

LEGAL IMAGES OF FATHERHOOD: WELFARE REFORM, CHILD SUPPORT ENFORCEMENT, AND FATHERLESS CHILDREN

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Introduction

For centuries the definition of fatherhood under American law was simple: the mother's husband. A legal doctrine that originated in English law called "the marital presumption" permitted courts to assume that the mother's husband was both the child's functional and biological father.¹ The policy rationales for the presumption were that it protected children from the legal and social impact of illegitimacy and preserved the sanctity of the perceived cornerstone of a healthy society—a family consisting of a husband, wife and children.² The marital presumption also had some factual justification. For a range of reasons, the number of children who were born to unmarried parents in early 20th century America was substantially lower than it is today.³ Thus, the legal -- i.e. married -- father, the biological father and the functional father were, in fact, often the same person.

The dramatic shift in family composition over the last several decades in the United States has made the marital presumption increasingly inadequate as the sole definition of fatherhood under the law. The United States Government's 2000 census made clear that married mothers and traditional families are on the decline.⁴ The number of women raising children in the United States without a husband grew both in number

¹ 1 W. BLACKSTONE, COMMENTARIES *459. The only recognized exceptions were cases where a man was sterile or impotent, or outside the country. *Id.*

² For a discussion of the privileged status accorded the marital or "unitary" family in Anglo-American jurisprudence, see *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *See also*, Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 888 (1984) (discussing the role of natural law in the law's view of the nuclear family as "the basic building block of society.")

³ *See* note 40 *infra* and accompanying text.

⁴ TAVIA SIMMONS & GRACE O'NEILL, U.S. CENSUS BUREAU; "HOUSEHOLDS AND FAMILIES: 2000," (Sept. 2001), <http://www.census.gov/population/www/cen2000/briefs.html>.

and in percentage of total household in the last decade alone.⁵ Although divorce contributed significantly to this increase, the number of births to unmarried parents has also increased dramatically in the last several decades.⁶ Only one quarter of American households now fit the traditional family model of married parents and children.⁷

The functional meaning of fatherhood has also changed significantly over time. The common law conception of paternal functions was expressed almost exclusively in economic terms. Although many debate the extent of the change,⁸ most agree that men today are participating more in family life than did their fathers.⁹ The once clearly defined role of mother as caregiver and father as breadwinner has eroded. In addition to the changing demographic and social landscape, scientific advances from genetic testing to new reproductive techniques have made defining fatherhood more complex.¹⁰

The law has made some attempt to refine its definition of father in the face of these changes. A series of United States Supreme Court decisions beginning with *Stanley v. Illinois*¹¹ in 1972, recognized that unmarried fathers, linked by both biology and some measure of involvement in a child's life, had both rights and responsibilities

⁵ *Id.* at 7. Nearly 25 million American children did not live with their fathers in 2000 compared with fewer than 10 million in 1960. William C. Smith, *Fathers Charge Legal Bias Toward Moms Hamstrings Them As Full-Time Parents*, A.B.A. J., February 2003, 38 at 40.

⁶ See note 40 *infra* and accompanying text.

⁷ SIMMONS & O'NEILL, *supra* note 4 at 4 tbl.2.

⁸ ARLIE HOCHSCHILD, *THE TIME BIND* 131-132 (1997); *See also*, Naomi Cahn, *The Power of Caretaking*, 12 *YALE J.L. & FEMINISM*, 177, 182-83 (2000) (summarizing studies demonstrating that mothers still assume a greater share of child caretaking); Theresa Arendell, *Soccer Moms and the New Care Work* (Berkeley Ctr. For Working Families, Working Paper No. 16, 2000); Naomi Gerstel, *The Third Shift: Gender and Care Work Outside the Home*, 23 *QUALITATIVE SOC.* 467 (2000); MONA HARRINGTON, *CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS* (1999); ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989).

⁹ *See, e.g.*, NICHOLAS W. TOWNSEND, *THE PACKAGE DEAL: MARRIAGE, WORK AND FATHERHOOD IN MEN'S LIVES* (2000); KATHLEEN GERSON, *NO MAN'S LAND: MEN'S CHANGING COMMITMENTS TO FAMILY* (1993).

¹⁰ *See e.g.*, JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE*, (1st ed. 1997); *Recent Developments in the Law: IV. Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 *HARV. L. REV.* 2052 (2003).

¹¹ 405 U.S. 645 (1972). *See infra* notes 46-54 and accompanying text.

that should be recognized under the law. The law has also given limited recognition to men who have served as “social” or “functional” fathers but were neither married to their child’s mother when the child was born nor biologically connected to the child.¹² More recently, there have been policy and legislative efforts designed to strengthen and facilitate the bonds between children and their fathers.¹³ While many of these new policies are designed to encourage fatherhood within marriage,¹⁴ many policymakers have come to recognize the importance of creating social and economic supports for unmarried fathers to foster continuing paternal involvement in children’s lives.¹⁵

While these developments have fostered a broader and more multidimensional legal conception of fatherhood, a series of recent judicial decisions and legislative enactments around the country threaten to push fatherhood back into a narrow box. The once limited definition based on marriage is now being replaced by an equally limited definition based on biology. This new definition of fatherhood has developed in the

¹² See notes 71-74 *infra* and accompanying text.

¹³ Dana Milbank, *A Marriage of Family and Policy*, THE WASHINGTON POST, Apr. 15, 2001 at A1; See, e.g., Deb Price, *Fatherhood Defines Bush Pick*, THE DETROIT NEWS, June 17, 2001 at 13A.

¹⁴ The 1996 Personal Responsibility and Work Opportunity Reconciliation Act (hereinafter PRWORA) provided federal funding to states to promote the formation and maintenance of marriage as well as the reduction of out-of-wedlock pregnancies. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.). THEODORA OOMS, ET. AL, CENTER FOR LAW AND SOCIAL POLICY, *BEYOND MARRIAGE LICENSES* 5 (2004). The Act included “illegitimacy bonuses,” funding made available to the top five states to reduce the rate of births to unmarried parents with no increase in abortion rates. ALTERNATIVES TO MARRIAGE PROJECT, *LET THEM EAT WEDDING RINGS*, 4 (2002) *available at* <http://www.unmarried.org/rings.html>. Other state marriage promotion programs funded by TANF include a program in West Virginia, where families receiving TANF benefits are awarded a \$100 bonus if the family is headed by a legally married couple. *Marriage on the Public Policy Agenda: What Do Policy Makers Need to Know From Research?*, POVERTY RESEARCH INSIGHTS (National Poverty Center, Gerald R. School of Public Policy, University of Michigan), Winter 2004, at 4. Arizona, Oklahoma, Utah and Wisconsin are also using TANF funds to promote marriage through “marriage handbooks” and media campaigns. ALTERNATIVES TO MARRIAGE PROJECT, at 3. In 2002-2003, the Administration for Children and Families at the U.S. Department of Health and Human Services committed \$90 million to many marriage-related activities including demonstration grants, research and evaluation projects and technical assistance. These grants focus on, among other things, emphasizing the importance of marriage in refugee families, and studies on family economic self-sufficiency. OOMS, at 8-10.

¹⁵ See, e.g., Ronald B. Mincy & Hillard Duncy, *There Must Be 50 Ways to Start a Family*, in THE FATHERHOOD MOVEMENT 83 (Horn et al. eds., 1999).

context of a series of cases in which men have assumed the role of father in children's lives and later, often after many years, seek genetic testing to be relieved of the legal obligations of fatherhood.¹⁶ While such "delegitimizing" of children would not be permitted under rules establishing fatherhood based on marriage or caretaking, these definitions of fatherhood are being increasingly rejected in favor of a single criteria for fatherhood based on biology. Over the last several years, many states have adopted policies by judicial decision or statute that relieve men of their legal status as fathers if genetic testing excludes them on biological grounds.¹⁷ As a result, children are becoming fatherless and losing the emotional connection, companionship, nurturing and economic support that fathers can provide.

This emerging definition of fatherhood based solely on biology has not developed to serve any of the traditional goals of family law – protecting children and preserving family stability.¹⁸ Rather, this trend appears to be one of the unintended consequences of three decades of federal and state legislation designed to reform the nation's welfare system.¹⁹ These policies were crafted to reduce welfare costs and improve conditions for custodial mothers and children through more vigorous establishment and collection of child support.²⁰ These policies have had mixed results in meeting those goals. At the same time, applied most aggressively against low-income

¹⁶ See notes 176-181 *infra* and accompanying text.

¹⁷ *Id.*

¹⁸ CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 153-54, 157-61 (1996) (describing two of the functions of family law as protecting vulnerable family members and supporting the social institutions of marriage and family).

¹⁹ See notes 77-119 *infra* and accompanying text.

²⁰ *Id.* Throughout this Article, I refer to custodial parents as mothers and non-custodial parents/child support obligors as fathers. While the number of single fathers who serve as custodians for children is increasing, the vast majority of children in single parent families are in single mother households. SIMMONS AND O'NEILL, *supra* note 3. See also, Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 708 (1998).

fathers of children receiving public benefits, welfare-driven child support policies are pushing those fathers to seek disestablishment of paternity. In resolving these claims, courts and legislatures are reinstating a construct of paternal functions defined almost exclusively in economic terms and a definition of fatherhood grounded in biology that ignores other potential bases for fatherhood-based caretaking.²¹ As a result, children are becoming fatherless and the state's interests in collecting child support, preserving families, and protecting children are undermined by the very laws designed to protect those interests.

The connections between welfare reform and the legal construct of fatherhood are complex and have not been fully explored.²² They have, however, profound implications for the future of children and families. Part One of this Article briefly reviews the law's historical approach to defining fatherhood. Part Two explores the connection between the evolving definition of fatherhood based exclusively on biology and developments over the last three decades in welfare and child support law.²³ The Article concludes with

²¹ See notes 180-83 *infra* and accompanying text.

²² Much scholarship analyzing the changes in child support in the early 1990's, including the author's, focused on how to make the new child support bureaucracy more effective in collecting support. See e.g., Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C.L. REV. 209, 226-231 (1991) (arguing that the move from discretion to rule-based child support guidelines with enhanced enforcement is much needed reform for custodial mothers and children.); Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 475, 479-81 (1994); *Essentials of Child Support Guideline Development: Economic Issues and Policy Considerations*, Women's Legal Defense Fund (1987). But a few scholars and researchers saw the risks of unintended consequences of the new directions in welfare and child support policy as early as a decade ago. David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2577 (1995) (discussing a suspicion "that although improved enforcement programs would likely produce substantial positive results for many women and children, they would also, for a substantial and immeasurable number of men, women and children, inflict unintended and undesirable harms that we would regret. As is often true in our society, these negative consequences would be borne disproportionately by the poorest persons and by persons of color."); Sara S. McLanahan, *The Consequences of Single Motherhood*, Am. Prospect, Summer 1994, at 48, 57 (recognizing the risks of "stricter" child support enforcement on the poor).

²³ In this section and elsewhere in this Article, I use the terms "child support reform" and "welfare reform" interchangeably. This reflects the fact that since the early 1970's child support collection has been inextricably linked to the goal of reducing welfare costs. See e.g., Tonya L. Brito, *The Welfarization of*

some preliminary suggestions for shaping policies that balance the need for appropriate child support enforcement with the overarching goal of keeping fathers in children's lives.

I. Historical Definitions of Fatherhood

The law's definition of fatherhood has evolved over time. The common law principle that fatherhood would only be recognized within marriage remained the law until the late 20th century when the law began to recognize unmarried fathers based on biology, caretaking or both. This modern expanded definition of fatherhood has been challenged by developments in the law in the last decade. As welfare costs have soared, the federal government has increased its powers to recover these costs from putative fathers, particularly low-income men, through aggressive paternity establishment and child support enforcement policies. In response, these men have sought to defend against incarceration and other sanctions for failing to pay child support by questioning the legitimacy of paternity orders established without genetic testing. The state legislatures and courts have answered these paternity disestablishment efforts by reverting to a narrow definition of fatherhood which is based solely on biology and which limits fathers' role under the law to that of breadwinner. This shift, based upon flawed assumptions about the value of linking child support and welfare, has dramatic and negative implications for families, especially children.

Family Law, 48 KAN. L. REV. 229, 254 (1999) ("The history of child support law represents a literal joining of family law and welfare law. The original child support program was limited to families receiving [welfare] because, quite simply, the government wanted to recoup welfare costs through child support collection.")

A. Fathers as Husbands: The Marital Presumption

The presumption that the husband of a married woman is the father of any children born to that woman was a fundamental principle at common law.²⁴ Dating back to Roman law, the presumption was conclusive unless the husband was sterile, impotent or had no access to his wife during the relevant time period prior to birth.²⁵ Non-access could only be proven by testimony from third parties²⁶ that “the husband be out of the kingdom of England” . . . for above nine months.²⁷ The marital presumption remained “one of the strongest presumptions known to law” in 18th and 19th century England and America.²⁸

There are two principle policy justifications for the marital presumption. The first is to protect children from the stigma and legal disabilities resulting from illegitimacy.²⁹ An illegitimate child was considered to be no one’s child.³⁰ This social stigma was reinforced by prevailing religious and legal principles that held that “all progeny not begotten” in a marriage were unlawful.³¹ The child of unmarried parents had no right of

²⁴ BLACKSTONE, *supra* note 1 at *459.

²⁵ H. NICHOLAS, *ADULTERIVE BASTARDY* 1 (1836).

²⁶ This rule of evidence provided that neither the husband nor the wife could be a witness to prove access or non-access where the effect of such testimony would result in the illegitimacy of a child. This rule is generally referred to as Lord Mansfield’s rule. HOMER CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 544 (2d ed. 1988). Lord Mansfield described the evidentiary conclusion as “a rule, founded in decency, morality, and policy, that [the husband and wife] shall not be permitted to say after marriage. . . that the offspring is spurious. . . .” *Goodright v. Moss*, 98 Eng. Rep. 1257, 1258 (K.B. 1777).

²⁷ The so-called “beyond the four seas” doctrine is described in Blackstone’s Commentaries at page 456.

²⁸ *See, e.g.*, *Esprey v. Guillory*, 753 S.W.2d 722 (Tex. App. 1988).

²⁹ This policy justification may be viewed as somewhat circular given that the rationale for the legal disabilities suffered by children deemed “illegitimate” was to protect the sanctity of marriage and punish the immorality of parents who gave birth outside of marriage. Ayer, *Legitimacy and Marriage*, 16 HARV. L. REV. 22, 37 (1902).

³⁰ Martha T. Zingo & Kevin E. Early, *Nameless Persons* (1994); *See also*, HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 3 (1971).

³¹ W. HOOPER, *THE LAW OF ILLEGITIMACY* 3 (1911). Social stigma from illegitimacy may have been greater in the United States than England due to the reign of William the Conqueror, “who made no effort to disguise his illegitimate origin and frequently referred to himself as William the Bastard.” Mary Kay Kisthardt, *Fatherhood, Families and Fantasy: The Legacy of Michael H. & Gerald D.*, 65 TULANE L. REV. 585, 588 (1991).

inheritance or succession.³² Unmarried biological fathers had neither an obligation to pay child support nor custodial rights to their children.³³ Thus, when mothers died or were unable to care for children, nonmarital children were often wards of the state.

The marital presumption was also justified as necessary to protect the sanctity of the most protected unit under Anglo-American family law, the marital family.³⁴ By preventing the possibility that either spouse would testify to establish a third party had fathered a child with the wife, the “peace and tranquility of states and families” were preserved.³⁵ As discussed in an 18th century English case, “It is a rule founded in decency, morality and policy that [the husband and wife] shall not be permitted to say after marriage that they have had no connection and therefore that the offspring is spurious; more especially the mother who is the offending party.”³⁶

The common law rules on fatherhood also reflected the view that “the father-child relationship was primarily an economic one.”³⁷ The rights and responsibilities that attached to legal – i.e. marital – fathers were primarily economic in nature. Married fathers had an obligation to provide financial support and children of married fathers could inherit from them. In turn, marital children were viewed as property and fathers

³² 2 KENT’S COMMENTARIES 175 (1827).

³³ While no legal support claim could be brought for these children under the common law, ecclesiastical courts might hold biological fathers responsible for the economic support of their illegitimate children. *See generally* R.H. Helmholz, *Support Orders, Church Courts, and the Rule of Filius Nullius: A Reassessment of the Common Law*, 63 VA. L. REV. 431 (1977).

³⁴ *See e.g.*, MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* (1985); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER SOC. POL. & L. 505 (1998).

³⁵ *Michael H. v. Gerald D.*, 491 U.S. 110, 125 (1989), quoting J. SCHOULER, *LAW OF DOMESTIC RELATIONS* § 225 at 306 (1882).

³⁶ Goodright, 98 ENG. REP. AT 1258.

³⁷ Kisthardt, *supra* note 31 at 588; *See also*, James Kent, *Commentaries on American Law, reprinted in* 1 *CHILD AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY* 363 (Robert H. Bremner ed., 1970).

were entitled to their labor, and, later, after the Industrial Revolution, to the earnings of their children.³⁸

B. Unmarried and “Defacto” Fathers: Adding Biology and Caretaking as Alternative Bases for Fatherhood

In practice, then, the marital presumption limited legal fathers to married men. If a child’s mother was married, her husband, with few exceptions, was viewed as the father. If a child was born to an unmarried woman, the child had no father.³⁹ In either circumstance, unmarried biological fathers were not recognized under the law. This rigid system that narrowly defined fatherhood by status began to change as the social, demographic and scientific supports for the system eroded. First, the numbers of nonmarital births in this country increased dramatically in the last three decades of the 20th century.⁴⁰ At the same time, the legal distinction between legitimate and illegitimate children began to be stricken from the law on constitutional grounds.⁴¹ Finally, science’s ability to determine biological fatherhood improved dramatically.⁴² All of these

³⁸ See Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1064-68 (1979).

³⁹ Biological fathers had no right of action at common law to bring a paternity suit. See, e.g., *Baker v. State*, 14 N.W. 718, 719 (Wis. 1883).

⁴⁰ The rapid growth in the illegitimacy rate did not begin until 1970 when it went from 11% of births in 1970 to 30% in 1991. Gertrude Himmelfarb, *A De-Moralized Society: The British/American Experience*, THE PUB. INT., Sept. 22, 1994, at 57. The nonmarital birth rate has remained relatively stable since 1990. Child Trends, *Facts at a Glance*, 2 (November 2003) at childtrends.org/Files/FAAG2003.pdf. When illegitimacy rates are broken down by race, the picture is somewhat different. For white children the ratio went up from 1.5 percent to a little over 2 percent between 1920 and 1960, and then advanced at an even steeper rate than that of blacks: to almost 6 percent in 1970, 11 percent in 1980, and nearly 22 percent in 1991. The black illegitimacy ratio did not accelerate as much because it started at a higher level: from 12 percent in 1920 to 22 percent in 1960, over 37 percent in 1970, 55 percent in 1980, and 68 percent by 1991. *Id.* at 3-4. See also Cynthia Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 737-734 (1996) (discussing the cultural and legal impediments to formal marriage among both African-Americans and poor white populations in the U.S. in the 18th and 19th century.); See also, NIH, *Proceedings from the Conference on Counting Couples: Improving Marriage, Divorce, Remarriage, and Cohabitation Data in the Federal Statistical System* (2001), available at <http://www.childstats.gov/countingcou>.

⁴¹ CLARK, *supra* note 26 at 155-172.

⁴² Two common paternity tests are human leukocyte antigen (HLA) tissue typing paternity testing and DNA fingerprinting. See Deborah A. Ellingboe, *Sex, Lies, and Genetic Tests: Challenging the Marital*

circumstances led to two developments in the last half of the 20th century that resulted in the expansion of both the legal definition of father and the perceived functions of fatherhood: 1) a weakening of the marital presumption and 2) a recognition that unmarried biological fathers have constitutionally protected relationships with their children.

While marriage continues to play an important role in defining fatherhood, the marital presumption has weakened in the last quarter century.⁴³ Although the nature of the evidence necessary to rebut the presumption varies widely, putative unmarried fathers can become “legal” fathers in a number of states by presenting evidence of both the biologic connection to the child and the extent of the relationship they have established with the child.⁴⁴

For fathers of nonmarital children, changes in the law have also resulted in legal recognition based on both biology and caretaking functions. In a series of decisions beginning in the 1970’s, the United States Supreme Court recognized 1) that unmarried

Presumption of Paternity Under the Minnesota Parentage Act, 78 MINN. L. REV. 1013, 1015 n.12 (1994). Although invasive HLA tissue typing can provide up to 98% probability of paternity, *see id.*, buccal swab DNA testing has become the most common method of determining paternity due to its noninvasiveness and near positive paternity identification. FORENSIC PATERNITY TESTING NEWSLETTER (April 2003), at <http://www.divorcenet.com/newsletter03/fptn008.html>. Buccal swab testing, which does not require lab technicians to collect, is available through home test kits provided by online services with turnaround times as minimal as 3-5 days for costs ranging from \$205 - \$575. *Id.*; SwabTest, *Bringing You the World of Genetics*, at <http://www.swabtest.com/>. Legal DNA testing, due to the necessary chain of custody, requires collection by appointment at a testing facility. Gene Tree DNA Testing Center, *DNA Paternity Testing for Legal Purposes*, at <http://www.genetree.com/product/dna-legaltests.asp>.

⁴³ See Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 566-571 (2000); Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 374 (1988).

⁴⁴ The marital presumption can now be challenged in many states by the mother, husband, and the child. *See, e.g.*, IND. CODE § 31-9-2-35.5 (2003); KY. REV. STAT. ANN. § 403.270 (Michie 2002); MINN. STAT. § 257C.01 (2003) (as amended by 2003 Minn. Sess. Law Serv. Ch. 7 (S.F. 356) (West)). But such challenges are often unsuccessful when subjected to a “best interests of the child” test. *See note 178 infra*. A sharply divided United States Supreme Court upheld the constitutionality of a strong marital presumption statute in *Michael H. v. Gerald D.*, *supra* note 2. A few years later, however, California joined the majority trend and amended and weakened its marital presumption statute. CAL. FAM. CODE § 7611 (2002).

fathers have legal rights and 2) the functions of fatherhood go beyond economic support.⁴⁵

In the 1972 decision *Stanley v. Illinois*,⁴⁶ the United States Supreme Court considered the rights of Peter Stanley who had lived with Joan Stanley and their children in an unmarried relationship for 18 years. When Joan Stanley died, Illinois, like most states at that time, did not recognize Stanley as the father and the children were declared wards of the state and placed in the custody of guardians. In holding that Illinois's statute violated both the guarantees of due process and equal protection, the Court found that Stanley's biological and caretaking commitment to his children entitled him to be recognized as their father under the law.⁴⁷ The Court further held that because unmarried fathers have a "liberty interest" in their continued relationship with children they had "sired and raised," the state must afford them an opportunity to establish their fitness prior to the children's removal.⁴⁸

Three decisions following *Stanley* reaffirmed the principle that an unmarried biological father's efforts to establish a relationship with his children – both as financial provider and nurturer– determine whether the law recognizes him as father. In the 1978 case *Quillion v. Walcott*,⁴⁹ the Supreme Court held that a putative father who had not attempted to establish a relationship with his 11-year old child could not prevent the child's adoption by the mother's husband when that adoption was in the best interests of the child. A year later, in *Caban v. Mohammed*,⁵⁰ the Court reaffirmed the connection

⁴⁵ John A. Blum, *Can An Unmarried Biological Father Recover Damages?*, 2002 UTAH L. REV. 577, 578-582.

⁴⁶ 405 U.S. 645 (1972).

⁴⁷ *Id.* at 658.

⁴⁸ *Id.* at 657-58.

⁴⁹ 434 U.S. 246 (1978).

⁵⁰ 441 U.S. 380 (1979).

between establishing an ongoing relationship with one's children and legal recognition of fatherhood. The Court invalidated a New York statute on equal protection grounds that precluded an unmarried father from adopting his biological children. In so doing, the Court held that there must be an "established . . . substantial relationship" between the unmarried father and the child in order for the father to exercise his rights.⁵¹

Finally, in *Lehr v. Robertson*,⁵² the Supreme Court found that states can impose a time limitation for a putative father to establish a relationship with his nonmarital child. The majority resisted the dissent's position that the biological connection itself was enough to create the legally protected status as father.⁵³ Instead, the majority held that "the significance of the biological connection is that it offers the natural father an opportunity . . . to *develop a relationship* with his offspring."⁵⁴

These developments in the law –the weakening of the marital presumption and the recognition of the importance of caretaking in *Stanley* and its progeny– have resulted in an expanded legal definition of fatherhood. Marriage to the child's mother, a biological connection, and an established relationship are all recognized as important elements in establishing legal fatherhood. Not all are required elements of fatherhood, but all are recognized as potential bases for establishing legal fatherhood. By expanding the category of men that could be legally recognized as fathers, the law also began to support an expanded conception of the functions of fatherhood that goes beyond economic

⁵¹ *Id.* at 393.

⁵² 463 U.S. 248 (1983).

⁵³ Justice White wrote a dissent in *Lehr* which was joined by Justices Marshall and Blackmun. It was their position that the "biological connection" is itself a relationship that creates a protected interest. "Thus the 'nature' of the interest is the parent-child relationship; how well-developed that relationship has become goes to its 'weight,' not its 'nature.' Whether *Lehr's* interest is entitled to constitutional protection does not entail a searching inquiry into the quality of the relationship but a simple determination of the *fact* that the relationship exists – a fact that even the majority agrees must be assumed to be established." *Id.* at 272.

⁵⁴ *Id.* at 262 (emphasis added).

support and includes the important functions connected with nurturing and caring for children's day to day needs. This re-envisioning of fatherhood has been strengthened by other developments in family law that reflect recognition of the importance of the child caretaking function of fatherhood.

In the area of custody, one of the first developments of this kind was the introduction of the concept of joint custody. The first joint custody statute was passed in 1979 in California⁵⁵ and most states eventually followed suit, either by joint custody statutes or through case law.⁵⁶ While many scholars have critiqued the implementation of joint custody statutes,⁵⁷ the enactment of such statutes reflects a legal recognition of father's roles as caretakers of their children.

⁵⁵ See Legislative History of CAL. FAM. CODE § 3080.

⁵⁶ About 41 states and the District of Columbia have statutes authorizing courts to order joint or shared custody. Of these 41, 29 authorize the court to order joint custody but do not require it. ALA. CODE § 30-3-152(a) (1998), ALASKA STAT. § 25.20.060 (Michie 2002), ARIZ. REV. STAT. ANN. § 25-403(B) (West Supp. 2003), ARK. CODE ANN. § 9-13-101(B)(1)(A) (Michie Supp. 2003), COLO. REV. STAT. ANN. § 14-10-124(b) (West 1996), DEL. CODE ANN. Tit. 13 §§ 722 & 727 (1999), HAW. REV. STAT. § 571-46.1 (1993), 750 ILL. COMP. STAT. ANN. 5/602.1(b) (West 1993), IND. CODE ANN. § 31-17-2-13 (Michie 2003), KY. REV. STAT. ANN. § 403.270 (Michie 2003), LA. REV. STAT. ANN. § 9:335 (West 1999), MD. CODE ANN., FAM. LAW § 5-203(d) (Supp. 2004), MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 2004), MICH. COMP. LAWS ANN. § 722.26a (West 2002), MO. ANN. STAT. § 452.375 (West 2002), NEB. REV. STAT. § 42-364(5) (Supp. 2004), N.J. STAT. ANN. § 9:2-4 (West 2002), N.C. GEN. STAT. § 50-13.2 (2003), OKLA. STAT. ANN. tit. 43, § 109(B) (West 2001), OHIO REV. CODE ANN. § 3109.04(2) (West Supp. 2004), OR. REV. STAT. § 107.105 (2003), 23 PA. CONS. STAT. ANN. § 5304 (West 2001), S.D. CODIFIED LAWS § 25-5-7.1 (Michie 1999), TENN. CODE ANN. § 36-6-101(a)(1) (Supp. 2003), UTAH CODE ANN. § 30-3-10.2 (Supp. 2004), VT. STAT. ANN. tit. 15 § 665(a) (2002), VA. CODE ANN. § 20-124.2(B) (Michie 2004), W. VA. CODE ANN. § 48-9-207(a) (Michie 2001), WYO. STAT. ANN. § 20-2-201 (Michie 2003). Twelve states and the District of Columbia have some form of presumption in favor of joint custody. CAL. FAM. CODE § 3080 (West 1994), CONN. GEN. STAT. ANN. § 46b-56a (West 2003), D.C. CODE ANN. § 16-914(a)(2) (Supp. 2004), FLA. STAT. ANN. § 61.13(2)(b) (2004), IOWA CODE ANN. § 598.41 (West 2000), KAN. STAT. ANN. § 60-1610(a)(4) (1994), ME. REV. STAT. ANN. tit. 19-A § 1653(2) (West Supp. 2003), MINN. STAT. ANN. § 518.17(2) (West Supp. 2004), MISS. CODE ANN. § 93-5-24(4) (Supp. 2003), NEV. REV. STAT. ANN. § 125.490 (Michie 2004), N.H. REV. STAT. ANN. § 458.17 (Supp. 2003), N.M. STAT. ANN. § 40-4-9.1 (Michie 1999), WIS. STAT. ANN. § 767.24 (2) (West Supp. 2003). Nine states do not have statutes but can order joint custody under the courts' general equitable powers. GA. CODE ANN. § 19-9-1 (2004), IDAHO CODE § 32-717 (Michie 1996), MONT. CODE ANN. § 40-4-212 (2003), N.Y. DOM. REL. LAW § 240 (McKinney Supp. 2004), N.D. CENT. CODE § 14-09-06 (2003), R.I. GEN. LAWS § 15-5-16 (2003), S.C. CODE ANN. § 20-3-160 (Law. Co-op. 1984), TEX. FAM. CODE ANN. § 152 (Vernon 2001), WASH. REV. CODE ANN. § 26.09.002 (West 1996).

⁵⁷ See, e.g., Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L. Q. 201 (1998) (arguing that studies supporting joint custody are misleading because research tools are flawed and the ultimate success of a joint custody arrangement depends upon cooperation between the parents);

Another development over the last decade that has promoted involvement of fathers in children's lives when parents live apart is the growing use of court ordered "parenting classes" in custody cases which emphasize the importance of both parents in the caretaking of children.⁵⁸ "Parenting plans" also promote the involvement of fathers in child rearing by requiring the parties to delineate each parent's responsibilities for the care of the children and decisions about education, health care, discipline and education.⁵⁹ About ten states and the District of Columbia currently require parties to submit proposed parenting plans prior to a grant of custody. Another eight states have statutes that give judges discretion to require parenting plans in custody cases.⁶⁰

Margaret M. Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U.L. REV. 767 (1997) (arguing in favor of resolving custody issues through agreements made by parents, rather than by the imposition of joint custody by courts).

⁵⁸ AFCC DIRECTORY OF PARENT EDUCATION PROGRAMS (2000) (providing brief program descriptions and contact people for parenting education classes). *See also*, Peter Salem et al., *Special Issue: Parent Education in Divorce and Separation*, 34 FAM. & CONCILIATION REV. No. 1 (1996).

⁵⁹ *See* Francis J. Cantania, Jr., *Learning From the Process of Decision: The Parenting Plan*, 2001 BYU L. REV. 857 (2001); Don R. Ash, *Adoption and Custody Law in Tennessee*, 22 MEMPHIS ST. LAW. R. 769, 804-805 (1997)

⁶⁰ ALA. CODE § 30-3-153 (1995) amended by Pub. L. No. 96-520 (1996) (requiring parents in joint custody cases to submit a plan regarding the care and custody of the child); ARIZ. REV. STAT. ANN. § 25-403(F) (West Supp. 2003) (before a court awards joint custody, parents must submit a proposed parenting plan); 750 ILL. COMP. STAT. ANN. 5/602.1(b) (1993) (in cases where a court considers an award of joint custody, the court requests that the parents produce a Joint Parenting Agreement specifying each parent's powers, rights and responsibilities regarding the child); MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 2003) ("At the trial on the merits, if...either party seeks shared legal or physical custody, the parties, jointly or individually, shall submit...a shared custody implementation plan."); MO. ANN. STAT. § 452.375(9) (2002) ("any judgment providing for joint custody shall include a specific written parenting plan setting forth the terms of such parenting plan arrangements... Such plan may be a parenting plan submitted by the parties...or, in the absence thereof, a plan determined by the court...the custody plan approved and ordered by the court shall be in the court's discretion and shall be in the best interest of the child."); MONT. CODE ANN. § 40-4-234(1) (2003) ("In every dissolution proceeding, proceeding for declaration of invalidity of marriage, parenting plan proceeding, or legal separation that involves a child, each parent or both parents jointly shall submit...a proposed final plan for parenting the child..."); N.M. STAT. ANN. § 40-4-9.1(F) (Michie 1999) (prior to the award of joint custody, a court shall approve a parenting plan (including division of child's time and care between parents) for the implementation of the custody arrangement); OKLA. STAT. ANN. tit. 43, § 109(C) (West 2001) ("If either or both parents have requested joint custody, said parents shall file their plans for the exercise of joint care, custody and control of their child."); WASH. REV. CODE ANN. § 26.09.181 (West1996) ("In any proceeding...each party shall file and serve a proposed permanent parenting plan"). *But see* DEL. CODE ANN. tit. 13 § 727 (1999) (the court may grant temporary joint or sole custody for up to six months to allow the parents the opportunity to show the court they are willing and able to cooperate with the custody order).

A new standard for resolving custody disputes proposed by a group of academics, judges and lawyers from the American Law Institute (ALI) has also contributed to an expanded definition of fatherhood that, in some instances, places caretaking on the same level as marriage and biology in establishing parental rights.⁶¹ The ALI proposes a substantive standard for custody that limits the court's ability to resort to parental stereotypes, shifting the paradigm in custody cases from parents to children.⁶² Instead of asking which parent has deviated from the prescribed role,⁶³ the new approach states that a child's best interest is served by "continuing existing parent-child attachments" and giving responsibility to "adults who love the child, know how to provide for the child's needs, and place a high priority on doing so."⁶⁴

A number of scholars have also made the case for legal recognition of "de facto" parents by challenging the law's adherence to the concept of exclusive parenthood based on marriage or biology.⁶⁵ Katharine Bartlett, one of the first to advocate for "non-exclusive parenthood," argues that when the nuclear family has broken down, children should have "the opportunity to maintain important familial relationships with more than one parent or set of parents . . . in the growing range of circumstances in which these

⁶¹ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 2.18 A.L.I. (2002).

⁶² ALI Principles use terms "custodial and decisionmaking responsibility" rather than physical and legal custody. *Id.* at § 2.03(3)-(4).

⁶³ For a review of child custody cases in which courts relied on the father as breadwinner and mother as nurturer stereotypes, see Murphy, *supra* note 20, at 696-99.

⁶⁴ *Id.*; § 218 A.L.I. (2002).

⁶⁵ An early explanation of the importance of the defacto or psychological parent is found in the landmark work of psychologists, Joseph Goldstein, Anna Freud and Alfred Solnit: "Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult – but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be." JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD, 17-20 (1973).

relationships are formed outside the nuclear family.”⁶⁶ Other scholars have argued for a more expansive view of non-exclusive parenthood, advocating for a “rewriting of the definition of the family.”⁶⁷ Under these proposals, the law’s recognition of adults who have assumed one or more parental roles is not predicated on the breakdown of the child’s parents’ marriage. These scholars reject the privileged status of the nuclear family, finding it insufficient to meet the needs of children.⁶⁸ Instead, these proposals envision a broader, more fluid family network, that one scholar has called “webs of care.”⁶⁹

While these proposals for non-exclusive parenthood vary in the criteria that trigger legal recognition of caretakers, they all place caring for the child as the condition for such recognition. Thus, they replace biology and, in most instances, marriage, with a functional definition of parenthood. They offer a theoretical framework that appropriately challenges the “all or nothing” biology-based definition of fatherhood emerging from the paternity disestablishment cases.

The work of scholars arguing against exclusive parenthood is also reflected in the ALI Principles which accord legal protection to “social” or “functional” fathers and

⁶⁶ Bartlett, *supra* note 2, at 882-883. *See also*, William C. Duncan, *Don’t Ever Take a Fence Down: The Functional Definition of Family – Displacing Marriage in Family Law*, 3 J.L. & FAM. STUD. 57 (2001); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parental Rights*, 14 CARDOZO L. REV. 1747, 1754-57(1993) (arguing that the biological mother’s unmarried partner who cared for mother and child throughout pregnancy and early childhood should be given legal parental status).

⁶⁷ Matthew M Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J. L. & FEMINISM, 83, 143 (2004). *See also*, Alison Harvison Young, *supra* note 34, Gilbert Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994); Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461 (1996).

⁶⁸ Kavanagh, *supra* note 67, at 93; Young, *supra* note 34, at 512-13.

⁶⁹ Kavanagh, *supra* note 67, at 137; Young, *supra* note 34, at 516-18; While recognizing the need for placing decision-making authority for children in a “core family unit,” these proposals recognize that parental roles may be allocated among several adults and argue that the law should recognize multiple caretakers.

others similarly situated.⁷⁰ In addition to legal parents, the ALI recognizes parents “by estoppel.” A parent by estoppel is a person who acts as a parent in circumstances that would estop the child’s legal parent from denying the claimant’s parental status. Parent-by-estoppel status is created when an individual (1) is obligated for child support, or (2) has lived with the child for at least two years and has a reasonable belief that he is the father, or (3) has had an agreement with the child’s legal parent since birth (or for at least two years) to serve as a co-parent, provided that recognition of parental status would serve the child’s best interest.⁷¹ Both legal parents and parents by estoppel are entitled to presumptive allocations of custodial and decision-making responsibility.⁷²

Building on the work of researchers and scholars, legislatures and judges have also begun to give increased recognition to “functional” parents when deciding custody and visitation cases. Over the last three decades, a few states⁷³ and a handful of courts⁷⁴

⁷⁰ ALI Principles *supra* note 61 §2.21(1). The ALI, courts and legislatures use a variety of terms to describe an individual who has, based on caretaking over a period of time, formed a strong bond with a child. The terms include “de facto,” “social,” “functional,” or “psychological” parent. While these terms may have slightly different meanings attributed by different scholars or courts, they are used interchangeably throughout this Article.

⁷¹ ALI Principles §2.03(1)(b)(2002).

⁷² ALI Principles §2.09(1)(a) and §2.10(b). §2.10(4)The Principles also recognize “defacto parents.” Under the ALI, a defacto parent is a person, other than a legal parent or parent by estoppel, who has regularly performed an equal or greater share of caretaking as the parent with whom the child primarily lived, lived with the child for a significant period (not less than two years), and acted as a parent for non-financial reasons (and with the agreement of a legal parent) or as a result of a complete failure or inability of any legal parent to perform caretaking functions. *Id.* at §2.03(1)(c). While a defacto parent may acquire some parental rights, the Principles still privilege the legal parent’s rights over the defacto parent’s. A defacto parent is precluded from receiving a majority of custodial responsibility for the child if a legal parent or a parent by estoppel is fit and willing to care for the child (§2.18(1)(a)). Similarly, a defacto parent’s rights may be limited or denied if the custodial allocation would be impractical in light of the number of other adults to be allocated custodial responsibility (§2.18(1)(b)).

⁷³ *See, e.g.*, OR. REV. STAT. § 109.119 (2001) (granting rights to “a person who establishes emotional ties creating child-parent relationship or ongoing personal relationship”); WIS. STAT. § 767.245 (2001) (granting rights to a person who “maintained a relationship similar to a parent-child relationship”).

⁷⁴ *Matter of J.C.*, 184 Misc.2d 935 (2000); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (granting visitation to the lesbian co-parent of twins but denying joint custody); *Weinand v. Weinand*, 616 N.W.2d 1 (Neb. 2000) (granting visitation rights to former stepparent); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (where a non-biological parent proves she has a parent-like relationship with a child, a court may grant visitation if it is in the best interests of the child); *Seeger v. Seeger*, 547 A.2d 424 (Pa. Super. Ct. 1988) (granting partial custody and visitation rights to non-biological father who was married to child’s mother

have granted non-biological, non-marital caretakers such as stepfathers or partners in same sex relationships rights similar to those granted legal fathers. While most of these statutes and decisions continued to distinguish between legal parents and third parties, they are a step toward recognition of social fatherhood in that rights are accorded based on the adult's caretaking relationship to the child rather than the adult's biological status.⁷⁵ As one leading family court trial judge commented:

Biology is not always determinative of a man's role in the life of a child. When I examine the ultimate issue of what is in the child's best interest, I have found that a biological connection is not necessarily required for a paternal link to grow between the man and the child. At the same time, while there may be a biological tie, biology alone does not make a good father.⁷⁶

Thus, by the late 20th century, the law had begun to recognize men as fathers based on marriage, biology, caretaking or some combination of these. These legal developments supported a view that fathers have a rich, complex role in their children's

and assumed the role of child's father for eight years); *Paquette v. Paquette*, 499 A.2d 23 (Vt. 1985) (a stepparent standing in loco parentis may be awarded custody of a non-biological child if he shows that the natural parent is unfit or that extraordinary circumstances exist and that it's in the best interests of the child); *Carter v. Broderick*, 644 P.2d 850 (Alaska 1982) (finding that the legislature intended to allow third party visitation and that where a stepparent is in loco parentis, a stepchild is considered a "child of the marriage"); *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978) (holding that a stepfather had a right to a hearing to determine whether he stood in loco parentis to his stepchild and whether it was in the child's best interest to have visitation with his stepfather). While these cases generally limit the parental rights to visitation, some courts have extended custodial rights to defacto parents *R.E.M. v. S.L.V.*, No. FD-15-748-98N (N.J. Ocean County Super. Ct. Nov. 2, 1998) (awarding non-biological mother both visitation and joint legal custody); *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996) (finding that nonlegal parent may have standing to seek partial custody of biological child of former lesbian partner if she can establish that she stood in loco parentis to child during relationship); See also, Robyn Cheryl Miller, *Child Custody and Visitation Rights for Non-Biological "Parents": Analyzing V.C. v. M.J.B.*, N.J. LAW MAG., Feb. 2001, at 17.

⁷⁵ The United States Supreme Court's recent decision in *Troxel v. Granville*, 530 U.S. 57 (2000), endorsing the common law tradition of autonomy for legal parents, may be seen as a statement in the opposite direction. However, the *Troxel* Court clearly supported continued legal recognition of nonparents based on its assumption of caretaking duties for the children. *Id.* at 64.

⁷⁶ The Honorable Sharon S. Townsend, *Fatherhood: A Judicial Perspective, Unmarried Fathers and the Changing Role of the Family Court*, FAM. CT. REV., Vol. 41 No. 3, July 2003 354-361.

lives. This role includes not only financial support but also the emotional and physical support that comes from ongoing connection and care.

II. Fatherhood as Biology and Economic Support: The Impact of Child Support Enforcement and Welfare Reform on Fatherhood

A. Child Support and Welfare Reform

Against a backdrop of laws expanding view of fatherhood, welfare and related child support policies have pushed the law in the opposite direction. Three decades of welfare “reform” have resulted in policies that threaten to limit the meaning of fatherhood to biology and financial support. While the primary goal of modern child support law was to reduce welfare costs,⁷⁷ many hoped improved child support collection would reduce poverty in low income custodial households.⁷⁸ These efforts, however, have had a number of unintended consequences that adversely impact low income families, particularly the relationship between fathers and children in those families.

The connection between legal recognition of fatherhood and welfare law begins with the requirement that custodial parents – overwhelmingly mothers – seeking public benefits for their children must identify the fathers of those children.⁷⁹ The principle that non-custodial parents should reimburse the state for its costs in supporting their children has been in place since the beginning of the child support “revolution” in the mid-

⁷⁷ See, e.g., Ann Estin, *Moving Beyond the Child Support Revolution*, 26 LAW & SOC. INQUIRY 505 (2001) (“Much of the motivation for the enormous national effort and expense devoted to the child support revolution was the promise that better support enforcement would help keep single-parent families off the welfare rolls and allow the government to recoup its growing expenditures for public benefits”). See also, Brito, *supra* note 23 at 250-51, 259.

⁷⁸ See note 22 *supra*.

⁷⁹ The overwhelming majority of children who live with only one parent live with their mothers. [cite] This article follows rhetoric and reality of welfare reform in assuming the named welfare recipient is a mother caring for children and the child support obligor who the state looks to for reimbursement is the father.

1970s.⁸⁰ In 1974, Congress enacted Title IV-D of the Social Security Act which created the Child Support Enforcement Act and established the Federal Office of Child Support Enforcement.⁸¹ The Act required welfare recipients to assign their rights to child support to the state⁸² to offset welfare costs of the federal government. Because identifying the non-custodial parent is the initial step in child support enforcement,⁸³ welfare recipients were required to cooperate in identifying the non-custodial parent.⁸⁴

In response to exceedingly low child support collection awards⁸⁵ and a belief that a “lack of a strong child support enforcement system contributed to child poverty and welfare dependency,”⁸⁶ Congress enacted more rigorous enforcement tools in the Child Support Enforcement Amendments of 1984,⁸⁷ requiring that states create fixed formulae for establishing the level of child support and impose sanctions such as income withholding, for child support obligors who fail to comply with child support orders.⁸⁸

⁸⁰ D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW, 763 (2002) (describing child support enforcement techniques as having “undergone a revolution in recent decades as a result of federal involvement”). For a complete history of the “federalization” of child support, see Cahn & Murphy, *infra* note 108.

⁸¹ FAMILY SUPPORT ACT, PUB. L. NO. 93-647, TITLE IV-D, 88 STAT. 2348 (1974) (CODIFIED AS 42 U.S.C. § 651-70 (1994)). The Act created a partnership between federal and state government wherein each state administered child support enforcement programs under the direction of federal policy and was reimbursed for a portion of the enforcement expenditures. ELAINE SORENSON, MARK TURNER, NATIONAL CENTER ON FATHERS AND FAMILIES, BARRIERS IN CHILD SUPPORT POLICY: A REVIEW OF THE LITERATURE (1995), <http://www.ncoff.gse.upenn.edu/litrev/sblr.htm>.

⁸² 42 U.S.C. 602(A)(26) (current version as amended codified at 42 U.S.C. § 608(A)(3) (1999)).

⁸³ E. WATTENBERG, PATERNITY ACTIONS AND YOUNG FATHERS – YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES (1993).

⁸⁴ 42 U.S.C. § 654 (29)(A)(West 2002) (requiring that, as a condition for receiving child support, a parent must provide the name “and such other information as the state may require” with respect to the noncustodial parent.)

⁸⁵ The average child support award in 1983 was \$2,521. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, Series P-23, No. 148, *Child Support and Alimony: 1983 (Supplemental Report)* 10 Table G (1986). A conservative estimate of annual expenditures that could have been expected to be made on behalf of two children in a two-parent, medium income family in 1983 was \$10,028. Thomas J. Espenshade, *Investing in Children: New Estimates of Parental Expenditures* 3 Washington D.C.: Urban Institute Press (1984) (Espenshade’s 1981 estimates updated to 1983 dollars using the Consumer Price Index).

⁸⁶ SORENSON AND TURNER, *supra* note 81.

⁸⁷ Child Support Enforcement Amendments of 1984, Pub.L.No. 98-378 (1984), § 18(b) (current version as amended codified at 42 U.S.C. § 667(A)(2001)).

⁸⁸ *Id.*

Four years later, Congress passed the Family Support Act of 1988,⁸⁹ which marked the real beginning of making paternity establishment the cornerstone of the modern child support and welfare system.⁹⁰ Prior to this federal legislation, the state was relatively uninvolved in establishment of paternity, leaving the resolution of the issue to parents.⁹¹ This Act requires that each state establish a minimum number of paternity declarations or face financial penalties.⁹² The Act also allowed for, but did not require, genetic testing in contested paternity cases and imposed time limits for states to process paternity cases.⁹³

Congress continued the push to increase and streamline paternity establishment when it enacted the Omnibus Budget Reconciliation Act of 1993.⁹⁴ Noting that the “first step in securing child support is the establishment of paternity,”⁹⁵ the Act mandated, among other things, that states “develop a simple administrative process for voluntarily acknowledging paternity and requiring that these procedures be available in hospitals.”⁹⁶

⁸⁹ Family Support Act of 1988, Pub. L. No. 485, 102 Stat. 2343 (current version codified at 42 U.S.C. §§ 666-67(2001)).

⁹⁰ “[Paternity establishment] may be considered the foundation of the [Child Support Enforcement] program. To improve the lives of children, one of [the] major goals is to increase paternity establishment rates for those children born outside of marriage.” *Hearing on Oversight of the Child Support Enforcement Program Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, (Sept. 23, 1999) (Statement of Honorable Olivia A. Golden, Assistant Secretary for Children and Families).

⁹¹ Prior to the federal push, paternity was established for only one-third of non-marital children born each year. Brito, *supra* note 23 at 259.

⁹² D. Meyer, *Paternity and Public Policy: Findings, Policy Issues, and Future Research Needs; Paternity Establishment: A Public Policy Conference*. Vol. 1: Overview, History, and Current Practice, Institute for Research on Poverty Special Report. University of Wisconsin (Aug. 1992).

⁹³ 42 U.S.C. § 666(a)(5)(B)(i).

⁹⁴ Employee Retirement Income Security Act of 1974, Pub. L. No. 103-66, § 4301(a), 107 Stat. 312, 372 (1993) (codified at 29 U.S.C. §§ 1021, 1144, 1169 (1994)).

⁹⁵ Pub. L. No. 103-66, 107 Stat. 312 (1993); Charlotte L. Allen, *Federalization of Child Support: Twenty Years and Counting*, 73 MICH. B.J. 660, 661 (1994).

⁹⁶ 42 U.S.C. §666(a)(5)(C)(ii).

More aggressive performance standards for establishing paternity were also included in the 1993 statute.⁹⁷

In 1996 Congress launched its most comprehensive effort “to end welfare as we know it”⁹⁸ and enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).⁹⁹ This law affects nearly every aspect of child support services, particularly paternity establishment. To further facilitate paternity establishment, the Act requires states to permit paternity establishment at any time before a child is 18 years old.¹⁰⁰ States were again mandated to simplify the process for voluntary paternity acknowledgment, including procedures enacting a program based in hospitals and other designated sites.¹⁰¹ States risk federal penalties unless they meet the ultimate goal of paternity establishment in 90% of welfare cases statewide.¹⁰²

Under PRWORA, the state is only required to provide genetic testing upon request and in certain contested cases.¹⁰³ To further encourage paternity establishment, the Act strengthened the “cooperation requirement” in which a mother seeking public assistance must aid in identifying the father of the child.¹⁰⁴ Failure of women to cooperate

⁹⁷ Compare P.L. 100-485 § 111(a)(1988) with P.L. 103-665 103721 (1993) (current version as amended at 42 U.S.C. § 652(g)(1999)).

⁹⁸ While PRWORA was soundly criticized by advocates for the poor for its caps on eligibility for benefits, the emphasis on streamlining paternity establishment was largely ignored. Paul Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 526, n.42. For an analysis of the context of the political support for PRWORA, see Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997 at 43-45.

⁹⁹ PRWORA, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

¹⁰⁰ *Id.* § 666(a)(5).

¹⁰¹ *See id.*

¹⁰² 42 U.S.C. § 652(g).

¹⁰³ 42 U.S.C. § 666(a)(5)(B)(i).

¹⁰⁴ 42 U.S.C. § 608(a)(2). Good cause may be shown where naming a putative father may result in violence against the mother and/or child. Other circumstances such as rape, incest, artificial insemination, and single parent adoption may result in a good cause showing. However, where the mother may simply not want assistance from the father or the father’s involvement, the State will generally demand such involvement when there is a request for state assistance. See Susan Notar and Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL’Y & L. 657 (2000); See generally Anna Marie Smith,

in identifying putative fathers without a showing of good cause will result in a reduction of benefits or a complete denial of assistance.¹⁰⁵ These policies were further strengthened by federal legislation in 1998¹⁰⁶ that provides significant monetary incentives to states to maximize paternity establishment.¹⁰⁷

PRWORA also strengthened a variety of sanctions for nonpayment of child support that had been added in previous legislation. These include income withholding, state and federal income tax refund intercept, and revocation of professional motor vehicle and recreational licenses.¹⁰⁸ While the imposition of sanctions had traditionally been dependent upon judicial findings after a hearing, PRWORA made the imposition of most sanctions automatic.¹⁰⁹

The federal system, then, has established a framework for paternity establishment for men identified by custodial mothers seeking public benefits through two principal methods.¹¹⁰ Under the most common method,¹¹¹ parents can sign a voluntary paternity

The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview, 8 MICH. J. GENDER & L. 121 (2002).

¹⁰⁵ 42 U.S.C. § 608(a)(2)(A), (B); “The Act specifies that applicants for TANF assistance and Medicaid must assign support rights, including distribution, to the state and cooperate in establishing paternity. The state must deduct a minimum of twenty-five percent from a family’s cash assistance grant, and may end the family’s eligibility for grants altogether, for “non-cooperation” in establishing paternity, or if a child support order is modified or unenforced without good cause. Additionally, if the Federal government finds that states are not enforcing non-cooperation sanctions against individuals, the state will be penalized up to five percent of the TANF block grant for the next fiscal year.” Candice Hoke, *Symposium: State Discretion Under New Federal Welfare Legislation: Illusion, Reality, and a Federalism-Based Constitutional Challenge*, 9 STAN L. REV. 115, 116 (1998).

¹⁰⁶ Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200; Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (1998) (increasing penalties under the Child Support Recovery Act of 1992 from misdemeanor to felony).

¹⁰⁷ 42 U.S.C. § 652(g).

¹⁰⁸ For a summary of sanctions added by child support legislation in the 1980’s and 90’s, see Naomi Cahn & Jane Murphy, *Collecting Child Support: A History of Federal and State Initiatives*, J. POVERTY L. & POL’Y, 165, (2000).

¹⁰⁹ 42 U.S.C. § 666(c)(1).

¹¹⁰ The third method of establishing legal paternity is through marriage. If the parents marry anytime before the birth of the child, the baby will be considered to be the legal child of the mother’s husband. If the parents marry after the child’s birth and the husband publicly acknowledges the child as his, there is a presumption that the husband is the legal father. See notes 24-28 *supra*.

acknowledgement in the hospital, the birth record agency or other designated site.¹¹² No paternity order is issued. After 60 days, the acknowledgement itself is the legal finding of paternity and is entitled to full faith and credit in other states.¹¹³ Although the acknowledgement must contain a statement of the legal consequences of signing the documents, there is no requirement that counseling or genetic testing be offered or conducted before the acknowledgement is signed and legally binding.¹¹⁴

The second method of establishing paternity is through a judicial proceeding typically initiated by the state after the mother applies for welfare and identifies someone as the putative father.¹¹⁵ Although the child support agency must make genetic testing available and can order the tests without court supervision,¹¹⁶ there is no federal requirement that genetic tests be conducted before paternity is established by this method either. In most cases these court based paternity proceedings are resolved by consent or

¹¹¹ Nationally, according to the federal Office of Child Support Enforcement (OCSE), paternity was established or acknowledged for over 1.5 million children in fiscal year 2003, the last year for which data is currently available. Of these, 662,500 were the result of legal actions and almost 862,000 were through the voluntary acknowledgment process. Child Support Enforcement (CSE) FY 2003 Data Report (2004), Table 2. The report is available at www.acf.dhhs.gov/programs/cse/pubs. In some states, the percentage of paternity establishments through voluntary acknowledgment has been particularly high. In Massachusetts, for example, 77% of fathers voluntarily acknowledge paternity in the hospital. *Child Support Enforcement Legislation: Hearing on Welfare Reform, 2003: S. HRG 108-147 Before the Sen. Comm. on Finance*, 108th Cong. (2003) (statement of Marilyn Ray Smith, Deputy Commissioner and IV-D Director). The voluntary paternity process was used for 74.74% of unmarried births in New Jersey to establish paternity in 1997. *Hearing Advisory on Oversight of the Child Support Enforcement Program, 1999: H.R.-10 Before the House Comm. on Ways and Means Human Resources Subcom.*, 106th Cong. (1999) (statement of Alisha Griffin, Assistant Director New Jersey Division of Family Development).

¹¹² 42 U.S.C.A. § 666(a)(5)(C) (West Supp. 2002). In some states, voluntary acknowledgment is permitted at a wide variety of sites including community centers, health centers, and preschool programs. The law gives states the option to allow voluntary acknowledgment at sites other than hospitals and birth records agencies if they use the same forms and materials. 45 CFR § 302.70(a)(5)(iii)(B) and (C).

¹¹³ *Id.* § 666(a)(5)(C)(iv).

¹¹⁴ *Id.* at § 666 (a)(5)(C)(i)(I). Federal law does require that the acknowledgement form meet certain requirements. *Id.* at § 666(a)(5)(C)(iv). Action Transmittal 98-02 (January 23, 1998) sets forth those requirements. They include current name, social security number, and date of birth of the mother and the father; current full name, date of birth, and birthplace of the child; a brief explanation of the legal significance of the document; a statement that either parent can rescind within 60 days; a clear statement that the parents understand that signing is voluntary and what the rights, responsibilities, and consequences of signing are; and signature lines for the parents and witnesses/notaries.

¹¹⁵ See notes 82-84 *supra* and accompanying text.

¹¹⁶ See 42 U.S.C. §§ 666(C)(1)(A), 666(A)(5)(B)(II)(I), 666(A)(5)(F)(III)(1999).

default without genetic testing.¹¹⁷ After the consent or default, the court enters an order and usually sets child support at the same time.¹¹⁸ In contested cases of paternity, federal law has also streamlined the adjudication process in court and administrative proceedings in a variety of ways, including eliminating the right to a jury trial.¹¹⁹

B. From “Deadbeat” and “Duped” Dads to “Dead Broke” and “Disappearing” Dads

Over the last three decades, then, both the federal and state governments have constructed massive bureaucracies focused on making non-custodial parents – mostly low income fathers – pay child support. This “revolution” in child support was, for the most part, enthusiastically received by many scholars and policymakers, particularly advocates for women and children.¹²⁰ The goals of “legalizing” the father-child relationship for more children of unmarried parents and increasing and enforcing court-ordered child support for all children in single parent households held the promise of reducing child poverty. Almost two decades later, however, it is time to reexamine the underlying assumptions driving these reforms as well as the impact of these reforms on low-income families.

1. The Assumptions

The first assumption that needs to be re-examined is that the enhanced child support enforcement scheme is critical to putting food in the mouths of children in poor

¹¹⁷ See *supra* notes 96, 100-03 and accompanying text.

¹¹⁸ 42 U.S.C. § 666. Neither the acknowledgement process nor judicial proceedings establishing paternity typically provide an opportunity to address visitation or other issues related to the developing of a relationship between the newly recognized father and the child. Instead they are focused exclusively on establishing the legal basis for child support orders. Hatcher & Lieberman, *infra* note 167, at 8 n.19.

¹¹⁹ 42 U.S.C. 666(a)(5).

¹²⁰ See *supra* note 22.

families.¹²¹ While there has been some success in improving child support collection,¹²² the child support regime has largely failed to reduce child poverty.¹²³ There is some evidence that the receipt of child support may be critical to non-welfare custodial households.¹²⁴ But the same research shows that aggressive child support enforcement has not reduced poverty for welfare families.¹²⁵ The reasons for this are multifaceted but not particularly complex. First, there has been limited success in obtaining child support orders for never married mothers, the population most likely to be receiving welfare benefits.¹²⁶ Even for those children who have orders, custodial mothers receiving welfare obtain no benefit unless the support paid exceeds their welfare benefits. As noted earlier, under the child support distribution scheme for families on welfare, the custodial parent assigns her right to support and the state retains support paid by noncustodial parents as reimbursement for welfare benefits.¹²⁷

¹²¹ Juliet Eilperin, *House Bill Target Deadbeat Parents*, WASH. POST, May 13, 1998, available in 1998 WL 11579927; Cokie & Steven Roberts, *Going After Those Deadbeat Dads at the Federal Level*, NEW ORLEANS TIMES-PICAYUNE, Aug. 1, 1997, available in 1997 WL 12658346 (reporting a statement made by Congressman Henry Hyde in support of aggressive child support enforcement: “A lot of little kids are undergoing economic child abuse.”)

¹²² PAUL LEGLER, ANNIE E. CASEY FOUNDATION, *Low-Income Fathers and Child Support: Starting Off on the Right Track*, 6 (2003) (hereinafter “Casey Study”) (child support collections increased from \$8 billion in 1992 to \$18 billion in 2000).

¹²³ J. THOMAS OLDHAM, *CHILD SUPPORT: THE NEXT FRONTIER* ix (J. Thomas Oldham & Marygold S. Melli eds., 2000) (summarizing recent research on the impact of child support reforms and finding “there is considerable evidence that reforms have failed to accomplish one of the most important objectives of child support, that of reducing child poverty.”)

¹²⁴ Institute For Women’s Policy Research, *How Much Can Child Support Provide? Welfare, Family Income, and Child Support*, 6 (Mar. 1999) (finding that for many non-welfare low-income families child support contributes to a lower poverty rate but child support does not have the same effect on single-mother families receiving welfare).

¹²⁵ *Id.* See also, *supra* note 122-128 and accompanying text.

¹²⁶ Marsha Garrison, *The Goals and Limits of Child Support Policy*, in *CHILD SUPPORT: THE NEXT FRONTIER* *supra* note 123, at 18 (citing Bureau of Census data demonstrating that more than three quarters of never-married mothers still do not have child support awards.)

¹²⁷ See note 82 *supra*. See also, 42 U.S.C. § 657(a)(1)(A). Prior to PRWROA, a mandatory fifty-dollar pass through existed which gave children on welfare some benefit for child support paid on their behalf. Family Support Act of 1988, Pub. L. No. 100-485 § 102, 102 Stat. 2343, 2346 (1988). Even this modest benefit to welfare families was repealed under PRWROA. While the states may (but are not required to) provide a pass through of any amount they wish, it will not be financed by the federal government. 45 U.S.C. 657(a)(1)(B). The funding must come from the state’s portion of collected support. See *id.* Thus,

In addition to the structural issues in welfare law that redirect child support from families to the state, the desperate economic circumstances of most fathers of children on welfare,¹²⁸ almost ensures the failure of the child support system to effectively address child poverty. As Marsha Garrison writes:

Child support policy can avert poverty only if that poverty derives from an income loss associated with family dissolution or nonformation. If parents lack the resources to avoid poverty when together, child support alone cannot remedy the problem . . . Because most poor children do not have ‘deadbeat dads’ who can contribute significantly to their support, child support policy will offer the most help to the least needy: It cannot be expected to achieve a major reduction in children’s poverty.¹²⁹

A related assumption that needs to be reexamined is that the low-income fathers who are the target of aggressive enforcement are all “deadbeats.”¹³⁰ The image of the “Deadbeat Dad” is well-entrenched in American culture.¹³¹ It evokes an image of a non-custodial father who has impoverished his children while improving his own standard of living after separation from the family.¹³² Media coverage¹³³ and political rhetoric¹³⁴

the ever-increasing resources devoted to collect child support from low-income fathers have no direct impact on the financial well-being of children on welfare.

¹²⁸ See *supra* notes 134-39 and accompanying text.

¹²⁹ Garrison, *supra* note 124 at 22, 25. Although beyond the scope of this Article, a number of promising proposals have been made to reduce child poverty by guaranteeing children a minimum level of income that is not linked to the amount of child support collected from their parents and is guaranteed through the child’s minority without regard to their parent’s work choices or eligibility for welfare. See e.g. Martha Fineman, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2003); Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 *VIRGINIA L. REV.* 2523 (1995)

¹³⁰ Daniel Borunda, *Roundup Nabs Alleged Deadbeat Dads*, *EL PASO TIMES*, June 20, 2003, at 4; Carlos Sadovi, *Dragnet Out for Deadbeat Dads*, *CHI. SUN TIMES*, June 14, 2003, at 1; Robert E. Pierre, *States Consider Laws Against Paternity Fraud; Child Advocates Worry About Effects*, *WASH. POST*, Nov. 14, 2002, at A.

¹³¹ *Id.*

¹³² See generally Lenore Weitzman, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323 (1985) (finding that female and child poverty increase after divorce, creating an overwhelming gap in the standard of living for divorced men compared to that of the children and ex-wives); James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 *FAM. L.Q.* 35 (1987) (citing studies conducted in California, Ohio, and Vermont that indicate a grim economic outlook for women in the years following divorce).

¹³³ Joe Mahoney, *Deadbeats in N.Y. Owe Kids \$3B*, *N.Y. Daily News*, June 30, 2000 at 5 (discussing New York State’s challenges in collecting child support from non-paying fathers who hide income by working

paint a picture of a father, usually divorced, who is middle-aged, middle class, ignoring his children's needs while enjoying a prosperous lifestyle. As one commentator has noted:

The public's anger has spread to all noncustodial fathers owing support. These fathers have emerged as the new villains in our culture. 'The irresponsibility of fathers takes three forms: they bring into the world 'illegitimate' children they do not intend to support; they leave marriages they should remain in; and, whether married or not, they fail to pay support for the children they leave behind.' It would not be an exaggeration to say that politicians of all stripes have taken up a moral crusade against nonsupporting fathers, condemning their immorality and selfishness.¹³⁵

While these stereotypical "deadbeats" exist, many of the men owing child support are in fact dead broke.¹³⁶ Researchers estimate that as many as 33.2% of young, noncustodial fathers are unable to pay child support due to poverty.¹³⁷ Many low-income fathers have substandard education, lack marketable skills, and often have criminal histories that hinder employment.¹³⁸ Many are minors, without strong family support.¹³⁹

off the books, moving to states lax in child support enforcement, and putting assets in others' names); *Pay for Kids or Pay the Price*, LOS ANGELES TIMES, Aug. 26, 2002 at Part 2, p. 8 (discussing the arrest of several parents with significant child support arrearages, including a doctor with a six figure income who owed \$86,000 and a disbarred lawyer who writes software who also owed \$86,000); Robert Pear, *U.S. Agents Arrest Dozens of Fathers in Support Cases*, N.Y. TIMES, Aug. 19, 2002 at A1 (discussing the arrest of a professional football player who makes approximately \$1.1 million per year and owes \$101,000, a Texas engineering company employee who owes \$264,000, and a psychiatrist who owes \$64,976.)

¹³⁴ See note 121 *supra*. See also, Ronald B. Mincy & Elaine J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. POL'Y ANALYSIS & MGMT. 44, 48 (1998).

¹³⁵ Brito, *supra* note 23, at 264, citing David Chambers *supra* note 22 at 2576.

¹³⁶ In Baltimore, where I direct a family law clinical program that includes a paternity and child support practice, most of the non-custodial parents in state initiated child support proceedings are young, poorly educated African-American males with little education and work experience.

<http://law.ublat.edu/clinics/familylaw>. See also, Robert J. Rhudy and Joe Surkiewicz, *Deadbroke Not Deadbeat: Child Support System Hurts Children, Families*, THE DAILY RECORD, July 11, 2003.

¹³⁷ Mincy & Sorensen, *supra* note 132 at 47.

¹³⁸ Elaine Sorensen, *Obligating Dads: Helping Low-Income Noncustodial Fathers Do More for Their Children*, Washington, D.C.: The Urban Institute (1999); Elaine Sorensen and Chava Zibman, *Poor Dads Who Don't Pay Child Support: Deadbeats or Disadvantaged?* In NEW FEDERALISM, NO. B-30. Washington, D.C.: The Urban Institute (2001). PAUL OFFNER & HARRY HOLZER, THE BROOKINGS INSTITUTION, LEFT BEHIND ON THE LABOR MARKET: RECENT EMPLOYMENT TRENDS AMONG YOUNG BLACK MEN, Survey Series, (April, 2002) (finding that nationally, the employment rate for black men in central cities in 1999/2000 was 46.99%, compared to 53.24% in metropolitan areas overall and 63.09% in the suburbs.)

Many are substance abusers, have mental or physical disabilities which can contribute to economic and family instability.¹⁴⁰ They are often immigrants for whom English is a second language.¹⁴¹ All of these circumstances have created a substantial group of non-custodial fathers who are subject to child support obligations they are simply unable to meet. They accrue large arrears, are subject to sanctions, and fall further into the cycle of poverty.

2. The Impact

A number of child support establishment and modification policies place special burdens on these low-income child support obligors. The first impact of the new policies is the pressure placed on unmarried fathers to voluntarily acknowledge or consent to paternity orders. As discussed earlier, a cornerstone of the federal effort to reduce welfare costs has been to increase paternity establishment.¹⁴² On its face, this aspect of “welfare reform” has been a success with numbers of paternity establishments increasing dramatically over the last decade.¹⁴³ Strengthening the bond between children of unmarried parents and their fathers can certainly yield important social¹⁴⁴ and

¹³⁹ Paula Roberts, *No Minor Matter: Developing a Coherent Policy on Paternity Establishment for Children Born to Underage Parents*, CLASP POLICY BRIEF (Center for Law & Social Policy, Washington, D.C.) (March 2004) (finding that “[t]here are roughly 150,000 babies born each year to unwed parents at least one of whom is a minor (typically under 18).”)

¹⁴⁰ WENDELL PRIMUS & KRISTINA DAUGIRDAS, CENTER ON BUDGET AND POLICY PRIORITIES, IMPROVING CHILD WELL-BEING BY FOCUSING ON LOW-INCOME NONCUSTODIAL PARENTS IN MARYLAND 3, 23-25 (2000).

¹⁴¹ *Looking to the Future: A Commentary on Children of Immigrant Families*, The Center for Law and Social Policy (Oct. 2004).

¹⁴² See notes 89-92 *supra* and accompanying text.

¹⁴³ Between 1992 and 2000, paternity establishment increased from 500,000 to 1.5 million. Casey Study, *supra* note 122, at 6. See also, Virginia Ellis, *Fathers' Legal Ties that Bind*, L.A. TIMES, Mar. 8, 1998, at A1 (highlighting the increase in paternity filings since the January, 1997 enactment of PRWORA and finding there was a 600% increase in the number of fathers signing paternity declarations in 1997).

¹⁴⁴ See, e.g., David Blankenhorn, *Fatherless America: Confirming Our Most Urgent Social Problem* (summarizing research demonstrating the importance of the involvement of fathers in children's emotional development, success in school and adult relationships); JAMES A. LEVINE WITH EDWARD W. PITT, NEW EXPECTATIONS: COMMUNITY STRATEGIES FOR RESPONSIBLE FATHERHOOD 26-27 (1995) (explaining that

economic¹⁴⁵ benefits. While the legal establishment of paternity may have some connection, these social and economic benefits do not automatically follow from a paternity order.¹⁴⁶ Moreover, the efforts to encourage early and easy paternity establishment may cause more harm than good for fathers and children when they result in efforts to disestablish paternity several years later.

The demographic profile of many of the fathers who fall behind in child support discussed earlier – young, poor, uneducated¹⁴⁷ – make them particularly vulnerable in the paternity establishment process. What was once a full quasi-criminal adversarial process often including a jury trial,¹⁴⁸ has become, more often than not, a non-judicial process that involves little more than signing a piece of paper.¹⁴⁹ While federal law requires oral and written disclosure of information about the legal consequences of paternity establishment before voluntary acknowledgment,¹⁵⁰ the disclosures are not an effective substitute for legal counsel, or even the advice of an informed layperson. Interviews with men who voluntarily acknowledged or consented to paternity in this context make clear the limitations of written disclosures in meaningfully informing putative fathers of the

nurturing father-involvement during infancy dramatically improves a child's cognitive, intellectual, and social development throughout childhood).

¹⁴⁵ Judith Selzer, *Child Support and Child Access: Experiences of Divorced and Nonmarital Families in Child Support*, in CHILD SUPPORT: THE NEXT FRONTIER, *supra* note 123, at 69, 73-74.

¹⁴⁶ Because of other differences between fathers who establish paternity and those that don't, "research cannot yet answer the question of how the legal establishment of paternity - - by itself, after other differences between parents who do and do not establish paternity are taken into account, affects the emotional and financial support available to children of unmarried parents." NATIONAL WOMEN'S LAW CENTER & CENTER ON FATHERS, FAMILIES, & PUBLIC POLICY, FAMILY TIES: IMPROVING PATERNITY ESTABLISHMENT PRACTICES AND PROCEDURES FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN 7 (2000) [hereinafter FAMILY TIES]. See also *infra* note 212.

¹⁴⁷ See *supra* notes 134-39.

¹⁴⁸ HARRY D. KRAUSE, ILLEGITIMACY: LAW & SOCIAL POLICY (1971).

¹⁴⁹ See *supra* notes 96-101 and accompanying text.

¹⁵⁰ PRWORA §666(a)(5)(C)(i).

legal consequences of acknowledging paternity.¹⁵¹ In addition, many acknowledgments occur in a hospital setting shortly after the child's birth. This heightens the emotional pressures that tend to result in acknowledgments by non-biological fathers.¹⁵²

The judicial process for establishment of paternity orders offers more procedural safeguards than the voluntary acknowledgment process, but there are still substantial risks in the judicial context that men will become legal fathers with little understanding of the legal consequences. In the case of judgments entered by default, putative fathers often do not get actual notice of the proceedings and the judgment is entered without their knowledge or participation.¹⁵³ Even if they are present in court, putative fathers are rarely represented by counsel,¹⁵⁴ and both the volume of cases and the routine treatment of cases by the child support agency or its counsel leave many fathers misinformed about the significance of the proceedings.¹⁵⁵ As a result of all these circumstances, many men

¹⁵¹ FAMILY TIES, *supra* note 144, at 17; These observations confirm the author's experience in interviewing pro se litigants in paternity establishment proceedings in the Circuit Court for Baltimore City. See, Margaret Barry, *Accessing Justice: Are Pro Se Clinics A Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 *FORDHAM L. REV.* 1879, 1903-04 (1999) (describing University of Baltimore Family Law Clinic and University of Maryland Pro Se Project).

¹⁵² Participants in the Common Ground Project described the hospital locale as "problematic" and "expressed concerns about the hospital setting because current hospital maternity stays are brief and the period surrounding childbirth is emotionally stressful. Thus, parents are often not emotionally or mentally equipped to digest the paternity acknowledgment form and/or make a decision during the hospital maternity stay." FAMILY TIES, *supra* note 144 at 12. The pressure to acknowledge paternity in this setting is increased by the statutory requirement that a nonmarital father's name cannot appear on a child's birth certificate unless he has signed an acknowledgment of paternity or has been adjudicated to be the father by a court or administrative tribunal. PRWORA, 42 U.S.C. §666(a)(5)(D)(i)(I & II).

¹⁵³ Casey Study, *supra* note 122 at 18-22.

¹⁵⁴ Steven K. Berenson, *A Family Law Residency Program? A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 *RUTGERS L.J.* 105, 110 (2001) (describing a 1991-1992 study of sixteen large urban areas nationwide finding that 72% of all domestic relations cases involved at least one unrepresented party). See also, Maryland Judiciary Administrative Office of the Courts Family Administration, 2003 Annual Report of the Maryland Circuit Court Family Divisions and Family Services Programs, 29-30 (2003) (64% of litigants in family disputes in Maryland were self-represented).

¹⁵⁵ Stacy L. Brustin, *The Intersection Between Welfare Reform and Child Support Enforcement: D.C.'s Weak Link*, 52 *CATHOLIC UNIV. L. REV.* 621, 643 (2003); See also, *Gantt v. Sanchez*, *infra* note 199, testimony of Sanchez, record at 28-32 (one father's testimony describing his confusion about the legal ramifications of signing a paternity acknowledgement and lack of explanation about the process).

acknowledged or consented to paternity with very little understanding of the legal ramifications of their actions.

Another factor leading to the ultimate push to disestablish paternity are the potentially unfair child support orders established for low-income fathers following the establishment of paternity. As noted, since the late 1980's, states have made initial awards of support based on a variety of fixed formulas. The most common approach to establishing an initial award of child support is the Income Shares Model.¹⁵⁶ These formulae base child support obligations on the marginal costs of raising children in a two-parent family.¹⁵⁷ This "one size fits all" approach to child support can result in unreasonably high awards for low-income obligors. The Income Shares formulae take a larger percentage of income from low-income obligors because low-income families have to spend a greater percentage of their income on their children.¹⁵⁸ In addition, as one scholar observed, for most non-marital families where children have never lived in an intact household, the Income Shares Model's "replication of past expenditures is pure fiction."¹⁵⁹

In addition to formulae skewed against low-income obligors, several other policies and circumstances at the establishment stage contribute to punitive awards for low-income fathers. The definition of income embodied in statutes and case law permit

¹⁵⁶ KELLY WEISBERG & SUSAN APPLETON, *MODERN FAMILY LAW* 735 (2002).

¹⁵⁷ Data used to establish the costs of raising children in a two parent family were originally based on a 1984 study by Thomas Espenshade, *supra* note 85.

¹⁵⁸ *See also*, Casey Study, *supra* note 122, at 11 (finding that both the Income Shares Model and other provisions of state guidelines such as the child care and medical expenses provision and adjustments when fathers have multiple families contribute to "regressive" guidelines "requiring low-income custodial parents to pay a larger share of their income toward child support than higher-income non-custodial parents." *See also*, Vicki Lynn Bell, *Alimony and Child Support Generally: Amend Child Support Calculations*, 12 GA. ST. U. L. REV. 169, 176 (1995) (finding that many Income Shares guideline models for child support take a higher percentage of income from low-income obligors than is taken from high income obligors).

¹⁵⁹ Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 37 ABA FAM.L.Q. 157, 168 (1999).

courts or agencies to impute income to obligors if, under varying criteria, the fact finder believes the obligor is earning less than he should be.¹⁶⁰ The theory behind such imputation of income statutes is that they can be used to discourage obligors from underreporting income and will encourage full employment.¹⁶¹ However, when such policies are applied to obligors who are chronically unemployed or in seasonal or other part time employment, they result in unpayable support and ever increasing arrearages.¹⁶² Even where legitimate defenses to imputation of income exist, without legal counsel these obligors often are unable to present them.¹⁶³ Moreover, given the high rate of default judgments for child support orders,¹⁶⁴ many obligors are not even present to provide testimony about their income and ability to pay.

The problems associated with excessive initial awards are often compounded by child support modification policies. First, state laws on when modification is justified vary considerably.¹⁶⁵ Some states do not permit downward modification in situations in which an obligor is clearly unable to maintain the income earned or imputed at the point of the initial award.¹⁶⁶ For example, in some states, incarceration is not a sufficient basis

¹⁶⁰ LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.04[C] (1996).

¹⁶¹ *Id.*

¹⁶² Office of Child Support Enforcement, Table 11, Total Amount of Arrearages Due, FY 2003.

¹⁶³ *See supra* note 152.

¹⁶⁴ Casey Study, *supra* note 122, at 18-22; NATIONAL WOMEN'S LAW CENTER & CENTER ON FATHERS, FAMILIES AND PUBLIC POLICY, DOLLARS AND SENSE: IMPROVING THE DETERMINATION OF CHILD SUPPORT OBLIGATIONS FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN, 13 (2000) [hereinafter DOLLARS AND SENSE].

¹⁶⁵ MORGAN, *supra* note 158 at § 5.01 (discussing the common law standard for modification: substantial change in circumstances which generally requires proof of a change that is material, substantial and permanent).

¹⁶⁶ *See e.g., In re Marriage of Thurmond*, 962 P.2D 1064 (Kan. 1998) (refusing to reduce or suspend support obligation where parent's incarceration was the only change of circumstances); *See Staffon v. Staffon*, 587 S.E.2d 630 (Ga. 2003) (where the natural and foreseeable consequences of father's voluntary conduct resulted in his imprisonment, placing him in a position where he was unable to earn income, a downward modification of child support was not warranted); *Yerkes v. Yerkes*, 824 A.2d 1169 (Pa. 2003) (court adopted "no justification" approach, holding that criminal incarceration was not sufficient to justify a reduction in child support; the court considered the best interests of the child and principles of fairness by

for a downward modification. Even in those situations where the law supports a reduction of child support, lack of legal representation often prevents timely application for modification.¹⁶⁷ Since 1989, federal law has prohibited retroactive modification of arrearages.¹⁶⁸ This is sound policy when applied as a check against judicial discretion that was often exercised to forgive arrearages for middle or high-income obligors who repeatedly evaded their support obligation. When rigidly applied to low-income obligors, however, this policy becomes another example of the unintended consequences of the welfare policy.¹⁶⁹ For example, a father may become disabled or become custodian of the children. Unless he initiates a court action promptly, he will continue to owe child support and arrearages will accumulate indefinitely to a point where payment is no longer possible.¹⁷⁰

not allowing obligor to benefit from his criminal acts); *Mascola v. Lusskin*, 727 So.2d 328 (Fla. 1999) (father's reduction in income due to his incarceration was insufficient to relieve him of his child support obligation because the reduction was caused by his voluntary acts); *Mooney v. Brennan*, 848 P.2d 1020 (Mont. 1993) (court held it was not unconscionable to refuse a downward modification of father's child support obligation when the changed circumstances were due to his incarceration for the commission of a crime); *Koch v. Williams*, 456 N.W. 2d 299 (N.D. 1990) (former husband's incarceration for incest was voluntary and self-induced, failing to constitute a material change in circumstances warranting a modification of child support); *Knights v. Knights*, 522 N.E.2d 104, 571 N.Y.2d 865 (1988) (ex-husband's application for modification of child support was denied as his financial hardship was a result of wrongful conduct resulting in his incarceration); *Carlsen v. State of Utah Dept. of Soc. Serv.*, 722 P.2d 775 (Utah 1986) (holding that ex-husband must reimburse state for public support given his child while he was incarcerated and unable to make child support payments). *But see* VT. STAT. ANN. tit.15, § 660(f)(2003) (allowing the court discretion to modify an order as to past support installments accruing after noncustodial parent's incarceration); *Bendixen v. Bendixen*, 962 P.2d 170 (Alaska 1998) (father's incarceration was not equivalent to voluntary unemployment; reduction of father's child support obligation was dependent on his ability to establish a substantial reduction in income due to incarceration); *Glenn v. Glenn*, 848 P.2d 819 (Wyo. 1993) (court found that father's sentence of life imprisonment constituted a change in circumstances and reduced his monthly child support obligation. *See generally, Prisons Offer No Escape from Paying Child Support*, N.Y. TIMES, Sept. 17, 2000 at § 1, p.35.

¹⁶⁷ See note 152, *supra*.

¹⁶⁸ 42 U.S.C. 666(a)(9)(c)(Supp. 1999). Child support obligations are also not dischargeable in bankruptcy. 11 U.S.C. 523(a)(1999).

¹⁶⁹ Daniel L. Hatcher & Hannah Lieberman, *Breaking The Cycle of Defeat for "Deadbroke" Noncustodial Parents Through Advocacy on Child Support Issues*, 37 J. POVERTY L. & POL'Y 5 (May-June 2003).

¹⁷⁰ *Id.*

Whether through inappropriate guidelines, imputation of income, or modification policies, unrealistically high awards lead to high arrearages.¹⁷¹ Low-income obligors are then subject to child support enforcement sanctions. As noted, these sanctions include income attachment, motor vehicle and professional license suspension, credit reporting, and incarceration.¹⁷² While enforcement actions were once judicial proceedings, most, except incarceration, are now done administratively without an opportunity for a hearing before imposition of the sanction.¹⁷³ The impact of these sanctions is further strengthened by a system of tracking and collecting information on fathers who owe child support¹⁷⁴ that “creates a detailed profile of who you are, what you do, and what you are likely to do.”¹⁷⁵ Under “the most onerous form of debt collection practiced in the United States,”¹⁷⁶ jobs, credit history and housing are lost, and economically fragile circumstances become desperate.

In the past, these sanctions often led to legal fathers going “underground.”¹⁷⁷ In recent years, many fathers have discovered a new way to defend these child support

¹⁷¹ See notes 155-56, 161, 164, *supra*.

¹⁷² See note 108 *supra* and accompanying text.

¹⁷³ Most enforcement actions are triggered by a missed child support payment tracked by the computer for the agency. Those that the agency can take without seeking a court or administrative order include income withholding, securing assets (including bank accounts, workers’ compensation payments, employment compensation payments, retirement and pension funds), imposing liens, voiding fraudulent property transfers, suspending professional and recreational licenses, and revoking passports. PRWORA, Pub. L. No. 104-193, §§ 364, 368-70, 459, 110 Stat. 2242 (1996).

¹⁷⁴ 42 U.S.C. §666(a)(5)(C)(2004); *see generally*, Robert Pear, *Vast Worker Database to Track Deadbeat Parents*, N.Y. TIMES, Sept. 22, 1997 at A1.

¹⁷⁵ Samuel V. Schoonmaker, IV, *Consequences and Validity of Family Law Provisions in the “Welfare Reform Act,”* 14 J. AM. ACAD. MATRIM. LAW 1, 146 (1997). There is some recognition in the statute that the massive information sharing contemplated under the statute may violate the privacy of obligors. PRWROA, 42 U.S.C. 654(26) (requiring that safeguards established to ensure access to confidential information are limited to authorized persons). But commentators point out that these provisions are rendered “practically meaningless by other provisions in the law that permit broad information sharing.” Brito, *supra* note 23, at 263.

¹⁷⁶ Ronald K. Henry, *Child Support at a Crossroads: When the Real World Intrudes upon Academics and Advocates*, 33 FAM. L.Q. 235, 239 (1999).

¹⁷⁷ Hatcher & Lieberman, *supra* note 167, at 5.

actions by challenging the underlying order of paternity.¹⁷⁸ Courts have responded to these paternity challenges in a variety of ways. While no coherent patterns have emerged,¹⁷⁹ not surprisingly, children of married parents are generally more protected than children of unmarried parents. Courts hearing competing claims for fatherhood of married children often preserve the relationship between the child and the married father, even if the husband is the psychological rather than the biological father.¹⁸⁰ In a few

¹⁷⁸ Under traditional state law, final civil judgments can only be reopened in cases of fraud, duress or material mistake of fact. *See e.g.*, *Tandra S. v. Tyrone W.*, 648 A.2d 439 (Md. 1994). State law varies on what constitutes mistake, fraud, or duress but many states now permit reopening based on an exception to this final judgment rule or based on the father's assertion that he was "defrauded" about the biological link with his child. Roberts, *infra* note 177, at 82-85.

While many of these disestablishment actions are triggered by onerous child support burdens, they are facilitated by changes in the DNA testing technology making such testing more accessible. Until a few years ago, paternity testing was invasive, required the participation of both parents and the child and cost from \$700-\$1,000. Recent advances allow DNA testing through a simple cheek swab, no longer require the participation of the mother, and can cost as little as \$200 when done through a private rather than court ordered lab testing. A June 15, 2004 web search revealed over 50 sites that made mention of paternity testing kits. Dozens of these sites advertised home testing kits free or at low cost. *See, e.g.*, www.genetree.com, which offers to ship free kits (payment is made if you send the samples back for testing) and www.prophase-genetics.com, which offers kits and results for \$160.

¹⁷⁹ For a thorough analysis of paternity disestablishment statutes and case law, *see* Paula Roberts, *Truth & Consequences, Parts I-III*, 37 FAM. L.Q. 35-103 (2003); Paula Roberts, Paternity Disestablishment Case Update (June, 2004).

¹⁸⁰ Relying on the marital presumption, many courts have denied DNA testing and dismissed these cases. *See, e.g.*, *Evans v. Wilson*, 2004 Md. LEXIS 502 (denying unmarried paramour's attempt to establish paternity in light of mother's husband's status as legal father); *In re Marriage of Pedregon*, 132 Ca. Rptr. 2d 861, 107 Cal. App. 4th 1284 (2003) (court ruled that where the husband held out a non-biological child as his own, he established the paternal relationship and was required to pay child support); *Betty L.W. v. William E.W.*, 569 S.E.2d 77, 86 (W. Va. 2002) (non-biological father's acknowledgement of marital child as his own for six years during marriage and four years after divorce precluded him from terminating or modifying child support); *Leger v. Leger*, 829 So. 2d 1101 (La. Ct. App. 2002) (wife had no legal authority to rebut presumption of husband's paternity when the child was born during the marriage or within 300 days after the divorce); *In the Interest of T.S.S.*, 61 S.W.3d 481, 487 (Tex. App. 2001) (court refused to admit DNA evidence excluding husband as biological father where parents were married and father had acknowledged child as his own for 14 years); *Culhane v. Michels*, 615 N.W.2d 580, 589 (S.D. 2000) (court cited welfare of children when denying genetic testing where father challenged paternity of marital children whom he had acknowledged as his own for 17 years); *McHone v. Sosnowski*, 609 N.W. 2d 844 (Mich. App. 2000) (court held that alleged biological father could not bring claim unless there was a prior determination that child was not the product of the marriage); *Strauser v. Stahr*, 726 A.2d 1052, 1053 (Pa. 1999) (court rejected DNA evidence excluding husband as father of parties' youngest child based on marital presumption and best interest of child born to married parents); *Godin v. Godin*, 725 A.2d 904, 910-11 (Vt. 1998) (court denied husband's motion for paternity testing citing the marital presumption of paternity and the superior interests of the state, the family and the child in "maintaining the continuity, financial support, and psychological security of an established parent-child relationship"); *Rodney F. v. Karen M.*, 71 Ca. Rptr. 2d 399 (1998) (court found that an alleged biological father could not bring a paternity action due to the presumption of paternity of marital father); *Amrhein v. Cozad*, 714 A.2d 409

states, paternity disestablishment requests have been denied for both children of married and unmarried parents under statutes of limitations or on estoppel grounds that cut off a man's right to challenge paternity after a period of time.¹⁸¹ But in a growing number of jurisdictions - even where disestablishment will leave a child fatherless - courts¹⁸² and

(Pa. 1998) (court held that presumption of paternity was not overcome by DNA test eliminating husband as biological father); *John M. v. Paula T.*, 524 Pa. 306, 571 A.2d 1380 (1990) (court held that marital presumption can be overcome only by proving non-access or impotency); *Watts v. Watts*, 337 A.2d 350, 352 (N.H. 1975) (court denied husband's motion for blood tests where parents were married and father did acknowledge children for 15 years). *But see*, *Brinkley v. King*, 701 A.2d 176, 181 (Pa. 1997) (court admitted DNA evidence that proved husband was not the biological father of the child produced during marriage because parents were no longer married at time of action and therefore there was no institution of marriage to protect); *Witso v. Overby*, 627 N.W.2d 63 (Minn. 2001) (court granted DNA testing to father who asserted that he had an affair with a married woman who had child.); *K.S. v. R.S.*, 669 N.E.2d 399 (Ind. 1996) (holding that Indiana law permits a man who claims to be the biological father of a child born during the marriage of the child's mother and another man to file a paternity action while that marriage remains intact).

¹⁸¹ *See, e.g.*, *Lefler v. Lefler*, 776 So.2d 319 (Fla. Dist. Ct. App. 4th Dist. 2001) (FL Rule 12.540 – paternity judgments cannot be reopened after 1 year); *D.F. v. Dept. of Rev.*, 823 So. 2d 97 (Fla. 2002) (FL Rule 12.540 – paternity judgments cannot be reopened after 1 year); *In re Paternity of Cheryl*, 746 N.E.2d , 488 (2001) (MA rule 60(b) – judgment may only be reopened within a “reasonable time”); *Romine v. Trip*, No. 00CA12, 2000 Ohio App. LEXIS 4602 (Sept. 29, 2000) (OHIO REV. CODE §§ 2151.232, 3111.211, 5101.314 – paternity judgments cannot be reopened after one year); *People v. R.L.C.*, 47 P.3d 327 (Colo. 2002) (judgments may only be reopened within a “reasonable time”); *DeGrande v. Demby*, 529 N.W.2d 40 (Minn. Ct. App. 1995) (§ 257.57 (Minn. Parentage Act)- paternity judgments cannot be reopened after 3 years); *In re Kates*, 761 N.E.2d 153 (Ill. 2001) (Ill. Parentage Act § 8(a)(4) – paternity action cannot be brought more than two years after adjudicated father obtains “actual knowledge of relevant facts”); *F.B. v. A.L.G.*, 821 A.2d 1157 (N.J. 2003) (several years after putative father waived right to genetic tests and acknowledged paternity, he sought to vacate the judgment of paternity and support and was denied because he did not prove fraud and he had acted as the father for eight years). *See also*, Ronald W. Nelson, *Statute of Limitations for Paternity Obligations and their Support Obligations*, available at [www.supportguidelines.com/articles/art200107.html\(2001\)](http://www.supportguidelines.com/articles/art200107.html(2001)); *But see*, *Dixon v. Pouncy*, 979 P.2d 520 (Ark. 1999) (Rule 60(b)(5) – claim brought two and one-half years after divorce was not unreasonable).

¹⁸² *Ex Parte Alabama ex rel. A.T.*, 695 So. 2d 624 (Ala. 1997) (court admitted DNA evidence based on Alabama statute AL § 26-17A-1 which permits reopening of paternity cases based on DNA evidence); *KB v. DB & Another*, 635 N.E.2d 275 (1994); *Langston v. Riffe*, 754 A.2d 389 (Md. 2000) (court held that DNA testing was available to the man in this case and is available to any putative father who sought to challenge a paternity declaration entered against him); *Walter v. Gunter*, 788 A.2d 609 (Md. 2002) (court held that DNA evidence was admissible in challenging paternity, and once it was established the unmarried man was not biological father, he could not be held liable for arrearages in child support); *Lipiano v. Lipiano*, 598 A.2d 854 (Md. 1991) (court permitted married man to admit DNA evidence to challenge paternity); *Sider v. Sider*, 639 A.2d 1076 (Md. 1994) (court permitted married man to admit DNA evidence to challenge paternity); *Missouri v. Hill*, 53 S.W.3d 137 (Mo. 2001) (court permitted unmarried man to admit DNA evidence to challenge paternity); *Brinkley v. King*, 701 A.2d 176 (Pa. 1997); *Alaska Dept. of Revenue v. Button*, 7 P.3d 74 (Alaska 2000) (court allowed DNA evidence to be admitted 9 years after paternity acknowledgement by non-biological father). *But see*, *Smith v. Jones*, 566 So. 2d 408 (Ct. App. 1990) (court admitted DNA evidence presented by biological father but found that the child may have two ‘fathers’, i.e. “dual paternity”).

legislatures¹⁸³ have opted for a rule based on biology. Under various articulations of this rule, if a man, who has been the legal father by conduct or by a paternity judgment or acknowledgement, has suspicions about his biological connection to the child, he is entitled to have DNA testing on demand.¹⁸⁴ If tests exclude him as the biological father, he is no longer a father under the law and has no legal, emotional or other obligations to his child.

A rule based on biology alone has potentially devastating effects in any family. But its effects on low-income families are particularly harmful. It completes a cycle in which the punitive aspects of welfare reform – first aimed at the mother, and then the father – may culminate in leaving children fatherless. Taking a closer look at one state’s experience with the new fatherhood rules illustrates the connections between welfare reform, paternity disestablishment, and harm to children left fatherless.

C. Case Study: Maryland

Maryland is one of several states that have opted to define fathers by biology in response to legal fathers who defend against child support enforcement actions by seeking paternity disestablishment. The leading Maryland case, *Langston v. Riffe*,¹⁸⁵ involved three consolidated cases that arose in response to child support proceedings involving men who had voluntarily acknowledged paternity of their children under the new procedures.¹⁸⁶ The state’s highest court held that pursuant to 1995 amendments to

¹⁸³ ALA. CODE § 26-17-12 (2003), CAL. FAM. CODE § 4935 (West 2003), MD. CODE ANN., FAM. LAW § 5-1029 (2003), ALASKA STAT. § 25.27.166(b)(2) (Michie 2002); ARK. CODE ANN. § 9-10-115 (Michie 2003); COLO. REV. STAT. § 19-4-107(1)(B) (2000); GA. CODE ANN. § 19-7-54 (2002); 750 ILL. COMP. STAT. 45/7 (2003); IOWA CODE § 600B.41; (2000); MINN. STAT. § 257.57(b) (2003); MONT. CODE ANN. § 40-6-105(3)(b) (2003); OHIO REV. CODE § 3119.962 (2002); VA. CODE ANN. § 20-49.10 (2004).

¹⁸⁴ See, e.g., MD. CODE ANN., FAM. LAW § 5-1029 as interpreted in *Langston*.

¹⁸⁵ 754 A.2d 389 (Md. 2000).

¹⁸⁶ *Id.* at 390-92.

the state's paternity statute,¹⁸⁷ the fathers were allowed to set aside the paternity judgments when genetic tests excluded them as biological fathers. The court further noted that the best interests of the child standard is not relevant when considering requests for DNA testing or requests to set aside judgments after DNA testing excludes the legal father as the biological father.¹⁸⁸ The court also held that, although the decision would leave the children involved fatherless because the biological fathers would likely never be found, these considerations should not "diminish the immediate substantive effect of setting aside an established paternity declaration."¹⁸⁹

In 2002 Maryland's highest court revisited the issue of paternity disestablishment and child support in *Walter v. Gunter*.¹⁹⁰ Again, the context was a legal father's attempt to set aside a paternity judgment as a defense to a child support arrearage case. In 1993, Nicholas Walter voluntarily consented to a paternity judgment for a child born to his girlfriend, Michele Gunter. Walter was then ordered to pay child support and throughout the next several years numerous proceedings were instituted against Walter to enforce the support obligation. In 2000, he filed a petition to modify support as well as a motion for genetic testing. The testing excluded Walter as the biological father and the trial court followed its earlier decision in *Langston* and terminated his future support obligations.¹⁹¹ A separate hearing was held to determine Walter's liability for his child support arrearages and whether he was entitled to recover support payments that he had already

¹⁸⁷ A declaration of paternity may be modified or set aside: 2. if a blood or genetic test done in accordance with §5-1029 [Blood or genetic tests] of this subtitle establishes the exclusion of the individual named as the father in the order. MD. CODE ANN., FAM. CODE § 5-1038(2)(1)(Michie 2001).

¹⁸⁸ "Simply stated, the fact of who the father of a child is cannot be changed by what might be in the best interests of the child. [T]he 'best interests' standard is only to be considered by the trial court in matters corollary to the paternity declaration, such as custody, visitation, 'giving bond,' or 'any other matter that is related to the general welfare and best interests of the child.'" *Langston*, 754 A.2d at 405.

¹⁸⁹ *Id.* at 464.

¹⁹⁰ 788 A.2d 609 (2002).

¹⁹¹ *Id.* at 611.

paid to Gunter.¹⁹² Based on the well-established statutory prohibition against retroactive modification of child support,¹⁹³ the trial court denied his request for release from the arrearage obligation and recoument of payments.

Walter appealed the judgment holding him liable for arrearages and the Maryland Court of Appeals reversed the ruling of the trial court and found that Walter was not responsible for payment of the arrearages.¹⁹⁴ The court found that although the record showed that Walter had questions about his paternity for some time before the action, the genetic test ‘extinguished’ Walter’s parenthood. As a result, the child support order, including arrearages in excess of \$11,000 was vacated.¹⁹⁵ The court relied on the state’s history of placing child support “squarely upon the shoulders of the natural (biological) parents”¹⁹⁶ as well as principles of natural law.¹⁹⁷ In so holding the court clearly equated fatherhood with biology:

Without question, the biological and legal status of ‘parenthood’ in Walter’s situation is now extinct; the genetic test extinguishes the prior, and the vacatur of the paternity declaration extinguishes the latter. In the absence of ‘parenthood’

¹⁹² *Id.*

¹⁹³ (fed stat on retroactive modification); MD. CODE ANN. § 5-1038 (Michie 2001).

¹⁹⁴ The Maryland court did not require the mother to reimburse the legal father for child support. Walter, 788 A.2d at 613. Some states have allowed tort actions to proceed against mothers to recover child support in this context. G.A.W. v. D.M.W., 596 N.W.2d 284 (Minn. Ct. App. 1999) (during dissolution of marriage, ex-husband discovered he was not the biological father and commenced a tort action against mother to recover child support; the court held the claim was not barred by res judicata, collateral estoppel or public policy considerations); Miller v. Miller, 956 P.2d 887 (Okla. 1998) (ex-husband discovered he was not the biological father of a child for whom he had paid support for ten years; he sued the mother for fraud and intentional infliction of emotional distress and the court permitted these claims). *See also*, Andrew S. Epstein, *The Parent Trap: Should a Man Be Allowed to Recoup Child Support Payments If He Discovers He Is Not the Biological Father of the Child?*, 42 BRANDEIS L.J. 665 (2004). In addition, at least one state statute authorizes repayment of child support paid to the state. CONN. GEN. STAT. § 46b-171(6)(2003) (if a court reopens a paternity case in which the person adjudicated to be the father of a child is not the father of the child, and the person has paid child support to the statue (as opposed to the mother), the Department of Social Services will refund the money paid to the state).

¹⁹⁵ Walter, 788 A.2d 609.

¹⁹⁶ *Id.* at 615 (quoting Brown v. Brown, 412 A.2d 396, 402 (Md. 1980)).

¹⁹⁷ “The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world.” *Id.* at 615 (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 447 (1854).

status, the duty that is normally cast upon parents, e.g. the duty of child support, can no longer exist.”¹⁹⁸

Maryland’s approach in *Langston* and *Walter* exemplifies an approach to defining fatherhood that does not serve the interests of families, particularly low-income fathers or children. To the extent the parents and child function as a family, these families are destabilized when the child can be subjected to genetic testing at any time, thus contributing to the breakup of an intact family. The threat of DNA testing on demand destabilizes the relationships between parents as well as those between father and child and undermines all the existing policies favoring fathers’ continued involvement in children’s lives. In many cases, particularly those involving older children, there is no one “waiting in the wings” to be the child’s father.¹⁹⁹ Vacating the paternity judgment or acknowledgment leaves the child fatherless for life, with the attendant loss of emotional support, companionship, child support, inheritance rights, and other benefits. Even where the child has already lost contact with the legal father, the child’s loss is further exacerbated by finding out that the only father she has ever known does not want to be her father anymore.²⁰⁰ Many fathers who would be willing and might prefer to stay in a child’s life are forced to seek disestablishment of paternity or face loss of employment, credit standing, jail or permanent poverty.

A brief look at one of the author’s clinical program’s typical cases demonstrates the link between child support policies and the breakup of fragile families. The clinic’s

¹⁹⁸ *Walter*, 788 A.2d 609, 615 n.9.

¹⁹⁹ From the Paternity Disestablishment caseload of University of Baltimore School of Law Family Law Clinic, (1998-2000) *supra* note 134.

²⁰⁰ *Id.* See also, Judith S. Wallerstein and Joan Berlin Kelly, SURVIVING THE BREAKUP 219 (1980) (children choose to maintain established parent-child relationships even where the relationship is poor or has deteriorated).

child client, Maria M., was fourteen years old when the court appointed the clinic to represent her in an action by her father to vacate his paternity judgment.²⁰¹ Until Maria was about four years old, she lived with her mother. Her mother's boyfriend, James, had assumed the role of Maria's father, lived with her and her mother at various times during these four years but did not provide regular financial support. When the mother applied for public benefits, she identified James as Maria's father. He consented to paternity without genetic testing.

The parties grew apart, the mother became drug addicted, and Maria went to live with her grandmother when she was four years old. Ten years later, James sought to reopen the paternity judgment after his truck driver's license was revoked and he was subject to criminal prosecution for nonsupport. Since he never had a genetic test prior to signing the paternity decree, he was able to challenge his paternity under the Maryland statute by requesting a blood test. At the hearing, a child development expert testified that, given Maria's circumstances, even the act of requiring her to go through a blood test and thereby learn of her father's effort to "disown" her would cause her substantial harm.²⁰² The father testified that he, too, had some emotional attachment to the child and did not wish to hurt her.²⁰³ Under existing law, however, he had to make a choice between risking harm to her or facing financial ruin for himself and his biological children.²⁰⁴

²⁰¹ *Gantt v. Sanchez*, Case No. PD 60-104431 (Baltimore City Circ.Ct. 1999) Although the use of first names for clients is not customary in the author's clinical program, first names have been used for easy identification and to protect the parties' identities.

²⁰² *Id.*, testimony of Leon Rosenberg, record at 7-8 (on file with the Author).

²⁰³ *Id.*, testimony of Sanchez, record at 38-40.

²⁰⁴ *Id.*, testimony of Sanchez, record at 22-23.

Given the *Langston* biology rule, Maryland courts and those in other states following the biology rule must permit genetic testing when requested and vacate paternity orders in all cases where there is no biological connection between child and father, regardless of the family's circumstances. Moreover, given the inflexibility of the current child support policies, courts have little or no discretion to reduce arrearages, suspend child support obligations, or provide fathers like James with some equitable remedies that will permit them to maintain their legal status as father. Instead, children like Maria are left fatherless for life.²⁰⁵

III. Proposals for Reform

To develop meaningful reform, policymakers must reconceive child support as primarily an issue of family law rather than welfare law. As such, protection of children replaces state and federal fiscal concerns as the goal that drives child support law and policy.²⁰⁶ Once that goal is clear, the foundation will be laid for a number of reforms. These include: 1) refining paternity establishment policies to reduce the number of fathers who assume the role of fatherhood mistakenly or with little thought about the consequences²⁰⁷ 2) refining child support establishment and modification policies to treat low-income fathers more fairly so that they are not pushed into paternity disestablishment

²⁰⁵ In Maria's case, the parties ultimately reached a settlement in which the father agreed to maintain his status as legal father as long as the local State's Attorney's Office (the office charged with child support enforcement in the jurisdiction) refrained from enforcing his past, present or future child support obligations. All parties believed such a settlement was the best option for the child in this case given existing Maryland law. It was not ideal, however, given that the threat of disestablishment was still present in the event personnel changes in the child support enforcement agency or other circumstances led to renewed efforts to collect child support from James.

²⁰⁶ There is broad consensus that, among the traditional goals of family, protection of children is the primary goal. See e.g., Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1183 (1999).

²⁰⁷ The goal of these efforts should not be to prevent all non-biological fathers from gaining the status of legal fatherhood. Instead, the goal is to have men consent to paternity only when they have made a meaningful decision to be fathers. In many cases, it will be the biological fathers who make this decision. In some cases, men who have no genetic connection may also make a decision to become legal fathers.

as the only alternative to financial ruin; and 3) creating paternity disestablishment policies that place the best interests of the child above the interests of the adults and recognize multiple bases for legal fatherhood.

A. Rethinking the Link Between Welfare and Child Support

As scholars and policymakers begin to evaluate the impact of the last three decades of federal legislation, many are beginning to question the link that body of legislation established between welfare and child support.²⁰⁸ While a careful evaluation of this link is beyond the scope of this Article, a brief assessment of the impact of linking child support with welfare law reveals both its policy limitations and its negative impact on low-income families.

As discussed earlier, aggressive child support enforcement has done little to reduce child poverty.²⁰⁹ The linking child support collection with welfare eligibility has also largely failed in meeting its other goal, to increase revenues for the state.²¹⁰ Although the initial data was promising,²¹¹ the policy's success in reimbursing the state for its welfare goals is decidedly mixed. Increasing the number of paternity establishments may end up having some noneconomic benefits for children but it has done little to increase the number of support orders for children on welfare.²¹² Even if more orders were obtained and more support was collected from noncustodial fathers, one widely cited

²⁰⁸ Brito, *supra* note 23.; Marsha Albertson Fineman, *Child Support Is Not the Answer: The Nature of Dependencies and Welfare Reform in CHILD SUPPORT: THE NEXT FRONTIER*, *supra* note 123, 209.

²⁰⁹ See *supra* notes 122-128 accompanying text.

²¹⁰ See *supra* notes 77-84 and accompanying text.

²¹¹ Casey Study, see note 122 *supra*, at 211 (initial data showing overall increase in child support collection post 1996).

²¹² Garrison, *supra* note 123 at 17 and sources cited therein. See also, Brustin, *supra* note 153 at 625 (noting that in the District of Columbia in 2000 less than 20% of TANF (welfare) recipients has a child support order); *The Child Support Improvement Project: Paternity Establishment*, Denver, CO (1995) (finding that fifteen months following birth, only 26% of parents who voluntarily acknowledged paternity and were in the child support system had a child support order).

study predicted that, given the poverty of this population of obligor fathers, even full payment of child support would only reduce combined spending for cash assistance, food stamps, and Medicaid by 8%.²¹³ Moreover, there is substantial evidence that administrative costs of collecting child support may exceed the dollars collected to offset welfare costs.²¹⁴

In addition to its ineffectiveness in reducing welfare costs, the linking of child support to welfare benefits harms low-income families in a variety of ways. The principle provision of the legislation that creates this link is the requirement that, as a condition of receiving full public benefits, recipients assign their rights to child support to the state.²¹⁵ Welfare recipients must fulfill a “cooperation requirement” – by identifying the fathers of their children so the state can pursue those men for child support.²¹⁶ Federal law has required assignment of support and cooperation since the late 1980’s but the PRWORA eliminated any pass through of child support to families²¹⁷ and gave states broad discretion in determining what constitutes “cooperation” and whether “good cause” exists for non-cooperation.²¹⁸

²¹³ Laura Wheaton and Elaine Sorensen, *Reducing Welfare Costs and Dependency: How Much Bang for the Child Support Buck?* GEO. PUBLIC POL’Y REV. 23-36 (1998).

²¹⁴ Office of Child Support Enforcement data for fiscal year 1999 collections in the welfare caseload totaled only \$.62 for every dollar in enforcement costs (U.S., DHHS, Admin. For Children & Families, Office of Child Support Enforcement 1999) (update). Even this figure may overstate the cost-effectiveness of child support collection since some portion of child support would be paid without the enhanced bureaucracy. *See also*, Vicki Turetsky, *Child Support Trends* (May 2003) (finding that the federal child support program has not paid for itself since 1980 and the gap between program costs and revenues is widening).

²¹⁵ 42 U.S.C. § 608(a)(3) (requiring recipients to assign support rights to the state).

²¹⁶ *See* note 82 *supra*.

²¹⁷ Prior to 1996, the federal government required that the first \$50 of child support collected on time each month was to be passed-through to the family. THERESA A. MEYERS, NAT’L CONFERENCE OF STATE LEGISLATURE (NCSL), CHILD SUPPORT PROJECT, ISSUE BRIEF: STATE CHILD SUPPORT PASS-THROUGH PROGRAMS. The majority of the states (30) no longer pass-through any amount of the child support collection. Paula Roberts & Michelle Vinson, CLASP, *State Policy Regarding Pass-Through and Disregard of Current Month’s Child Support Collected for Families Receiving TANF-Funded Cash Assistance*, October 2004 (listing all 50 states and the District of Columbia’s child support pass-through and income disregard policies as of August 31, 2004).

²¹⁸ *See* notes 79-84 and 104-105 *supra* and accompanying text..

Both the assignment and cooperation requirements create a number of problems for low-income families. An assignment requirement that prevents children from benefiting from the collection of child support hurts those children in a variety of ways. Studies have long suggested that fathers are more willing to pay child support if they know their money is actually going to the children.²¹⁹ And fathers who are able to pay child support and do so tend to be more active in their children's lives.²²⁰ In addition, even modest pass through payments can assist low-income families for whom child support may constitute about 25% of the average family income.²²¹ Finally, eliminating the pass through may have an adverse impact on reducing welfare costs. Those states that have opted for generous pass throughs have increased both the number of families leaving welfare²²² and the amount of child support collected.²²³

Because of its direct link to the increase in paternity disestablishment, the cooperation requirement is even more troubling. First, the process of meeting the cooperation requirement is, at best, intrusive and demeaning for custodial mothers. In some circumstances, it may also place mothers at grave risk of harm when putative fathers retaliate with intimidation, threats and violence after being identified.²²⁴ While a good cause exception for victims of domestic violence to the cooperation requirement has

²¹⁹ "Participants in the Common Ground Project agreed that [assignment of support to the state] is one of the most alienating features of the welfare system: that many of the children most in need, those receiving public assistance, receive nothing from the fathers who may be struggling the hardest to pay child support." DOLLARS AND SENSE, *supra* note 162 at 10. *See also*, Libby S. Alder, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 215 (1999).

²²⁰ Studies showing connection between payment of child support and involvement in children's lives.

²²¹ FDCH *Federal Department and Agency Documents, Regulatory Intelligence Data*, Feb. 26, 2002.

²²² MEYERS, *supra* note 216.

²²³ Wheaton & Sorensen, *supra* note 213, at 23.

²²⁴ Personal Responsibility Act 333, 42 U.S.C. 654(20) (Supp.III 1997). The Personal Responsibility Act permits "good cause" and "other exceptions" to the cooperation requirement in situations when an exception would be "in the best interests of the child." *Id.* Current federal regulations define good cause as a situation where, among other things, identification would lead to physical and emotional harm to the child or caretaker. See 45 C.F.R. 232, 42(a), 303.5(b) (1997).

been codified in federal welfare law since 1989, states have wide discretion in implementing this exception. This discretion creates the potential that a state will limit the availability of this exception “to remove difficult cases from the welfare rolls.”²²⁵ Its effectiveness has also been limited because women “either did not know of its existence or could not verify their status as victims of abuse.”²²⁶

Most importantly, the cooperation requirement may also encourage identification of men who have neither a biological connection nor a desire to become the child’s psychological father. Both the informality of the setting in which these identifications are made and the pressure imposed by making financial support dependent upon identification lead to paternity establishments that are later challenged when serious child support enforcement begins.²²⁷ Amending the statute to *encourage* rather than *require* mothers seeking welfare to cooperate in identifying fathers would reduce the high rate of legal fathers who later seek to disestablish.

B. Refining the Current System

Eliminating the compulsory assignment and cooperation requirements from federal child support law could do much to reduce the number of paternity

²²⁵ Paul Legler, *The Impact of Child Support Reform on the Child Support Enforcement System*, in CHILD SUPPORT: THE NEXT FRONTIER, *supra* note 123, 46 at 49. *See also*, Shelby A.D. Moore, *Symposium: Subversive Legacies: Learning from History/Constructing the Future: Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women From Leaving Abusive Relationships*, 12 TEX. J. WOMEN & L. 451, 480 (2003).

²²⁶ Moore, *supra* note 224 at 477; *See also*, Catherine Wimberly, *Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single Mother Families*, 53 STAN. L. REV. 729, 736 (2000).

²²⁷ *See* notes 147-153 and accompanying text. “Our system kind of encourages this [paternity identification and future contests]. . . in order for a mother to collect AFDC[sic] she has to name someone for the office of child support enforcement to go after. Naming the father is done under pressure and without the formality that would encourage truth-telling.” *Langston v. Riffe*, 754 A.2d 389, n.15 (Md. 2000) (quoting Jane C. Murphy, Daily Record).

disestablishments that lead to fatherless children.²²⁸ But even if such sweeping change is not feasible at this time, modifications to the current framework can help to avoid the chain of unintended consequences described in this Article. These proposals focus on three critical points in the child support process: paternity establishment, child support establishment and paternity disestablishment.²²⁹

1. Paternity Establishment

An obvious solution to the problem of paternity disestablishments is to require genetic testing in all cases before legal recognition of paternity.²³⁰ More genetic testing would certainly reduce the number of later paternity disestablishments. But mandatory testing presents a number of problems. First, the obvious problem with such an approach is cost. Even though the costs of such testing have come down significantly in the last decade,²³¹ the average cost for court approved laboratories is still at least \$300.00.²³² Imposing such costs on parties or the state for all paternity establishment—voluntary and contested-- would significantly undermine the goal of obtaining child support orders for as many children as possible.

A genetic testing requirement might also present non-economic obstacles to the goal of having fathers in as many children's lives as possible. Practitioners in the field

²²⁸ While such a change would require a major rethinking of welfare policy, it could be achieved without changing the work and time limitations that were central to PRWORA and welfare reform in the 1990's. Without conceding the value or viability of these provisions, they could be applied as part of the conditions for welfare receipt without requiring the recipient to identify the father.

²²⁹ Many of the proposals discussed in this Article come from the Common Ground Project. This innovative project, a collaboration of the National Women's Law Center and Center for Fathers, Families and Public Policy, is an effort to develop areas of consensus between low income mothers and fathers to "develop and advance public policy recommendations on child support and interrelated welfare and family law issues that promote effective coparenting relationships and ensure emotional and financial support of children." (hereinafter "Common Ground Project") DOLLARS AND SENSE, *supra* note 162, at 1.

²³⁰ See, e.g., Paula Roberts, *Truth & Consequences Part I*, 37 FAM. L.Q. 35, 42 (2003); Jennifer L. Merrill, *Determining Legal Fatherhood: A Case for Genetic Paternity Establishment* (unpublished paper on file with the Author)

²³¹ See *supra* note 176.

²³² FAMILY TIES, *supra* note 144, at 19.

report that an undetermined but substantial number of fathers who acknowledge or consent to paternity do so having doubts that they are biologically related to the children who are the subject of the paternity establishment.²³³ While some of these fathers will later seek to disestablish paternity,²³⁴ many will not. Those that do not seek disestablishment have stayed with the child's mother or formed a strong emotional bond with the child or both.²³⁵ Many children, who might otherwise be fatherless, will get fathers through this process. If genetic testing were required in all cases, many child support professionals believe these "volunteer" fathers would opt out after they are confronted with the test which removes any doubt that they share no genetic link with their children.²³⁶ As a result, many ultimately strong families would never be formed.

Rather than *require* testing in all cases, testing should be *encouraged* in a number of ways. First, more resources must be devoted to giving putative fathers the verbal and written legal information required by federal law about the consequences of acknowledging or consenting to paternity.²³⁷ Ideally, this information should be explained before consents are obtained, by lawyers, or, at a minimum, by informed lay staff present at paternity acknowledgment sites. The Common Ground Project has proposed a series of reforms to provide both better-written materials and more informed and accessible staff in locations where paternity acknowledgments are made.²³⁸ These improved resources should help ensure that more putative fathers undergo genetic testing

²³³ Interview with Martin J. McGuire, Assistant State's Attorney, Chief, Support Enforcement Unit (October, 2004) (notes on file with author).

²³⁴ Some state statutes prohibit paternity disestablishment when the father consents to paternity knowing he was not the biological father. *See, e.g.*, MD CODE ANN., FAM. L. § 5-1038(a)(2)(ii) (2003). In practice, however, it is difficult to prove this knowledge to prevent a disestablishment.

²³⁵ Interview with Martin J. McGuire, *supra* note 232.

²³⁶ *Id.*

²³⁷ *See supra* notes 149-50.

²³⁸ FAMILY TIES, *supra* note 144 at 16-18; 24-25.

before acknowledging paternity, and those who choose to forgo such testing, do so knowingly and voluntarily.

In addition to educating putative fathers about legal rights and obligations, the government should waive the costs of testing in all cases where testing is requested by the parties. Federal law currently requires the child support agency to advance the cost of the test if there is a financial need.²³⁹ But costs can be assessed later against putative fathers who deny paternity and are not excluded by the test.²⁴⁰ Waiving costs of all tests for low-income litigants regardless of result will result in greater “up front” costs for the state. But learning that the putative father is not the biological father at this early stage will avoid forfeiture of arrearages after paternity disestablishment, will provide an opportunity to determine whether a good cause exception exists to excuse the custodial mother from identifying the biological father, and will provide the opportunity to investigate alternative putative fathers at a point when there is still a possibility of identifying another man as the biological father. Most importantly, it will avoid the trauma of paternity disestablishment for the children when they are older.

2. Child Support Establishment and Modification

A variety of reforms can be made to the current child support establishment and modification process to strike a balance between effective child support enforcement and fair treatment of low-income obligors. As a guiding principle for reforms at this stage, federal and state law should seek to “develop targeted, specific initiatives” to deal with

²³⁹ See 42 U.S.C. § 666(a)(5)(B)(ii)(I)(1999).

²⁴⁰ FAMILY TIES, *supra* note 144 at 19; Despite the federal protection, some child support agencies routinely require prepayment for testing. See *e.g.*, *Wiggins v. Griner* 843 A.2d 887 (Md. Ct. Spec. App. 2004) (putative father requesting a waiver of prepayment claiming indigency was denied the waiver and had to appeal to obtain order requiring that “the costs of genetic testing shall be borne by the county where the proceeding is pending.”)

the problems faced by the “special population” of low-income obligors.²⁴¹ These reforms should not signal a retreat from the rule-based formula approach to child support and a return to the discretionary approach that yielded low awards and inconsistent treatment even among families with the same income²⁴². Rather, these refinements recognize the particular burdens the current system places on low income obligors and should reduce the number of legal fathers who now view paternity disestablishment as the only defense against aggressive child support sanctions.

The first point of reform for the current system is to develop procedures that facilitate obligor participation in the development of child support orders. Under current procedures, child support orders are routinely entered without actual notice and participation by the noncustodial parent.²⁴³ Where support is set by administrative agencies rather than courts, service may be done by first class mail rather than personal service and hearings may be dispensed with entirely.²⁴⁴ Even where support is set in a judicial process, unrepresented obligors, not understanding the significance of the notice to appear, frequently do not attend hearings.²⁴⁵ There is, therefore, a high likelihood that support orders will be set by default order without income information and other input from the obligor. Given these circumstances, states should develop easy-to-use

²⁴¹ Policy Briefing, Center For Family Policy and Practice 1(October 2004)(describing the United States Office of Child Support Enforcement’s (OCES) “2005-2009 Strategic Plan for Child Support Enforcement”).

²⁴² For a critique of the pre-guideline approach to child support establishment, see Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, *supra* note 22.

²⁴³ See notes 151-53 and accompanying text.

²⁴⁴ Casey Study, *supra* note 122, at 41. The OCES’ 2005-2009 Strategic Plan includes proposals to increase the use of “expedited and administrative processes.” Such plans include “recourse to the courts to ensure that parents receive procedural justice.” NATIONAL CHILD SUPPORT ENFORCEMENT STRATEGIC PLAN, <http://www.acf.hhs.gov/program/cse>. The lack of legal advice and representation to file appeals and appear in court, however, certainly weakens any assurance of procedural fairness. See *supra* note 152.

²⁴⁵ *Id.* See also, Paula Roberts, *If You Don’t Know There’s a Problem , How Can You Find a Solution?: The Need for Notice and Hearing Rights in Child Support Distribution Cases*, 36 Clearinghouse Rev. 422 (Nov.-Dec. 2002).

procedures for obligors to obtain relief to adjust the orders quickly so substantial arrearages do not accrue. A few states have experimented with making child support orders set by “provisional or temporary orders to permit changes if the noncustodial parent appears and provides actual income information.”²⁴⁶ Alternatively, some states have extended the time for modifying or vacating default orders to permit obligor input.²⁴⁷

Once before the court or agency, the guidelines used to determine the amount of the support order need to be restructured to avoid unrealistically high orders. While the needs of low-income fathers must always be balanced against the needs of custodial mothers and children,²⁴⁸ finding the right mix of incentives and sanctions is challenging at best. A variety of proposals have emerged from the American Law Institute²⁴⁹, the Common Ground Project²⁵⁰ and others²⁵¹ that create the potential for greater fairness in child support orders for low-income obligors. While the proposals vary in their details, all include adjustments to minimize the unjust results for low-income obligors from the marginal expenditure approach of the Income Shares Guideline.²⁵² For example, when determining the obligor’s financial capability, guidelines should be structured to include

²⁴⁶ Casey Study, *supra* note 122, at 41.

²⁴⁷ *Id.*

²⁴⁸ Of course, under the current assignment policies, support for children on welfare will go to the state and any policies that reduce the support order will not affect the children. However, to the extent some state’s permit pass-through support or families are forced or choose to leave welfare, the level of support orders of low-income fathers will have an impact on their children.

²⁴⁹ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 61, 3.01-3.05 A.L.I. (2002)

²⁵⁰ DOLLARS & SENSE, *supra* note 162 at 37.

²⁵¹ Casey Study *supra* note 122 at 13.

²⁵² *See supra* note 156.

an adjustment to the mandated support amount to create a “self support reserve” for the obligor’s basic living expenses.²⁵³

Other proposals critique the use of “presumptive minimum awards” These support orders, typically from \$20.00 - \$50.00 per month but may run higher, authorize courts and agencies to order support even where the obligor has no income.²⁵⁴ Such orders may be appropriate where the obligor has “the realistic capability of making a current financial contribution.”²⁵⁵ Where no such capability exists because of chronic unemployment or part time or seasonal employment, the courts should not order support. Instead, courts should set regular reviews and require these fathers to participate in job training, parenting classes, and, if applicable, substance abuse programs to assist them in meeting their support obligations.²⁵⁶

Refinements in the law also need to be made to address the substantial numbers of low-income obligors who are currently subject to unrealistically high orders and are facing sanctions for mounting arrearages.²⁵⁷ For example, federal law should be strengthened to encourage states to forgive arrearages when they are owed to the state and where the obligor’s income is at or near poverty level.²⁵⁸ Child support agencies

²⁵³ Casey Study, *supra* note 122, at 11. Some states have included such an adjustment in their guidelines but these often fall short of assuring obligor minimum living expenses because the reserve set aside is “substantially below the federal poverty level for one person.” *Id.* See also, Grace Blumberg, *Balancing the Interests: The American Law Institute’s Treatment of Child Support*, 33 FAMILY LAW QUARTERLY 39, 44-45 (1999).

²⁵⁴ DOLLARS & SENSE, *supra* note 162 at 11.

²⁵⁵ *Id.* at 13; Casey Study, *supra* note 122, at 26-27. Some experts suggested that minimum awards should not be imposed unless the obligor’s income is at least at or about 50% of the federal poverty level. *Id.*

²⁵⁶ Casey Study, *supra* note 122, at n.9 (describing Partners for Fragile Families: “a ten site demonstration project in which faith-based and community-based responsible fatherhood programs are working together with welfare, workforce development, and child support agencies to assist young, low-income, unwed parents to: 1) establish paternity, 2) increase their financial ability to pay support, and 3) work together in raising their children.”)

²⁵⁷ See *supra* note _____.

²⁵⁸ The Federal Office of Child Support Enforcement has developed policy intended to permit states to develop standards to guide courts to exercise discretion to forgive state-owed arrearages in appropriate

should also be more prudent in seeking sanctions. For example, instead of automatic revocation of all licenses when support is overdue, agencies should consider permitting work-restricted licenses where the obligor's income is dependent upon a professional or motor vehicle license. For the same reasons, when incarceration is used as a sanction for failure to pay child support, the sentence should include work release when it will facilitate the payment of child support.

And, as recommended at almost every point in this process, adequate resources must be devoted to provide greater access to legal representation or pro se assistance for timely intervention for those with legitimate bases for reducing or terminating child support--- e.g. fathers who are incarcerated, disabled, or who have assumed informal custody of children.²⁵⁹ Poverty legal assistance programs should also consider

circumstances. Office of Child Support Enforcement, U.S. Dep't of Health & Human Servs., Policy Interpretation Question (PIQ) 99-03 (Mar. 22, 1999) ("Compromise of Child Support Arrearages"), www.acf.dhhs.gov/programs/cse/pol/piq-9903.htm. Unfortunately, states have done little to develop arrearage forgiveness policies to assist low-income fathers. *See e.g.*, Hatcher & Lieberman, *supra* note 167, at 10-11 (describing the Maryland Child Support Enforcement Administration's consistent refusal to grant the Legal Aid Bureau's "requests for forgiveness of state-owed arrearages on behalf of obligors who are reunited with their children" despite the existence of a pilot project in Baltimore to encourage forgiveness of arrearages with participation in counseling and job skills programs). There are hopeful signs from the 2005-2009 OCSE Strategic Plan which includes among its strategies for the coming years: "Leverage debt, *relieving uncollectible debt owed to the State*, or to the custodial parent (obligee) with obligee's permission, in return for regular, reliable payment of current support." *See supra* note 241 Policy Briefing at 1.

²⁵⁹ Although the need for legal representation for family law litigants continues to far exceed the supply, pro se assistance programs have developed around the country in response to the lack of affordable legal representation in family law disputes, even for those who qualify for free legal assistance. *See, e.g.*, Deborah J. Cantrell, *What Does It Mean to Practice Law "In the Interests of Justice" In the Twenty-First Century?: Justice For Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 *FORDHAM L. REV.* 1573 (2002). Where these pro se assistance projects exist, noncustodial fathers are frequent users of the services. *See e.g.*, An evaluation of three pro se programs in California indicated that in Los Angeles County, 38,521 individuals utilized the pro se program in fiscal year 2001-2002. Paternity cases make up 27% of the caseload (the second largest category of cases). In all three programs combined, child support cases make up 21% of the requests for assistance. Overall, 58% of the individuals requesting assistance were women and 42% men. In Los Angeles County, 55% of clients were women and 45% men. JUDICIAL COUNCIL OF CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, A REPORT TO THE CALIFORNIA LEGISLATURE - FAMILY LAW INFORMATION CENTERS: AN EVALUATION OF THREE PILOT PROGRAMS, 26-27, 39-40 (2003).

redirecting resources to systemic reform for low-income noncustodial fathers, a group that has not been the traditional beneficiary of resources of such programs.²⁶⁰

C. Paternity Disestablishment

Perhaps the most complex challenge for reform in this area is the development of sound policies for paternity disestablishment. A number of competing interests are present in many situations in which a legal father who is not the biological father seeks to disestablish paternity.²⁶¹ The factual circumstances underlying these disestablishment cases are many and varied. The mothers may have identified a non-biological father for “good” reasons – to get needed public benefits for her children while avoiding the threat of harm from the child’s abusive biological father.²⁶² Or she may have identified a non-biological father under less sympathetic circumstances. She may have had multiple partners and been unsure about the paternity of the child, or she may have identified a putative father to solidify her relationship with him because of a strong emotional, financial or other bond.²⁶³ Non-biological fathers, too, consent to paternity for a variety of reasons, some engendering more sympathy than others. The putative father may indeed be a “duped dad”²⁶⁴ who was misled by a partner into believing he was the biological father and consented to paternity to meet his legal and emotional obligations to the child. Or he may have known he was not the biological father or had doubts but

²⁶⁰ Hatcher & Lieberman, *supra* note 167, at 6 (describing a pilot project developed by the Maryland Legal Aid Bureau focused on the needs of low-income fathers by providing assistance in addressing barriers to sustained employment and economic stability as a result of child support problems or policies.).

²⁶¹ One court identified three entities with interests that are implicated in paternity determinations: “the child, the putative parent, and the State.” *In re Marriage of Wendy M.*, 962 P.2d 130,132 (Wash Ct. App. 1998). I would add the mother to that list, as someone who has at least as great an interest as the father and State in these matters.

²⁶² University of Baltimore Family Law Clinic, *supra* note 134.

²⁶³ *Id.*

²⁶⁴ *Dads By Default: Forced To Help Support Three Sons He Did Not Father, Morgan Wise Speaks Out On Behalf Of Other Deceived Dads*, PEOPLE, Nov. 25, 2002, at 78; Kathy Boccella, *Men Seek ‘Paternity Fraud’ Law: Many Must Pay Support for Children Who Aren’t Theirs*, PHILA. INQUIRER, Dec. 23, 2003, at A01.

wanted to solidify his relationship with the mother, child, or both, regardless of genetic link.²⁶⁵ Or he may have anticipated benefiting from the welfare payments that followed paternity establishment, unaware of the child support obligations he would face as a consequence.²⁶⁶

Whatever the circumstances, both adults share some responsibility for the troubling circumstances in which they and their child find themselves if years later the father seeks to disestablish paternity. Regardless of their motivations, the mother's actions in identifying the putative father and the father's actions in consenting to paternity without genetic testing have a number of consequences. Their actions have prevented further efforts to identify the biological father and, in many instances, have resulted in the formation of an emotional and/or financial bond between the putative father and the child. The only truly innocent victim in these cases is the child. Given that, any policy solution must resolve competing interests in favor of the child. Like most sound family regulation, the strongest approaches include clearly defined rules with some limited discretion.

1. Statute of Limitations

A statute of limitations which provides a clean "cut off" for claims of paternity disestablishment has the virtue of certainty, predictability, and simplicity. Putative fathers can be easily informed about their rights to challenge a paternity determination and custodial mothers know when a paternity acknowledgment or order will be permanent.

²⁶⁵ University of Baltimore Family Law Clinic, *supra* note 134. Although the claim that the father consented to paternity knowing he was not the father is often a defense under state law, in practice it is unlikely to successfully bar disestablishment. See *supra* note 224.

²⁶⁶ *Id.*

When combined with social science research on child development, such an approach also contributes to decisions that are in the best interests of the children.

Two issues that must be resolved in developing a child focused statute of limitations are: 1) the appropriate length of time for the statute of limitations and 2) the point in time that triggers the statute. Some statutes run from the time of the child's birth and others run from the time the father learns of the "fraud," that led to his status as legal father. If the statute of limitations is tolled until the father alleges he learned of the "fraud," the proceeding may be brought long after a strong bond with the child has formed.²⁶⁷ If the child's interest is to take precedence over fairness to fathers, the time limit should run from the child's birth.

In deciding the number of years for the statute of limitations, states that have such statutes vary in length from one year²⁶⁸ to five years.²⁶⁹ While the time within which a father and child bond will vary with the frequency of contact and the temperaments of the parties involved, most child development specialists feel that with at least minimal contact between father and child this bond forms within the first two years of the child's life.²⁷⁰ Thus, a statute of limitations that protects children from the possibility of genetic testing and potential disestablishment after the child reaches the age of two is best suited

²⁶⁷ Although state law often regulates when tests can be ordered and admitted into evidence, the wide availability of genetic testing kits makes testing without either a court order or the custodial parent's permission possible. *See supra* note 178.

²⁶⁸ *See* L.A. CIV. CODE. ANN. ART. 189 (West. Supp. 2001) (enforcing one year time limitation strictly unless the child is born more than 300 days after the parents are legally separated).

²⁶⁹ ALASKA STAT. § 25.27.166 (providing a three-year statute of limitations from the date of child's birth or the time the putative father knew or should have known of paternity); *see also*, Ronald Nelson, *supra* note 183; COLO. REV. STAT. § 19-4-107(1)(b) (2002).

²⁷⁰ Reporter Notes, UPA (2000) (finding that allowing such paternity actions after the child's 2nd birthday will "have severe consequences for the child." *See also*, Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297 (2000); In a 1991-1992 study of sixteen large urban areas nationwide, 72% of all domestic relations cases involved at least one unrepresented party. The child's bond to the father can occur even without frequent contact and even where the father does not reciprocate. *See Gantt, supra* note 199, at 7-8.

to protect the child's interests. This is the approach followed under the Uniform Paternity Act of 2000 and has been adopted in a handful of states.²⁷¹

Imposing a uniform statute of limitations will certainly result in requiring greater numbers of nonbiological social fathers to remain legal fathers. Legal recognition of such fathers is consistent with the sound child-centered policies that are developing in the custody area²⁷² and should have equal application in paternity decisions.

2. Best Interests Test

Even where the request to disestablish paternity is made within the statute of limitations, all decisions concerning paternity disestablishment should be made under a "best interests of the child" standard. A custodial parent's decisions on behalf of her child are often presumed to be in the child's best interests.²⁷³ There are, however, a number of circumstances in paternity contests in which the custodial mother may support the legal father's request for paternity disestablishment regardless of the interests of the child. Even if she believes the legal father is the biological father, she may not be interested in any support from him. She has supported the child herself without any help from the legal father or is not likely to receive his support because the state has provided benefits. In other cases where there is genuine doubt as to the legal father's biological link, she may agree it is only fair to let the legal father "off the hook." Or she may believe the legal father voluntarily became the psychological father to the child, but the legal father may have intimidated or regularly harassed the mother about "setting the

²⁷¹ UPA (2000) § 607(a); OKLA.STAT.ANN. tit. 10 § 3 (West 1998); *See also*, WASH. STAT. RCW 26.26.300

²⁷² *See supra* notes 61-69 and accompanying text.

²⁷³ *See, e.g. Troxel v. Granville*, 530 U.S. AT 57 (2000). Given the potentially conflicting interests of the parents and child in paternity cases, a provision requiring separate counsel to guide the court in its best interests analysis may be needed. The UPA's model statute contains such a provision. UPA (2000) § 612. *See also*, Jane C. Murphy and Cheri Levin, *When Daddy Wants Out: The Issue of Paternity*, 32 MD. BAR JOURNAL 10 (2000).

record straight.” The mother may acquiesce under pressure from the legal father or because she feels that she and her child would be better off without the negative presence of the legal father. Thus, courts should not “rubber stamp” a mother’s acquiescence in a request but should make an independent determination as to whether a paternity disestablishment is in the best interests of the child.²⁷⁴

While some states have adopted this approach,²⁷⁵ many have not.²⁷⁶ And even those that have adopted the standard have not applied it with any consistency, often articulating the standard but giving greater deference to fairness for fathers.²⁷⁷ Thus, courts need specific factors to assist them in applying the best interest standard in paternity disestablishment cases. Factors that should guide the court in this context include examining:

- 1) the past relationship and existing bond between the child and the legal father;
- 2) whether there is an existing relationship with another de facto or biological father or the potential to create such a relationship;
- 3) the child’s current physical and emotional needs;
- 4) the child’s need to ascertain genetic information for the purpose of medical treatment or genealogical history.²⁷⁸

²⁷⁴ Murphy & Levin, *supra* note 270 at 12.

²⁷⁵ See e.g., *Ferguson v. Winston*, 996 P.2d 841 (Kansas App. 2000); *In re marriage of Ross*, 783 P.2d 331 (Kansas 1989); *Sleeper v. Sleeper*, 929 P.2d 1028 (Oregon App. 1997); *McDaniels v. Carlson*, 738 P.2d 254 (Wash. 1987); *In the Interest of J.A.U.*, 47 P.3d 327 (Colo. 2002); _____, 185 A.D. 2d 977 (N.Y. _____); *Paternity of Adam*; 903 P.2d 211 (Mont. 1995); *Tuboron v. Weisberg*, 394 N.W.2d 601 (Minn. 1986).

²⁷⁶ See *supra* notes 180 and 181.

²⁷⁷ **Case cite**

²⁷⁸ *Turner v. Wisted*, 327 Md. 106, 116-17, 607 A.2d 935, 940 (1992). While Maryland courts have approved a best interest standard in the context of a request to reopen paternity where the mother of the

Applying such factors will assist courts in resolving paternity disestablishment cases in a way that appropriately places the child's interests above the state's and parents'.

Conclusion

State and federal child support and welfare policies that aggressively encourage paternity establishment and focus enforcement efforts on low-income fathers have contributed to a new definition of fatherhood based exclusively on biology and economic support. This definition hurts the state, low-income families, and, most especially, children. Legal fathers may be willing to maintain a formal connection with children who are at risk of becoming fatherless. But current child support policies that privilege the economic function of fatherhood above all others do not permit functional fathers to assume emotional and caretaking responsibilities without assuming full financial responsibilities. Legal fathers, particularly low-income obligors, must often choose between irreparably harming a child they have called their own for many years or face financial ruin.

The legal definition of fatherhood must be broad and flexible enough to resolve paternity conflicts in ways that stabilize families and protect children. This requires rethinking the current child enforcement system to develop policies that discourage uninformed paternity consents on the front end. And, if challenges to paternity are permitted, legislatures and courts need to define fatherhood broadly enough so that decisions about paternity disestablishment are grounded in the child's best interest at the backend. In addition, while rigorous child support enforcement policies are essential to middle and upper income custodial parents and children, the application of these policies

child was married, it has not applied this standard in cases where the mother is unmarried. *Langston v. Riffe, supra* note 183.

to low-income, fragile families must be reexamined to discourage functional fathers from seeking paternity disestablishment even when there is no biological or marital connection with the child or her mother. Creating a legal definition of fatherhood to account for the complexity of families today is a difficult task but one that must have as its goal protecting children and preventing the loss of fathers in their lives.