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My Two Dads: Disaggreagating Biological and Social Paternity

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† Associate Professor of Law, Michigan State University College of Law. I am grateful for the comments I received on earlier drafts of this work from participants at the 2005 Law & Society and International Society of Family Law conferences. My appreciation, too, to the reference librarians at MSU College of Law and John Sherwood for their research assistance, as well as to my family for their wonderful support.

I. INTRODUCTION

Dubbing its lawsuit "Roe v. Wade for Men," a men's rights advocacy group filed a lawsuit in federal district court in March 2006 claiming that current paternity laws violate their constitutional rights because paternity and corresponding child support orders are premised on biological paternity without considering parental intent or interaction with the child.[1] Less a case about reproductive rights, the case begs the question, on what basis should fatherhood be established, biology or something more?

Biological paternity does not necessarily establish legal paternity. Marriage has long served as the basis for establishing a child's paternity: the husband of the child's mother has been presumed the child's father in the absence of several extenuating circumstances.[2] Often, then, paternity is predicated on both a biological and social relationship with the child.[3] Sometimes, however, the husband is not the child's biological father but is still deemed the child's legal father.[4] In recent decades, in an attempt to equalize the rights of marital and nonmarital children and ensure support and benefits for children born out of wedlock, laws have been enacted to establish paternity for a child out of wedlock based solely on biology.[5] An interesting disconnect thus emerges: biological fatherhood has been subordinated to social fatherhood[6] to preserve an intact familial relationship,

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1. David Crary, *Activists Seek to Let Fathers Opt Out of Child Support*, BOSTON.COM, Mar. 9, 2006, http://www.boston.com/news/nation/articles/2006/03/09/activists_seek_to_let_fathers_opt_out_of_child_support/.

2. Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 331 (2005) ("[T]he [marital] presumption was conclusive unless the husband was sterile, impotent, or had no access to his wife during the relevant time period prior to birth."); *see also* Diane S. Kaplan, *Why Truth Is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 70, 73–81 (2000) (stating that "impotence, sterility, or non-access to the wife" could rebut the presumption, and examining three state models of the marital presumption).

3. Murphy, *supra* note 2, at 326 ("[T]he legal—i.e., married—father, the biological father, and the functional father were, in fact, often the same person.").

4. *Id.* (describing that the rationales for the marital presumption were to protect children from the stigma of illegitimacy and to preserve the sanctity of the traditional family). See *infra* Part III.B for a discussion of *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), in which the Supreme Court applied the marital presumption to preserve the sanctity of the unitary family.

5. See *infra* Part III.A regarding the history of paternity and child support enforcement efforts.

6. *See* Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 650, 671 (1993) (discussing the importance of a social relationship with the child's mother through marriage or a marriage-like relationship, or a relationship with the child to establish legal paternity). Throughout this article, I discuss social fathers, who have a legally recognized parent-child relationship either because of the marital presumption or reliance on emerging doctrines of functional and intentional parenthood. By "functional parent," I mean a person who has assumed many of the daily responsibilities of parenting, such as providing food,

yet biological fatherhood has served as the sole means to establish the legal benefits and obligations of paternity. The commonality between the biological and social paternity approaches is preservation of the unitary, nuclear family: a family predicated on a two-parent paradigm consisting of one mother and one father.[7]

Our society, however, includes many families which do not comport to the traditional mold.[8] In attempting to restrict parenthood to two individuals—and, more specifically, paternity to one man—courts and legislatures have created inconsistencies in the emphasis placed on biological and social fatherhood. Rather than a paradigm which requires choosing one type of fatherhood over the other, family law should instead move to a model by which multiple fathers are recognized. While it may often be the case that a biological father is also the social father—and one man will enjoy all of the rights and responsibilities of parenthood—biological and social fatherhood do not always coincide in the same individual. In those instances, both types of fatherhood should be recognized.

Improved reproductive technologies and changing societal and family norms open the door to multiple parenthood. A simple "who's your daddy" or "who's your mommy" may not be as readily obvious as it once was. Two decades ago, for example, we did not question if a birth mother was, in fact, a legal mother; only recently have women gestated eggs or embryos without any connection to the genetic material.[9] In the paternity context, society assumed a husband was the child's father pursuant to the marital presumption, regardless of whether the husband was, in fact, the biological

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shelter, clothing, and nurturance for the child. By "intentional parent," I refer to a person who has manifested an intent to parent the child, either by actively participating in the mother's pregnancy and encouraging the birth of the child, or by participating in reproductive technology efforts to create the child.

7. See *infra* Parts III, IV, and V in which I address the tension between biological and social paternity in various contexts and the common denominator of the opinions, which is preservation of the two-parent family.

8. Statistics from the 2000 U.S. Census reveal that married-couple households with children made up only twenty-four percent of all households, compared with forty percent in 1970. JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS 3 (2001), *available at* http://www.census.gov/prod/2001pubs/p20-537.pdf.

9. See, for example, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293–94 (Ct. App. 1998), where a married couple contracted with a sperm donor, egg donor, and gestational surrogate. The couple was deemed parents because of their "intent to parent," despite their lack of any biological or genetic relationship to the baby. *Id.* at 293.

father.[10] For children born out of wedlock, society usually treated the child as having one legal parent and forwent an analysis of paternity.[11]

A major shift in paternity jurisprudence commenced in the 1970s with the enactment of several federal laws that mandated paternity establishment and child support enforcement nationwide.[12] A primary basis upon which to establish paternity for a child born out of wedlock is through the biological relationship between father and child. Biology as the sole basis for parentage establishment is closely linked with recent developments in paternity law, child support enforcement, and welfare reform.[13] Regardless of intent, an ongoing relationship with the child's mother, or acts of parenting, biology alone can and does establish paternity.[14]

In recent decades, genetic testing—like reproductive technology—has improved and we now have the scientific ability to identify each child's biological mother and father. As courts and legislatures embrace functional and intentional parenthood as alternatives to biological parenthood, the disconnect between parenthood by biology and parenthood by social relationship grows wider. While courts are beginning to imbue persons with legal parental rights who have no biological connection to their children, the push to establish paternity in greater numbers by relying on biology seems grossly at odds with other family law trends.

A critical component of the discussion concerning the interplay of biological and social paternity is the current adherence to the two-parent paradigm. In a series of cases, the Supreme Court rejected the claims of non-marital, biological fathers who contested the termination of their parental rights because they had not established a significant enough connection with their child and the child's mother.[15] The biological father was given no legal protection in those cases because another man had assumed the role of father. Thus, biological fatherhood was subordinated to social fatherhood because the Supreme Court continued to embrace the

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10. *See supra* notes 2–3 and accompanying text.

11. Murphy, *supra* note 2, at 333 ("If a child's mother was married, her husband . . . was viewed as the father. If a child was born to an unmarried woman, the child had no father . . . . [U]nmarried biological fathers were not recognized under the law.").

12. *See infra* Part III.A.

13. Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 49 (2004).

14. *See, e.g.*, UNIF. PARENTAGE ACT § 505(a) (amended 2002), 9B U.L.A. 332 (2000) (providing that a man who is genetically related to a child should be legally declared the child's father). See *infra* notes 86–95 and accompanying text regarding a man who had no intent to parent but after an unplanned pregnancy was adjudicated as the child's father and ordered to pay child support.

15. *See infra* Part III.B.

traditional two-parent family. Conversely, in the paternity context, courts have used biology alone to establish parentage to ensure that a child has two available parents—and two sources of financial support.[16] In both contexts, though, the full range of parental rights and responsibilities has been conferred or denied in an effort to preserve a two-parent family.

Reliance on the traditional two-parent paradigm must yield to a more flexible approach to parentage. Using paternity as a model, I propose that courts disaggregate the rights and responsibilities of parentage. In the absence of any other indicia of parentage, biology should not become the predicate for a judgment of paternity that identifies the biological father as the *only* legal father with the full range of responsibilities such judgment entails. Rather, biological connection—standing alone—should have a more limited function in determining the legal connection between the biological father and child.

This article is the beginning of a larger exploration of multiple parenthood. Strict adherence to a two-parent paradigm does not accurately reflect many of today's families, such as multiple parents due to divorce and remarriage, or multiple gay and lesbian parents. In writing this article, I hope to present paternity as only one aspect of multiple parenthood.[17] I propose that courts no longer be constrained by current legal doctrine to choose either a biological father or social father, but instead recognize that both men may have a sustainable legal relationship to the child and may jointly share the responsibilities of fatherhood.[18] Biological fatherhood should be but one determinate of full paternity; if a biological father has no desire or intent to parent, has no functional connection with the child, and has no social connection to the child's mother, he should not be the child's only legal father. His role should be limited to modest financial support, if

16. *See infra* Part III.A.

17. I have chosen to focus this paper on paternity because of the current scholarly debate concerning biological versus social paternity, as well as the recently heightened awareness of "paternity fraud" and the trend for social fathers to "disestablish" their paternity. My discussion is fairly narrow and limited to the initial establishment of paternity or disestablishment of paternity in the more traditional cases. For example, I am not discussing the issue of sperm donors, as there are additional policy issues implicit in that discussion. I anticipate that future papers will discuss genetic donors as well as the many possible variations of multiple parenthood.

18. Currently, Louisiana is the only jurisdiction to recognize dual paternity. *See generally* State *ex rel* Dept. of Soc. Servs. v. Howard, 03-2865 (La.App. 1 Cir. 12/30/04); 898 So. 2d 443. In permitting the state to establish the biological paternity of a child to obtain child support, despite the presumption that the husband of the child's mother is the legal father, the court noted that "[t]he concept of 'dual paternity' allows a child to seek support from the biological father notwithstanding that the child was conceived or born during the mother's marriage to another man, and is therefore presumed to be the legitimate child of the marriage." *Id.* at 444 (citing Warren v. Richard, 296 So. 2d 813, 817 (La. 1974)).

appropriate, and a source of genetic identity and history for the child. In this way, social fathers may share in the responsibilities of fatherhood, alongside the biological father, and may share in the many benefits. Limiting the biological father's legal rights and responsibilities in this manner fosters greater fairness in establishing parenthood: a man who truly has neither desire nor intent to parent will have a more limited obligation to the child under my proposal than the he does under the current regime. More importantly, we can protect the institution of parenthood and acknowledge that parentage is defined by much more than DNA.

In Part Two, I discuss the ways in which legal parenthood is established, including responses to reproductive technology and the role of intent. Next, in Part Three, I focus on the paternity paradox and preservation of the two-parent paradigm. Specifically, I explore the jurisprudential disconnect between biological and social fatherhood in preserving and establishing parental rights. I also review paternity fraud and the impact biological versus social fatherhood has had on many legislatures and courts in Part Four, again highlighting the struggle to preserve the two-parent paradigm. Then, in Part Five, I examine the current scholarly debate regarding whether biology should continue to serve as a basis for establishing parentage and show the difficulty of "choosing" biological fatherhood over social fatherhood.

Finally, in Part Six, I offer a new system for establishing parental rights. Specifically, I conclude that parental rights should be disaggregated and established pursuant to a continuum. While it is beneficial to a child to have access to her genetic history and some financial support, biology alone should not give rise to full parental obligations and rights without additional intent or parental actions. To preserve the best interests of the child, we should establish a system whereby a biological father is identified to provide genetic history and, if appropriate, furnish a minimum amount of child support. Yet, to preserve the integrity of parentage and in fairness to biological fathers, a man who has expressed no parental intent nor parental obligation should not shoulder the majority of responsibility for a child's support.

Often the biological father will also be the social father, and all rights and responsibilities will rest with him. In the absence of the combination of biological and social fatherhood, a disaggregation of rights will permit a social father to contribute financial support and nurturance, and to remove the full burden of support from the biological father.[19] The biological father

19. Disaggregation of paternal rights would thus allow for two men to share the obligation of support, if factually appropriate.

will not have full parental rights without accepting them, thus enabling another man to contribute to the child's welfare and support—and establish a legal parental relationship. Finally, recognition of biological and social fathers will help alleviate much of the current unrest concerning paternity fraud, by protecting children's interests in their current relationships with their social fathers and enabling them to commence a relationship with their biological fathers.

II. DETERMINING LEGAL PARENTAGE

The American family has undergone a metamorphoses and, with it, family law jurisprudence has embraced numerous methodologies to begin recognizing the legal rights of families that differ from the traditional, nuclear family norm. In recent years, scholars, courts, and legislatures have attempted to reconcile the application of current parentage laws to nontraditional families and have further recognized new means of establishing parentage.[20] For example, the American Law Institute ("ALI") recognizes parents by estoppel and de facto parents.[21] Several states have enacted third party visitation statutes.[22] Multiple court decisions recognize the right of nonlegal lesbian mothers to maintain a relationship with the children they helped to raise.[23] Although parent-child relationships predicated on one biological mother and father are still the majority, other parent-child relationships are gaining recognition.

Marriage has traditionally established legal parentage: a child born within an extant marriage has two legal parents, the wife and husband.[24] Moreover, the marital presumption has long operated to establish legal

20. *See generally* 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 (1984); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002) [hereinafter *Adjudicating Maternity*]; Richard Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597 (2002).

21. AMERICAN LAW INSTITUTE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (2000).

22. *See* Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 211 (2004) [hereinafter *Paternity Fraud*].

23. *See* Jacobs, *Adjudicating Maternity*, *supra* note 20, at 354–366 (reviewing several cases in which courts preserved the relationship between the nonbiological mother and her child). See also *infra* note 54 for additional cases in which the parental rights of the nonbiological mother have been recognized.

24. For a thorough analysis of the marital presumption, see generally Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547 (2000).

paternity for a husband who may not be biologically related to his child. In the absence of sterility, impotence, or non-access, a husband has been presumed the father of a child born into marriage.[25]

For children born out of wedlock, only one legal parent was recognized, the mother; the biological father bore no responsibilities nor rights to the child.[26] Today, all jurisdictions have statutes that permit a child, or her mother or father to seek a paternity judgment.[27] Once a judgment of paternity is entered, the father is a legal parent with all of the responsibilities and rights of parentage.[28] In 1973, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Parentage Act ("UPA") to protect the rights of nonmarital children.[29] The UPA recognizes biological connection with the child as well as various social connections, such as marriage to the child's mother or functional parenthood, as bases for establishing paternity.

The UPA contains several "presumptions" of fatherhood, most predicated on marriage, by presuming that a man who is married to the child's mother at the time of her birth, married the mother after the child's birth and voluntarily asserted his paternity in a recorded document, or terminated a marriage within 300 days after the child's birth is the child's legal father.[30] The presumption may only be rebutted by an adjudication within two years of the child's birth.[31] The presumption most relevant to this discussion is the fifth presumption, namely that "for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own."[32] This presumption recognizes both intent and function: that a man who is not biologically related to a child may still intend to parent the child and engages in active parenting by living with the child and holding the child out as his own. It demonstrates, too,

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25. Murphy, *supra* note 2, at 331–32 (explaining that non-access could only be proven if the husband was away for longer than nine months).

26. *Id.* at 332–33; *see also* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 6 (2004).

27. *See* UNIF. PARENTAGE ACT § 602 (amended 2002), 9B U.L.A. 338 (2001) (providing that the child, mother of the child, man whose paternity is to be adjudicated, or support-enforcement agency all have standing to initiate paternity proceedings).

28. For a review of the many tangible and intangible benefits and responsibilities of parentage, see *Adjudicating Maternity*, *supra* note 20, at 346–47.

29. The Uniform Parentage Act was revised in 2000 and 2002. UNIF. PARENTAGE ACT prefatory note (amended 2002), 9B U.L.A. 296 (Supp. 2006).

30. *Id.* § 204(a).

31. *Id.* §§ 204(b), 607(a). Section 607 includes a two-year statute of limitations during which paternity presumptions may be rebutted by judicial proceeding. *Id.* § 607(a).

32. *Id.* § 204(a)(5).

that the act of fathering may give rise to legal parentage and that those actions are often more significant than biological connection alone.

Historically, there was no need to evaluate and examine parental intent and function; the marital and/or biological connection presumed or subsumed those parentage elements.[33] However, with the advent of new reproductive technologies, such as artificial insemination and surrogacy, the relationship between biology and intent requires re-examination. When one or neither parent has a genetic connection to the child, courts have determined that "intent" to parent can substitute biological connection and parentage can be established without adoption or other procedure.[34] For example, the UPA provides that "[a] donor is not a parent of a child conceived by means of assisted reproduction."[35] In artificial insemination, intent is superior to biology in paternal decision-making.[36]

Modern gestational surrogacy arrangements frequently rely upon parental intent as a substitute for biological relationship in determining legal parentage. For example, in *Johnson v. Calvert*,[37] the California Supreme Court was required to determine maternity under California's Uniform

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33. *See* Murphy, *supra* note 2, at 326 (explaining that the marital presumption vested paternity in one man who was generally both the biological and social father).

34. *See, e.g., In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293–94 (Ct. App. 1998).

35. UNIF. PARENTAGE ACT § 702 (2000). The comment further explains:

> If a child is conceived as the result of assisted reproduction, this section clarifies that a donor (whether of sperm or egg) is not the parent of the resulting child. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child. In sum, donors are eliminated from the parental equation
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> . . . .
>
> This section of UPA (2000) further opts not to limit nonparenthood of a donor to situations in which the donor provides sperm for assisted reproduction by a married woman. This requirement is not realistic in light of present practices in the field of assisted reproduction. Instead, donors are to be shielded from parenthood in all situations in which either a married woman or a single woman conceives a child through assisted reproduction.

Id. § 702 cmt.

The issue of whether sperm and egg donors *should* have anonymity is a source of current debate. While some fertility experts are in favor of anonymity to protect customers from being caught up in potential custody battles, other customers would like access to donor information, both for genetic medical history purposes as well as to give children the opportunity to contact their genetic parent and learn more about their genetic identity. *See* Amy Harmon, *Are You My Sperm Donor? Few Clinics Will Say*, N.Y. TIMES, Jan. 20, 2006, at A1. See also *infra* Part V.A.2 regarding the issue of genetic identity.

36. *See* UNIF. PARENTAGE ACT § 703 (amended 2002), 9B U.L.A. 356 (Supp. 2006) (providing, in part, "[a] man who provides sperm for, or consents to, assisted reproduction by a woman . . . is a parent of the resulting child.").

37. 851 P.2d 776 (Cal. 1993).

Parentage Act.[38] Mark and Crispina Calvert had contracted with Anna Johnson to serve as a gestational surrogate for them.[39] Although Crispina had had a hysterectomy and could not gestate a pregnancy, she was able to produce eggs, and Anna became the gestational surrogate for an embryo created from Mark's sperm and Crispina's egg.[40] During the pregnancy, Anna became reluctant to give the child to the Calverts and ultimately sought to establish her maternity and keep the baby.[41] The court had to choose who was the legal mother: the birth mother or the genetic mother?

The case illustrates both the way in which courts use substitutes for biological connection in establishing parental rights and are constrained to legalize parental rights for only two parents. In fact, the *Johnson* court specifically wrote that California law recognizes only one mother.[42] Thus, it was obligated to craft a doctrine by which a "tie-breaker" of sorts could be implemented to choose one mother over another and preserve the traditional family unit. To make its decision, the court looked to the parties' intent prior to the pregnancy.[43] While Crispina had a genetic connection with the child, Anna was the birth mother; both women qualified as a parent under the UPA.[44] The court concluded that, "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[45] While the case does include biological connection, it helped pave the way for future rulings in which intent trumped any biological connection with the child. Moreover, the case reinforced the traditional two-parent paradigm.

In a more unusual case, *In re Marriage of Buzzanca*, five people were responsible for the birth of a child, and the court needed to determine two legal parents.[46] Luanne and John Buzzanca "agreed to have an embryo

38. *Id.* at 777–78.
39. *Id.* at 778.
40. *Id.*
41. *Id.*
42. *Id.* at 781.
43. *Id.* at 782.
44. *Id.* Under California's Uniform Parentage Act, the mother and child relationship may be established either by the woman giving birth to the child or *under the Act. Id.* at 780 (citing CAL. CIV. CODE § 7003 (repealed 1994)) (emphasis added). Like the UPA, California's version makes the provisions relating to paternity applicable to maternity declarations, too, whenever practicable. *Id.* One means by which to establish paternity is through evidence from genetic testing. *Id.* at 781. Because genetic testing excluded Anna as the child's genetic mother and confirmed that Crispina was, in fact, the genetic mother, both women qualified as "mother" under the Act. *Id.*
45. *Id.* at 782.
46. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

genetically unrelated to either of them implanted in . . . a surrogate."[47] After the pregnancy, John filed for divorce, and a trial court was asked to determine the legal parents of the child, Jaycee.[48] The trial court decided that Jaycee had no legal parents.[49] Because the surrogate and her husband had agreed in writing that they were not the lawful parents[50] and because neither Luanne nor John had a biological connection to Jaycee, the trial court determined no legal parents existed.[51]

The appellate court disagreed and, in beginning its analysis, clarified that legal motherhood could be established other than by giving birth or contributing an egg.[52] Analogizing to paternity law, the court recognized that fatherhood can be established by conduct, such as permitting a spouse to be artificially inseminated.[53] Because Luanne "caused Jaycee's conception and birth by initiating the surrogacy arrangement," she intended the birth, intended to parent, and thus should have been declared the legal mother.[54] Given the circumstances of the case, the court made a good decision for Jaycee. In reaching its conclusion, however, the court was forced to perform some legal gymnastics to ensure it applied various presumptions to achieve a two-parent family and no more.

More recently, courts have applied the intent test to legalize the parentage of non-biological lesbian co-parents.[55] In addition, the ALI Principles permit a determination of legal parentage in the absence of biology.[56] Parent by estoppel incorporates both function and intent: one who

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47. *Id.*

48. *Id.*

49. *Id.*

50. The *Buzzanca* court permitted the contractual relinquishment of any parental rights by the surrogate and her husband. *Id.* The UPA similarly permits a surrogate and her husband to waive their parental rights. UNIF. PARENTAGE ACT § 801(a) (amended 2002), 9B U.L.A. 362 (2000). The UPA specifically authorizes gestational agreements and provides further that the prospective gestational mother, her husband if she is married, and the donors relinquish all parental rights and that the intended parents will be the legal parents of the child. *Id.*

51. *Buzzanca*, 72 Cal. Rptr. 2d at 282.

52. *Id.*

53. *Id.*

54. *Id.* at 291.

55. *See, e.g.*, Elisa B. v. Superior Court, 117 P.3d 660, 662–63 (Cal. 2005) (holding that a lesbian partner who agreed to have children with her partner, supported her partner's artificial insemination with an anonymous donor, and actively parented the children with her partner while living together as a family unit is a parent under the Uniform Parentage Act); Kristine H. v. Lisa R., 117 P.3d 690, 692, 696 (Cal. 2005) (holding that a woman was estopped from attacking the validity of a parentage stipulation jointly signed and filed by her and her lesbian partner, and that permitting an attack on the validity of the judgment would contravene public policy that favors a child having two legal parents).

56. AMERICAN LAW INSTITUTE PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (2000).

intended to parent a child and engages in specific acts of parenting is entitled to full parental rights under the ALI Principles.[57] Even the application of modern parentage approaches, however, has been used to maintain the traditional two-parent family paradigm.[58] By recognizing two lesbian mothers, two gay fathers, or a mother and father who used a donor egg and/or sperm, the courts move beyond biological parentage while still reinforcing the two-parent paradigm.

While many courts have used equitable approaches to establish legal parenthood for a second, non-biological parent, other courts have placed heightened emphasis on biological fatherhood to establish or disestablish paternity. The next section addresses the paradox of using biological fatherhood to establish paternity yet rejecting biological fatherhood when a social father is available.

III. THE PATERNITY PARADOX AND PRESERVATION OF THE TWO-PARENT PARADIGM

Given the greater reliance on functional and intentional parenthood, it is anachronistic to establish paternity with all of the responsibilities and benefits thereof based solely on biological fatherhood. Many scholars note that parentage law has presumed that something more than biology creates the legal rights and responsibilities of parenthood.[59] For instance, it is a well

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57. A parent by estoppel is defined, in part, as:

> [A]n individual who, though not a legal parent, . . . lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as a parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests; or . . . lived with the child for at least two years, holding out and accepting full and permanent responsibilities as a parent, pursuant to an agreement with the child's parent (or, if there are two legal parents, both parents), when the court finds that recognition of the individual as a parent is in the child's best interests.

Id.

58. *See* Storrow, *supra* note 20, at 639–40. Professor Storrow observes that parenthood by intention has been largely used to resolve parentage determinations for married couples who have used assisted reproduction. *Id.* He argues, however, that the doctrine of intentional parenthood should be applied more broadly. *Id.*

59. *See, e.g.*, Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 323 (2004) (stating that "biology has never been all-determinative in defining parentage, whether in nature or under law . . . . For as long as law has governed various family matters among humans, it has looked at biology as only one among a number of factors to be used in deciding how to allocate parental rights and responsibilities.").

established principle that unwed fathers must meet the "biology plus" standard to contest a termination of their parental rights.[60] Paradoxically, however, family law jurisprudence seems to be moving in two directions at once. Although courts and legislatures are embracing alternatives to biological parenthood, biology alone frequently establishes parentage, especially when the state has an interest in establishing paternity and a concurrent child support order, i.e., when in the interest of the public fisc.[61]

The disconnect between establishing legal parentage for a nonbiological father who intends to and actively nurtures the child and conferring full parental rights and responsibilities on a biological father who has no intent to be a parent is illustrated in the following example. Imagine that a couple engages in oral sex; without telling the man, the woman uses the sperm from the sexual act to become pregnant. She later brings a paternity action and sues for child support. Is the sperm donor a father? What sounds like the stuff of a movie or novel has allegedly occurred and was widely publicized in national newspapers, websites, and blogs.[62] In one case, a man's paternity was adjudicated, and he was ordered to pay child support despite his contention that he never engaged in sexual intercourse with the mother, but rather, she "stole" his sperm after performing fellatio and impregnated herself without his knowledge or consent.[63] Under our current paternity laws, his biological fatherhood is sufficient to establish his legal parenthood, despite his lack of intent to become a parent.

The allegations regarding the "sperm theft" may or may not be true; regardless, this case should give us pause and encourage us to consider

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60. *See generally* Dolgin, *supra* note 6; David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753 (1999). See *infra* Part III.B for a discussion of the "biology-plus" cases.

61. *See* Oren, *supra* note 13, at 77. Analyzing several Supreme Court cases regarding invalidating insufficient statutes of limitations for filing paternity suits, Professor Oren notes:

> An interesting thread runs through the cases . . . . In each situation, the state limited the ability to file suit against unmarried fathers, which paradoxically cuts against its own interest in maximum collection. The Justices focused on the rights of nonmarital children, but they clearly considered the impact of their decisions on the public fisc.

Id.

62. *See, e.g.*, *Sperm: The Gift that Keeps on Giving*, MSNBC.COM, Feb. 24, 2005, http://msnbc.msn.com/id/7024930/ (discussing an appeals court opinion in which the court refused to recognize a cause of action of theft regarding the sperm allegedly stolen after fellatio, but permitting a claim for emotional distress).

63. *See* Irons v. Phillips, No. 00 D6 79109 (Cook County Cir. Ct., Jul. 18, 2005). Judge Thomas J. O'Hara reiterated the court's findings that: (1) the DNA evidence indicated that Phillips was the father of the child; (2) that a paternity order and child support order were previously entered by the court; and (3) that an order for child support arrearage should be entered as well as an order of no visitation between Phillips and the child. *Id.*

whether biology alone suffices to establish parentage. Although we want children to have financial and emotional support, by predicating all of these rights and responsibilities on biology, the law creates a legal relationship for the child that may offer no nurturance, just potential financial support (and likely potential conflict and animosity), while also preventing another man from establishing any legal parental rights. By using biology alone to establish paternity, children may be deprived of a man who would like to assume the responsibilities of parenthood but may be reluctant to do so because he will have no parental rights. On the other hand, to reject biology as a basis of parenthood seems to completely ignores the importance of genetic identity and heritage as well as an important source of support for a child.

A. The Role of Federal Child Support Enforcement

As a result of national child support enforcement efforts, biology has played an increasingly important role in establishing paternity, largely to help the public fisc. Conversely, more courts and legislatures are moving away from strict reliance on biology or marriage to establish parenthood due to function and intent. In the paternity context, biology has never been the sole determinate of parental rights under Supreme Court jurisprudence and yet for purposes of the public fisc, biology reigns supreme.

For many years, a child born out of wedlock only had one legal parent, the mother.[64] In fact, unwed fathers often had no rights or responsibilities to their biological children.[65] Professor Katharine Baker traces the origins of legal paternity and support laws and her discussion reveals the importance of the public fisc in initial paternity development. The duty of a biological father to support his non-marital child originated in England in 1576 as part of the British Poor Laws but only obligated men whose children were receiving a form of public assistance.[66] Other non-marital children were not entitled to support until 1844.[67] In the United States, paternity was fairly haphazard, with some states establishing the duty to support in the criminal context and other states refusing to impose any support obligation on an unmarried father.[68]

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64. *See* Baker, *supra* note 26, at 6.

65. *See id.* (discussing the refusal of several states to impose any duties of support on biological fathers and noting that a court even refused to permit a child to have his paternity investigated).

66. *Id.*

67. *Id.*

68. *Id.* (noting that some states did not recognize a duty to support and that "[a]s late as

Meanwhile, in the 1960s and 1970s, the Supreme Court rendered a number of opinions in which it determined that non-marital children were entitled to many of the benefits of marital children. The Court made several rulings to protect the rights of children born out of wedlock, such as the right to receive child support,[69] sustain an action for wrongful death,[70] and recover under a state's workers' compensation law.[71] The Court's focus in these cases was the best interests of the child or children, and their entitlement to benefits.[72]

In response to the Supreme Court rulings, and in an effort to equalize the rights of non-marital and marital children, the Uniform Parentage Act was promulgated in 1973.[73] Its purpose was to establish a civil scheme whereby legal parentage would be established for non-marital children, allowing for corresponding child support obligations and custody benefits—and to ensure that a child has two legal parents to provide financial and emotional support.[74] Nineteen states have adopted the UPA and several others have adopted many of its provisions.[75] Soon thereafter, Congress entered the paternity arena. As Professor Laura Oren has observed, "[e]ver since 1975, with increasing vehemence, federal policy has encouraged and, indeed, coerced the identification of the biological fathers of nonmarital children."[76]

1971, Texas and Idaho refused to impose any support obligation on an unmarried father.").

69. Gomez v. Perez, 409 U.S. 535, 537–38 (1973) (holding that children born out of wedlock are constitutionally entitled to the same right of support as are children of married parents).

70. Levy v. Louisiana, 391 U.S. 68, 72 (1968) (holding that it violated the Equal Protection Clause not to permit five children born out of wedlock to seek damages as a result of the wrongful death of their mother).

71. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 169–70 (1972). Two children born out of wedlock sought to recover under a state's workers' compensation law but were denied because of their illegitimate status. *Id.* at 167. The children lived in an intact household with their unwed mother and father, and their father's four legitimate children from his marriage. *Id.* at 165. Based on the fact that they comprised an intact family, the Court found it violated the Equal Protection Clause to deny the two children born out of wedlock the same right to sue under a workers' compensation law as the four legitimate children. *Id.* at 169–70, 176.

72. Dolgin, *supra* note 6, at 663 n.114. Professor Dolgin observes that although the biological paternity cases

> make declarations of paternity on the basis of legal biological paternity alone, they are essentially decisions that the biological father bears a certain contractual, financial obligation . . . . No relationship *with the child* is assumed to flow from the man's biological paternity. His responsibility for the child's support is in essence, . . . a matter between the man . . . and the state.

Id.

73. UNIF. PARENTAGE ACT prefatory note (amended 2002), 9B U.L.A. 296 (Supp. 2006).

74. *Id.*

75. *Id.* (stating that nineteen states adopted the UPA as of December 2002).

76. Oren, *supra* note 13, at 94.

In 1975, Congress established the federal office of child support enforcement.[77] Pursuant to the legislation establishing the office of child support enforcement and programs, each state was required to develop its own child support enforcement program. Under the initial legislation, a cooperative endeavor between the state and federal government was envisioned and states received some federal funding for their state programs.[78] Moreover, despite the fact that states have discretion to develop their programs, federal requirements are imposed.[79] One of the most significant pieces of legislation regarding the federal child support enforcement program is the Family Support Act of 1988 ("FSA").[80] The FSA set "performance standards for state programs establishing paternity," and "[s]tates must meet a specified 'paternity establishment percentage.'"[81] The FSA also requires presumptive use of mandatory child support guidelines for establishing child support awards, periodic review of child support orders, and development of statewide automated systems.[82] As Professor Oren explains, the welfare reform initiatives of 1996 placed even greater emphasis on paternity establishment and was designed to promote male responsibility.[83]

Paternity establishment and a child's corresponding entitlement to support and benefits are often based purely on biological connection. Regardless of the father's intent or desire to parent, he will be adjudicated the child's legal father and will have all the responsibilities of fatherhood. As Professor Baker observes, "much paternity law seems to be based on a strict liability theory for genetic contribution."[84] Thus, the "sperm-theft" father was deemed the child's legal father and a child support obligation imposed, regardless of his lack of intent to parent and alleged lack of sexual intercourse.[85]

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77. Child Support Enforcement Act of 1975, 42 U.S.C. § 651 (2000).

78. For a thorough discussion of the development of paternity and child support enforcement legislation, see Murphy, *supra* note 2.

79. A 1984 amendment to the Child Support Enforcement Act requires states to use wage garnishment. *See* Pub. L. No. 98-378, § 466(a)(8), 98 Stat. 1305 (1984).

80. 42 U.S.C. § 652 (2000).

81. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 507 (2d ed. 2002).

82. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 576 n.15 (3d ed. 1998).

83. Oren, *supra* note 13, at 97–98. Oren writes that the purpose of the new legislation was to alleviate child poverty by establishing paternity and corresponding child support orders. *Id.* at 98. To establish paternity in greater numbers, states were required to have in-hospital voluntary paternity establishment procedures and other administrative procedures for ordering genetic testing. *Id.* at 98–99.

84. *See* Baker, *supra* note 26, at 8–9.

85. See *infra* Part V.A. regarding "assumption of the risk" and child support obligations.

Paternity laws have not gone unchallenged.[86] In a recent Hawaii court decision, a man challenged the constitutionality of the UPA.[87] John and Jane Doe met in high school and dated for about fourteen months.[88] The couple agreed to use condoms to avoid pregnancy, and the facts revealed that the couple did not intend to procreate; Jane Doe became pregnant, however, and she decided against abortion or placing the child up for adoption.[89] John Doe strongly opposed her decision.[90] After the child's birth, Jane Doe began receiving state assistance, and the state filed a paternity action on behalf of the child.[91] Genetic testing proved that John Doe was the child's father and he was ordered to pay child support.[92] John Doe appealed and challenged the constitutionality of Hawaii's version of the UPA ("HUPA") as a violation of his equal protection and procreational autonomy rights, and further challenged the trial court's child support order.[93]

The Hawaii Supreme Court disagreed and found that HUPA did not violate Doe's rights.[94] First, the court determined that the level of review applicable was rational basis, as "HUPA does not implicate the father's fundamental privacy right to procreational autonomy, but rather his economic interest in not supporting his child" and that the biological relationship of fathers to children is a non-suspect classification.[95] The court determined that HUPA does not create an improper gender-classification, but rather distinguishes parties based on their biological relationship to the child, which is subject only to rational basis review.[96]

The alleged sperm-theft father demonstrates the tenuousness of imposing all parental responsibilities by virtue of biological connection alone, especially if the man does not think he is engaging in activity which in the ordinary course could possibly result in pregnancy. *See supra* note 63 and accompanying text.

86. In a highly publicized case filing, a men's rights group has recently filed in federal district court a lawsuit nicknamed "Roe v. Wade for Men." *See supra* note 1 and accompanying text. The group claims that men's reproductive choice is violated by paternity establishment and child support enforcement, as women have the choice to abort or place a child for adoption and men do not have a similar choice. *Id.*

87. Child Support Enforcement Agency v. Doe, 125 P.3d 461, 463 (Haw. 2005).

88. *Id.* at 463–64.

89. *Id.* at 464.

90. *Id.*

91. *Id.*

92. *Id.* Following the filing of the complaint by the Child Support Enforcement Agency, the parties stipulated to genetic testing, which revealed a 99.99 percent probability of paternity. *Id.* The father did not contest his biological paternity but objected to having his legal paternity established and to being ordered to pay child support. *Id.*

93. *Id.* at 463.

94. *Id.* at 468.

95. *Id.*

96. *Id.* at 471.

The court further explained that the State had not interfered with Doe's right of procreation: the State did not require him to engage in sexual activity nor did it interfere with his right to use contraception.[97] Just because a woman has more control over the decision whether to bear the child, both parents are aware of the possibility of pregnancy when they engage in "a course of conduct inconsistent with the exercise of [their] right not to beget a child."[98] The court thus concluded that Doe's economic interest was implicated rather than his right to procreational autonomy.[99] Using rational basis review, the court held that HUPA furthers a legitimate state interest by protecting the financial welfare of children and the public welfare.[100]

Even if a mother agrees to waive or limit child support, courts have held that the waiver or limitation is violative of public policy.[101] A recent California court held that if the father voluntarily terminates his parental rights with the mother's approval as a matter of convenience to guarantee no contact between the father and child and to obviate the father's support obligation, public policy will intervene to "protect the child's continued right to support."[102] Although the mother and father in this case stipulated to the father's termination of parental rights and the mother argued that she should be free to raise her child as a single parent, the court wrote "'by recognizing the value of determining paternity . . . the Legislature implicitly recognized the value of having *two* parents, rather than one, as a source of both emotional and financial support.'"[103]

Interestingly, as the next section demonstrates, while biology often results in paternity establishment and child support obligations, biological paternity is insufficient to protect paternal rights when not related to the public fisc.

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97. *Id.* at 469.

98. *Id.*

99. *Id.*

100. *Id.* at 472. The court noted that "the imposition of support obligations on fathers rather than non-fathers is not arbitrary or capricious." *Id.* The court also rejected Doe's claim that imposition of child support violated his right to be free from compulsory service—"[t]he father's arguments are so palpably lacking in merit as to suggest bad faith on the part of the pleader." *Id.* Finally, the court held that Doe's appeal was frivolous because each contention was "long ago put to rest by well-settled precedent." *Id.* at 474. Doe was ordered to pay damages and costs. *Id.* at 475.

101. Kristine M. v. David P., 37 Cal. Rptr. 3d 748, 749 (Ct. App. 2006).

102. *Id.*

103. *Id.* at 788 (quoting Elisa B. v. Superior Court, 117 P.3d 660, 669 (Cal. 2005)) (emphasis added).

B. The Supreme Court and "Biology-Plus"

As the Court decided several cases regarding the rights of nonmarital children and Congress developed its federal initiatives to establish paternity and support, the Court also decided several cases concerning the rights of unwed fathers. In each case, an unwed father challenged a state's ability to terminate his parental rights. While the Court has long deemed parental rights fundamental and one of the most important rights necessitating protection,[104] in the following cases a biological father did not have constitutional protection without better indicia of parentage than biology. Ultimately, the Court determined that an unwed father's paternal rights were deserving of protection only if he demonstrated a commitment to a parental relationship with his child, not just a mere biological connection.

In *Stanley v. Illinois*,[105] an unwed father challenged the State's authority to put his children in foster care pursuant to a presumption that unwed fathers are unfit to care for, and have no legal standing to raise, their children.[106] The Court emphasized not only that Stanley had sired his children but raised them, too.[107] In fact, the Court did not merely see Stanley as the biological father of children with whom he had little or no relationship; rather, the Court noted that refusing Stanley a hearing concerning his parental fitness violated the Due Process Clause because of the very important issue at stake—"the dismemberment of his family."[108] The Court thus struck down the Illinois presumption as a violation of Stanley's due process and equal protection rights.[109]

Then, in a series of three cases, the Court established what has become known as the "biology-plus" test. In these cases, unwed fathers challenged

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104. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that the liberty interest guaranteed by the Fourteenth Amendment includes the right to "establish a home and bring up children" without state interference).

105. 405 U.S. 645 (1972).

106. *Id.* at 646. To demonstrate that children were wards of the state, Illinois had to prove that either the child had no surviving parent or that the parent did not provide suitable care. *Id.* at 649. The Illinois statute defined parent as "the father and mother of a legitimate child, or the survivor of them, or the natural mother of an illegitimate child," but the statute did not include unwed fathers. *Id.* at 650 (citing ILL. REV. STAT., c. 37 § 701-14).

107. *Id.* at 651 ("The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and . . . protection.").

108. *Id.* at 658. As Professor Janet Dolgin observes, "[t]he Court's decision in *Stanley* strongly suggests that the rights extended to Stanley depended on his position as a biological *and* a social father to his children." Dolgin, *supra* note 6, at 650.

109. *Stanley*, 405 U.S. at 658.

the termination of their parental rights when their child was to be adopted by a stepfather. The Court concluded that an unwed father did not have the right, pursuant to biology alone, to challenge the termination of his rights; only if he had actively engaged in parenting could he challenge the termination.

In *Quilloin v. Walcott*,[110] an unwed father, Quilloin, sought to prevent the adoption of his son by the stepfather.[111] The child was born in 1964 and was in the sole custody and control of his mother, Walcott, for twelve years prior to the adoption proceedings.[112] Walcott married in 1967, and in 1976 she consented to the son's adoption by her husband.[113] Quilloin objected to the adoption petition and sought visitation but did not seek a custody order.[114] The Georgia adoption scheme provided that a child born in wedlock could not be adopted without the consent of both parents, but a child born out of wedlock could be adopted solely with the mother's consent.[115] Quilloin argued that the differential treatment violated his due process and equal protection rights.[116]

Unlike *Stanley*, the Court did not agree that the Georgia statute violated the due process and equal protection rights of an unwed father.[117] In fact, distinguishing this case from one in which the State was attempting to force the breakup of a family, the Court noted that Quilloin had never sought physical or legal custody of his son.[118] Moreover, the Court noted that the adoption would instead grant "full [legal] recognition to a *family unit already in existence*" rather than deprive Quilloin of any constitutional rights.[119]

One year later, the Court was again confronted with a case concerning the rights of an unwed father who did not consent to his children's adoption

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110. 434 U.S. 246 (1978).

111. *Id.* at 247.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 248 (citing GA. CODE ANN. § 74-403(3) (1975)).

116. *Id.* at 252–53.

117. *Id.* at 256.

118. *Id.* at 255 (noting that due process is likely violated if the state attempts to force the breakup of a natural family over the objections of the parents (citing Smith v. Org. of Foster Families, 431 U.S. 816, 862–63 (1977) (Stewart, J. concurring))).

119. *Id.* at 255 (emphasis added). In concluding that the adoption statute did not deprive Quilloin of any due process or equal protection right, the Court specifically noted that by not having any custodial relationship with his son, he shouldered no significant responsibility regarding "supervision, education, protection, or care of [his son]." *Id.* at 256. While Quilloin's parental rights were not protected by the decision, the Court emphasized the importance of a nurturing family by protecting the child's right to be adopted by the man who had shouldered parental responsibility. *Id.* at 255–56.

by their mother's new husband.[120] Abdiel Caban and Maria Mohammed lived together from September 1968 until the end of 1973.[121] Although never legally married, the two held themselves out as husband and wife and during this time they had two children: David born in 1969 and Denise born in 1971.[122] Caban was listed as the father on each child's birth certificate; he lived with them for the first few years of their lives, and he contributed to their support.[123] After the couple ended their relationship, Caban continued to visit the children, although they ultimately moved to Puerto Rico with their maternal grandmother.[124] Caban subsequently communicated with the children through his parents, who also resided in Puerto Rico.[125] In November 1975, Caban traveled to Puerto Rico to visit with the children for a few days and, rather than return them to their grandmother, brought them to New York.[126]

A custody battle ensued, with Mohammed and her husband seeking to adopt the children and Caban cross-petitioning for adoption.[127] The Mohammeds' petition was granted, with the judge noting the limited right of an unwed father under New York's adoption statute,[128] specifically section 111.[129] Essentially, the New York adoption statute permitted an unwed mother to preclude the adoption of her child simply by withholding her consent, whereas an unwed father had no similar right, even if he had a substantial relationship with the child.[130] Rather, an unwed father could only prevent adoption if he could prove it was not in the child's best interests.[131] Subsequent to the upholding of the adoption ruling by the NY Supreme Court, Appellate Division, Caban appealed, alleging that the statute violated both his equal protection and due process rights.[132]

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120. Caban v. Mohammed, 441 U.S. 380 (1979).

121. *Id.* at 382.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 383.

126. *Id.*

127. *Id.* As the Supreme Court noted, while an unwed mother has many parental rights without adopting her child, the adoption statute was interpreted to permit adoption of a child born out of wedlock by her mother. *Id.* at 383 n.1 (citing *In re* Anonymous Adoption, 31 N.Y.S.2d 595 (Surr. Ct. 1941)) (addressing the use of New York Domestic Relations Law section 110).

128. N.Y. DOM. REL. LAW § 111 (McKinney 1977) (providing, in part, that consent to adoption shall be required of the mother of a child born out of wedlock). There is no corresponding provision requiring consent of an unwed father. *See id.*

129. *Caban*, 441 U.S. at 384.

130. *Id.* at 386–87.

131. *Id.* at 387.

132. *Id.* at 385.

The Supreme Court agreed that section 111 violated the Equal Protection Clause because of impermissible gender-based distinctions.[133] Mohammed argued that the state had a substantial interest in promoting the adoption of illegitimate children, and that requiring consent of unwed fathers would both discourage adoption and make the process more difficult, as locating unwed fathers during adoption proceedings could significantly impede the adoption process.[134] Neither argument was persuasive,[135] and the Court held that by excluding loving fathers from participation in the decision of whether their children could be adopted or permitting a mother to arbitrarily deny paternal rights to an unwed father, section 111 violated equal protection.[136] Integral to the Court's opinion was the relationship that Caban had established with his children: the Court stated that "[t]he facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children."[137]

Four years later, the Court heard another case in which it considered whether, "New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth."[138] The father, Lehr, argued, pursuant to the Due Process and Equal Protection Clauses, that he had "an absolute right to notice and an opportunity to be heard before the child may be adopted."[139] The Court disagreed, for many of the reasons articulated in *Quilloin*.[140] Lehr's daughter, Jessica, was born in November 1976 and her mother, Robertson, married eight months after Jessica's birth.[141] When Jessica was a little more than two years old, her mother and stepfather sought to adopt her and the petition was granted.[142] One month after the

133. *Id.* at 389. The Court specifically noted that in its *Quilloin* decision it had reserved the question whether gender-based distinctions within a statute such as section 111 would violate equal protection because the claim was not properly presented. *Id.* at 389 n.7.

134. *Id.* at 390–92.

135. The Court noted that "in cases such as this, where the father has established a substantial relationship with the child and has admitted his paternity, a State should have no difficulty in identifying the father even of children born out of wedlock." *Id.* at 393. The Court further observed that "[t]he effect of New York's classification is to discriminate against unwed fathers even when their identity is known and they have manifested a *significant paternal interest in the child.*" *Id.* at 394 (emphasis added).

136. *Id.*

137. *Id.*

138. Lehr v. Robertson, 463 U.S. 248, 249–50 (1983).

139. *Id.* at 250.

140. *Id.*

141. *Id.*

142. *Id.*

commencement of the adoption proceedings, Lehr filed a visitation and paternity petition in another county, which was ultimately dismissed.[143]

On appeal, Lehr argued that "a putative father's actual *or potential* relationship with a child born out of wedlock" is a protected liberty interest.[144] The Court found that "[t]he difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant."[145] The Court observed that a father who demonstrates a "full commitment to the responsibilities of parenthood" acquires protection under the Due Process Clause.[146] The Court further observed that the "*mere existence of a biological link* does not merit equivalent constitutional protection."[147] In an oft quoted passage, Justice Stevens continued to discuss the relevance of biology to parental rights:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.[148]

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143. *Id.* at 252–53. Prior to granting the adoption, the family court examined the putative father registry and found no record of Lehr, thereby allowing the petition. *Id.* at 251. New York law provided that a man who files with the registry is entitled to notice of adoption proceedings; similarly, if a man put his name on the child's birth certificate, lived with the child and her mother and held himself out as the father, or was named by the mother as the child's father in a sworn statement would also be entitled to notice. *Id.*

Although Lehr had not lived with Jessica, nor appeared on her birth certificate, nor filed with the registry, he claimed special circumstances, specifically, that he had filed a paternity action. *Id.* at 252. While the judge hearing the adoption case was made aware of the paternity proceeding, he went ahead and granted the adoption without officially notifying Lehr, maintaining that New York law did not require notice in these circumstances. *Id.* at 253. Both the Appellate Division and New York Court of Appeals upheld the ruling that the filing of the paternity action did not require Lehr to receive notice. *Id.* at 253–55. The Appellate Division emphasized that Lehr could have protected his rights if he had filed with the putative father registry. *Id.* at 254. While the Court of Appeals recognized that it might have been prudent to give notice to Lehr, the court found it was not an abuse of discretion for the trial court judge to grant the petition without notice. *Id.* 254–55.

144. *Id.* at 255 (emphasis added).

145. *Id.* at 261.

146. *Id.* (citing Caban v. Mohammed, 441 U.S. 380, 392 (1979)).

147. *Id.* (emphasis added).

148. *Id.* at 262 (footnote omitted).

Additionally, the Court distinguished the equal protection claim from that in *Caban*; whereas Caban had actively participated in parenting his children, Lehr had not established any "custodial, personal, or financial relationship" with Jessica, thus equal protection did not require that both parents be accorded the same rights.[149]

The "biology-plus" cases demonstrate the legal landscape for unwed fathers in constitutional jurisprudence: biology, on its own, does not entitle a man to the rights of parentage. In fact, as *Lehr* shows, not only is biology alone insufficient to protect parental rights, the "plus" must be significant enough for constitutional protection to attach.[150] In so doing, the Court has defined paternity as something more than biology and appears to have included a functional component in its analysis.[151] The cases also demonstrate the inherent paradox in predicating paternity determinations on biology alone, without the father demonstrating any commitment to the child or intent to parent. Justice Stevens noted this paradox in but three sentences of his opinion in *Lehr*, where he wrote:

> [The] Court has considered the extent to which the Constitution affords protection to the relationship between natural parents and children born out of wedlock. In some we have been concerned with the rights of children. In this case, however, it is a parent who claims that the State has improperly deprived him of a protected interest in liberty.[152]

Perhaps Justice Stevens meant that in the paternity context, it is important to identify a second legal parent for the child but that in the adoption cases, the child's rights were adequately protected as another man had already willingly assumed the role of father. Thus, there was no reason to protect the rights of the unwed father. Neither approach makes much sense: arguably, if the biological father's rights are not worthy of

149. *Id.* at 267–68. In discussing the equal protection claim, the Court wrote:

> We have held that these statutes may not constitutionally be applied in that class of cases where the mother and father are in fact similarly situated with regard to their relationship with the child. In *Caban v. Mohammed*, [we] held that it violated the Equal Protection Clause to grant the mother a veto over the adoption . . . but not . . . their father . . . . [We] made it clear, however, that if the father had not "come forward to participate in the rearing of his child, nothing in the Equal Protection Clause would preclude the State from withholding from him the privilege of vetoing the adoption of that child."

Id. at 267 (citations omitted). The State would not violate the Equal Protection Clause by denying the father such veto. *Id.*

150. *Id.* at 261–62.

151. *Id.*

152. *Id.* at 258 (citations omitted).

constitutional protection then he should not be declared a legal father pursuant to biology alone under current Supreme Court jurisprudence. Alternatively, if protecting the best interests of the child is paramount, it would make more sense to permit the adoption and legalize the relationship between the adoptive father and child while also maintaining a legal relationship for the biological father so that the child has access to her genetic history and, perhaps, another source of support. But both approaches are inconsistent with the Court's adherence to the two-parent family paradigm.

The "biology-plus" cases exemplify the Court's fondness for unitary, "nuclear" families and the traditional parental paradigm.[153] For example, in *Quilloin* and *Lehr*, by allowing the adoptions, the Court merely recognized family units already in existence;[154] whereas in *Caban*, to permit adoption over the objection of the father was seen as violative of the family unit.[155]

Interestingly, in *Caban*, however, the children had not been living with their mother and stepfather, but rather, had been in the custody of their maternal grandmother prior to the adoption proceedings.[156] Perhaps the Court would have considered the case differently if the facts had been similar to *Quilloin* and *Lehr*. Professor David Meyer offers another possible interpretation of the Court's opinions in these three cases, that the Court was also concerned with the father's moral claim to a relationship with his child.[157] Viewed this way, the Court was concerned not only with protecting the child's relationship with the man s/he viewed as father, but also to determine whether the biological father behaved in a way deserving of constitutional protection.[158]

The paternity cases further elucidate the difficulty of choosing one legal father: because of the adherence to a two-parent paradigm, the Court must craft its jurisprudence regarding the rights of unwed fathers to "fit" the traditional model.[159] So, in a case where the stepfather has actively parented the children and the children are being raised by two loving parents, the Court more easily discounts the rights of the unwed father who had no interaction with the child.[160] But, in a case where the father actively

153. *See id.* at 260 n.16.
154. *See id.* at 259, 261.
155. *See id.* at 259–60.
156. *Caban*, 441 U.S. at 382–83.
157. Meyer, *supra* note 60, at 764.
158. *Id.*
159. *See id.* at 759–60.
160. *See, e.g.*, *Quilloin*, 434 U.S. at 255–56.

parented the children and sought to continue his relationship, the "plus" was given credence.[161]

Ultimately, in these cases the Court focused on an intact familial relationship to determine paternal rights. While certain presumptions about children are implicit in the opinions, namely that children will benefit from a stable father figure in their lives, the Court relied heavily on the two-parent paradigm and chose the "better" father—a man who had demonstrated greater commitment to the child. The Court did not consider the possibility of preserving parental rights for two men.[162]

The difficult permutations of legal reasoning between biological and social fathers are highlighted in *Michael H. v. Gerald D.*[163] This case demonstrates that the Court does not envision the possibility of multiple fathers for a child, even if both men demonstrate emotional and financial commitment to the child.[164] In May 1976, Carole, an international model, married Gerald, an executive in an oil company.[165] About two years into their marriage, Carole began having an affair with a neighbor, Michael, and she conceived a child; her daughter, Victoria, was born in May 1981.[166] While Gerald was listed on Victoria's birth certificate as her father, blood tests later revealed that Michael was Victoria's biological father.[167] When Gerald moved to New York, Carole stayed in California.[168] Meanwhile, Carole lived successively with two different men: Michael, "who held Victoria out as his daughter," and a man named Scott.[169] In April 1984, after Michael had spent the better part of eight months living intermittently with Carole and Victoria in Los Angeles, "Carole and Michael signed a stipulation that Michael was Victoria's natural father."[170] One month later, Carole left Michael; ultimately, she reconciled with Gerald in June of 1984

161. *See, e.g.*, *Caban*, 441 U.S. at 393–94.

162. Professor Meyer offers a new model of adoption law that would, indeed, recognize the rights of more than two parents. *See* Meyer, *supra* note 60, at 822. Professor Meyer proposes that "adoptive parents would gain custody, [and] full decision-making authority . . . while the biological parent would retain a right to visit and communicate with the child." *Id.*

163. 491 U.S. 110 (1989).

164. *See id.* at 114–15, 118.

165. *Id.* at 113.

166. *Id.*

167. *Id.* at 113–14.

168. *Id.* at 114.

169. *Id.* Carole and Victoria resided with Scott for several months, but the facts do not suggest that he held himself out as Victoria's father in any way and he was not a party to the case. *Id.*

170. *Id.* at 114–15. Although the parties signed a stipulation of parentage, Carole instructed her attorneys *not* to file the stipulation. *Id.* at 115.

and moved with Victoria to New York, where the couple had two more children.[171]

Michael sought visitation rights and Gerald later intervened, arguing that the marital presumption operated such that he was Victoria's legal father and Michael had no standing to pursue a visitation order.[172] Upholding the marital presumption, the trial court denied Michael continued visitation with Victoria as it would "impugn[ ] the integrity of the family unit."[173] Michael alleged the decision violated his procedural and substantive due process rights; and Victoria, who had also sought visitation rights for Michael through a guardian ad litem, alleged a due process violation, seeking to maintain her de facto relationship with Michael.[174]

Justice Scalia, writing for the plurality, began his discussion of Michael's claims by noting that "California law, like nature itself, makes no provision for dual fatherhood."[175] In bringing his suit for visitation, Scalia noted Michael was seeking to "be declared *the* father of Victoria."[176] By denying Michael's status as father, all parental rights, including visitation, were denied.[177] Michael claimed that his liberty interest in maintaining a relationship with Victoria was violated by California's adherence to the marital presumption; the Court did not agree.[178]

Justice Scalia, firmly relying on history and tradition, upheld the validity of the marital presumption as a way to preserve "family integrity and privacy" by excluding inquiries into a child's paternity.[179] Moreover, he noted that "persons in the situation of Michael and Victoria" have not been treated as a protected family unit, but rather the marital family has been

171. *Id.*

172. *Id.* The applicable law provides that "the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." *Id.* (quoting CAL. EVID. CODE § 621(a) (West Supp. 1989)). Moreover, the presumption could be "rebutted by blood tests, but only if a motion . . . [was made] within two years . . . of the child's birth." *Id.*

173. *Id.* at 116 (quoting Supp. App. to Juris Statement A-91).

174. *Id.* at 115–16.

175. *Id.* at 118.

176. *Id.*

177. *Id.* at 118–19. Although he may have succeeded in securing visitation rights as a nonparent, the Court held that the California Superior Court had correctly denied him visitation rights against the wishes of the mother since he had been denied the right to establish paternity. *Id.* at 119–21.

178. *Id.* at 126–27.

179. *Id.* at 120. Quoting Justice Powell's decision in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977), Scalia writes, "'[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.'" *Michael H.*, 491 U.S. at 123–24.

protected.[180] In rejecting Michael's claim to establish paternity and "*thereby . . . obtain parental prerogatives*,"[181] Scalia wrote that someone in Michael's position is not entitled to substantive parental rights:

> What counts is whether the States in fact award substantive parental rights to the natural father of a child conceived within, and born into, an extant marital union that wishes to embrace the child. We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.[182]

Given Michael's biological connection, along with his significant relationship with Victoria, it is seemingly inconsistent to reject his claim under the reasoning of the "biology-plus" cases. In distinguishing Michael from the unwed fathers in the biology-plus trio of cases, Scalia recognized that in *Lehr*, the Court assumed that the Constitution might provide protection for the unwed father, referring to the "significance of the biological connection."[183] But here, where "the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference for the latter."[184]

The Court similarly rejected Victoria's due process claim to maintain a relationship with Michael, as "the claim that a State must recognize multiple fatherhood has no support in the history or traditions of this country."[185]

As Professor Nancy Polikoff has noted, the plurality in *Michael H.* reinforces the State's interest "in assuring that every child has neither more nor less than one mother and one father."[186] Moreover, the opinion reifies a narrow, traditional concept of family, whereby a wife and husband are the "best" parents.[187] Justice Brennan, writing for the dissent, observed that the

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180. *Michael H.*, 491 U.S. at 124.

181. *Id.* at 126.

182. *Id.* at 127.

183. *Id.* at 128–29 (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)).

184. *Id.* at 129.

185. *Id.* at 131. Victoria also claimed that her equal protection rights were violated because she had no opportunity to rebut the presumption of her legitimacy. *Id.* Because the Court had determined her legitimacy under the presumption, it held she had not been discriminated against and "allowing a claim of illegitimacy to be pressed by the child . . . may well disrupt an otherwise peaceful union." *Id.*

186. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 479 (1990).

187. Dolgin, *supra* note 6, at 670 ("The difference between *Michael H.* and the [three] other cases . . . stems from the narrowness with which the concept 'family' was defined . . . .").

only difference between the two households was the fact of marriage and that the plurality emphasized the importance of marriage in establishing a unitary family, which directly contradicted the prior unwed father cases.[188] Rejecting the plurality's view of a unitary family and its interpretation of precedent, Justice Brennan wrote that "[t]he plurality's exclusive rather than inclusive definition of the 'unitary family' is out of step" and the plurality's "rhapsody on the 'unitary family' is out of tune."[189] Finally, Justice Brennan wrote of the plurality's "cramped vision of 'the family'" and concluded, "[w]hen and if the Court awakes to reality, it will find a world very different from the one it expects."[190]

Justice Brennan's reference to the "cramped vision of family" sums up, in large part, the Court's jurisprudence regarding fatherhood. While Justice Brennan was particularly alarmed by the narrow conception of family employed by the plurality in *Michael H.*, all of the biology-plus cases represent the cramped two-parent paradigm, as well as the legal logistics of choosing one father over another. The plurality's explicit rejection of multiple parenthood continues to constrain courts and legislatures, specifically in the context of "paternity fraud," as discussed in the next section.

IV. BIOLOGICAL V. SOCIAL PATERNITY AND THE PATERNITY FRAUD PHENOMENON

Stronger reliance on biological paternity is creating additional turmoil within family law jurisprudence. One example is the paternity fraud phenomenon: with the improvement of DNA testing, a growing number of men who previously thought they had a biological connection to a child they have helped to raise and/or for whom they were adjudicated father have learned that they are not biologically related to their children.[191] This has lead to a flurry of legislation and court cases in which men are claiming "paternity fraud" and seeking disestablishment of their paternity.[192] States differ on the permissibility of nonpaternity claims, but biology plays a leading role in the debate.[193] I have previously argued that biology alone

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Professor Dolgin further explains that by adhering to the traditional family, Michael could not be considered part of the family and could not adequately demonstrate his social fatherhood. *Id.*

188. *Michael H.*, 491 U.S. at 144.

189. *Id.* at 145.

190. *Id.* at 157.

191. Jacobs, *Paternity Fraud*, *supra* note 22, at 193–95.

192. *Id.* at 193–94.

193. *Id.* at 194–95.

should not disestablish parentage, but rather, functional parenthood should suffice as the predicate for a legal parentage determination.[194] If biology alone should not disestablish parentage, I contend that biology should not serve as the sole basis for establishing the full range of rights and responsibilities of parentage.[195]

As with the cases discussed in the previous section, paternity fraud cases force courts to choose either biological or social fathers. Courts and legislatures have struggled in recent years to balance the interests of "duped dads"[196] and children in the context of paternity fraud.[197] On one side, courts and legislatures have determined that maintaining a current parental relationship with the nonbiological, social father promotes the best interests of the child(ren) involved.[198] These courts are loathe to disestablish paternity; yet, in maintaining the social father's paternity, these courts offer no room for a biological father to establish a legal relationship with his child.[199] On the other side, disestablishing paternity is seen as the best way to promote the best interests of the nonbiological father who did not know until after his paternity was established that he is unrelated to the child.[200] So, in some cases, courts will disestablish the paternity of a man who has

194. *Id.* at 239. I contend that a man who has established a relationship with a child, functioned in all ways as a parent, should remain a legal parent and that a lack of biological connection is not sufficient to disestablish the parent-child relationship. *Id.* at 239–40.

195. An additional point worth noting is that the decreased importance of biology to paternity determinations will impact who is declared a legal parent and who is declared a nonparent. Historically, if a person was not biologically related to the child or married to the child's mother, that person was a nonparent and legal stranger to the child. *See* Jacobs, *Adjudicating Maternity*, *supra* note 20, at 348–351 (discussing legal parents versus legal strangers). Parentage should not be established by biology alone; other factors, such as intent and function, should also play a role in establishing parentage. *See, e.g.*, Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 480 (1996) (arguing that functional parenthood is the best method for assigning the duties and granting the privileges of parenthood); *see also* Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 448 (2005) (arguing that intentional and functional parenthood should be used to legalize parentage for nonlegal lesbian coparents).

196. *See* Jacobs, *Paternity Fraud*, *supra* note 22, at 196.

197. I use the term paternity fraud to discuss cases in which a nonbiological father seeks to disestablish his legal paternity. Paternity fraud has gained significant public attention in recent years. For a discussion of the paternity fraud phenomenon, see Jacobs, *Paternity Fraud*, *supra* note 22, at 194–96 nn.8–17 and accompanying text.

198. *See generally id.* (discussing court decisions and legislative actions regarding nonbiological fathers).

199. *Id.*

200. For more information on paternity fraud, see Jacobs, *Paternity Fraud*, *supra* note 22, parts IV and V, which provide a thorough review of cases and statutes both enforcing the current social paternity relationship as well as a review of the cases and statutes that permit paternity disestablishment in the absence of a biological connection between the father and child.

parented a child for years because he learns he has no biological connection to the child. Because our legal system does not permit recognition of two fathers, the child is deprived of a relationship with one of her fathers in both scenarios.

In *Godin v. Godin*,[201] Mark lived with his daughter, Christina, until she was eight years old, at which time he and Christina's mother divorced.[202] Mark did not challenge his paternity of Christina during the divorce, but six years later, after hearing rumors that he might not be Christina's father, he filed a motion for genetic testing.[203] The trial court denied the motion for genetic testing, and the Vermont Supreme Court affirmed, finding that the State has a strong interest in the marital presumption and "in ensuring that children born of a marriage do not suffer financially or psychologically merely because of a parent's belated and self-serving concern over a child's biological origins."[204] The Court held that ascertaining the genetic "truth" of Christina's origins is subsidiary to her emotional and financial security and to preserving her relationship with the only father she has ever known.[205] Ultimately, the Vermont court placed the emphasis on Christina's best interests, suggesting that the only "victim" in the case was Christina, not Mark.[206] If the genetic testing had been permitted and revealed nonpaternity, Christina might have been left without any legal father, as the facts do not indicate that her biological father was aware of her birth or in any way involved in her life.

Other courts, though, have determined that it is the "duped dad" who is the victim and his best interests should be protected, not the child's. In *Doran v. Doran*,[207] the father, William, sought to disestablish his paternity of Billy more than eleven years after Billy was born.[208] William lived with Billy and Pamela, Billy's mother, for the first four years of Billy's life. William and Pamela divorced when Billy was about five years old.[209] At a subsequent point, for reasons unexplained in the case, Billy's biological father visited William's house, which lead William to ask Pamela if he was,

201. 725 A.2d 904 (Vt. 1998).

202. *Id.* at 906.

203. *Id.*

204. *Id.* at 910.

205. *Id.* The Court observed that Mark lived with Christina for the first eight years of her life and continued to treat her as his daughter subsequent to the divorce. *Id.* Thus, "a parent-child relationship was formed, and it is that relationship, and not the results of a genetic test, that must control." *Id.* at 910–11.

206. *Id.* at 912.

207. 820 A.2d 1279 (Pa. Super. Ct. 2003).

208. *Id.* at 1281.

209. *Id.*

in fact, Billy's father.[210] In response, Pamela affirmed William's paternity.[211] By 2001, however, William became convinced that he was not Billy's father due to Billy's appearance and mannerisms; and he requested that Pamela bring Billy for DNA testing, which revealed a zero probability of William's paternity.[212]

Thereafter, Pamela told Billy that William was not his biological father, and William "as gently as possible removed himself from the child's life in a way which he felt would cause the child the least amount of anguish and hurt."[213] William also sought an order to discontinue child support payments and to disestablish his paternity.[214] On appeal, the court held that the marital presumption of paternity did not apply in this case, as the purpose of the presumption is to preserve intact families and Pamela and William were divorced.[215] Moreover, the court held that William was not estopped from denying his paternity, despite having held Billy out as his own son during the marriage and afterwards and by exercising his visitation rights.[216] The Court wrote that William only held Billy out as his own son because of Pamela's "fraudulent conduct" and, thus, was not estopped from seeking to disestablish his paternity.[217] The court's emphasis on Pamela's "fraudulent conduct" and William's interests in being free of this burden ignored altogether what served Billy's interests and took from Billy the only man he had ever known as his father.[218] By placing biological paternity over social paternity, the court illegitimized Billy for the sake of biology and enforced a notion of fatherhood that disregards nurturance and relies only on biological connection.

A recent Michigan decision further illustrates the tension between biological and social paternity and how the current two-parent paradigm

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210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at 1281–82. The trial court granted the order regarding future child support payments but did not grant his motion to disestablish paternity; Pamela appealed. *Id.* at 1282.

215. *Id.* at 1283. "'The policy underlying the presumption of paternity is the preservation of marriages.' . . . In this case, there is no longer an intact family or a marriage to preserve . . . . Accordingly, the presumption of paternity is not applicable." *Id.* (citations omitted).

216. *Id.* at 1283–85.

217. *Id.*

218. *Id.* Quoting the trial court opinion, the court wrote of Pamela's subterfuge, intentional misstatements, and deceptions, stating "[u]nfortunately, her deceit, falsehoods and misrepresentations gave Mr. Doran no reason but to treat the child as his own—with love, care and respect, as only a decent human being would do under the circumstances." *Id.* at 1284. Interestingly, the court did not consider how this would affect Billy nor did the court address that a "decent human being" might continue his parental relationship, as he had done for more than eleven years.

does not adequately meet the best interests of children, nor of two men seeking to preserve a parent-child relationship.[219] Rebeka Killingbeck had sexual relationships with both Tony Rosebrugh and Dennis Killingbeck at the time of conception of her son, Devon, born in July 1998.[220] Before Devon's birth, Rebeka moved in with Dennis and, four years later, they married.[221] Dennis knew he might not be Devon's father, but prohibited Rebeka from having any contact with Tony after Devon's birth, and executed an acknowledgment of parentage even though he had no proof of his biological paternity.[222] In September 2002, six months after their marriage, Rebeka filed for divorce from Dennis and contacted Tony to arrange genetic testing to determine Devon's parentage; the testing confirmed Tony's paternity.[223]

Rebeka and Tony sought to revoke Dennis' acknowledgment of paternity, although the divorce judgment listed Devon as a child of the marriage.[224] The trial court revoked the acknowledgment of parentage, but granted Dennis the rights of a de facto father so long as his requests did not diminish the rights of Tony.[225] The appeals court reversed.[226] Narrowly interpreting precedent regarding equitable or de facto parenthood, the appeals court held that Dennis could not have any parental rights under either doctrine since Tony was Devon's biological father.[227] Recognizing, though, that the trial court had revoked the acknowledgment of parentage in part because of its additional order regarding Dennis as a de facto parent, the appeals court also reversed the revocation of the acknowledgment.[228]

Thus, the appeals court continued to operate within a strict two-parent paradigm: either Dennis would continue to be Devon's legal father pursuant to the acknowledgment and, thus, be entitled to parental rights, or all of his parental rights would be terminated in favor of Tony assuming the parental role. As the dissent observed:

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219. *See* Killingbeck v. Killingbeck, 711 N.W.2d 759, 768–69 (Mich. Ct. App. 2005).

220. *Id.* at 761.

221. *Id.* at 761–62.

222. *Id.*

223. *Id.* at 762.

224. *Id.*

225. *Id.* The trial court noted that Dennis had rights to seek parenting time and would have an obligation to pay support, thereby seemingly recognizing two fathers for Devon. *Id.* at 763.

226. *Id.* at 761.

227. *Id.* at 764–65. Prior Michigan cases recognized equitable parenthood only if the child was born or conceived during marriage and as Rebeka and Dennis had married several years after Devon's birth, the court said equitable parenthood did not apply. *Id.* at 764.

228. *Id.* at 766.

> On remand, if the trial court determines not to revoke Mr. Killingbeck's acknowledgment of parentage, he will remain Devon's legal father with full rights of visitation. However, Mr. Rosebrugh . . . would have no grounds to seek visitation. If the trial court again determines to revoke Mr. Killingbeck's acknowledgment, he would be precluded from seeking visitation with the child that he raised and supported from birth . . . . Without relying on equitable principles, Devon must be separated from one of these men.[229]

Rather than disaggregating biological and social paternity to permit both fathers to exercise rights and obligations for Devon, the court has given its imprimatur to the trial court to continue rigidly adhering to the two-parent paradigm, even though the two-parent paradigm does not adequately represent Devon's best interests.

Some states have statutes under which men move to set aside paternity judgments if genetic testing disproves their paternity, regardless of the child's interests. For example, Ohio's paternity disestablishment statute, enacted in 2000, provides that a man may seek relief from a child support order if genetic testing proves that: 1) he is not the biological father of the child; 2) he has not adopted the child; and 3) "the child was not conceived as a result of artificial insemination."[230] An Ohio appeals court found the statute unconstitutional in 2003:

> Such a legislative mandate overlooks how complex the parent-child relationship is. A person who has served as a parent for many years is still in many ways a parent to the child, no matter whose genes and chromosomes are involved. If this were not so, no adult could successfully adopt a child and raise the child to adulthood.[231]

The Ohio Supreme Court disagreed and upheld the validity of the statute, observing that the legislature "intended to create a substantive right to address potential injustice."[232]

Statutes such as Ohio's do not adequately protect a child's best interests, nor do the statutes embrace fatherhood as something more than biological connection. By placing all of the emphasis on biological paternity, the statutes disregard the importance of social paternity and the reality that

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229. *Id.* at 769 (Cooper, J., dissenting).

230. State *ex rel* Loyd v. Lovelady, 840 N.E.2d 1062, 1064 (Ohio 2006) (citing OHIO REV. CODE ANN. § 3119.962 (West 2002)).

231. Van Dusen v. Van Dusen, 784 N.E.2d 750, 752 (Ohio Ct. App. 2003)

232. *Lovelady*, 840 N.E.2d at 1065 (permitting a man to introduce genetic testing disproving his paternity seven years after a default judgment of paternity was entered).

many children have established relationships with their social fathers. Yet, emphasizing only social paternity may similarly preclude a biological father from establishing a relationship with his child, as *Killingbeck* demonstrates. The paternity fraud phenomenon highlights the tension between biological and social paternity and may, hopefully, serve as the impetus to recognize more than one father.

V. THE SCHOLARLY DEBATE CONCERNING BIOLOGICAL V. SOCIAL PATERNITY

The disconnect between biological and social paternity has engendered scholarly debate about the "correct" way to establish paternal rights. As many scholars observe, social parenthood, predicated on function, intent, and/or nurturance, is superior to establishing parental rights solely because of a genetic connection in that social parenthood better reflects the panoply of actions parentage entails.[233] Yet other scholars have emphasized the importance of preserving a child's genetic identity and ensuring appropriate financial support for the child.[234] A common theme which emerges from the scholarship is the need to justify the "choice" between biological and social paternity. In fact, even those scholars who advocate social paternity have had difficulty addressing the financial and genetic concerns of biological paternity advocates. By discussing some of the arguments in favor of both biological and social paternity, I hope to highlight the difficulty of choosing one methodology.

A. The Importance of Preserving Biological Paternity

Professor Katharine K. Baker has argued that biology should not suffice to establish paternity but rather contract should provide the basis for establishing parentage.[235] Baker, however, has identified three possible rationales for our current paternity law, based solely on biology: punishment of the father, assumption of the risk, and entitlement of the child.[236] Punishment of the father is a way to thwart irresponsible sex and encourage use of birth control; but, as Baker writes, birth control can fail and, more significantly, we punish men who have done nothing wrong. In fact, there are multiple cases in which a boy has been the victim of statutory

233. *See infra* Part V.B.
234. *See infra* Part V.A.
235. *See generally* Baker, *supra* note 26.
236. *Id.* at 17–22.

rape and is still adjudicated the father of the child and made to pay child support.[237] Punishment does not seem to "fit" in many cases. Moreover, a large portion of the paternity effort is focused on lower socio-economic classes who, as noted below, may have no ability to support their children, regardless of intent.

A second reason to use biology as the sole basis of paternity establishment is closely linked with the first, assumption of the risk. If a man engages in sexual intercourse, he assumes the risk that the woman will become pregnant and must be prepared to assume the responsibilities of parenthood.[238] To establish fatherhood using the assumption of the risk methodology flies in the face of functional, nurturing parenthood. It also sends a negative message about fathers generally; in an era in which men are voicing their concerns for equal parenting time post divorce and recognition of parental rights and complaining that they pay too much support without concomitant visitation rights, it is seemingly incongruous that society should place all of its emphasis in establishing parenthood on financial responsibility.

The third reason for establishing paternity based on biology is the most contentious: entitlement of the child. Entitlement of the child seemingly incorporates two components, a financial component and a genetic identity component. The difficulty of reconciling current paternity law with constitutional jurisprudence is that legal parenthood embodies all of these rights and responsibilities. Under current paternity law, if the biological father is not adjudicated the child's legal father, he does not have a financial responsibility to the child. But recognizing a biological father for support

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237. *See* State *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273, 1279 (Kan. 1993). In that case, a sixteen-year-old babysitter began sexual relationship with twelve-year-old boy, resulting in a pregnancy when the babysitter was seventeen. *Id.* at 1274. The boy was adjudicated the baby's father and required to pay child support. *Id.* at 1274–75. The court held that "[t]his State's interest in requiring minor parents to support their children overrides the State's competing interest in protecting juveniles from improvident acts, even when such acts may include criminal activity on the part of the other parent." *Id.* at 1279; *see also In re* Parentage of J.S., 550 N.E.2d 257, 258 (Ill. App. 1990). In that case, the father did not contest paternity finding but argued that he should not be responsible for minor child's support, as he was only fifteen years old when the child was conceived. *In re J.S.*, 550 N.E.2d at 258. The court disagreed and determined that "the public policy mandating parental support of children overrides any policy of protecting a minor from improvident acts." *Id.*

238. *See* Harris, *supra* note 195, at 473 ("In addition, the argument that the man who is responsible for a child's conception should be responsible for the child's support because he has voluntarily undertaken this obligation has a strong appeal, especially in a society such as ours that regards voluntary assumption as an obvious justification for imposing legal duties."). *But see supra* notes 86–100 and accompanying text (regarding a man who was adjudicated a father and ordered to pay support although he and his girlfriend agreed that they did not intend to parent and engaged in "safe sex").

and genetic identity and history purposes may result in not recognizing a different man who is functioning as the child's father. Until we disaggregate parental rights and responsibilities, it is impossible to provide a child with a father who is a partial source of financial support along with a second, social father.

1. A Child's Entitlement to Child Support

Regarding the financial component, "but for" the father's actions, "the child would not have been born" and thus is entitled to support.[239] A child's right to receive support and a host of benefits such as inheritance rights, medical support, social security death benefits and more are predicated on the establishment of a parent-child relationship.[240] Using biology to establish paternity is an easily applied, bright-line rule that is fairly simple to administer.[241] Even proponents of social paternity agree that a biological father should shoulder some financial responsibility for his biological child.

Professor Dowd argues that while a biological father, who has not engaged in acts of nurturance, should be denied the full spectrum of rights of parentage, the biological father should nonetheless pay child support, embracing the entitlement of the child theory.[242] Professor Baker argues that the State should shoulder greater support for nonmarital children but, perhaps, biological fathers can contribute some portion of child support, even if not reflective of the child support guidelines.[243] Baker acknowledges that if biology is no longer used to establish paternity and child support, the current regime may require tremendous overhaul, as the government would need to budget greater expenditures for children.[244] Professor Oren argues

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239. Baker, *supra* note 26, at 18.

240. Cynthia R. Mabry, *Who Is the Baby's Daddy (and Why Is It Important for the Child to Know)?*, 34 U. BALT. L. REV. 211, 233 (2004).

241. Harris, *supra* note 195, at 473.

242. Nancy E. Dowd, *From Genes, Marriage and Money to Nurture: Redefining Fatherhood*, 10 CARDOZO WOMEN'S L.J. 132, 140 (2003). Professor Dowd agrees that economic responsibility and rights to social fatherhood should not automatically be linked. *Id.* She writes, "genetic fatherhood would generate economic responsibility but not relational rights; relational rights would be dependent upon satisfying a definition of nurturing fatherhood." *Id.*

243. *See* Baker, *supra* note 26, at 66–68. Baker notes that other developed countries provide greater support for children and do not place as much reliance on the support of two parents acting alone. *Id.* at 66. She notes, however, that if society is concerned with the moral obligation or deterrent functions of support, a biological father could pay a tax to provide additional income for children. *Id.* at 67.

244. *Id.* at 66. Baker notes that even if the government did need to budget more for children, it would merely "bring the United States up to par with the rest of the industrialized world." *Id.*

that biological fathers should pay support as a way to meet the "plus" component of "biology plus" and thus not be thwarted in their attempts to withhold their consent to adoption.[245] Her argument makes sense in the unwed father adoption context, but does not seem a strong enough rationale to impose a child support obligation on the man who had his sperm stolen, or who has engaged in one act of sexual intercourse with a woman and has no intent to parent a child.

A critique of biological paternity as a way to ensure child support is the evidence that child support enforcement may not actually be cost-effective. The Department of Health and Human Services reported to Congress in 1993 that for every dollar spent on enforcement, four dollars of support were collected.[246] As Professor Leslie Harris points out, that claim does not adequately consider what money would have been collected without the support mechanisms, nor does it "analyze the relevant statistic, which is the cost of the marginal increases in support collected."[247]

Moreover, if the purpose of child support enforcement is to alleviate poverty, the system is not working. Baker observes that the average unwed father earns just over $16,000 a year, and that money spent on child support enforcement might more appropriately be spent on a direct subsidy to children.[248] Additionally, Harris observes, "childhood poverty is often attributed to single motherhood . . . [y]et many single parents do not receive child support."[249] Murphy notes that the "child support regime has largely failed to reduce child poverty."[250] Furthermore, "aggressive child support enforcement has not reduced poverty for welfare families."[251] The image of

245. Oren, *supra* note 13, at 129 ("How is a biological father to establish the 'plus' factor when he has been thwarted of the opportunity to develop a relationship with his child? It seems that the most obvious and 'fatherly' way to do that is to provide financial support, or at least try to do so.").

246. Harris, *supra* note 195, at 476 (citing Office of Child Support Enforcement, U.S. Dep't Health & Human Services, Eighteenth Annual Report to Congress 48 (1994)). On its website, the federal Office of Child Support Enforcement reports that the "[t]otal distributed child support collections were $21.9 billion for FY 2004. This was a 3.2 percent increase in collections over the previous fiscal year . . . . More than half of all child support collections come from never assistance cases." DIVISION OF PLANNING, RESEARCH AND EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD SUPPORT ENFORCEMENT, FY 2004 PRELIMINARY REPORT, http://www.acf.dhhs.gov/programs/cse/pubs/2005/reports/preliminary_report/.

247. Harris, *supra* note 195, at 476.

248. Baker, *supra* note 26, at 66.

249. Harris, *supra* note 195, at 476.

250. Murphy, *supra* note 2, at 351.

251. *Id.* Murphy observes that "there has been limited success in obtaining child support orders for never married mothers" who are most likely to be receiving public assistance. *Id.* at 351–52. Even if a child support order is obtained, it is not likely to exceed the welfare benefits she receives and thus she has no direct benefit from the order. *Id.* at 352.

the "deadbeat dad" who should pay support may also be misleading. More than thirty-three percent of noncustodial fathers are "dead broke" and themselves victims of poverty.[252]

Despite the critiques concerning a child's entitlement to financial support, most scholars, courts, and legislatures agree that children are entitled to a certain level of financial security and that biological fathers are a good source for that support. But rather than use financial entitlement to establish paternity based on biological connection and, therefore, open the door to the full range of parental rights and responsibilities, courts should consider a narrower legal recognition of biological paternity that creates obligations where appropriate and even permits parental rights such as visitation, while not creating an exclusive parent-child relationship.

2. A Child's Entitlement to Her Genetic Identity and History

Another reason proffered to base paternity on biology is a child's entitlement to her genetic identity. Genetic identity forms a part of a child's history. It is important, too, that a child know her genetic identity for medical history purposes. Professor Cynthia Mabry argues that while financial support and medical history are reasons to be aware of genetic identity, cultural identity is also important for children.[253] Mabry posits that children have important emotional and psychological interests in knowing their father's identity.[254] In particular, she argues that children develop a better sense of self when both parents are involved in their lives and that the presence of a father in the life of an African American child is particularly critical.[255]

Relying on the work of Dr. Alvin Poussaint, Mabry contends that for an African American child, knowing her or his father is crucial to developing a sense of cultural identity.[256] In addition, because African American men experience racism differently than African American women, she suggests

252. *Id.* at 354. Murphy observes that many noncustodial fathers are minors, have substandard education and job skills, may have substance abuse problems, criminal histories, mental or physical health disabilities, and/or may be immigrants for whom English is a second language. *Id.* at 354–55.

253. Mabry, *supra* note 240, at 232.

254. *Id.* at 228.

255. *Id.* Professor Mabry cites the testimony of Dr. Alvin Turner, who has testified that "'[o]ne of the decisions that a child confronts as part of the developing identity is the degree to which he or she will adopt characteristics of the parent.'" *Id.* (citing testimony from Gary S.S. v. Jacqueline D.S., No. CN93-07265, 98-18321, 1999 WL 692100, at *2 (Del. Fam. Ct. June 8, 1999)).

256. *Id.* at 232.

that fathers will offer their children a different perspective on racism and teach different types of coping skills.[257] Although her arguments about cultural identity are largely directed at the African American community, Mabry's concerns about genetic and cultural history transcend race and ethnicity.[258] Professor Dowd is similarly concerned with a child's right to know her genetic identity, not only for medical and health reasons, but also for cultural purposes.[259]

Professors Carbone and Cahn explore the importance of biology in establishing commitment to a parent-child relationship; that is, does a biological parent express greater commitment to his child than a non-biological parent?[260] Based on their research of evolutionary psychology, Carbone and Cahn conclude that men invest more money and time in the children of their current mates, regardless of genetic connection.[261] As a result, they propose a system of paternity testing at birth.[262] By requiring testing at birth, a married man who learns he is not the biological father will either terminate the marriage and deny paternity at or close to birth, thereby obviating paternity challenges later on, or will accept paternity and similarly be precluded from changing his mind in the future.[263]

Carbone and Cahn are most focused on stability for the child: not only do they advocate paternity testing and determinations, they similarly

257. *Id.* at 231 ("African American boys need to learn how to cope in a society that fears them from men who have had those experiences.").

258. The overriding issue is whether society should impose all of the rights and obligations of parenthood on a biological father to assure a child access to his or her genetic and cultural identity, or if there is a different method whereby the child still has that information and may also have access to a second parent who provides support and nurturance.

259. Dowd, *supra* note 242, at 139 (arguing that genetic ties should create identity rights and that a child's genetic ties would be part of her identity but that parents would be identified by nurture, not their genetic ties to the child); *see also* Bartholet, *supra* note 58, at 323 (postulating that it might be wise to give a child access to her genetic heritage by requiring DNA testing at birth, but that such testing does not mean that a biological father, without more, should be entitled to visitation rights with the child).

260. June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1011 (2003).

261. *Id.* at 1035. Relying on studies of the effects of divorce on children, Carbone and Cahn conclude, "[l]ove the one you're with" is a "better predictor of male contributions to children than genetic ties." *Id.*

262. *Id.* at 1067–68. By making paternity testing routine, Carbone and Cahn hope to eliminate some of the distinctions between the treatment of married men, who are presumed fathers, and unmarried men, who must hold out a child as his own for the same presumption. *Id.* at 1067. In addition, this testing will enable men to knowingly and willingly assume the responsibilities of parenthood. For example, a married man who submits to testing, learns he is not the genetic father, but assumes parental responsibility, will not later be able to challenge his paternity. *Id.* at 1069.

263. *Id.*

advocate a process for second-parent determinations.[264] That is, if a person acknowledges and accepts parental responsibility for a child, neither parent can later challenge the child's parentage.[265] Thus, while Carbone and Cahn recognize the importance of genetics to the formation of a parent-child relationship, their proposal stops short of requiring a system whereby women are required to identify the biological father and impose the responsibilities of parenthood on a man who may have no interest in parenting.[266] In a subsequent writing, Carbone emphasizes the importance of biological connection in establishing parenthood. She concludes that "parentage should be, first and foremost, about identity. Parenthood is, now and historically, the legal category that answers the question: To which family does this child belong?"[267] Carbone questions, however, whether parental rights should be unbundled and comments favorably on the concept of dual paternity, especially when only one father has the full panoply of parental rights.[268] Rather than automatically concluding that biological parentage is best for children, Carbone concludes that irrevocable establishment of parentage is best, so that a child knows where she belongs.[269] Carbone does not embrace multiple parents, each with various rights and responsibilities of parentage.[270]

B. The Importance of Preserving Social Paternity

Rather than basing paternity on biological connection, Professor Baker proposes using contract theory to determine who should assume the rights and obligations of parenthood. Recognizing that express contract has been used in gestational surrogacy cases such as *Johnson v. Calvert*,[271] Baker writes that, in addition to biology, intent has been used to establish parental rights.[272] Reliance and intent in contract law accords with the parties'

264. *Id.*

265. *Id.* ("The one irreducible element of the proposal is that, once two parents are established on the basis of biology or acknowledgment at the child's birth, their parental status cannot be challenged or changed without consideration of the child's interests . . . .")

266. *Id.* ("This proposal does not necessarily require the identification of a father (or second parent) for every child, but it does impose legal obligations on those who self-identify through voluntary acknowledgments or paternity testing at the time of a child's birth."); *see also id.* at n.235.

267. June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1297 (2005).

268. *Id.* at 1341–42.

269. *Id.* at 1343–44.

270. *Id.* at 1343.

271. *See supra* notes 37–45 and accompanying text.

272. *See* Baker, *supra* note 26, at 26–27.

expectations and is a much more useful determinate of parental rights than genetic connection. She similarly argues that courts are embracing de facto or equitable fathers whose rights are determined because of contract notions of bargain and reliance.[273] By using the functional relationship, courts can impose the obligations of parenthood because, arguably, the man expressed elements of intent and reliance. Baker is reluctant, however, to deny completely a biological father's obligation to contribute a minimal support contribution, even if it is only in the form of a tax.[274] While advocating paternity based on contract, she is unable to remove the biological father from the equation entirely, although she has not clarified what legal status the biological father would have.

Professor Nancy Dowd has written extensively about the importance of nurturing fathers and the need to recognize the rights of men who offer emotional support and nurturance to children. She, too, believes paternity based solely on biology is the wrong approach. Dowd writes, "[g]enes should not define fatherhood. This is wrong for men and wrong for children. Genes define identity, but that link should be separated from the obligations and rights of parenthood."[275] Instead, Dowd would define fatherhood based on nurturance, function, and active parenting.[276] Dowd advocates separating economic obligation from the benefits of social relationships.[277] While her argument seemingly advocates paternity based on nurturance, Dowd does not fully reject the genetic tie and does not explicitly argue for a recognition of dual paternity.

Professor Harris notes several adverse consequences of basing legal paternity on biology, including the fact that biological fatherhood as a basis for child support duties defines fatherhood in financial terms only and ignores the many other aspects of fatherhood.[278] Moreover, she argues that recognition of biological fatherhood may break up the relationship a child already has with an existing social father and, further, may undermine recognition of blended families.[279]

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273. *Id.* at 31–33.

274. *Id.* at 67. ("[I]f we are deeply concerned about the moral obligation or deterrent functions that a biologically-based paternity system may serve, a tax on biological fathers could serve those functions just as well while providing additional income for children.").

275. Dowd, *supra* note 242, at 134.

276. *Id.* at 135.

277. *Id.* at 141.

278. Harris, *supra* note 195, at 475.

279. *Id.* at 474. Professor Harris suggests that legal validation of biological paternity undermines the many stepfathers and other social fathers who may support the children with whom they are living, rather than their biological children with whom they have no emotional attachment. *Id.* at 474–85. These stepfathers are characterized as deadbeat dads to their biological children, and their contributions to the children with whom they live may be legally

The arguments for social paternity are consistent with the direction of current family law. As previously discussed, courts are placing greater emphasis on functional parenthood.[280] In fact, the American Law Institute promulgated Principles of Dissolution in which the members advocate the recognition of parents by estoppel and de facto parents. These equitable doctrines are based on a combination of nurturance, functional parenthood, and intent. By recognizing these elements of parenthood, more than mere financial paternity, courts embrace newer ideas of fatherhood and recognize that more than ever before, fathers seek involvement in their children's lives and wish to be more than a financial resource.

Scholars advocating social paternity, however, have not fully addressed the legal status of the biological father. If he is required to contribute some financial support, on what legal basis should courts impose that obligation? Below, I hope to address the gap that exists in the current scholarly debate.

VI. DISAGGREGATING BIOLOGICAL AND SOCIAL PATERNITY TO RECOGNIZE TWO LEGAL FATHERS

Many fathers are both biological and social fathers. There are instances, however, in which biological and social paternity do not coincide, and the legal maneuvering to justify one father over the other has created a system whereby the best interests of the child may not be realized nor protected. Rather than impose all of the rights and responsibilities of fatherhood on one man, the law should disaggregate biological and social paternity, where appropriate, and recognize two fathers for each child. Not only will this proposal permit better protection and preservation of a child's best interests, it will also ensure greater fairness for biological and social fathers, as detailed below.

In discussing the benefits and rationales for both biological and social paternity, the difficulty of choosing one type of father over the other emerges. There are many reasons to recognize social fathers and protect their interests and the interests of children to maintain relationships with the men who have cared for them. But children also have an interest in their genetic history and in financial support. By choosing one father over the other, children's best interests may be ignored in favor of maintaining a

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ignored. *Id.* Thus, Professor Harris argues that functional paternity should serve as the basis for legal rights and duties of parenthood. *Id.*

280. Bartholet, *supra* note 59, at 326–27 ("The dominant trend in law today is in the direction of reducing the importance of biology as a factor in defining parentage. Increasing emphasis is being placed on established and intended parenting relationships, with these factors sometimes weighing equally with or even outweighing biology." (footnotes omitted)).

two-parent paradigm. Recognition of the rights of both biological and social fathers best preserves a child's best interests.

Essentially, I contend that courts adopt a scheme of "relative rights." A biological father with no parental intent might have his paternity recognized for genetic history purposes, but would have no further legal obligations nor legal rights to maintain a relationship with the child. Removing the heavy financial burden from a biological father with no parental intent is consistent with biology-plus jurisprudence and lends greater consistency to family law jurisprudence. A man engaging in significant social parenting without a biological connection to the child would support the child and would reap the benefits of custody and/or visitation. In the paternity fraud context, courts would no longer disestablish paternity because of a lack of biological connection; the social relationship and obligations which flow there from would be maintained. If, however, a biological father sought access to his child, he could also have legal recognition as the biological father, defray some of the support costs, and seek visitation with the child. Neither biological nor social paternity would be preferred as a norm, but rather courts would preserve existing relationships and permit additional relationships that serve the child's best interests.[281]

Critical to the recognition of multiple parents is the disaggregation of parental rights and responsibilities. At present, the establishment of legal parentage entails all of the responsibilities of parentage, such as financial and medical support, and all of the benefits, such as the right to custody and visitation. By separating and disaggregating all of these rights and responsibilities, more than one father may hold the designation of "legal father," yet each will make different contributions. For example, one father may primarily be responsible for support and also have full physical custody while the other father may have limited visitation and pay a modest support stipend.

The difficulty of this proposal is that it eschews current bright-line rules in favor of a case-by-case determination of what best serves the child's interests. If limiting the role of a biological father to genetic history purposes alone is best, the court can do so at the initial paternity hearing and make clear to the biological father that he will not have any visitation or custodial rights. If the biological father wants to preserve some visitation rights, even for the future, then he will likely need to agree to contribute some child support. The support obligation, however, should not be

281. Recognition of multiple fathers is not entirely new. Professor David Meyer has previously advocated for recognizing more than one father in cases in which a biological father may have been thwarted in his attempt to prevent an adoption of his child by a stepfather. *See supra* note 162 and accompanying text.

consistent with current child support guidelines if the father has no parental intent or interest.

The flexibility of a case-by-case determination is that courts would be able to recognize the legal status of both the biological and social father in other contexts. In many cases, a child would benefit from the financial and emotional support of two fathers, rather than one. In the paternity fraud context, the social father would continue to support the child, financially and emotionally, but the biological father (if identified) could share the support obligation and develop a relationship with the child, too.

The concept of dual paternity has been adopted by at least one jurisdiction, Louisiana. In *Geen v. Geen*,[282] a Louisiana appellate court applied statutes permitting dual paternity to recognize custodial rights of two fathers. Prior to her marriage to Kevin Geen (Geen), Donna Geen Robertson had a sexual relationship with Kevin Robertson (Robertson), and Donna was pregnant when she married Geen in 1990.[283] Donna informed Robertson of the pregnancy, but elided his queries concerning whether he was the baby's father.[284] Ryan was born in July, 1991, nine months after Donna and Robertson last had sex.[285] Donna and Geen separated more than a year after Ryan's birth; pursuant to their divorce decree, Donna and Geen were awarded joint legal custody of Ryan and Geen was designated the primary custodial parent with liberal visitation to Donna.[286]

Shortly thereafter, Donna resumed her relationship with Robertson and they subsequently married.[287] Although Geen has been the primary custodial parent, he has encouraged Ryan to spend considerable time with Donna and Robertson.[288] DNA testing revealed that Robertson is Ryan's biological father and Robertson sought to establish his paternity and he and Donna sought primary physical custody of Ryan.[289]

The court had to consider several questions, including whether Robertson had waited too long to file an action of avowal[290] and which

282. 95-984 (La.App. 3 Cir. 12/27/95); 666 So.2d 1192.
283. *Id.* at 1193.
284. *Id.*
285. *Id.*
286. *Id.* at 1193–94.
287. *Id.* at 1194.
288. *Id.*
289. *Id.*
290. *Id.* The court noted that article 184 of the Louisiana Civil Code, which provides that the husband of a child's mother is presumed to be the child's father, does not prohibit a biological father from also establishing his paternity. *Id.* "Moreover, the presumed father's failure to disavow paternity does not preclude the biological father from bringing an avowal action." *Id.* (citing Smith v. Cole, 553 So.2d 847 (La. 1989)). Louisiana has since amended its paternity laws and now specifically permits a biological father to establish his paternity within

parent(s) should have primary custody of Ryan. Because Donna did not tell Robertson that she believed he was Ryan's father until after she separated from Geen, the court determined that he had not waited too long to establish paternity.[291] A thornier question, perhaps, was deciding who should have primary physical custody of Ryan; the trial court awarded physical custody to Donna and Robertson but the appellate court reversed.[292]

The court emphasized that Geen had been "faithfully fulfilling the role of father" for a significant period of time and had been the primary caretaker and a constant in Ryan's life.[293] Regardless of the marriage of the biological parents, the court found that Geen, a "model legal parent," should not have his parental rights trumped when he has been an exemplary parent.[294] Ultimately, the court awarded joint legal custody to all three parents with primary physical custody to Geen and liberal visitation to Donna and Robertson.[295] While *Geen* is not the only Louisiana case to apply dual paternity, it provides a wonderful illustration of the possibility of recognizing multiple fathers: both the biological and social fathers are now legal parents and the father who has exercised greater responsibility for the child has the primary role in the child's life.

I suggest that other jurisdictions similarly employ dual paternity or other methodologies for recognizing the rights of biological and social fathers. If a biological father is identified at birth or, as in the paternity disestablishment context, if a biological father is identified later in the child's life, that biological father should be given legal recognition. Legal recognition of the biological father gives the child a sense of her genetic identity and history and permits her to develop a relationship with her biological father, if both persons so desire. Identification of a biological father also may provide some financial stability and security for the child.

If the biological father has had no contact with the mother, other than the act of intercourse which resulted in pregnancy, it seems inappropriate to place a full child support obligation on him, especially given that statistics reveal that poverty is largely not alleviated by child support orders. A small contribution both protects and preserves the biological father's right to

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one year of the child's birth, even if the child is presumed to be the child of another man. The statute contains a tolling provision "if the mother in bad faith deceived the father of the child regarding his paternity" and provides that the biological father should institute the action within a year of the day the biological father learns of his paternity or the child's tenth birthday, whichever first occurs. LA. CIV. CODE ANN. art. 198 (2005).

291. *Geen*, 666 So. 2d at 1195.

292. *Id.* at 1194.

293. *Id.* at 1196.

294. *Id.*

295. *Id.* at 1197.

maintain a relationship with his child, provides some financial benefit to the child, and may provide access to additional benefits, such as survivor benefits or health benefits. Biological fathers with no parental intent nor parenting role would no longer have child support orders predicated on mandatory child support guidelines. Instead, a judge would exercise discretion and review the totality of the circumstances to determine if a child support order was warranted and, if so, the appropriate amount of the order.[296]

Restricting the role of the biological father would not be required; if the biological father has demonstrated intent and a commitment to the child, he would be given greater rights, such as enhanced visitation rights, and also a greater responsibility to pay support for the child. If no other man has assumed a social parenting role, the biological father could establish himself as the "primary" father of the child. If, however, a social father was actively parenting, nurturing, and supporting the child, the biological father could establish and preserve a visitation relationship with the child and also pay support for the child's well-being. The social father would be the primary father, with greater custodial rights, but the biological father's parental rights would still be recognized. As noted above, this would establish a scheme of "relative rights" based on the amount of parental interaction each man demonstrates.

Thus, in those instances where a biological father is identified for genetic history and minor support only, the child would also have the ability to have another legal father recognized, her social father. If the mother began a long-term relationship with a man other than the biological father who nurtured and supported the child, that man could also be legally recognized as a father and his rights and the child's rights to maintain the relationship would be preserved.

In *Michael H. v. Gerald D.*,[297] for example, both men would have had their legal paternity recognized, Michael as the biological father and Gerald as the social father. They could have shared the financial responsibility for Victoria and, as Victoria would have lived in Gerald's home, Michael could have had reasonable visitation. There would have been no imposition on Gerald's parental autonomy, as Michael would also be a parent. The situation would not be significantly different from a couple that divorces, a

296. Baker proposes using contract theory to determine damages that would serve as support. *See* Baker, *supra* note 26, at 55. She recognizes the unfairness and inconsistency within the law of requiring a man who had no intent to parent nor acted as a father to pay twenty or twenty-five of his income, regardless of reviewing the case circumstances and the child's actual need. *Id.* at 56.

297. 491 U.S. 110 (1989).

parent remarries, and two people perform the day to day caretaking while the noncustodial parent has visitation rights. Victoria would benefit by maintaining active, loving, relationships with both fathers and would further benefit from their combined financial support.

Establishing paternity for two men permits courts to appropriately allocate the obligations and benefits of parenthood among the biological and social fathers. It would give courts discretion to limit the rights of biological fathers while preserving the best interests of the child. Moreover, multiple parenthood is a daily reality for many American families, where step-parents and extended family members assume parental functions, but do not receive legal recognition of their role. My proposal merely asks courts to recognize de jure what is a de facto reality: multiple fatherhood. While my proposal has been presented in the specific context of paternity, I expect that ultimately, courts will recognize multiple parenthood in other contexts as well.

VII. CONCLUSION

Current paternity laws do not recognize a child's right to have a relationship with both her biological and social father. By adhering to a strict two-parent paradigm, paternity jurisprudence is a patchwork of doctrines, some of which rely on social paternity and others which rely solely on a biological connection to establish all of the rights and obligations of fatherhood. Rather than continue a regime which requires choosing biological *or* social fathers and, perhaps, disrupting existing parental relationships or precluding additional parental relationships, courts should instead disaggregate the rights of fatherhood and recognize *both* biological and social fathers. By so doing, courts will preserve the best interests of the child, demonstrate greater fairness to men who have no intent to parent, and will promote the integrity of parentage by function and intent, rather than DNA alone.