy, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.").

340. *See* Stephanie Beaugh, Comment, *How the DNA Act Violates the Fourth Amendment Right to Privacy of Mere Arrestees and Pre-Trial Detainees*, 59 LOY. L. REV. 157, 180-81, 194 (2013) (quoting Roe v. Marcotte, 193 F.3d 72, 78 (2d. Cir. 1999)) (observing that the U.S. Supreme Court "has applied the special needs exception to non-criminal investigatory types of cases and held that, '[i]n these cases, a significant governmental interest, such as the maintenance of institutional security, public safety, and order, must prevail over a minimal intrusion on an individual's privacy rights to justify a search on less than individualized suspicion'"); Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1395 (2012) (discussing the disparate impact of data collection practices on privacy in the lives of the poor and middle class).

emotional, psychological, and financial harm on the child. Just as there is a fairness issue concerning the establishment of paternity based on fraud or material mistake of fact, a fairness issue also is raised by policies that permit strong family bonds to develop, only to be severed abruptly years later when biological evidence of non-paternity is discovered. Such a regime surely is not in the best interests of the child, the family, or society. At a minimum, mandatory paternity testing at birth should obviate the need for disestablishment of paternity actions and the emotional and psychological trauma of severing an established relationship with the only father figure in the child's life. Fraud and material mistake of fact, two common factors on which disestablishment claims are based, can be avoided simply by conducting routine tests at birth to determine paternity. Even if the testing of a putative father shows non-paternity, the test's early timing potentially will enable another man to be tested and identified as the father, sooner rather than later.

Although paternity has always been a fact, only with twenty-first century advances in DNA technology has it become a fact that is easily ascertainable. As a matter of public policy, mothers, fathers, children, and the state have an interest in establishing the fact of paternity sooner rather than later. Indeed, there is no longer any excuse for interested parties to rely mistakenly on a mere assumption or presumption of paternity. Under no circumstances should a falsehood serve as the basis upon which states assign to anyone the bundle of rights and obligations associated with paternity. If fraud, mutual mistake, and similar claims concerning paternity can be avoided, the fact of paternity should be established as soon as possible after the birth of the child.

Genetic tests offer an efficient, accurate, and inexpensive means of establishing paternity that states may rely on, in part, to shift the potential financial responsibility for a child to the biological father.[341] The state of technology allows paternity to be established with nearly a 100 percent certainty. That same technology is now used to disestablish paternity, primarily in cases where paternity is based on fraud, material mistake of fact, or misrepresentation. Many of the adverse effects, particularly the emotional and psychological harm to the child, can be avoided if DNA testing to establish paternity occurs at birth. Mandatory genetic testing at birth or soon thereafter is an efficient and inexpensive means to establish paternity, which eventually should obviate the need for paternity disestablishment proceedings.

341. Drew, *supra* note 8, at 19-20.