DADDY DILEMMAS: UNTANGLING THE PUZZLES OF PATERNITY

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"[T]he meaning of biological paternity and social fatherhood are in a state of flux."[1]

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† The arguments in this paper are drawn from a work in progress. *See* DONALD C. HUBIN, PARSING PATERNITY: THE LEGAL AND PHILOSOPHICAL FOUNDATIONS OF FATHERHOOD (forthcoming) (manuscript on file with The Cornell Journal of Law and Public Policy). I am grateful to Sanford Braver, Damon Adams, Carnell Smith, Bruce Ellis, Steven Beckerman, David Gollancz, Bill Marsiglio, David Merli, Zac Cogley, Patrick McKenry and Julia Carpenter-Hubin for their guidance on this work. I am also indebted to the editors of this journal, and especially to Ankur Doshi, for their extraordinary efforts, and patience, in the editorial process.

[1] WILLIAM MARSIGLIO, PROCREATIVE MAN 38 (1998).

INTRODUCTION

Society's interest in establishing the paternity of children is not new. For centuries, it has been driven by the desire to provide support for children without making excessive demands on the public coffers and the hope of reducing the incidence of irresponsible procreative behavior. In recent years, the desire to provide children with complete genetic histories for medical purposes and to allow children and their fathers the psychological and social benefits of a relationship have also fueled an interest in establishing paternity.

What is new, of course, is the ability to conclusively determine genetic paternity through deoxyribonucleic acid ("DNA") testing.[2] This process, often used to determine paternity in order to establish child support obligations or to ground a man's right to a parental relationship with a child, is used increasingly to *dis*establish paternity. Courts and legislatures are struggling with the issue of paternity disestablishment.[3] The puzzles of paternity have led some courts to make bizarre blunders, reaching conclusions that are both legally and morally unacceptable.

The problems arising in legislative and judicial discussions of paternity establishment and disestablishment are difficult and many of the discussions surrounding these issues have not been illuminating. At an abstract level, the core issue is often framed as one of determining what makes a man the real father.[4] I contend that this way of framing the problem is part of the problem, part of the reason the puzzles of paternity remain unresolved. As is often the case, society has difficulty answering a question because it asks the wrong question. The difficulties in answering the question do not disappear when the question is framed correctly; genuine disagreements will remain. Framing the question properly, however, is an essential precondition to answering it.

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[2] Comment, *Who is My Daddy? Using DNA to Help Resolve Post-Death Paternity Cases*, 8 ALB. L.J. SCI. & TECH. 151, 154, 159–65 (1997) (noting the effectiveness of DNA testing as compared to previously used methods).

[3] *See* discussion *infra* Part III.

[4] Usually when "father" is qualified by "real," the intent is to identify the biological father (for a discussion of the complexity of the notion of biological fatherhood itself, see *infra* p. 61). This use, with its suggestion that biology determines fatherhood, has probably led to the framing of the debate in the unhelpful terms of who is the real father. Mary B. Mahowald takes up the issue directly:

> A real mother, then, is first and foremost a woman who cares for a child, from any stage of development, until the child no longer needs that care. A real father is a man who does the same when he can, *i.e.*, after the child is born. . . . From the standpoint of gender equality, it is hard to see how genetic ties alone ever provide an adequate for defining real mothers *or* real fathers.

Mary B. Mahowald, *Genes, Clones, and Gender Equality*, 3 DEPAUL J. HEALTH CARE L. 495, 526 (2000) (emphasis in original).

This article does not attempt to solve the social and legal problems of paternity establishment and disestablishment. Instead, it attempts to set the discussion on a more productive course by separating and clarifying the various questions that are confounded in the apparently simple question, "Who's your daddy?"

In Part I, I discuss the importance of paternity establishment and disestablishment. In Part II, I briefly address the history of legal approaches to this issue in the Anglo-American tradition. In addition, I also offer a snapshot of the current, rapidly changing legal landscape on this issue in Part III. In Part IV, I examine the concept of paternity. I argue that the current common sense understanding of paternity no longer serves our society well for many of its purposes. The concept of paternity is complex, comprising many separable elements; these elements must be separated in the abstract because they are increasingly being separated in reality. The separation of the various elements of paternity makes it completely natural to talk of children having multiple, though clearly nonfungible, fathers. Based on the conceptual parsing of paternity, I address various questions concerning paternity establishment and disestablishment. The concept of paternal rights and responsibilities is complex, like the concept of paternity itself. The normative philosophical problem of paternity involves linking the individual elements of paternal rights and responsibilities correctly to the individual elements of the concept of paternity. Part V looks at the possible concept of multiple fathers, and the issues of paternal rights this concept may invoke in practice. Finally in Part VI, I suggest how the exercise of this article lays a foundation for addressing the pressing social, legal, and political questions concerning paternity more productively.

I. THE IMPORTANCE OF FATHERS

> *Parentage determination does more than provide genealogical clues to a child's background; it establishes fundamental emotional, social, legal[,] and economic ties between parent and child. It is a prerequisite to securing financial support for the child and to developing the heightened emotional support the child derives from enforceable custody and visitation rights. Parentage determination also unlocks the door to government-provided dependent's benefits, inheritance, and an accurate medical history for the child.*[5]

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[5] U.S. COMM'N ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM 120 (1992).

Why is paternity establishment important? There are many reasons, grounded in a variety of interests. To bring some semblance of order to this issue, I divide the interests into personal and social interests and make a variety of distinctions within each of these classes. This primary division undoubtedly is somewhat arbitrary since, on any plausible account, social interests are grounded in personal interests. Still, it is a useful way to begin.

A. PERSONAL INTERESTS

Among the personal interests that prompt a desire to establish paternity are those of the two primary players: the child and the father. Third parties, notably, but not exclusively, the mother, also have interests in paternity establishment. Grandparents, half-siblings, aunts, uncles, and other members of the extended family may have interests in establishing paternity. Even full siblings may have such an interest, for they may otherwise suffer under the mistaken conception that they are not full siblings. With the exception of one special third party, I will focus primarily on the interests of the father and the child. The exception is for a putative father who is not the biological father; this article will discuss the benefits of paternity establishment that might accrue to him. I do not intend this focus, however, to suggest that these are the only relevant personal interests.

Among the personal interests, it is useful to specifically cite these interests: medical, financial, emotional, and developmental. Certainly there are others that are important, and those listed—especially the latter two—are not always clearly distinguishable. Nevertheless, this partial list will serve our purposes.

1. *Medical Interests*

With the growing ability to diagnose and treat genetically based and genetically influenced diseases, having access to information about one's genetic heritage is increasingly important.[6] Individuals who lack the medical history of both parents are at a disadvantage in the diagnosis and treatment of a variety of diseases compared to those who possess such

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[6] [T]he compilation of a thorough family history remains the first step for genetic counseling in any situation where a hereditary disorder is suspected. It is virtually impossible to establish an accurate hereditary cancer syndrome diagnosis and, in turn, to determine a given patient's risk for cancer, without knowing how this disease is manifested in his or her family.

Henry T. Lynch & Jane Lynch, *Genetic Counseling for Hereditary Cancer*, 10 ONCOLOGY 27 (1996); *see also* Alka Srivastava et al., *Risk of Breast and Ovarian Cancer in Women with Strong Family Histories*, 15 ONCOLOGY 889 (2001) ("Assessing the risk of breast and ovarian cancer starts with obtaining a complete and accurate family history. . . . [A]n accurate family history continues to be the most informative tool for assessing cancer risk.").

information.[7] Those who have a false belief about the identity of their genetic father are further disadvantaged: they lack knowledge of their true genetic ancestry, hold false beliefs about it, and are generally unaware of their ignorance and false beliefs. For their entire lives, they may unwittingly be giving doctors false information with potentially lethal consequences. Children receive a clear medical benefit from paternity establishment based simply on the increased knowledge of their genetic endowment. Those who deny a person the right to knowledge of his genetic ancestry—or, worse, mislead him about it—are harming the person in ways that could result in the needless death of that person.

The child's medical interest in the establishment of paternity is not simply limited to the genetic predisposition towards disease. Should illness or injury necessitate an organ replacement, genetic relatives are the best candidates for donors.[8] Consequently, children whose paternity has not been established are disadvantaged because their pool of potential donors is reduced. In addition, since the likelihood of organ donation presumably is increased when parents and children are tied to one another by bonds of affection—rather than the relatively sterile cognitive consciousness of genetic relatedness—children have an interest, based on the possibility of organ donation, in the early establishment of paternity and fostering a parent/child relationship with their genetic father throughout their lives.[9]

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[7] *See generally* Lynch & Lynch, *supra* note 6.

[8] Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 57 n.93 (1995). Early in medical transplant history, organ transplants were limited to organs harvested from blood relatives in an attempt to genetically "match" the tissue, allowing for a better prognosis of the patient. *Id.* Identical twins were believed to be the best match, usually having a 90% success rate. *Id.* Developments in immunosuppressive drugs have made it possible to now expand the availability of organ donation beyond blood relatives to third parties who have a high degree of consanguinity or histocompatibility with the donee. *Id.* at 57.

[9] Although never legally challenged, the state has no legal authority to require a parent to contribute more to a child than financial support, such as an organ, for the benefit of his child. *See* Holden v. Holden, 957 F. Supp. 1204, 1206 (D. Ka. 1997) (finding no legal duty for a parent to provide "emotional support"). Courts generally would view this type of involuntary intrusion on the body by the state as a violation of constitutional rights. *See* Planned Parenthood v. Casey, 505 U.S. 833, 851, 898 (1992) (holding that the mother has a liberty interest while pregnant that a father cannot take away); *cf.* Winston v. Lee, 470 U.S. 753, 759 (1985) ("A compelled surgical intrusion into an individual's body for evidence, however, implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime"); Rochin v. California, 342 U.S. 165, 174 (1952) ("Every individual [has the right] to the possession and control of this own person, free from all restraint of interference of others."). In recent years, however, many states have passed organ donation laws that automatically presume consent for harvesting of organs after death, an issue that implicates archaic laws of property granting ownership of the body to next of kin, not the decedent's constitutional rights. Alexander Powhida, Comment,

This latter benefit can, and sometimes does, flow in the opposite direction. There have been numerous cases of adult children donating organs to their parents.[10] In these cases, the parents clearly had a medical interest in knowing their genetic children and, most likely, in having the opportunity to establish a typical parent-child relationship with them.

The establishment of genetic paternity has benefits for both fathers and children with respect to their reproductive choices. Fathers may well benefit from having genetic information about their children. A man who knows that he sired a child with a genetic illness may choose to alter his procreative behavior in the future. He may alter it by preventing conception or encouraging *in utero* testing of the fetus to aid the decision of terminating the pregnancy, seeking prenatal treatment, or preparing to rear a child with a genetic disability. Obviously, if paternity is not established and the father does not learn about the existence and medical condition of his child, he is disadvantaged in planning his reproductive life and preparing for his future children's possible medical problems.[11] Alternatively, when paternity is misattributed, the putative father, in the mistaken belief that he carries a genetic illness, unnecessarily may choose not to father a child.

An additional benefit of genetic paternity establishment concerns the procreative plans of the child. A child's lack of knowledge regarding her genetic history may lead her to procreate when, had she known that history, she would have chosen otherwise. If paternity is misattributed, she may choose not to procreate in the false belief that she carries a genetic illness. Furthermore, if an individual's genetic paternity is not established correctly, she or he may marry and have children with an individual who is more closely related genetically than is desirable.[12]

Forced Organ Donation: The Presumed Consent to Organ Donation Laws of Various States and the United States Constitution, 9 ALB. L.J. SCI. & TECH. 349, 363, 368, 370 (1999).

[10] *See, e.g.*, Eric P. Cohen et al., *Benefit of Child-to-Parent Kidney Donation*, 3 AM. J. TRANSPLANTATION 865 (2003); Susanne Quick, *Study Backs Child-Donor Transplants*, MILWAUKEE J. SENTINEL, July 7, 2003, at G1; L. Westlie, et al., *Quality of Life in Norwegian Kidney Donors*, 8 NEPHROLOGY DIALYSIS TRANSPLANTATION 1146 (1993).

[11] Furthermore, a future child could be disadvantaged if his father is, as a result of misidentified or unidentified paternity, unaware that he carries a genetic disease. This is true independent of the controversial issue of whether a child can ever be wronged by being born. The possibility of *in utero* surgery and other relatively new medical treatments may make it possible to cure or ameliorate the effects of genetic illness if they are known or suspected during fetal development. *See, e.g.*, M. Meuli et al., In Utero *Surgery Rescues Neurological Function at Birth in Sheep with Spina Bifida*, 1 NAT. MED. 342 (1995); Catherine A. Mazzola et al., *Dermoid Inclusion Cysts and Early Spinal Cord Tethering after Fetal Surgery for Myelomeningocele*, 347 NEW ENG. J. MED. 256 (2002); Nancy Humphrey, *Spina-Bifida Babies Prospering After* In Utero *Surgery At VUMC*, VANDERBILT REGISTER, Mar. 22–28, 1999, *available at* http://www.vanderbilt.edu/News/register/Mar22_99/babies.htm (last visited Oct. 4, 2003).

[12] Individuals often avoid marriage with close relatives because of the increased possibility of the transmission of genetic defects. While the likelihood of such problems has been

Conversely, she or he may unnecessarily forgo marriage to an individual in the mistaken belief that the relationship is too genetically close for safety in having children.[13]

2. *Financial Interests*

Almost too obvious to need to be stated, but clearly too important to be omitted, is the financial interest children have in establishing paternity. The father's economic resources, which often exceed the mother's, provide a crucial benefit for children, frequently making the difference between a life of poverty and a comfortable, if not opulent, existence.

In 2000, 32.5% of single mother households with children were below the poverty level, compared with only 16.1% of single father households with children and only 6% of married couple households with children under the age of eighteen.[14] When parents live apart, fathers' financial contributions are important. A 1997 survey of children living apart from one parent revealed that 52.8% of children living with their mothers received financial support from their nonresident fathers and that 38.6% of children living with their fathers received financial support from their nonresident mothers.[15] In the same year, 23.1% of those children living with their mothers with an existent child support order received all their ordered child support from their nonresident father, while only 6.1% of those living with their fathers received all the ordered child support from their nonresident mothers.[16]

In fiscal year 2000, the Administration for Children and Families of the Department of Health and Human Services reported national collections of child support in the amount of $17.9 billion—the overwhelming

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exaggerated in the case of cousins, it is real and significantly greater with close relatives. *See generally* MARTIN OTTENHEIMER, FORBIDDEN RELATIVES: THE AMERICAN MYTH OF COUSIN MARRIAGE (1996).

13 The following story illustrates both problems: Janet, a young woman, comes home and joyfully announces to her parents that she is going to marry an attractive young man named Jason. Later that evening, Janet's father takes her aside and reluctantly tells her that she must not marry Jason. He confesses to his daughter that, years ago, he had a brief affair with Jason's mother and that Jason is actually Janet's half-brother. Janet is heartbroken and despondent. Her mother is very concerned about her change in mood and encourages Janet to talk about what is bothering her. Finally, Janet confides in her mother, tearfully recounting what her father has told her. Her mother pauses, smiles and says, "Go ahead and marry Jason. Jason may be your dad's son, but he's not your half-brother."

14 U.S. Census Bureau, Poverty Status of Families, by Type of Family, Presence of Related Children, Race, and Hispanic Origin: 1959 To 2001, (2002), *at* http://www.census.gov/hhes/poverty/histpov/hstpov4.html (last visited Aug. 31, 2003).

15 Elaine Sorensen & Chava Zibmann, *To What Extent do Children Benefit From Child Support?*, ASSESSING THE NEW FEDERALISM: DISCUSSION PAPERS 99-19, Urban Inst., Jan. 2000, at 11, 99–110, *available at* http://www.urban.org/UploadedPDF/discussion99-19.pdf; *see also* W. V. Fabricius, S. L. Braver, & K. Deneau, *Divorced Parents' Financial Support of Their Children's College Expenses*, 41 FAM. CT. REV. 224, 224–41 (2003).

16 *Id.*

majority of these payments came from nonresident fathers.[17] Moreover, these figures vastly underestimate the actual amount of financial support nonresident fathers provide for their children. First, these figures only count child support transfer payments made through child support enforcement agencies.[18] Fathers living apart from their children may transfer money to support children to the mother without a court order.[19] Furthermore, some parents pay child support pursuant to a child support order but not through a child support enforcement agency.[20] Second, the national child support figures do not include the direct support nonresident fathers provide for their children.[21] Needless to say, the amount of money one parent pays to the other parent through a child support enforcement agency is not a measure of all financial support that a parent provides for his children.

There is reason to believe that financial support for children is more consistently and generously given when there are bonds of affection between the parent and the child. This is one plausible explanation for the fact that child support obligors who have shared custody of their children are far more compliant with child support orders than those who only have visitation rights, and that those with visitation rights are far more compliant than those who are deprived of the opportunity to see their children.[22] As with the medical interest in organ donations, these facts argue for early paternity establishment and support for parent-child rela-

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17 ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, FY 2000 PRELIMINARY DATA PREVIEW REPORT, 3.6 TOTAL COLLECTIONS (2001), *available at* http://www.acf.dhhs.gov/programs/cse/pubs/2000/datareport/ch03.html#N79A1 (last visited Aug. 28, 2003) (hereinafter, ADMIN. FOR CHILDREN AND FAMILIES).

18 *See id.*

19 Evidence of such payments taking place is strongly implied by statutes such as the following Ohio statute: "Any payment of money by the person responsible for the support payments under a support order to the person entitled to receive the support payments that is not made to the office of child support, or to the child support enforcement agency administering the support order under sections 3125.27 to 3125.30 of the Revised Code, shall not be considered a payment of support under the support order and, unless the payment is made to discharge an obligation other than support, shall be deemed to be a gift. OHIO REV. CODE ANN. § 3121.45 (2003). Furthermore, cases decided pursuant to this statute include findings that such payments have taken place. Thottam v. Thottam, No. 1995CA00332, 1996 Ohio App. LEXIS 2884, at *7–8 (Ohio 5th Ct. App. May 20, 1996).

20 E-mail from Kim Newsom Bridges, Esq., Executive Director, Ohio Child Support Directors Association to Donald C. Hubin, Professor, Ohio State University, (Oct. 23, 2003, 09:05:33 CDT) (on file with the Cornell Journal of Law and Public Policy) (noting that the federal reports are only compilations of collections only made through state and local agencies, and fail to collect information on payments made by fathers outside of collection agencies).

21 *See* Admin. for Children and Families, *supra* note 18.

22 In 1999, for fathers with joint custody and visitation agreements, 85.9% of child support due was paid; for fathers without custody, but with visitation agreements, 77% of child support due was paid; for fathers with neither custody nor visitation agreements, only 46.3% of child support due was paid. Figures calculated from U.S. Census Bureau Table 9, 2, *available at* http://www.census.gov/hhes/www/childsupport/chldsu99.pdf (last visited Sept. 29, 2003).

tionships with both parents. Paternity identification also allows children to inherit from their fathers and to receive "third party benefits" such as life insurance benefits, veterans' benefits and social security benefits.[23]

All of these financial benefits accrue to the child. In the past, the economic benefits of establishing paternity flowed primarily in the other direction. Children were economic assets, providing efficient and low-cost labor for family farms.[24] Young children, however, no longer provided an economic benefit to their parents, and while many factors weigh in favor of having children, sound economic investment does not seem to be among them. Yet, while the economic advantages of children may not be apparent to those paying for braces and contemplating college tuition costs, there are still some significant economic advantages to procreation. Due to steep increases in the costs of providing elder care, more and more elderly people need to rely on their children for economic support during the last years of their lives.[25]

Children certainly have an economic interest in paternity establishment. Fathers may have an economic interest in knowing who their children are. Moreover, putative fathers who are not the biological fathers have an economic interest in the disestablishment of paternity.

3. *Emotional Interests*

Both parents and children typically have strong emotional interests in their relationship with one another. In the best of circumstances, this relationship is among life's most fulfilling relationships for both parents and children, even if the children are not aware of it until later in life.

Many adults, especially those involved in setting public policy, are likely to focus on the adverse economic consequences of divorce for children. In contrast, children, even grown children of parents who divorced when they were young, are likely to consider the loss of a relationship with one of their parents, usually the father, as a greater consequence.[26] This fact speaks to the emotional interest children have in relationships with their fathers.[27] Conversely for most fathers, the re-

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[23] *See* DISTRICT OF COLUMBIA CHILD SUPPORT ENFORCEMENT DIVISION, PATERNITY ESTABLISHMENT, *available at* http://www.csed.dc.gov/collect.shtm (last visited Sept. 26, 2003).

[24] Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1129, 1132 (1999).

[25] Alan C. Weinstein, Essay, *The Challenge of Providing Adequate Housing for the Elderly . . . Along with Everyone Else*, 11 J.L. & HEALTH 133, 134–35 (1996–97).

[26] JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE 238 (1989).

[27] Wallerstein describes the overwhelming sadness of children of divorced parents who taught us very early that to be separated from their father was intolerable. The poignancy of their reaction is astounding. . . . They cry for their daddies—be they good, bad, or indifferent daddies. I have been deeply struck by the distress children of every age suffer at losing their fathers.

lationship with their children is of enormous personal value. The importance of a man's relationship with his children is exemplified in a variety of links between this relationship and his physical and psychological health.

"[A] man's life as a father is central, not peripheral, to his health."[28] In fact, a variety of problems with men's physical health (including fatigue, sleeplessness, back problems and more) increase with worries about their children and their parenting relationship with their children.[29] Their relationship with their children also affects their psychological well-being.[30] Perhaps surprisingly, worries about their children and their parent-child relationship with them proved a greater hindrance to job performance for men than for women.[31] Apparently, men demonstrated less ability than women to "compartmentalize" and leave their worries about their children outside of the office.[32]

Men's concerns with their children and their status as a father often begin before the birth of the child. A surprising number of expectant fathers, "especially those who are involved in committed relationships" with the mothers, experience couvade syndrome.[33] This set of symptoms mimics, in some ways, the experiences of pregnancy.[34] Estimates of the frequency of couvade syndrome vary from 11% to 65% of expectant fathers.[35]

Id. at 234.

28 Caryl Rivers & Rosalind Barnett, *Fathers Do Best: Why Dedicated Dads are Usually Healthier and Happier*, WASH. POST, June 20, 1993, at C5.

29 *Id.*

30 *See generally* Rosalind Barnett et al., *Men's Multiple Roles and Their Relationship to Men's Psychological Distress*, 54 J. MARRAIGE & FAM. 358, 358–67 (1992); see also Rosalind Barnett & Nancy Marshall, *Men, Family Role, Job Role Quality, and Physical Health*, 1 HEALTH PSYCHOLOGY 48, 48–55 (1993).

31 *See* Kirby Deater-Deckard et al., *The New Property*, 5 PSYCHOLOGICAL SCI. 341, 345 (1994) (finding that fathers reported similar levels of separation anxiety as mothers and slightly higher levels of concern for their children in day care facilities). The authors found that fathers tended to overestimate their wives' concerns; the authors believe this occurs because it is "socially more acceptable for mothers' anxieties about children's well-being to exceed fathers' than for fathers' anxieties to exceed mothers." *Id.* Fathers know how anxious they feel themselves, and they may adjust their perceptions of their wives' concerns to exceed their own, regardless of mothers' actual level of anxiety. *Id. See also* Rivers & Barnett, *supra* note 28, at C5.

32 There is a growing body of research that supports the conclusion that men's satisfaction with their parenting role is central to their physical and emotional health. *See* Rivers & Barnett, *supra* note 28, at C5; *see also* Barnett et al., *supra* note 31, at 358–67; Barnett & Marshall, *supra* note 31, at 48–55.

33 MARSIGLIO, *supra* note 1, at 23.

34 *Id.*

35 *Id.*

Divorced men are nearly ten times more likely to commit suicide than divorced women.[36] Interestingly, divorced mothers are about ten times more likely to have primary physical custody of their children.[37] In light of the connection between a father's relationship with his children and his physical and emotional health, it would be naïve to think these two statistics are unrelated.

The emotional importance of the father-child relationship to both fathers and children depends on the existence of a developed relationship. While it might not be immediately obvious how this bears on the issue of paternity establishment, the fact that such an emotionally important relationship is possible between fathers and their children serves as the basis for recognizing a "future interest" that both have in the establishment of paternity. There is, however, reason to believe that the correct establishment of paternity also has immediate emotional benefits for both fathers and their children.

Undoubtedly, many people have a profound and compelling desire to learn about their genetic ancestry, as exemplified by the enduring popularity of genealogy. In addition, there is a strong movement among adoptees to secure the right to know the identity of their genetic parents.[38] Individuals produced by artificial insemination by a donor are also challenging laws that prevent them from learning the identity of their genetic fathers.[39] Many of these individuals write poignantly of the

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[36] *See* Augustine J. Kposawa, *Divorce and Suicide Risk*, 57 J. EPIDEMIOLOGY & CMTY. HEALTH 559, 559–60 (2003); *see also* C. H. Cantor and P. J. Slater, *Marital Breakdown, Parenthood, and Suicide*, 1 J. FAM. STUDIES 91, 91–102 (1995).

[37] Joanne Byfield, *Irreconcilable Differences*, THE REPORT, Jan. 6, 2003, at 30, *available at* http://www.fathersforlife.org/articles/report/irreconcilable.htm.

[38] *See generally* TIM J. WATTS, THE RIGHTS OF ADOPTEES TO KNOW THEIR BIOLOGICAL PARENTS: A BIBLIOGRAPHY (1988).

[39] David Gollancz, a British attorney and activist for the rights of such individuals, and a product of "artificial insemination by donor" himself, writes

> Human beings are storytelling animals. We make sense of the world and ourselves by telling stories. . . . Our storytelling is not only a social and cultural activity. We ourselves embody a narrative. Sperm is not just fertiliser [*sic*]: it is a book, in which is written half the recipe for a new human being. When my donor's sperm fertilised [*sic*] my mother's egg, he ensured that his genes were passed on, to me. Most people would accept that an individual's personal development is the story of the interaction of genetic predisposition with environment. And there are kinds of genetic inheritance which have nothing to do with personal mythology: recessive genes for incurable diseases are not susceptible to interpretation. . . . We need to recognise [*sic*] a human right that would not only benefit the offspring of assisted reproduction and adoptees, but would prevent all those other eradications of inconvenient personal history: such as the export of children to Canada and Australia or the theft of aboriginal children. . . . This right, like any authentic human right, would not only benefit those individuals who assert it but should be seen as one of the conditions of a decent society. It is the right not to be deliberately deceived about our essential personal history.

David Gollancz, *Give Me My Own History,* THE GUARDIAN (London) May 20, 2002, at 18.

desire to know who their genetic parents and other blood-relatives are.[40] Richard P. Perna points out that, with respect to paternity establishment,

> [M]ore than economics are at stake for a child. Emotional and psychological well-being often depend upon a sense of identity and family history derived from both parents. Given the importance of the parent-child relationship to the future psychological and emotional health of the child, it is imperative to establish that relationship with the real father—not just any man capable of providing economic support.[41]

Genetic fathers probably do not seek out their missing children as frequently as children seek out their genetic parents. There are a variety of plausible explanations for this occurrence. The first two deal with asymmetries between the situation of fathers and children. First, an epistemic asymmetry: children always know that they have two genetic parents, whereas fathers may not know that they have genetic children. At least sometimes, fathers may fail to seek out their genetic children because they do not know that these children exist.[42] Second, the identity of genetic children with whom one does not share a life probably does not have the influence on one's sense of self—who one is and where one originates—as much as the identity of one's genetic parents has. Finally, fathers may be unlikely to seek out their genetic children because once such a genetic relation is established, it will almost certainly result in a

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[40] David Gollancz, in another article describes his joy at finding two half-siblings—products of the same sperm donor as himself:

> I have found two half-siblings: children of the same donor father but of a different mother. . . . [W]hat doubts I have had about the profound significance of blood ties, their importance in the story-telling that is as much the stuff of life as the events it recounts, are gone now. We are three people in middle age. . . . [F]or me the discovery of these two has been like the warming of frozen soil after a hard winter, bringing growth and green into places that have seemed dead and desolate for 30 years and more. For all three of us, the delight we feel in each other's company, and our certainty about the importance of our connection with each other, have a strength, immediacy and simplicity that is like a taste in the mouth: something known before and beyond the need for discussion. This meeting has brought me great joy—and an even greater certainty about the need for an end to secrecy in [donor insemination cases].

David Gollancz, *Donor Insemination: A Question of Rights*, 4 HUMAN FERTILITY 164, 167 (2001).

[41] Richard P. Perna, *The Uniform Reciprocal Enforcement of Support Act and the Defense of Non-Paternity: A Functional Analysis*, 73 KY. L.J. 76, 99 (1984–85).

[42] Often, this is because the mothers conceal the existence of these children from the fathers. Except in extraordinary situations, mothers are not in the same epistemic situation as fathers. If they do not know who their genetic children are, it is seldom because they do not know that they have children. More importantly, when mothers do not know who their children are, this situation is usually brought about by a voluntary decision of the mother, though the voluntary decision may have been made in circumstances that are far from ideal.

child support obligation but is much less likely to result in the ordinary benefits of fatherhood, such as the opportunity to rear and care for the children.[43] So long as the establishment of paternity is merely the occasion for a financial obligation, without any concomitant familial rights, benefits, or even respect, it is not surprising that more men do not seek their potential biological children.[44]

4. *Developmental Interests*

Children have a significant interest in paternity establishment because it can affect their development into normal, healthy adults.[45] Though much of the scientific research in this area must be treated as provisional, it is certainly strongly suggestive of an important role that fathers play in the development of their children when they are actively involved in their children's lives. Some benefits of such paternal involvement may be possible to reproduce with "male role models" or surrogate fathers who are biologically unrelated to the child.[46] However, many of these benefits appear to be more easily and naturally produced by genetic fathers, and surprisingly, some appear to actually require the presence and involvement of the genetic father.[47]

On average, children reared with both biological parents develop better than children reared with only one biological parent or with neither biological parent.[48] The reasons for the difference are unclear. There is mounting evidence to support the conclusion that the reasons for this difference are not solely economic.[49] What role, other than economic, do involved fathers play in their children's development?

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[43] *See* Perna, *supra* note 41, at 100.

[44] *See id.* This does not mean that men do not love and support their children. Rather, it recognizes that there are environmental triggers for the love and commitment that produces voluntary sacrifice—a child's smile or hug, for example. It is probably unreasonable to expect a high level of voluntary compliance with a duty to provide financial support for a child from a father who is not allowed to be a real parent to his children. Evolution did not select for fathers with a disposition to write child support checks—though it most certainly did for fathers with a disposition to provide for and protect the children they love. See David C. Geary, *Evolution and the Human Expression of Proximate Paternal Investment*, *126* PSYCHOLOGICAL BULLETIN 55, 55–77 (2000).

[45] *See* DAVID POPENOE, LIFE WITHOUT FATHER 139–63 (1996) (discussing how fathers can affect a child's development).

[46] *See* ROSS D. PARKE, FATHERHOOD 217–23 (1996).

[47] *See* POPENOE, *supra* note 45, at 150–88. At least the genetic father's presence is required as a practical manner. Technological progress could allow us to reproduce artificially the benefits of the genetic father's presence. *Id.*

[48] *Id.* at 139.

[49] Michael E. Lamb, *Placing Children's Interests First: Developmentally Appropriate Parenting Plans*, 10 VA. J. SOC. POL'Y & L. 98, 103 (2002).

While there is controversy over the question of whether fathers play a *unique* and *irreplaceable* role in the development of their children,[50] there appears to be evidence that, on average, men interact with infants and children differently than women do.[51] They roughhouse and engage in physical play more than women do; they encourage risk-taking more than women do; and they interact with infants and children in ways that encourage more independence and self-reliance.[52] These activities appear to help children learn to be more independent and resourceful. Play, it seems, and particularly the forms of play that fathers typically engage in with their children, is anything but frivolous in a child's development.

Fathers also serve as a male role model for children. Good male role models are important in the development of both boys and girls.[53] Boys often emulate their fathers and girls' self-esteem is bolstered by a good relationship with their father.[54]

While biological fathers typically play these roles in their children's lives, there is nothing in what we have said so far that limits this role to biological fathers. People often reflect this insight by talking of the importance of fathers merely in terms of "male role models"—roles that could, in principle, be played by unrelated adult males or adult male relatives other than biological fathers.

The role of these men in children's lives is important. Adoptive fathers, step-fathers, grandfathers, uncles and other men contribute in many ways to the development of children. It seems more likely, however, that a biological father will be more interested in making the sacrifices to promote development of his children than will an unrelated male.[55] Among primates, humans are unique in the degree of paternal investment in children.[56] The evolution of a high level of paternal sacrifice for children is, almost certainly, at least partly the result of "kin selection," the theory that fathers who invest in their biological children have a higher level of inclusive fitness than fathers who do not because

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50 *See generally* Louise B. Silverstein & Carl F. Auerbach, *Deconstructing the Essential Father*, 54 AM. PSYCHOLOGIST 397, 397–98 (1999) (defending the view that "neither a mother nor a father is essential" to a child's healthy development).

51 *See generally* POPENOE, *supra* note 46, at 139–63; PARKE, *supra* note 48, at 63–72; TINE THEVENIN, MOTHERING AND FATHERING: THE GENDER DIFFERENCES IN CHILD REARING (1993) (examining the typical differences in the way fathers and mothers interact with their children); ROSS D. PARKE & ARMIN A. BROTT, THROWAWAY DADS: THE MYTHS AND BARRIERS THAT KEEP MEN FROM BEING THE FATHERS THEY WANT TO BE 3–13 (1999).

52 THEVENIN, *supra* note 51, at 86–102.

53 *See generally id.*

54 *E.g.*, PARKE, *supra* note 46, at 149–55, 173–78.

55 *See* POPENOE, *supra* note 45, at 174–77. The obvious exception is likely to be adoptive fathers—men who have made a conscious choice to be social fathers to children they know are unrelated to them. The group is highly self-selected for men who strongly desire to rear children.

56 *Id; see also*, Geary, *supra* note 44, at 55–77.

more of their offspring survive and thrive.[57] This theory does not settle the issue of the mechanism for such kin selection. The proximate causes of paternal investment are, of course, only contingently connected to genetic relatedness (or, at least, were so connected through evolutionary history). So, it is possible *a priori* that the psychological mechanism that promotes paternal investment and nurturing stems from the man's attachment to his sexual partner, which fosters paternal behavior toward her children, or is triggered by the mere presence of the child in the man's household. If either of these could fully explain paternal investment in humans, then genetically unrelated men who were either the mother's sexual partner (the first hypothesis) or were living with the children (the second hypothesis) would, on average, invest as many resources in the children as a biological father. However, these hypotheses are not adequate. In particular, the significantly higher rate of child abuse by stepfathers suggests that the mechanism promoting paternal investment and nurturing does not consist only of pair-bonding with the mother or contact with the children.[58]

Finally, empirical evidence indicates that genetic fathers make a unique contribution to the development of their children, one that unrelated males cannot make. Surprisingly, it is a contribution that requires them simply to be present.[59] Over the past several decades, medical

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[57] Kin selection is an evolutionary mechanism that increases an individual's inclusive fitness by increasing the reproductive success of genetic relatives. Although suggested by earlier authors, the theory of kin selection was first developed by W.D. Hamilton. See generally W.D. Hamilton, *Altruism and Related Phenomena, Mainly in Social Insects*, 3 ANN. REV. ECOLOGY & SYSTEMATICS 193 (1972); W.D. Hamilton, *The Evolution of Altruistic Behaviour*, 97 AM. NATURALIST 354 (1963); W.D. Hamilton, *The Genetical Evolution of Social Behaviour I, II*, 7 J. THEORETICAL BIOLOGY 1 (1964).

[58] Margo Wilson and Martin Daly write

> Some have suggested that the problems characteristic of steprelationships are incidental consequences of the creation of a "parent-offspring" relationship too late. There is no evidence in favor of this idea and at least one study that speaks against it. Flinn . . . found that men who coresided with stepchildren from their births were if anything even more hostile toward them than were those whose steprelationships were established later, and much more so than genetic fathers. One possible implication is that human paternal affection is "cognitively penetrable" by something like conscious knowledge of paternity or nonpaternity. (This need not imply that paternal affection is insensitive to cues like phenotypic resemblances as well, without the man's necessary awareness.)

Margo Wilson & Martin Daly, *The Man Who Mistook His Wife for a Chattel*, *in* THE ADAPTED MIND: EVOLUTIONARY PSYCHOLOGY AND THE GENERATION OF CULTURE 289, 307 (Jermone H. Barkow et al. eds., 1992).

[59] *See generally* Bruce J. Ellis, *Of Fathers and Pheromones: Implications of Cohabitation for Daughters' Pubertal Timing*, *in* JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION FOR CHILDREN, FAMILIES, AND SOCIAL POLICY 161–72 (A. Booth & A.C. Crouter eds., 2002); Bruce J. Ellis & Judy Garber, *Psychosocial Antecedents of Variation in Girls' Pubertal Timing: Maternal Depression, Stepfather Presence, and Marital and Family Stress*, 71 CHILD DEVELOPMENT, 485, 485–501; Bruce J. Ellis et al., *Quality of Early Family Relationships and*

scientists in the United States have noted an advance in the onset of puberty in girls.[60] The early onset of puberty in girls is problematic for a number of reasons. It is associated with an increased risk of breast cancer later in life, unhealthy weight gain, depression, anxiety, alcohol consumption, sexual promiscuity, higher rates of teenage pregnancy, and low birth weight of the resulting infants.[61]

Various hypotheses have been developed to explain this phenomenon—ranging from hormones in milk and meat to obesity. It is likely that there are multiple factors contributing to this troubling phenomenon, but recent research suggests a surprising, new hypothesis. It appears that, on average, girls raised with a stepfather (or presumably any unrelated adult male) present in the house enter puberty at an earlier age than those with no male living in the household.[62] Those with involved biological fathers have, on average, the latest onset of puberty.[63] One plausible, but still speculative, explanation for this phenomena relates to the effects of human pheromones on the timing of puberty. While the pheromones of genetic fathers slightly delay the onset of puberty, those of unrelated males significantly advance the onset of puberty.[64] If the proposed explanation is confirmed, genetic fathers provide a benefit to their daughters by just "being there."[65]

B. SOCIETAL INTERESTS

There is a social interest in children's well-being. Insofar as one of the objectives of a society is to "promote the common good," children's well-being is, *ipso facto*, a societal interest. Furthermore, for a society to flourish through time, its children must be raised with love, care and sufficient material resources for them to flourish as individuals. The societal costs of children who are raised in abject poverty or without the guidance of loving, involved parents are high.

Individual Differences in the Timing of Pubertal Maturation in Girls: A Longitudinal Test of an Evolutionary Model, 77 J. PERSONALITY & SOC. PSYCHOL. 387, 387 (1999).

60 Ellis et al, *supra* note 59, at 387.

61 *Id.*

62 Ellis, *supra* note 59, at 164–65.

63 *Id.* at 166–67.

64 *Id.* Just 18% of girls from traditional homes began to menstruate by the time they were 11 years old; 25% of girls in homes with no adult male present and 35% of girls in homes with step-fathers present began to menstruate by this time. *Id.* Girls with stepfathers, on average, menstruated nine months earlier than girls in "father-present" homes and girls in homes with no unrelated male began menstruating four months earlier. *See* Ellis et al., *supra* note 59, at 387; Ellis & Garber, *supra* note 59, at 485. The studies of Ellis and Garber controlled for race since there are known racial differences in the average time of onset of puberty in girls. *Id.* at 494.

65 Ellis, *supra* note 59, at 397.

Children need adequate economic resources to thrive, and, as indicated earlier, those who can draw on the economic resources of both parents are less likely to be raised in poverty than those who must rely on only one parent. Sufficient public assistance could, in theory, address the problem of childhood poverty, but there are two primary problems with relying on public assistance to solve this problem. First, because it does not associate the costs with the behaviors that made those costs necessary, it creates the wrong incentives and could encourage irresponsible behavior. Second, in part because of the imprudent incentive structure, such a system will inevitably become extremely costly by creating a permanent subculture dependent on public assistance.

Tying the costs of raising children to the activities that make these costs necessary—which typically means making genetic parents responsible for their children and thereby creating the right structure of incentives—as a practical matter requires the establishment of genetic paternity.[66] This requirement long has been and still is one of the primary social interests in paternity establishment.

As indicated above, the financial benefits that accrue to children are not always direct benefits from the father. There are also third party benefits of which some involve public funds, while others do not. Children's access to the nonpublic funds also reduces their dependency on public support.

There are a variety of other ways in which society can realize direct financial benefits from paternity establishment. For example, if a relationship between a father and his child is created, it may save public funds when the child takes some financial and personal responsibility for the father's care in his old age. Establishing this relationship may also make possible organ donations—either from father to child or vice versa. This can reduce medical expenses and increase the availability of scarce medical resources.

Clearly, one of the primary social benefits of paternity establishment, at least if it results in fathers being involved in their children's lives, is crucially linked to the developmental benefits father involvement appears to produce. The absence of fathers from their children's lives has been associated with a variety of behavioral problems that impose significant social costs. While social science research seldom speaks unequivocally and conclusively, especially where significant policy issues

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[66] As I will suggest later (though I will not defend the proposition), it is not the genetic relationship itself that is relevant to the existence of a moral duty to support a child, nor *should* it be that relationship that is relevant to the existence of legal duty of support. See *infra* p. 56. However, genetic paternity is practically always associated with the factor that does ground a moral duty and should ground a legal duty. As such, it is evidentially related to an intrinsically relevant factor.

are at stake, there is overwhelming evidence that children who grow up without their fathers are more likely to commit crimes, to engage in early sexual relationships, to fail in school, and so forth.[67]

For example, one study found that 64% of adolescents charged with murder grew up without a father involved in their lives.[68] Anne Hill and June O'Neill found that young males are more likely to engage in criminal activity when raised without a father and even more likely to do so if raised in a neighborhood with a high concentration of single-parent families.[69] Hill and O'Neill also found that the presence or absence of a father in the home can explain nearly one-half of the racial differentials in criminal behavior.[70] Additionally, a study of young men charged with rape found that 60% grew up without their fathers.[71]

The increased risk of criminal behavior by individuals who grew up without their fathers cannot be explained by the economic disadvantages experienced by such children.[72] Research, however, seems to belie this notion. Hill and O'Neill, for example, found that young black men raised in single-parent families on welfare and living in public housing are significantly more likely to be involved in criminal acts than young black men raised in two-parent families who were also on welfare and living in public housing.[73] They concluded that "[t]he effects of family income are surprisingly small and are seldom significant for predicting dysfunctional behavior"[74] and that "[i]ncreases in parental income are associated with only minimal reductions in dysfunctional behavior, while a higher level of welfare benefits is generally associated with increases in these behaviors."[75]

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It is in part because of the important social and interpersonal roles that fathers play that Western cultures have associated paternal rights and responsibilities with the role of being a father. Put simply, society's beliefs about paternal rights and responsibilities are grounded in facts about paternity. Insofar as those factors in virtue of which one is a father "stay

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67 M. ANNE HILL & JUNE O'NEILL, UNDERCLASS BEHAVIORS IN THE UNITED STATES: MEASUREMENT AND ANALYSIS OF DETERMINANTS v-vii(1993); WARREN FARRELL, FATHER AND CHILD REUNION: HOW TO BRING THE DADS WE NEED TO THE CHILDREN WE LOVE 29–54.

68 Nicholas Davidson, *Life Without Father: America's Greatest Social Catastrophe*, 51 POL'Y REV. 40, (1990)

69 *See* HILL & O'NEILL, *supra* note 67, at vi.

70 *See id.* at vii.

71 Nicholas Davidson, supra note 68, at 40.

72 Elaine Ciulla Kamarck, PUTTING CHILDREN FIRST: A PROGRESSIVE FAMILY POLICY FOR THE 1990s (Progressive Policy Institute 1990).

73 *See* HILL & O'NEIL, *supra* note 68, at vii.

74 *Id.* at v.

75 *Id.* at vii.

together" we can, for practical purposes, end the discussion there. The bundle of normative elements[76] that we label paternal rights and responsibilities attach to the Western concept of fatherhood. When we recognize that paternity itself is not a unitary concept, but a bundle of roles, relationships and features, it becomes apparent that we cannot be content to say merely that paternal rights and responsibilities are grounded on paternity. The "normative bundle" of rights and responsibilities is grounded on the "descriptive bundle" of features, roles and relationships that, taken together, constitute our ordinary conception of a father. Yet this does not tell us which elements of the normative bundle are grounded on which elements of the descriptive bundle.

II. PATERNITY ESTABLISHMENT IN ANGLO-AMERICAN LAW

Until recently, it was often not possible to have certainty about genetic paternity. This mundane fact was expressed in folk wisdom as well as esoteric legal principles.[77] Given the social structure common in Western societies, however, the establishment of paternity served many personal and social interests. Due to the importance of these interests, Anglo-American legal systems have developed methods for establishing paternity within the social characteristics and scientific capabilities of the society.

By far, the predominant method of paternity establishment involved the "marital presumption" (sometimes referred to as the "presumption of legitimacy").[78] This presumption, which has its roots in Roman law, held that the husband of a mother was presumed to be the father of the child, unless the husband was sterile, impotent, or had no access to his wife during the period when conception occured.[79] This presumption is sometimes referred to as "Lord Mansfield's Rule;" strictly speaking,

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[76] Philosophers use 'normative' to refer to prescriptive or evaluative claims. Normative claims are distinguished from descriptive claims and so claims about what behavior is statistically normal are not normative in the philosopher's sense—neither are claims about what social roles are enforced in society. These are descriptive claims, possibly involving claims about what norms people accept, but they are not, themselves, normative claims. *See* SHELLY KAGAN, NORMATIVE ETHICS 1–11 (1998).

[77] So, for example, we have the American proverbs, "maternity is a matter of fact, paternity is a matter of opinion" and the better known, "mother's baby, father's maybe" as well as the more learned, "*mater semper certa est, pater nunquam*" [the mother is always certain, the father never is].

[78] For a history of marital presumption's use in English common law courts, *see* Mary R. Anderlik & Mark A. Rothstein, *The Genetics Revolution: Conflicts, Challenges and Conundra: DNA-Based Identity Testing and the Future of the Family: A Research Agenda*, 28 AM. J.L. & MED. 215, 221–26 (2002); David J. Shuster, Note, *The Best Interests of the Child Must Be Considered Before Rebutting the Presumption of Legitimacy*, 23 U. BALT. L. REV. 661, 667–70 (1994).

[79] In his Commentaries on the Laws of England, Blackstone says:

however, that rule is a rule of evidence that prevents husbands and wives from introducing testimony about their sexual relations for purposes of undermining the marital presumption. Mansfield defended the rule saying:

> The law of England is clear, that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage. . . . As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule, founded on decency, morality, and policy, that they shall not be permitted to say after marriage, that they had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party.[80]

The marital presumption handled those cases in which the mother was married. A different approach was used to handle paternity of children of unmarried mothers. Two fundamental theories arose to ground a man's responsibility to support a child that was born out of wedlock. One was "the theory of delict," in which the responsibility was based on the wrongful act of illicit intercourse with the mother.[81] The second the-

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Pater est quem nuptiæ demonstrant. [The nuptials show who is the father.] The marriage of the mother declares the paternity of the child. At common law, the nuptials must proceed the birth of the child; in the civil law, they may proceed or follow.

1 WILLIAM BLACKSTONE, COMMENTARIES *446, *454–56.

80 Goodright v. Moss, 98 Eng. Rep. 1257, 1258 (1777). Mansfield states his rule in a question-begging way, of course, since what is at issue is whether the husband of the mother is, indeed, the father. *Id.* But this is a trivial point, easily corrected. The more important part of the justification for the martial presumption, as well as for Lord's Mansfield's rule, was that the negative consequences of illegitimacy for the offspring were so profound. Illegitimate children were sometimes referred as *filii nullius* (children of no one). See Stephen L. Sass, *The Defense of Multiple Access (*Exceptio Plurium Concubentium*), in Paternity Suits: A Comparative Analysis*, 51 TUL. L. REV. 468, 469–80 (1977). At one time, such children had no legal rights with respect even to their mothers. *See* BLACKSTONE, *supra* note 81, at *447. Blackstone sums up succinctly the law in England during his time, saying, "The rights [of a bastard] 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*." *Id.* (footnotes omitted) (emphasis in original). Over the past few centuries, the legal status of children born to unmarried parents has improved rather dramatically. See generally PETER LASLETT, KARLA OOSTERVEEN & RICHARD SMITH, BASTARDY AND ITS COMPARATIVE HISTORY (1980); Wolfgang P. Hirczy de Mino, *From Bastardy to Equality: The Rights of Nonmartial Children and their Fathers in Comparative Perspective*, 31 J. COMP. FAM. STUD. 231 (2000). As the legal status of non-martial children improves, at least one of Lord Mansfield's considerations of "decency, morality and policy" diminishes. Goodright, 98 Eng. Rep. at 1258. Finally, it is interesting to note that Lord Mansfield finds it especially offensive for the mother to challenge marital presumption. *Id.* Modern employment of the marital presumption has, probably, been aimed primarily at the father's attempt to challenge the presumption.

81 Sass, *supra* note 80, at 469. Stephen Sass provides an excellent discussion of the history of the "defense of multiple access" in paternity suits and how the two theories led to different legal approaches.

ory, "the theory of descent," grounded the obligation on the father's blood relationship with the child.[82] In cases where there was only one potential father, where only one man could have engaged in the "illicit sex" with the mother at the time conception must have taken place, the two theories led to the same result.[83] These two theories allow divergent approaches, however, in cases where more than one man had sexual relations with the mother during the period when conception might have taken place.[84] According to the theory of delict, "each man who had intercourse with the mother during the critical period could be held liable in full for maintenance of the child since liability was based on an unlawful act committed by each."[85] The theory of descent, on the other hand, treated the situation of "multiple access" as a defense against a paternity action since the man who was related to the child by blood could not be determined.[86] Gradually, the theory of descent won out over the theory of delict.

In the early and middle 18th century in England, a series of changes to the Poor Laws addressed the problem of the poverty of children born out of wedlock.[87] These "Bastardy Laws" (as they were known):

- Required an unmarried pregnant woman to declare her pregnancy and name the father;
- Required the putative father to provide financially for his child, punishing non-compliance with jail; and,
- Provided for support for the mother and child from the parish until the father agreed to support the child, at which time he was required to reimburse the parish.[88]

In 1844, amendments to the Poor Laws provided an unwed mother with a civil right of claim against the alleged father, even if she was not receiving public assistance.[89]

The model developed in England for handling financial support of children born out of wedlock was adopted by most common law legal

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82 *Id.*

83 *See id.*

84 *Id.*

85 *Id.* at 469.

86 *Id.*

87 *See generally* PAUL SLACK, THE ENGLISH POOR LAW, 1531-1782 (1995); SIDNEY WEBB & BEATRICE WEBB, *English Poor Law History: The Last Hundred Years, in* 7-8 ENGLISH LOCAL GOVERNMENT 7–8 (1963).

88 Laurence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.*: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 8 n.30 (1999). This approach to dealing with the poverty of children of unmarried parents is remarkably similar in concept to that employed today in Western legal systems. *Id.* at 8 n.32.

89 Webb & Webb, *supra* note 87, at 8; ENGLISH LOCAL GOVERNMENT 178.

systems. Moreover, it is similar to the system employed in much of Western Europe.[90]

III. THE CURRENT STATE OF PATERNITY ESTABLISHMENT/ DISESTABLISHMENT IN AMERICAN LAW

As is obvious from the brief recounting of the history of paternity establishment, contemporary Western societies confront many of the same problems faced in earlier centuries. In modern society, however, the problem of paternity establishment for out-of-wedlock children is at a dramatically elevated level.[91] Fortunately, we face these old problems with powerful new tools in hand. Yet even as they help us solve the old problems, these tools create new ones. Until very recently, Anglo-American legal systems handled the problem of paternity establishment in a manner very similar to that employed historically. The marital presumption has been virtually universal in Anglo-American legal systems.[92] Further, while the technology and legal procedures for establishing paternity for children born to unmarried mothers has evolved markedly, both the reasons for such establishment and the underlying principles of law involved have remained constant.

There has been an increasing tension, however, between the improvement in the techniques for determining paternity of out-of-wedlock children and the presumption of paternity of children of married women. Indeed, the techniques for establishing paternity can serve to *dis*establish biological paternity in cases where it was previously established by the marital presumption, by acknowledgement or by previous court action. DNA testing is on a collision course with this long-recognized legal presumption. Because paternity disestablishment is one of the important trends that require a reevaluation of the concept of paternity, we will return to this issue shortly. The need to re-examine the concept of paternity does not arise from this issue. There are other issues—dramatically illustrated by real, if bizarre, legal cases—that clearly demonstrate the

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90 *See generally* A.G. Chloros, THE REFORM OF FAMILY LAW IN EUROPE (1978).

91 NATIONAL CENTER FOR HEALTH STATISTICS, BIRTHS: FINAL DATA FOR 2000, 50 NAT'L VITAL STATISTICS REP. 5 (2000), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_05.pdf (last visited Sept. 9 2003). One-third of all births were to unwed mothers, a figure that reflects an enormous rise from the 18.4% of births to unmarried mothers in 1980. *Id.* The rate of non-martial births is not constant across racial and ethnic groups. In 2000, it was approximately 22.1% of those identifying themselves as white, 42.7% for those identifying themselves as "Hispanic," and 68.7% for those identifying themselves as "black." *Id.* The rate across age groups is more nearly even. *Id.* Perhaps surprisingly, though, it is lower for women under 20 years of age (29.3%); women 20 to 24 years old had the highest rate (36.4%) and women of 25 years of age and over had a rate of nonmarital birth of 34.3%. *Id.*

92 *See* Joan C. Sylvan, *Michael H. v. Gerald D.: The Presumption of Paternity*, 39 CATH. U. L. REV. 831, 831–32 (1990).

need to clarify our conception of paternity. We will begin with some of these.

A. PROBLEM CASES

1. *Statutory Rape Cases*

There are, unfortunately, numerous cases in which an adult woman became pregnant as a result of sexual relations she initiated with a minor child—sometimes a young teen or a preteen.[93] The act that caused pregnancy in these cases is statutory rape. The adult who engages in it is criminally liable for the action; the minor child is considered a victim of this action because he is deemed incapable of giving legally significant consent to the act of sexual intercourse.[94] However, courts have not held that these facts settle the question of whether both genetic parents have a responsibility to financially support the resulting children. Indeed, courts have held that these facts are not even relevant to that question.[95]

Courts across the country have given an unequivocal answer to the question of whether both genetic parents have an obligation to support a child who is the product of an act of statutory rape. The obligation to support a child is not altered by the fact that the parent was a victim of statutory rape.[96] In a 1993 Kansas case, the court concluded that:

> This State's interest in requiring minor parents to support their children overrides the State's competing interest in protecting juveniles from improvident acts, even when such acts may include criminal activity on the part of the other parent. . . . This minor child, the only truly innocent party, is entitled to support from both her parents regardless of their ages.[97]

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93 *See, e.g.*, Cnty. of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843 (Cal. Ct. App. 1996); Schierenbeck v. Manor, 148 Colo. 582 (1961); Dep't of Revenue *ex rel.* Bennet v. Miller, 688 So. 2d 1024 (Fla. Dist. Ct. App. 1997); *In re* J.S., 193 Ill. App. 3d 563, 550 (1990); State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273, 1279 (Kan. 1993); Rush v. Hatfield, 929 S.W.2d 200 (Ky. Ct. App. 1996); Commonwealth v. A Juvenile, 442 N.E.2d 1155 (Mass. 1982); Jevning v. Chicos, 499 N.W.2d 515 (Minn. Ct. App. 1993); Mercer County Dep't of Soc. Serv. v. Alf M., 589 N.Y.S.2d 288 (N.Y. Fam. Ct. 1992); *In re* Paternity of J.L.H. v. L.H., 149 Wis. 2d 349 (Wis. Ct. App. 1989).

94 *Rush*, 929 S.W.2d at 202.

95 *Id.*; *Seyer*, 847 P.2d at 1278 ("We conclude that the issue of consent to sexual activity under the criminal statutes is irrelevant in a civil action to determine paternity and for support of the minor child of such activity.").

96 *Seyer*, 847 P.2d at 1279.

97 *Id.*

2. *Purloined Sperm Cases*

The question of what, if anything, can count as stealing a man's sperm is both interesting and controversial. The issue was brought to public attention some years ago when Peter Wallis sued Kellie Smith for breach of contract, fraud, and conversion of property after she became pregnant from one of their acts of sexual intercourse.[98] Wallis argued that Smith had breached a contract by not taking birth control pills when she promised to do so, committed fraud by lying about taking birth control pills, and committed conversion by using his sperm for a purpose he did not authorize.[99] Wallis's suit was dismissed "for failure to state a claim upon which relief may be granted" and the dismissal was upheld on appeal.[100]

Consider Wallis's claim of conversion of property, even though the court did not rely on it in dismissing Wallis's suit.[101] Wallis claimed that Smith had used his sperm in an unauthorized manner—a manner that constituted conversion of property.[102] Smith contended that Wallis "surrendered any right to possession to his semen when he transferred it during voluntary intercourse."[103] It is beyond the scope of the discussion here to try to resolve questions about what counts as "authorized" use of a man's sperm. Several points, however, are worth making in passing. First, voluntarily transferring physical possession of a thing does not generally constitute transferring property rights to the thing.[104] If it did, parking valets would own far more (and probably better) cars than they do. There are social practices that determine the social meaning, as well as the moral and legal significance, of an act of physical transfer of property. One cannot resolve the moral and legal questions of ownership by merely documenting the history of voluntary physical transfers. Nor is the case different with respect to bodily fluids, such as semen. Suppose a couple is having fertility problems and the man goes to a lab for testing of his sperm count and quality. He ejaculates in a specimen jar and transfers the semen to a lab technician. Now, suppose the lab technician impregnates herself with this man's semen. The technician's use is quite

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98 Wallis v. Smith, 22 P.3d 682, 683 (N.M. Ct. App. 2001).

99 *Id.*

100 *Id.* at 683.

101 *Id.*

102 *Id.*

103 In her legal filings, Smith frames the thesis in terms of Wallis "surrendering any right of *possession* to this semen." *See* Barbara Vobejda, *Court to Decide if Man Has a Right to Choose Fatherhood*, WASH. POST, Nov. 23, 1998, at A1. At issue, however, is not the right of possession, but the right to decide to put the semen to a specific use. To interpret Smith's claims as relevant, we will assume that she meant not only that Wallis had surrendered any right of *possession* but also any right of control. As a result, she alleges, he has no say in how the semen was used.

104 THOMAS HOBBES, LEVIATHAN, CH. XIV, *10 (1688).

clearly an unauthorized use of the semen. Given our social practices, this is the case even in the absence of an explicit contract between the patient and the lab that his semen will not be used to impregnate someone without his knowledge or consent. Smith's argument must be that there is something special about the nature of transferring semen in an act of voluntary intercourse that constitutes surrendering any right to control how it is used. It is difficult to see what would make sexual intercourse special in this way.[105] It is also difficult to determine what counts as "sexual intercourse" and what counts as *transferring* semen during sexual intercourse.[106] For example, is oral sex sexual intercourse?[107]

Late in 1983, Emile Frisard and his siblings were frequently at the East Jefferson General Hospital to help take care of their parents who were patients there.[108] Debra Rojas, working for the hospital as a nursing assistant became "abnormally friendly" (as one witness described it) with the family—visiting Frisard's parents' room frequently "to the point of being bothersome" (as another testified).[109] Frisard was with his parents practically every night and Rojas often visited when he was there.[110] According to Frisard's unchallenged testimony, on one of these visits Rojas offered to have oral sex with Frisard provided he used a condom.[111] He agreed and, after he left, Rojas apparently inseminated her-

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105 It is, though, easy to see why the courts would not want to be drawn into issues concerning the appropriate assumptions between partners in acts of sexual intercourse. There may be no *common* assumptions and, even when there are, evidential problems are obvious. Such shared assumptions are seldom discussed between the partners explicitly and even less frequently are they committed to writing.

106 Suppose Wallis used a condom and Smith had retrieved the discarded condom and artificially impregnated herself with it. Would it count as semen "transferred during voluntary sexual intercourse"? Suppose that Smith had, in anticipation of Wallis's using a condom, surreptitiously removed the condom he kept in his wallet and punctured it with holes. Then, were he to have voluntary sexual intercourse with her, it is seems literally true that Wallis would have "transferred [his semen] during voluntary sexual intercourse." He would not, however, have voluntarily transferred his semen. This latter seems to be the crucial point.

107 Former President Clinton famously asserted: "I did not have sexual relations with that woman—Ms.Lewinski." *See What Clinton Said*, WASH. POST., Jan. 26, 1998, *at* http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/whatclintonsaid.htm. He later admitted that Ms. Lewinsky had performed oral sex on him but, apparently, questioned whether having oral sex was equivalent to having sexual relations. *Oral Sex—Does it Constitute Sexual Relations*, BBCNEWS ONLINE NETWORK, *at* http://news.bbc.co.uk/1/hi/events/clinton_under_fire/multimedia/173278.stm (last visited on Sept. 26, 2003) (presenting videotape of President Clinton's testimony before the grand jury explaining why he believed that oral sex performed on him was not sexual relations). Few people accepted Clinton's distinction. However, the notion of sexual intercourse is narrower than that of sexual relations. It is much more plausible to many people that oral sex, while being a sex act and a form of sexual relations, is not an instance of sexual intercourse.

108 Louisiana v. Frisard, 694 So. 2d 1032, 1034 (La. Ct. App. 1997).

109 *Id.*

110 *Id.* at 1035.

111 *Id.*

self with the sperm in the condom.[112] Frisard denied that he ever had vaginal intercourse with Rojas and he apparently had no indication that Rojas would use his sperm in this way.[113] Based on DNA testing, the court determined that Frisard was the father and ordered him to pay child support retroactively, resulting in an immediate arrearage of almost $18,000.[114] This decision was upheld on appeal, though the trial court's specific determination of the amount of child support was remanded for further consideration on grounds unrelated to the unusual genesis of the pregnancy.[115]

In the case of Emile Frisard, there was, at least, a voluntary sexual act that played a causal role in Rojas' pregnancy (this paper will set aside the issue of whether Frisard engaged in an act of sexual intercourse).[116] While it is difficult to see why the fact that one of the acts that played a causal role in Rojas' pregnancy was a *sexual* act by Frisard should have any bearing on his responsibility for the pregnancy, even the element of a voluntarily sexual act is missing from the following case.

In September of 1992, an Alabama woman identified as T.M. apparently had sexual relations with a man, identified as S.F., while the man was unconscious.[117] T.M. became pregnant and bore a child, who was later determined to be the genetic offspring of S.F.[118] A witness testified that T.M. had told him that S.F.'s sexual act had "saved her a trip to the sperm bank."[119] On the basis of S.F.'s genetic relationship with the child, he was determined to be the father and ordered to pay child sup-

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112 *Frisard*, 694 So. 2d at 1035.

113 *Id.*

114 *Id.*

115 *Id.* at 1041.

116 *Id.* at 1035.

117 S.F. v. State *ex rel.* T.M., 695 So.2d 1186, 1188 (Ala. Civ. App. 1996). This is not the first such story. *Genesis* 19:30–38 recounts the story of Lot's two daughters rendering him unconscious with alcohol and raping him while he was incapacitated.

> Come, let us make our father drink wine, and we will lie with him, that we may preserve seed of our father. And they made their father drink wine that night: and the firstborn went in, and lay with her father; and he perceived not when she lay down, nor when she arose. And it came to pass on the morrow, that the first born said unto the younger, Behold, I lay yesternight with my father: let us make him drink wine this night also; and go thou in, [and] lie with him, that we may preserve seed of our father. And they made their father drink wine that night also: and the younger arose, and lay with him; and he perceived not when she lay down, nor when she arose. Thus were both the daughters of Lot with child by their father.

118 *Id.* at 1186.

119 *Id.* at 1188.

port.[120] This decision was upheld by the Civil Court of Appeals of Alabama.[121]

The pleadings made by Kellie Smith suggest that one of the crucial issues in any of these purloined sperm cases is whether the genetic father had any right to control how his sperm was used.[122] The courts, however, ignored this issue almost entirely—typically mentioning it only to dismiss its relevance.[123] With respect to a duty to support a child, the court in *Wallis* noted that the New Mexico legislature adopted, with only minor revisions, the recommendations of the Uniform Parentage Act that "imposes a form of strict liability for child support without regard for which parent bears the greater responsibility for the child's being."[124] What the court in *Wallis* described as "a form of strict liability" has been accepted by courts in the cases discussed above because "the child is an innocent party, and it is the child's interests and welfare that we look to under the Alabama Uniform Parentage Act. The purpose of this act is to provide for the general welfare of the child . . . ."[125] The courts dismissed concerns about the unusual, and even wrongful, nature of the genesis of the fetus as irrelevant to the "father's duty to provide support for the child."[126] Further, in all of these cases, the identity of the father was settled entirely through genetic testing.

These cases suggest a settled approach to the establishment of nonmarital paternity in the contemporary American legal system. In these cases, genetic relationships establish legal paternity regardless of whether the genetic fathers gave legal consent, or were capable of giving legal consent, to an act of sexual intercourse that resulted in the pregnancies. Indeed, *Frisard* treats the issue of whether there was an act of sexual intercourse as irrelevant, and *S.F.* seems to consider the issue of whether the man deemed the father took part in *any* action that caused the pregnancy irrelevant.[127] The perspective behind the foundation of these decisions is that being the genetic father is a sufficient condition for grounding a paternal legal obligation to support a child. The principled

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120 *See id.* at 1186–90. This decision contrasts markedly with the decision in *The Division of Child Support Enforcement ex rel. Esther M. v. Mary L.*, No. 38812, 1994 Del. Fam. Ct. LEXIS 11 (Del. Fam. Ct. 1994). In that case, the mother was relieved of any child support responsibility because the pregnancy resulted from an act or rape. *Id.* at *2. The Alabama court decision in *S.F.* did not reference the Delaware decision in *Mary L.*

121 *S.F.*, 695 So. 2d at 1190.

122 *See* Wallis v. Smith, 22 P.3d 682, 683 (N.M. Ct. App. 2001).

123 *S.F.*, 695 So. 2d at 1189 (citing *L. Pamela P. v. Frank S.*, 449 N.E.2d 713 (N.Y. 1983), a case similar to *Wallis*, as grounds for dismissing as irrelevant issues other than biological paternity).

124 Wallis, 22 P.3d at 684.

125 *S.F.*, 695 So. 2d at 1189.

126 *Id.*

127 *Id.* at 1189; Louisiana v. Frisard, 694 So. 2d 1032, 1032 (La. Ct. App. 1997).

basis for a duty to support that appears to underlie these decisions is the theory of descent: a person has a moral obligation and should have a legal obligation, to support those children who are his or her immediate genetic descendants, regardless of other factors. The theory of delict would lead to a contrary decision in these cases—most clearly, in *S.F.*

Indeed, issues relevant to the theory of delict are expressly swept aside by these courts and others facing related questions:

- "[A]ny wrongful conduct on the part of the mother should not alter the father's duty to provide support for the child."[128]
- "The mother's alleged fault or wrongful conduct is irrelevant."[129]
- "This Court is not concerned with the child's mother's actions. . . ."[130]

The courts have generally placed a duty on the genetic father to support his child regardless of the illicit conduct of the mother in conceiving the child. While illicit conduct on the part of the mother, *per se,* does not seem relevant to the genetic father's duty, this should not be construed to mean that the *particular* illicit actions of the mother might not undermine the argument for a paternal responsibility. To say this is not to challenge the existence of a child's right to be supported, but the relevance of that alleged right to the decision these courts reach. That a child has a positive right to support does not answer the question of whom this right is a right against—the question of who has the obligation to provide for that child. The existence of a positive right to education, for instance, does not establish any particular person has the obligation to provide this education; this obligation could fall on all of society collectively. A further argument is necessary to determine who has the obligation to provide a person with something to which she has a positive right. While it is quite plausible that a child's right to be supported imposes a special obligation on certain individuals, it is not clear that this obligation should be imposed on the genetic father simply by the virtue of being the genetic father. The question to ask is, "In virtue of what actions, relationships or properties does a man have a special moral obligation to provide financially for a child?"

The courts have implicitly relied solely on a theory of descent[131] probably less out of an ideological commitment to this theory than out of

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128 S.F., 695 So. 2d at 1186

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

130 Mercer County Dep't of Soc. Serv. v. Alf M., 589 N.Y.S. 2d 288 (Fam. Ct. N.Y. 1992).

131 There is at least one "outlier case" that does not fit well with this interpretation. In *Division of Child Support Enforcement ex rel. Esther M. v. Mary L.*, the court ruled that a

convenience and the certainty that genetic testing provides concerning questions of genetic paternity. A clear answer is frequently preferred to a correct one and courts, no less than social scientists, are often guilty of "looking where the light is better."[132] Nevertheless, this answer is clearly wrong. If the actual cases cited above are not clear enough evidence of the inadequacy of the theory of descent as a foundation for an obligation to support a child, consider the following hypothetical cases, the first of which was described above:

- A man who is being tested for the count and quality of his sperm gives a sperm sample to a lab technician. She impregnates herself with the sperm and then seeks (or the state seeks on her child's behalf) child support from the genetic father.
- A woman undergoes a procedure for the removal of her ovaries. The doctor, who is infertile, removes some of the ripe eggs, fertilizes them *in vitro* with her own husband's sperm and implants them in herself. After she gives birth, she seeks child support from her former patient.
- A couple preserves frozen embryos for the future possibility of bearing children. A worker at the cryogenic lab implants one of the embryos in her uterus and carries the embryo to term. Then, she seeks child support from the couple.
- An emergency room surgeon is treating a wealthy man who has been injured in a car accident. Unfortunately, the patient dies. After his death, the surgeon harvests sperm from his body and impregnates herself with it. After the child is born, she seeks child support from the estate of the deceased man.

To argue in any of these cases that genetic relation alone determines the basis for a parental obligation to support a child is preposterous.

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woman indisputably the genetic mother of the child should be exempted from a support obligation if she could show that she did not, in fact, consent to the sexual intercourse. No. 38812, 1994 Del. Fam. Ct. LEXIS 11, *9–10. To distinguish this case from those of statutory rape of a minor child, the court distinguished legal consent from "actual consent" and emphasized that the relevant concept was the latter. *Id.* "Where voluntary intercourse results in parenthood, then for purposes of child support, the parenthood is voluntary. A parent's duty to support the child flows directly from his voluntary parenthood." *Id.* This is clearly a divergence from the theory of descent and from the stated rationales of the cases discussed in the text. (It is interesting to note the court's seemingly unwitting slide from "voluntary intercourse that leads to parenthood" to "voluntary parenthood."). *Id.*

[132] The phrase comes from the old comedy sketch of a person looking for a misplaced item, not where it was lost, but under a street lamp "because the light is better" there.

However, the reasoning of the courts in the above-cited cases would lead precisely to this result. For, as these courts say:

> [T]he child is an innocent party, and it is the child's interests and welfare that we look to . . . . Our goal is "to provide for the general welfare of the child[.]"[133]
>
> [A]ny wrongful conduct on the part of [someone else] should not alter the [parent's] duty to provide support for the child.[134]

Few would find such a line of reasoning plausible in these hypothetical cases. This fact shows that the line of reasoning is not right even where it arrives at answers that some find more palatable. Even when the strict theory of descent gets the right answer, it gets it for the wrong reasons.

While the cases discussed above all seem to imply that courts have taken genetic parenthood to be sufficient to ground a child support obligation, other cases (which are rather common, unfortunately) suggest that the current legal climate does not view genetic fatherhood as a necessary condition for the establishment of legal paternity and a duty to support a child. There are other routes to the determination of paternity and the grounding of a duty to support a child. In the first place, the marital presumption is still generally adopted by Anglo-American courts. Furthermore, even in the absence of a legal marriage, playing the role of a father and representing oneself as the father of a child can also be used as a basis for a determination of legal paternity. So desirous is the legal system of ensuring "paternity identification" that it has recognized multiple independent grounds for legal paternity and a duty to support a child.

The situation in which there are several independent grounds sufficient to establish legal paternity indicates the social urgency that attends to the determination of legal paternity. It also sets up potential conflicts. What happens when genetic testing and other methods for establishing paternity identify different men as the father? One answer—an answer that would seem natural when there are independent sufficient grounds for the application of a concept—would be to allow for multiple paternity. Indeed, if one is considered to be a child's father by virtue of being the biological father, by virtue of the social role that one voluntarily and publicly accepts and by virtue of being married to the mother of the child, then the most obvious conclusion would be that a child can have multiple fathers if these three properties are instantiated by different men. This conclusion has been explicitly rejected by the courts. The Supreme Court summarized the rejection in *Michael H. v Gerald D.*,

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133 *S.F.*, 695 So. 2d at 1189.

134 *Id.* at 1186.

declaring that "California law, like nature itself, makes no provision for dual fatherhood."[135]

Ruling out the possibility of multiple fatherhood, the Court had to determine the factors for legal paternity when the various grounds which could be sufficient pointed to different men.[136] The trial court in *Michael H.* answered this question in a dramatic fashion in granting summary judgment.[137] The Supreme Court affirmed, allowing the marital presumption to override a genetic relationship and, moreover, to override the fact that the genetic father played the role of a social father, represented himself, was represented by the mother as the father of the child, and kept a household with the mother for the benefit of the child.[138] Here, the marital presumption trumped genetic considerations and practically every other property or relationship that has been held to ground legal paternity.

Until very recently, the major changes in paternity law concerned paternity establishment concentrated on ways to establish paternity more effectively and cheaply. Even the improvements in accuracy were hailed primarily for their ability to establish paternity more effectively. Very recently, there has been remarkably rapid change concerning the legal disestablishment of paternity, and this change is undermining the power of the marital presumption.

Since 1994, at least seven states have enacted laws concerning the disestablishment of paternity based on DNA tests.[139] At least seven others have pending legislation.[140] Numerous other states have controlling court decisions either allowing or mandating such disestablishment under a variety of circumstances when DNA tests show that the child is

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135 491 U.S. 110, 118 (1989).

136 *Id.* at 115.

137 *Id.* at 127.

138 *Id.* One wonders whether the marital presumption would have carried as much weight in with the courts had the husband, Gerald D. died leaving the mother, Carol D. and her daughter, Victoria, destitute. Had she applied for public assistance, one might doubt that the state of California would have given as much weight to the marital presumption in its decision about whether to pursue Michael M. for child support payments to reimburse the state for the public assistance it gave Carol and Victoria. The reasoning of the courts discussed above, which base determinations of paternity for child support purposes solely on the genetic relationship, suggests that, had the state chosen to impose a child support obligation on Michael M., the courts would have endorsed this. *Id.* at 127.

139 They are: Alabama, ALA. CODE § 26-17A-1 (1994), Arizona, ARIZ. REV. STAT. § 25-812 (2001), Georgia, GA. CODE ANN. § 19-7-54 (2002), Maryland, MA. CODE ANN. §5-1038 (1994), Ohio, OHIO REV. CODE ANN. § 3119.962 (2000), Virginia, VA. CODE ANN. § 20-49.10 (2001), and Washington, WASH. REV. CODE § 26.26.335 (2002).

140 These states are: California, S.B. 1030 (Ca. 2003), Idaho, H.B. 417, (Id. 2004-5), Michigan, H.B. 4120; H.B. 4650; S.B. 621 (Mich. 2003), New Jersey, A. 2374; S. 2692 (N.J. 2003), New York, A. 6269 (N.Y. 2003), Texas, H.B. 503 (Tx. 2003), and Vermont, H. 330 (Vt. 2004).

not the genetic child of the man designated as the legal father.[141] These developments constitute legal reform at a breakneck speed.

In those states that have recently passed new legislation to allow DNA evidence to overturn a paternity determination established by a marital presumption or an acknowledgment that is based on fraud, the legislation "sailed through" the legislatures.[142] The speedy passage of this legislation indicates the speed with which scientific methods can overtake a centuries-old legal principle like marital presumption.[143]

Much of the preceding discussion has concerned the obligation to provide financial support for a child. While that obligation is typically considered a paternal responsibility, and more generally, a parental one, it might seem to digress from the central topic of this paper. Indeed, in the problematic cases discussed, there is really no question of who the father is. The victims of statutory rape, Emile Frisard, and S.F. are unquestionably the *fathers* of the children in these cases.[144] The only question is whether these fathers should have the obligation other fathers do to financially support their child.[145]

These cases are, though, misleading in their clarity. The genetic relationship seems to settle the question of paternity in each of these cases because, coincidentally, there is no rival for the designation of "dad." Consider this hypothetical, though: imagine that chemotherapy renders a young man sterile. He undergoes a transplant of testicular tissue, receiving healthy tissue from his brother. The transplanted tissue begins producing healthy sperm cells in the recipient.[146] Thereafter, the

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141 I am indebted to Carnell Smith, Executive Director & Founder, U.S. Citizens against Paternity Fraud (US-CAPF), for providing me with this information that is up-to-date as of this writing.

142 For example, in Ohio, there was only one dissenting vote in both of the houses combined. H.B. 242, 123d Ohio Gen. Assem., Reg. Sess. (Ohio 2000), *available at* http://www.lsc.state.oh.us/analyses/00-hb242.pdf. In Georgia, there were only six dissenting votes in both of the houses. H.B. 369, 2002 Ga. Gen. Assem., Reg. Sess. (Ga. 2002), *available at* http://www.legis.state.ga.us/legis/2001_02/hb369.htm.

143 *See In re* Findlay, 170 N.E. 471, 472–73 (1930) (Cardozo, C.J.) ("Potent, indeed, the presumption [of legitimacy] is one of the strongest and most persuasive known to law, and yet subject to the sway of reason. Time was, the books tell us, when its rank was even higher."). We are currently watching the rank of the marital presumption plummet. See text accompanying note 47, *supra* p. 41. This is largely because DNA testing has given us indisputable facts that undermine the result of the presumption in a surprisingly large number of cases. As Cardozo went on to say, "[w]hen all the ends the presumption of legitimacy is designed to conserve have been defeated by sordid facts, the courts must deal with the situation in a common sense way." *See Findlay*, 253 N.E. at 474–75 (quoting Nolting v. Holt, 215 P.281, 281 (Kan. 1923)). DNA testing does not itself give us the "sordid facts," but it can show us that the facts must exist.

144 *See S.F.*, 695 So. 2d at 1186; *Frisard*, 694 So. 2d at 1032. In both of these cases, the men were established as the biological fathers.

145 I am grateful to David Merli for pressing me to clarify this point.

146 To my knowledge there have been no successful transplants of this sort between two humans. There have been successful surgeries in which a healthy testicular tissue is removed

donor dies in an accident shortly after the transplant. The recipient of the transplant eventually marries. He and his wife have a normal sexual relationship and after a few years, they decide to have a baby. They stop using birth control and the man impregnates his wife. The child is conceived in the normal way as a result of the couple's intentions to have a child. The man lives with the woman and helps to support her through the pregnancy. He goes to Lamaze classes with her and, when she is ready to deliver the child, the obstetrician allows him to "catch" the baby and cut the umbilical cord. The man rears the baby, nurtures him, and provides for him throughout his childhood. Here, the transplant recipient is the father in every respect except one—he is not the genetic father. In this hypothetical, to claim that the genetic relationship settles the identity of the father is simply to dig in one's heels and insist that genetics are all one cares about.

The obligation to financially support a child is one of the elements in the "normative bundle" of paternity—the bundle of rights and responsibilities typically associated with this concept. The cases just discussed suggest that it has been grounded on the wrong element of the "descriptive bundle" of paternity. It has been based solely on genetic paternity when, in fact, it is properly grounded on other elements of paternity. To develop this line of thought, more has to be said about the concept of paternity.

IV. THE CONCEPT OF PATERNITY

Most people can easily answer the question of who their father is. This is not because the question is unequivocal. This question is ambiguous—though perhaps the ordinary notion of ambiguity is not quite the right one here. Those who can answer the question easily can do so because the various elements of paternity are co-referential in their case; regardless of which element is salient, the very same man is picked out by the term "father."

The stereotypical concept of a father is a compound concept, having multiple elements that are typically co-instantiated in the same individual, or at least are so co-instantiated frequently enough for the stereotype to be socially useful.[147] When these elements are co-instantiated, the concept works well enough for most practical purposes; regardless of

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from a man prior to chemotherapy that destroys his ability to produce sperm. The removed tissue is then reintroduced into the man's testicles and begins to function to produce healthy sperm. *See* Martin Hutchinson, *Testicle Transplant Makes Sperm*, BBC NEWS ONLINE, at http://news.bbc.co.uk/2/hi/health/3032804.stm (last visited Sept. 8, 2003). Surgeries of this sort have resulted in functioning testicles and in allowing men to father children after the surgery. *Id.*

147 How frequently probably depends on many factors, including the social role that such a stereotype might play.

which elements one uses to identify the referent of the term, one is led to the same man. Many of the cases discussed in the previous section illustrate that these elements are not necessarily co-instantiated. When they are not, the different elements that form our compound concept of a father may point to different men. In those cases, practical difficulties may ensue.

In certain contexts, the meaning of "father" is clearly restricted. For example, if a doctor asks an angina patient whether his father had a history of heart disease, it is relatively clear that he means his genetic father.[148] Almost as clearly, if a girl tells a friend that her father will drive them to the movies, social roles fix the intended reference.

This discussion of the current legal understanding of "father" shows that the context does not always sufficiently resolve the meaning of a term. Saying "for legal purposes" is little help because there are multiple legal purposes for establishing paternity and they lead in diverse directions. Is society concerned with establishing an obligation of financial child support? With acting on a child's right to access to her genetic heritage? With ensuring a child an ongoing relationship with a person who has reared and supported him? With determining who has a right to speak for the child if she cannot speak for herself? Each of these concerns could, under certain circumstances, lead us in a different direction in determining paternity.

Failure to recognize this explicitly and adjust the conceptual framework accordingly leads to seemingly endless arguments over who the *real* father is. But as some redouble their efforts to defend a univocal answer to the question of paternity, they forget that the objective is to determine the properties, roles and relationships of fatherhood that give rise to the moral and legal rights and responsibilities.[149] To achieve this end, we do not have to work with a unequivocal concept of father—a concept now clearly showing itself to be rather problematic.

The elements constituting the concept of paternity are typically, but not necessarily, connected. The traditional concept of a father includes genetic, psychological, and social elements, as well as elements of causal and moral responsibility. It is generally understood that the psychological and social aspects of fatherhood can exist separately from the genetic aspect. There is a long history of adoptive fathers, stepfathers, and other adult men nurturing, supporting, and raising children to whom they are

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[148] This clarity results from a background assumption that there are important genetic predispositions to heart disease. Were we convinced that environment and, in particular, diet and stressful living conditions, caused heart disease, we would more plausibly interpret the doctor's question to be about someone fulfilling the social role of father. See Marjorie E. Marenberg et al., *Genetic Susceptibility to Death from Coronary Heart Disease in a Study of Twins*, 330 NEW ENG. J. MED. 1041, 1041 (1994).

[149] *See* Mahowald, *supra* note 4. Mahowald offers an unhelpful framing of these issues.

not genetically related, sometimes even without knowing that there is no genetic relationship. The separability of the genetic elements of paternity from the elements of causal and moral responsibility for the development of a child has not been acknowledged in legal literature. As a result, its significance has not been appreciated.

Genetically, the father is the male parent, the man whose haploid cell contributed half of his genetic material to the child.[150] There was a time when it would have seemed equally correct to say the genetic father is the man who contributed the sperm cell to fertilize the egg that developed into a human infant. However, the possibility of fertilization through the use of DNA of a haploidized normal (somatic) cell makes this account problematic.[151] The artificial gamete produced may not be appropriately considered a sperm cell or, if it is considered a sperm cell, it may be more properly considered that of another man.[152]

The role of the genetic father is typically closely associated with the role of causing the pregnancy that result in the creation of a child. In a normal case of impregnation, the same act that causes the process that results in the development of a child involves the transfer of gametes from the male parent to the female parent.[153] One of these gametes, by fusing with the egg, produces the genetic relation between the child and the man who causes the development of new life.[154] This connection is not necessary, though, and techniques of artificial insemination and *in vitro* fertilization can result in a genetic father who does not have causal

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150 OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, MAPPING OUR GENES: GENOME PROJECTS: HOW BIG HOW FAST 24 (1988). Each human has forty-six paired chromosomes, half of them (a haploid set) from the father, and half from the mother. *Id.*

151 *See* Jason A. Barritt et al., *Epigenic and Experimental Modifications in Early Mammalian Development: Part II*, 4 HUM. REPROD. UPDATE 428, 434 (2001) ("The haploidization and formation of artificial gametes by fusion of oocytes and non-germline cells will create gametes with potential use in reproduction. However, these artificial gametes will have a nuclear genetic component from a somatic cell and a mitochondrial component from another person's germline cell.").

152 *See generally* LEE M. SILVER, REMAKING EDEN: CLONING AND BEYOND IN A BRAVE NEW WORLD 160–87 (1997). This emerging technology promises much, including new conceptual, ethical and legal problems. Silver characterizes the possibilities of two same sex parents having a child with genetic material from the parents through a process that fuses cells from two eight-cell embryos fertilized by the parents earlier. *Id.* at 185. The process creates a human with two sets of chromosomes, one from each parent. *Id.* The resulting human could effectively have three parents, two of the same sex, and a third would would contribute the genetic opposite sex material. *Id.* These new technologies guarantees that paternity laws will have to be rewritten and our popular categories of thought will have to evolve to handle the new cases.

153 *In re* Adoption of Paul, 550 N.Y.S.2d 815, 818 (N.Y. Fam. Ct. 1990) ("A sperm is merely a gamete, potentially capable, if successfully joined with an egg [also a gamete], of creating an embryo which must then survive gestation to birth. . . .")

154 *Id.*

responsibility for the pregnancy or, alternatively, a man having causal responsibility for a pregnancy without being the genetic father.[155]

Real life presents dramatic illustrations of genetic paternity without what we might call "causal paternity." Numerous women have been impregnated with the sperm of their dead husbands.[156] In some cases, the sperm was harvested with the knowledge and assistance of the man, prior to his death, who desired to make it possible for his wife to bear his child.[157] Here, one might argue that the genetic father had the same causal responsibility as in more ordinary cases of pregnancy even though the causal mechanisms were extraordinary. In other cases, however, the harvesting of the sperm occurs when the man is comatose or even after the man's death, in situations in which the man had no antecedent thoughts about the matter.[158] The post-mortem harvesting of the sperm, unanticipated by the genetic father, banishes the idea that the man exercised any agency in the production of the new life. While his existence played a causal role in the pregnancy, he did not act as a causal agent of the pregnancy.[159] Nonetheless, he is the genetic father.

While one may sympathize with women who want to have a child fathered by their deceased husbands, not all of the cases of genetic fatherhood without causal responsibility for a new life are so benign. T.M., who raped S.F. while he lay unconscious and, thereby, "saved her[self] a trip to the sperm bank," is not an object of our sympathy.[160] This case does, however, provide another clear case in which the genetic father is not the causal father.

Due to the close causal link in the normal case between the act of intercourse causing pregnancy and the genetic relation between the child and the man involved in the act of sexual intercourse, few previous writ-

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155 *See generally* Sherylynn Fiandaca, Comment, In Vitro *Fertilization and Embryos: The Need for International Guidelines*, 8 ALB. L.J. SCI. & TECH. 337 (1998), for an introduction into the legal problems underlying *in vitro* fertilization.

156 *See generally* S.E. Kahan, A.D. Seftel & M.I. Resnick, *Postmortem Sperm Procurement: A Legal Perspective*, 161 J. UROL. 1840 (1999); S.M. Kerr et al., *Postmortem Sperm Procurement*, 157 J. UROL. 2154 (1997); Gladys B. White, *Legal and Ethical Aspects of Sperm Retrieval*, 27 J.L. MED. & ETHICS 359 (1999).

157 *See* L.A. Dwyer, *Dead Daddies: Issues in Postmortem Reproduction*, 52 RUTGERS L. REV. 881 (2000); Carson Strong et al., *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J.L. MED. & ETHICS 347 (1999).

158 *E.g.*, Dwyer, *supra* note 156, at 881 (citing Scott Sonner, *Sperm Retrieval Raises Questions*, THE COLUMBIAN (Columbia, Wash., Oct. 2, 1998, at A2).

159 It is important to recognize that even the notion of genetic paternity involves a causal element. One is not the genetic father of a child simply by virtue of a similarity in their genetic make up. The relation of genetic descendent requires that the genetic material of the father play a causal role—and a causal role of the right sort—in the genetic make up of the child. The element of paternity that I am calling "causal paternity" requires agent causation; it requires that the father be an *agent* in the act of impregnation.

160 S.F v. State *ex rel.* T.M., 695 So. 2d 1186, 1188 (Ala. Civ. App. 1996).

ers on paternity have separated genetic paternity from causal paternity.[161] Terms like "biological father," "natural father," or "genetic father" are used to refer to both roles combined. I think of genetic and causal paternity as facets of biological (or natural) paternity and this is how I will use the terminology. Regardless of the typology, the genetic and causal elements of paternity are conceptually, and sometimes empirically, separate. Keeping them separate is crucial to solving some of the legal conundrums concerning paternity.

The stereotypical concept of paternity includes much more than biological (either genetic or causal) elements. Typically, fathers and mothers share moral responsibility for the existence of their children—they voluntarily engage in actions that they know, or should know, might cause pregnancy. This role is clearly separate from the genetic element of paternity and it involves more than the mere causal paternity. One may be a causal agent in the production of an outcome without being morally responsible for it. This can happen because of various sorts of "excusing conditions," of either a global or a local nature. Nonculpable ignorance of certain relevant facts, compulsion and a multitude of other factors may function as excuses from moral responsibility for an outcome that one clearly caused.[162] With respect to responsibility for causing a new life, matters are no different. One can be causally responsible for creating a child in the sense of having intentionally engaged in an action that produces the child, without bearing any moral responsibility for the new life.

Perhaps the most obvious case of a man being causally responsible for a pregnancy without being morally responsible for it is the rare case of heterosexual rape of a man that results in pregnancy.[163] For present purposes, the definition of rape simply requires nonconsensual sexual intercourse.[164] The absence of consent can result from a variety of factors. A typical rape is one by force or by coercion. In the first case,

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161 An important exception is Peter Vallentyne, *Equality and the Duties of Procreators*, *in* THE MORAL AND POLITICAL STATUS OF CHILDREN 195, 198 (David Archer & Collin McCleod eds. 2002) (distinguishing between the concepts of procreator and biological parent).

162 *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 205–19 (2001). *See generally* MICHAEL CORRADO, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW: A COLLECTION OF ESSAYS (1994).

163 *See S.F.*, 695 So. 2d at 1186. The story of T.M. and S.F. is one of rape, but it is one in which the man in question did not even have causal responsibility, because he did not take any action that caused the pregnancy. *Id.* Different sorts of cases of heterosexual rape resulting in pregnancy may divide causal and moral responsibility.

164 Not all jurisdictions define rape in this way and not all commentators agree on this definition. *See* SUE BESSMER, THE LAWS OF RAPE 58–64 (Annette K. Baxter ed., 1984) (1976); *see also* SUSAN ESTRICH, REAL RAPE 29–41 (1987); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1793–1805 (1992).

sexual intercourse is achieved by simple brute force.[165] The victim does not yield to a threat, she or he is simply physically forced into intercourse.[166] Rape by coercion involves the wrongful use of a threat to secure compliance with a demand for intercourse.[167] But the absence of consent need not result from force or coercion; it may also result from some form of ignorance or incapacity.[168] Furthermore, rape may also result from fraud where the action to which the victim consents is materially different from the act of sexual intercourse that takes place.[169]

The heterosexual rape of a man by the employment of coercive threats would be one example where a man would have causal but not moral responsibility for the resulting child. Such cases are rare, and it is rarer still that such an act leads to a successful pregnancy. Acts of this sort, however, are certainly possible.[170] A man who is the victim of such coercion would be causally responsible for the production of the child who results from the coerced act of sexual intercourse. However, the coercion would preclude his moral responsibility. This sort of case is clear, albeit unusual. There are more common cases in which it is at least plausible to deny moral responsibility for the creation of a new life while conceding causal responsibility.

First, consider statutory rape.[171] An adult who has sexual intercourse with a minor is guilty of statutory rape even if the minor was a willing participant.[172] In recent decades, there have been numerous cases of adult women having sexual relationships with young teenage and even preteen boys.[173] On the theory behind statutory rape laws, these underage boys are not yet capable of giving meaningful consent to the woman's sexual advances.[174] We can make the moral situation

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165 Patricia J. Falk, *Rape By Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 133 (2002).

166 *Id.*

167 *Id.*

168 *Id.*

169 *See generally* Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39 (1998).

170 The coercion need not be imposed by the woman with whom the victim has intercourse. A third party could coerce the man into having sex with a willing or unwilling female partner. *State v. Haines*, 25 So. 372, 373–74 (La. 1899) (holding that were one man to force another man to have sex with the first man's wife, the first man "might well be found guilty of the crime [of rape], and his unwilling instrument of its accomplishment acquitted").

171 See *supra* note 93 for cases of statutory rape of a boy leading to pregnancy of the perpetrator.

172 *See generally* Britton Guerrina, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251 (1998).

173 The most famous case in recent years is that of Mary Kay Letourneau, the thirty-four year old school teacher who had two children by a boy she began having sexual relations with when he was thirteen. *See* GREGG OLSEN, IF LOVING YOU IS WRONG (1999); *see also* State v. Letourneau, 997 P.2d 436 (Wash. App. Div. 1st 2000).

174 See Guerrina, *supra* note 172, at 1257-58.

clearer by imagining that the boy does not fully understand the connection between sexual intercourse and pregnancy; given his age, one cannot reasonably expect him to understand this connection. Perhaps the woman, usually a teacher or some other authority figure, has intentionally misled the boy about the possible consequences of sexual intercourse. These cases, which are not merely hypothetical, illustrate situations in which a male has causal responsibility, but not moral responsibility, for the existence of the child that results from the sexual activity.

We could also imagine the case of a mentally retarded father who has sexual intercourse at the urging of a mentally competent woman who has the intention of getting pregnant by him. If his retardation makes the father incapable of understanding the connection between sexual intercourse and pregnancy but is not severe enough to call into question his agency, he may be causally responsible but not morally responsible for the pregnancy.

Another, perhaps more controversial, example of a man having causal responsibility but not moral responsibility, for a new life is presented in the case of Emile Frisard.[175] Frisard engaged in an action that was a causal contributor to Rojas' pregnancy. In this sense, Frisard acted in a way that was causally related to the pregnancy. Most people would be reluctant to hold him morally responsible for the production of a new life because his course of conduct was not one that any reasonable person would anticipate had any chance of resulting in pregnancy. If that is correct, then this case is also one in which a man who is causally responsible for a new life is not morally responsible for that life.

These cases show the need to distinguish causal responsibility for a child's life from moral responsibility for that life. Once this distinction is made, we need to recognize that fathers are typically both causally and morally responsible for the lives of their children. Our paradigmatic father is the genetic father who is both causally and morally responsible for the creation of his children. Much more is involved in our stereotypical conception of a father, as well.

Other elements of fatherhood include a variety of psychological relationships to a child and social roles with respect to the child. Ordinarily, fathers and children are bound together by special bonds of affection. This does not entail that "father-child love" can exist only between individuals who have other elements of the father-child relationship (genetic, causal, *etc.*). Indeed, the point of this current exercise is to understand that the various elements of paternity are conceptually separable and sometimes separate in fact. Therefore, a man who either knowingly or unknowingly bears no genetic relationship to a child, may love

175 Louisana v. Frisard, 694 So. 2d 1032, 1034 (La. Ct. App. 1997).

that child (and the child may love him) in the way that is characteristic of fathers and children. When such bonds result from the false belief that there is a genetic relationship, they are frequently destroyed when the truth comes out and often not because either the child or the putative father chooses to end the relationship.[176]

In addition, the emotional ties fathers have toward their children usually lead to voluntary financial support of their children. Fathers mentor their children, nurture them, discipline them, cuddle them, protect them, encourage them, and much more. It is clear enough that these elements can come apart from each other in various ways and that they can come apart from other aspects of paternity.

This section has attempted to understand the concept of paternity by looking at its various elements. These elements are conceptually distinct and may be—and, due to technological and social changes, increasingly are—instantiated in different men. Increasingly, some of them are not instantiated at all. As important as it is to separate these different aspects of fatherhood conceptually, it is also important to understand the various connections between them. The elements of fatherhood are not combined in our concept of a father merely accidentally, as an optional matter of social convenience, or even as a social construct that exists without a biological foundation.

In ordinary cases of pregnancy, there is a close causal connection between causal paternity and genetic paternity. Also, in most cases, the causal father meets the conditions for moral responsibility. Exceptions are not just statistically rare; they are generally deviations from our social norms concerning sexual relations.

Furthermore, important causal connections exist between the biological elements of paternity and the social and psychological elements. Presumably, the reason paternal investment evolved is that it enhanced a man's inclusive fitness. As was mentioned before, this does not entail that the mechanisms that trigger the panoply of paternal behaviors depend directly on the existence of a genetic relationship between a man and his child, and certainly not on knowledge of this genetic relationship.[177] Indeed, the proximate causes of fatherly behavior could, in principle, be factors that are not even causally dependent on a genetic relationship. Thus, if over the evolutionary period of humans, the infants born of the male's female partner typically were his genetic offspring, selection for a disposition to support and sustain infants born from one's

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176 For a fictional treatment of the situation of paternity fraud and the emotional fallout of such fraud, see generally EDWARD DEANGELO, THE LIES THAT BIND (2001). I know of several cases of this sort in which the putative father unsuccessfully struggled to stay in the life of the child.

177 *See* text *infra* p. 61; see also *supra* note 44.

female partner would enhance a male's inclusive fitness.[178] However, evidence indicates that men are far more likely to fulfill the social and psychological roles associated with fatherhood for their genetic children than for other, unrelated children.[179] The exact causal mechanisms are still disputed.[180]

V. MULTIPLE FATHERS?

> *"California law, like nature itself . . . makes no provision for dual fatherhood"*[181]

Does the nature of paternity as a compound concept make it possible for one individual to have more than one father? Or, is the Supreme Court correct when it declared that, California law, like "nature itself . . . makes no provision for dual fatherhood."[182] Either answer requires society to engage in a bit of verbal legislation, at least with respect to penumbral cases. Yet, before addressing this question, it is worth noting that even with a simple, unified conception of fatherhood, the denial of "dual fatherhood" has not been as universal as the Court assumes.

The Barí tribe of Venezuela employs a notion of "partible paternity."[183] Natives of this tribe believe that a child is partly the child of every man who had sexual intercourse with its mother during the pregnancy.[184] According to Barí belief, all of the men who had intercourse with a mother at about the time of conception, or anytime during the pregnancy, are fathers of the child.[185] The husband is considered to be the primary father, apparently by virtue of the presumption of having had sexual intercourse with his wife more frequently than the other males.[186] Primary and secondary fathers owe social responsibilities to the children,

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178 The point is that there is a distinction between the *content* of a disposition to act and the *effect* of having a disposition with that content. A disposition that has as its content "nurturing the children of one's female partner" may have the effect of increasing a man's inclusive fitness even where this effect is no part of the disposition. *See* POPENOE, *supra* note 46, at 177.

179 [T]here is ample evidence of men's reluctance to assume child support obligations to the offspring of other men. . . . [S]teprelationships, once established, are much less satisfying to all parties than the corresponding genetic relationships, and much more likely to erupt in violence. Stepfathers are discriminative in their maltreatment, sparing own offspring in the same household. The tensions characteristic of steprelationships are cross-culturally ubiquitous.

Wilson & Daly, *supra* note 58, at 289 (citations omitted).

180 *Id.*

181 Michael H. v. Gerald D., 491 U.S. 110, 118 (1989).

182 *Id.*

183 *See generally* Stephan Beckerman et al., *The Barí Partible Paternity Project: Preliminary Results*, 39 CURRENT ANTHROPOLOGY 164 (1998).

184 *Id.* at 165.

185 *Id.*

186 *Id.*

though there are variations in the diligence in which the secondary fathers fulfill these responsibilities.[187] Stephen Beckerman has shown that the practice of partible paternity among the Barí is adaptive in the following respect: children with secondary fathers are 16% more likely than single-fathered children to survive to their fifteenth birthdays.[188]

While practices differ, at least eighteen South American cultures, widely separated geographically, accept some version of partible paternity.[189] Indigenous cultures in India and Polynesia also accept partible paternity.[190] In light of this, the Supreme Court may have been a bit parochial when it declared California's practice to be nature's own,[191] at least if this is intended to imply that no other social practice is possible or feasible.

The idea of dividing paternity need not be based on false conceptions of the genesis of human life. In the early 20th Century, Denmark, presumably without false beliefs about the development of the fetus, apportioned a child support obligation among all men who had had intercourse with the mother during the period when conception might have taken place.[192] These men were all equally the legal fathers of the child under a concept called "corporate paternity."[193] Denmark was apparently motivated by a desire to ensure support for the child by dividing the responsibility between all potential biological fathers rather than selecting one of these men over the others without sufficient basis for such selection,[194] or as often happened in other Western legal systems, leaving the child unsupported because no single man confidently could be determined to be the biological father.[195] Regardless of the intent or the pub-

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187 *Id.*

188 *Id.* at 166; see also CULTURES OF MULTIPLE FATHERS: THE THEORY AND PRACTICE OF PARTIBLE PATERNITY IN LOWLAND SOUTH AMERICA (Stephan Beckerman & Paul Valentine eds. 2002) (discussing the advantages and disadvantages of partible paternity in various South American societies).

189 Kim A. McDonald, *Shared Paternity in South African Tribes Confounds Biologists and Anthropologists*, THE CHRON. HIGHER EDU., Apr. 9, 1999 at A19.

190 Sara Abdulla, *More Than One Father Is Good For You*, NAT. SCI. UPDATE (1999), *at* http://www.nature.com/nsu/990204/990204-8.html (last visited Sept. 8, 2003).

191 Michael H. v. Gerald D., 491 U.S. 110, 118 (1989).

192 Sass, *supra* note 80, at 490.

193 *Id.*

194 *Id.* Stephen Sass describes an approach to the establishment of paternity that was adopted by Hungary after World War II, under which the mother could simply choose one of the men who could have bseen the biological father, and the state would impose a child support obligation on him despite the existence of other men who could also have been the father. *See id.* at 470–71, 497. Sass also describes a proposed reform to German law—one that was never enacted into law—under which the mother could name any of the possible fathers as the father. This man would have an obligation of child support but he would also have a cause of action against the other possible fathers. *See id.* at 471.

195 As those economists who are fond of insurance schemes would remind us, something like the economic effect of corporate paternity could be gotten by randomly picking one of

lic policy considerations that lie behind the theory of corporate paternity, Denmark found a way of making provisions for dual [or triple, *etc.*] fatherhood.[196]

As reported by anthropologists, the aboriginal practice of partible paternity is based on false beliefs about the genesis of infants.[197] Plausibly, the Danish practice of corporate paternity arose from the evidential problems associated with establishing genetic paternity during the 20th century.[198] I do not propose undermining the idea of unified paternity for either of these reasons. The Barí have it wrong. For children conceived in the normal way, there is only one genetic father of a child.[199] The Danish were suffering from inadequate forensic technology. Now, the capability exists to determine with practical certainty the paternity of any child, provided genetic material from the child and the man who is the genetic father is available. This does not, however, mean that paternity is a unified concept.

We have seen that paternity can fragment, in the sense that its various elements are instantiated in different men. Even the concept of a biological father is fragmented into genetic and causal senses. Barring exotic technologies, a child still has only one *genetic* father. However, this person may not have engaged in any procreative act, natural or artificial, with the mother of the child and may not be causally responsible for the creation of the child. Even if he is causally responsible, he may not be morally responsible for the pregnancy. It is possible that a person who is not the genetic father is causally and, also, morally responsible for the creation of the new child.[200] Finally, it is possible for individuals

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these men on whom to impose the obligation and then allowing a market in paternity insurance. Unless the insurance were based in a very fine-grained division of the market, it would divide the risk over all insurance purchasers—presumably all sexually potent and active males who act rationally in insuring themselves against this risk—rather than among the specific men who could be fathers of a particular baby.

196 *See generally* Sass, *supra* note 192.

197 This need not be so. As seems always to be the case, a practice could survive the refutation of the beliefs that fostered it initially. Furthermore, a similar practice could emerge without the false beliefs. *Science and Technology: Paternity Test,* 350 THE ECONOMIST 74, 75 (1999).

198 Sass, *supra* note 80, at 490. It is even clearer in this case that the practice could be supported for different reasons. In the first place, it could have been based quite self-consciously on a theory of delict according to which all men who had sexual access to the mother were equally guilty of a delict. Alternatively, if we think of pregnancy as a generally unwanted outcome of sex for unmarried couples—a risk of copulation—it may seem fairer to apportion the costs of the undesired outcome among those taking the risk of producing it. Though, of course, there are many other issues in play here, too.

199 *But see* Barritt et al., *supra* note 151, at 434 (explaining haploidization and the use of artificial sperm) SILVER, *supra* note 152, at 180–90. Recombinant DNA technologies could result in a child having genetic material from multiple men and women. See Barritt et al., *supra* note 151, at 434. In such cases, even the concept of a genetic father will be fragmented.

200 *See* S.F. v. State *ex rel.* T.M., 695 So. 2d 1186, 1189 (Ala. Civ. App. 1996).

who are not biological fathers, either in the genetic or causal sense to be fathers in the social and psychological sense.

So, who is the *real* father? It is better not to ask the question that way. What we want to know is what elements of the normative cluster—the moral and legal rights and responsibilities of fatherhood—are grounded on what elements of the descriptive cluster—the roles, relationships and properties that collectively comprise our stereotypical concept of fatherhood. When we see that the roles, relationships, and properties can come apart, we should be ready to acknowledge that the rights and responsibilities can come apart, as well.

VI. SOME STEPS TOWARD CLARIFICATION

> *"[T]he values and norms that once reinforced the cultural ideal of fatherhood have collapsed leaving the cultural expression of fatherhood fragmented and 'decultured'"*[201]

The legal concept of paternity need not fit perfectly with our ordinary concept of paternity. One could hold that paternity law sets out to define a *sui generis* sense of "paternity": legal paternity. For legal purposes, one might claim, the father is the husband of the mother, or when the mother is not married, the genetic father of the child. There is no reason that the legal concept of a father must align with other, non-specialized notions of fatherhood. The legal system has found it useful to have a legal concept of a person that is rather different from our ordinary concept of a person. It might also have purposes for defining an entirely new concept of a father.

Whatever the merits of a legal definition of "father" that is stipulative, this does not seem to be an accurate description of the way Anglo-American legal systems have addressed the concept of paternity. The marital presumption of paternity almost always includes exceptions for instances when the husband can establish that he was sterile, impotent, or away from the mother at the time of conception.[202] These exceptions make little sense unless one interprets the marital presumption as being an attempt to resolve the question of genetic paternity, a question often fraught with evidentiary difficulties and one that could be socially and

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201 MARSIGLIO, *supra* note 1, at 151 (describing David Blankenhorn's view in *Fatherless America*).

202 Justice Scalia summarized the traditional exceptions to the marital presumption:

> Traditionally, that presumption could be rebutted only by proof that a husband was incapable of procreation or had had no access to his wife during the relevant period. . . . As explained by Blackstone, nonaccess could only be proved "if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, *extra quatuor maria* [beyond the four seas]) for above nine months. . . ."

Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

interpersonally explosive. The history of paternity establishment appears to be one in which presumptions about paternity are tied closely to the biological facts about paternity. For example, the official principle on which paternity was established has never been one of direct appeal to the best interest of the child. Courts have always sought the man who is, or is likely to be, the genetic (or causal) father.

It is possible to hold that the biological connection is unimportant—that the law is free to continue to determine paternity by employing the marital presumption or, more reasonably, by determining who functions as the social father. This is not a savory presumption in most people's eyes.[203] The frequency of mistaken or fraudulent attributions of paternity, often estimated to occur in about 10% of cases, has put pressure on legislatures and courts to give up the legal fiction implied in the marital presumption in the face of the scientific fact established by DNA testing.

The best way to understand the legal notion of paternity is as an attempt, in epistemically infertile territory, to determine genetic paternity. The availability of extremely reliable, relatively low-cost DNA tests for genetic relatedness has changed the epistemic terrain. It is now possible to determine with a very high degree of certainty the paternity of an individual with a sample of genetic material from the child and the alleged father. This places the marital presumption on a collision course with science. Moreover, recent events suggest that it is the marital presumption that is yielding to the juggernaut of scientific truth.[204]

Suppose, as seems likely, that this trend continues. Where are we left? Is the biological relationship all that matters in determining paternity? Is genetic relatedness the basis on which all the rights and responsibilities of fatherhood depend? I think it is not, but (as I will indicate below) my reasons for this are not the usual ones.

In addressing these issues, it is important to remember that the answers to questions of public policy, as well as the approaches to sound judicial review, will improve if society unbundles the cluster of separable concepts involved in paternity as well as those involved in the cluster of paternal rights and responsibilities. Society must seek to ground separately the individual rights and responsibilities fathers typically have by virtue of their paternity in the individual sets of properties, roles and

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[203] The swift and nearly unanimous action of some of the state legislatures in enacting paternity fraud legislation suggests that legislators perceive widespread support for grounding legal paternity on scientific facts. See *supra* note 142. Feminist author Wendy Kaminer seems to sum up popular sentiment when she says, "if a man is ordered to pay child support by mistake, on the basis of inaccurate information or a knowingly false charge of paternity, fairness demands that the mistake be acknowledged (and damn the consequences)." Wendy Kaminer, *Fathers in Court*, AM. PROSPECT, Sept. 25, 2000, at 63.

[204] *See supra* notes 140, 142 (citing new legislation concerning the disestablishment of paternity based on genetic testing).

relationships fathers typically have. What it is about fathers that grounds an obligation to provide financial support for a child may be quite different from the features, roles, or relationships that ground a right to associate with, or the right to rear, the child. This can be masked by the social stereotype of a father, which fuses separable features, roles and relationships in one concept and, thereby, inclines us to see these as inhering in one man.

What happens by unbundling these elements in this conceptual framework? The problems are not immediately solved by this conceptual reconstruction, but new and promising potential solutions present themselves. Here are some suggestions for directions in which to develop an account of paternity that is sufficient for legal purposes.[205]

A. CHILD'S RIGHT TO FAMILY MEDICAL HISTORY

There is no generally recognized legal right for an individual to have access to a family medical history even when such information is available.[206] This is unfortunate. I believe that there is a moral right to this information and that this moral right ought to receive legal protection. As a result of advances in our medical knowledge, this genetic information is increasingly important to an individual's health care. Furthermore, the public and members of the legislature and the judiciary are becoming more aware of the importance of this information. Both of these changes are likely to increase pressure for legal recognition of a right to a person's genetic information. If such a right is to be legally recognized, it would create yet another purpose for establishing paternity.

It is clear that a paternity determination for purposes of satisfying an individual's right to know her family medical history requires us to identify the genetic father. No matter what other elements there are in our paradigm of paternity, or how these might eclipse genetic paternity for other legal purposes, it is the genetic relationship that matters for these purposes.

Is the father more than a sperm donor? Yes, of course. But not for purposes of satisfying a child's right to have access to his family medical history. For these purposes, the father is precisely a sperm donor. This

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205 These suggestions are not adequately defended here. For a fuller development and defense of these suggestions, see Donald Hubin, Parsing Paternity: The Legal and Philosophical Foundations of Fatherhood (2003) (manuscript on file).

206 In fact, there is strong precedent in the Supreme Court for recognizing a constitutional right to conceal one's medical history. Whalen v. Roe, 429 U.S. 589, 605–06 (1977); Anderson v. Romero, 72 F.3d 518, 522 (7th Cir. 1995). Courts have ruled, however, that there are times where a countervailing interest may outweigh the parent's rights to privacy. *See* Johnson v. Superior Court, 80 Cal. App. 4th 1050, 1069–70 (Cal. 2nd Ct. App. 2000) (determining that adoptee's interests outweighed sperm donor's limited privacy interests in medical history).

does not mean, however, that this man is the father for other legal purposes.

B. RESPONSIBILITY FOR SUPPORT OF CHILDREN

Perhaps everyone has a moral responsibility to provide for children who are in need. Nevertheless, it is commonly accepted that parents have a special responsibility to provide for their children. As discussed earlier, ensuring that this responsibility is discharged has long been one of the primary purposes for making a legal determination of paternity.

The theory of descent suggests that a paternity determination for purposes of establishing a support obligation should, like a determination for establishing a medical history, be determined solely by the genetic relation between the man and the child. The widespread and rapidly growing use of DNA testing to conclusively establish an obligation to support a child and, more recently, to *dis*establish such an obligation clearly suggests this view.[207]

As attractive as this view might appear, on reflection it seems obviously wrong. It is plausible to think that the responsibility to provide financially for a child depends on the causal role an adult plays in the creation of the new life under conditions that render the adult morally responsible for the specific procreative consequence of his or her actions.[208] Though these conditions are special in the sense that they are restrictive—not all imaginable instances of human conception satisfy them—they are the typical conditions of human conception.

I call this the "causal theory of responsibility for support" and distinguish it from the theory of descent, which is a genetic theory of responsibility for support. In a way, one could think of the causal theory as reincorporating one element of the delict theory. Like the delict theory, the causal theory of responsibility for support focuses attention on the *actions* of the father. The crucial element for establishing such a responsibility for support is a voluntary action of the father and not, as the theory of descent holds, a genetic relationship between the man and the child. But the causal theory is not a version of the standard theory of delict. The causal theory of responsibility for support is not, for example, committed to holding that extramarital (including premarital) sex is a criminal offense, a tort, or even a moral wrong. However, it is motivated by the thought that it is at least *prima facie* wrong for a person to volun-

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207 On this view, the marital presumption is merely an epistemic crutch to assist us in determining who is the genetic father. Absent proof of Justice Cardozo's "sordid facts" that defeat the marital presumption, we will presume that the husband of the mother is the genetic father of the child. *In re* Findlay, 170 N.E. 471, 473–74 (N.Y. 1930).

208 This is not the only way a person could incur a special obligation to support a child. Adoption provides another clear instance of incurring a special obligation to support a child. SILVER, *supra* note 152, at 136–37.

tarily engage in an action he knows, or should know, might result in the creation of a dependent human life *and*, then, not to support that child should it come to be. The requirement to support a child you cause to come into existence is not, as the traditional theory of delict holds, a punishment for "illicit sexual intercourse" or even for a wrongful act of bringing the child into existence.[209] Rather, the causal theory treats it like the obligation to repay a debt. Taking out a loan is not a delict. Failure to repay a loan is. On the causal theory, fathering a child as a result of voluntarily engaging in conduct that one knows, or should know, might cause a child to come into existence is not, in itself, a delict. Willful failure to support a child one caused to exist typically is.

Clearly the causal theory of responsibility for support needs a much more thorough defense than this commentary provides.[210] My purpose here is only to suggest a plausible approach to grounding an obligation to support a child—one that shows how, for legal purposes, the various elements of paradigmatic paternity can come apart, and how the obligation to support a child may plausibly be grounded on an element other than genetic paternity.

One apparent objection to the causal theory proceeds by appealing to our practice of establishing child support obligations based on DNA testing. While we could declare this practice fundamentally misguided, such a conclusion seems unacceptable. But if the responsibility for supporting a child is not based on the genetic relationship between the man and the child, what is the justification for employing DNA testing to establish support obligations? The answer is obvious. It is the same justification we have for using fingerprint information (or DNA information, for that matter) in determining the perpetrator of a murder, for example. The fingerprint on the murder weapon (or the DNA material at the crime scene) is not the fact that *constitutes* guilt. It is, rather, evidence of the fact that constitutes guilt. Similarly, that a child is the genetic offspring of a man is evidence—and very compelling evidence in any ordinary situation—that the man engaged in an action that caused the child to come into existence. Typically such actions are voluntary and the man knows, or should know, that they can lead to pregnancy. However, certainty about the genetic relationship does not entail certainty about the fact that is constitutive of fathering a child in the sense that is

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209 *See* SASS, *supra* note 80, at 469 (interpreting the delict as that of engaging in illicit intercourse with the mother). I know of no development of the theory of delict that interprets the delict as that of creating a child, but that is a logically possible development of a theory of delict. The causal theory of responsibility for support does not locate the delict in either the act of sexual intercourse or the act of procreation.

210 *See* Donald Hubin, Parsing Paternity: The Legal Foundations of Fatherhood (2003) (manuscript on file), for such a defense.

relevant to having an obligation to support the child. A variety of cases, both real and hypothetical, demonstrate this adequately.[211]

C. RIGHT TO ESTABLISH A "PARENT/CHILD RELATIONSHIP" WITH A CHILD

Where paternity is not fragmented in fact, we believe that fathers have a right to establish a parent/child relationship with their children. Our concern for the best interest of the child does not give us license to prevent a biological father who is willing and able to act as a father from doing so. Increasingly, this is being recognized outside the marital context; the right of a biological father to establish such a relationship with his child and for the child to establish that relationship with his biological father has been extended to cases where neither the father nor the mother is married.[212] Furthermore, despite the reasoning of the Court in *Michael H.*, courts have been increasingly willing to recognize a right of biological father to develop a relationship with his natural child even when the mother is married to another man.[213]

In doing so, they have not distinguished between two aspects of biological paternity: genetic and causal. It is not my purpose to argue whether either, neither or both of these elements of biological paternity ground a right to establish a parent/child relationship with a child. Instead, I want to show that because these are separable elements from each other and from the other elements of paternity, it is possible, *ex ante*, to give any combination of answers to these questions. One might hold that the right to establish a relationship with the child is grounded only on the genetic relationship, or only on the causal responsibility for the child's life, or on the conjunction of these, or on each of these individually or on neither of these, or on one (or both) of these in conjunction with some other element of paternity.

The question of what grounds a right on the part of a child to establish a parent/child relationship with an adult, and conversely, what

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211 *See supra* Part III.

212 In a 1998 case, for example, the Supreme Court of Appeals of West Virginia wrote,

> The instant a child is born, both unwed biological parents have a right to establish a parent-child relationship with their child. To preserve his parental interest vis-à-vis his newborn child, an unwed biological father must, upon learning of the existence of his child, demonstrate his commitment to assume the responsibilities of parenthood by coming forward to participate in the care, rearing, and support of his newborn child and by commencing to establish a meaningful parent-child relationship with his child.

Kessel v. Leavitt, 511 S.E.2d 720 (W. Va. 1998).

213 *See, e.g., In re* J.W.T., 872 S.W.2d 189 (Tex. 1994) (holding that denying a man, who claims to be the child's biological father, an opportunity to rebut the marital presumption or to claim parental rights by establishing paternity, violates due course of law guarantee under the State Constitution).

grounds such a right on the part of the adult in question must be answered by looking at the legitimate interests of the parties. The following is an example of how such an argument might proceed. As was noted earlier,[214] there are potential medical benefits that accrue to both the genetic father and his child not only from a proper identification of this genetic relationship, but also from the establishment of a parent/child relationship. Children having such a relationship are more likely to receive a needed organ donation from their biological father or one of his relatives. Given the fact that organ donation can go from a child to a parent, the genetic father would also have such an interest. These interests may form the basis for arguing that the right to establish a parent/child relationship with a child arises from the genetic relationship itself (though, perhaps, it also has other sources).

On the other hand, one could imagine a man, rendered sterile by chemotherapy or radiation therapy, receiving a transplant of testicular tissue from another man. Imagine this man has sexual relations with a woman with the intention of causing a pregnancy and being a father to the child. One would think that this man has a legitimate interest in developing a parent/child relationship with the child and, perhaps, a right based on that interest. The fact that the man would not be the genetic father would not undermine the consideration for such a right.

It is possible that more than one man has a right to develop a parent/child relationship with a child, pronouncements of the Supreme Court notwithstanding. Thus, in cases where the various elements of paternity are separated, the child may have a right to a parent/child relationship with multiple men, and vice versa.[215] To insist that only one man can fulfill this role on the grounds that in our stereotypical cases there is only one father, is to attempt to pound a square peg into a round hole. Clearly, the problematic cases we have been discussing are not typical. Simple answers will not do for complex cases.

D. RIGHT TO "PARENT" A CHILD[216]

Children need much more than financial support to have happy, healthy, secure childhoods and develop into productive, responsible, well-adjusted adults. They need love, discipline, and education. They need to have their physical and mental abilities challenged, their compassion developed, their sense of right and wrong honed. These are tasks

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214 *See supra* Part I.A.1.

215 The same is true of women: in certain situations, a child may have the right to develop a parent/child relationship with two women, and they with the child. SILVER, *supra* note 152, at 133–38.

216 To my ear, "parent," as used as a verb, is a neologism that grates on the ear; but "custody" (applied to children who are not incarcerated) is an anachronistic barbarism that offends decency and reinforces a proprietary attitude toward children.

that are, in Western cultures, traditionally handled by parents—fathers and mothers—in an intact family within the context of a supportive community.

Alternative approaches to raising children have been proposed by some philosophical luminaries from Plato[217] to Marx.[218] Many of these proposals are motivated by legitimate moral concerns such as the desire to promote social equality, protect children, diminish the degree to which gender roles determine one's life prospects, and so forth. As a remedy for these problems, the proposal to abolish the family as a unit for rearing children may appear to some to "stand to reason." As is often the case, though, what stands to reason falls to experience. Attempts to abolish the family unit for the rearing of children have not led to desirable results.

Our traditional conception of a nuclear family involves a man and woman living with children who are both their genetic children and whom they caused to exist. In such cases, one has no difficulty in deciding who the father is, and, absent extraordinary features of the situation, this man is the only man with paternal rights and responsibilities. In these cases, the conceptual problems of paternity are hidden from view given our practical concerns. The cases that we are concerned with here, however, are not of this sort. They are cases in which the semantic complexity of the concept of paternity is manifest because our practical concerns cannot be met by relying on our stereotypical conceptions.

I think that the right to function as a parent to a child depends on one having an established parent/child relationship and its being consistent with the child's well-being for one to function in this capacity. This approach makes the right to function as a parent to a child depend on the factors that give an adult the right to *establish* a parent/child relationship with the child. (Conversely, the right of a child to be parented by an adult depends on the factors that give the child a right to establish a parent/child relationship with the adult.)

Establishing this dependency does little to solve the problems we are ultimately concerned with here. Again, though, it is not my current purpose to defend any specific answer to questions about the basis of various rights and responsibilities of paternity. Rather, I seek only to show that these need not be unified in one person and that, even with

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217 In *The Republic*, Plato says, "All these women are to belong to all these men in common, and no woman is to live privately with any man. And the children, in their turn, will be in common, and neither will a parent know his own offspring, nor a child his parent." PLATO, THE REPUBLIC 457 (Allan Bloom ed., 1968).

218 *See* Karl Marx & Frederick Engels, *Manifesto of the Communist Party, in* SELECTED WORKS IN ONE VOLUME 49–53 (International Publishers, New York 1968).

respect to a single paternal right or responsibility concerning an individual child, it may be held by more than one man.

CONCLUSION

The above arguments and considerations may be frustratingly inconclusive when one focuses directly on our practical concerns with establishing, or disestablishing, paternity. I have said very little about what grounds parental rights and how to solve the pressing practical problems society is trying to address with paternity determinations. I have gestured toward promising lines of argument addressing these issues, but done little to pursue them here. Rather, I have engaged in what seems to me to be a conceptual precondition to progress on these questions. My intention has been to show that such progress is more likely if we can manage to separate the various paternal rights and responsibilities and seek independent grounding for each on one or more of the properties, roles or relationships of fathers.

This conceptual dissection is necessary because the concept of paternity is, despite initial appearances, extremely complex. Social and technological changes have conspired to make the conceptual complexity of paternity of practical importance. The pressing practical problems one seeks to solve by attributions of paternity will be solved only by recognizing the complexity of the concept and adjusting our legal and social norms to reflect a morally justifiable grounding of the various rights and responsibilities of paternity on the various properties, roles, and relationships that constitute paternity.