

Personal Responsibility in Parentage: An Argument Against the Marital Presumption

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* J.D. Candidate, May 2007, University of California Los Angeles School of Law. There are several people who have contributed invaluable support, encouragement, and advice throughout the research, drafting, and editing of this article—more than can be named here. I am deeply grateful to my seminar professor, Julie Cantor, for her support and encouragement during my development and research of this topic, and the freedom she gave me in defining the parameters of this article. Further thanks are extended to Eugene Volokh for providing much needed guidance on how to get this work published; his time and dedication to all students, regardless of their enrollment in his courses, is an extraordinary asset to the UCLA community. I am forever indebted to my mother and father for making every attempt to answer every question I had, no matter what the topic, and never questioning my potential. Finally, a most heartfelt thank you to my husband, Patrick, for his unceasing questions on my positions and research, his stark honesty in all things, and his unwavering faith in my abilities as a lawyer and human being.

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I. Introduction

In 1990, the United States Department of Energy and the National Institutes of Health officially began the U.S. Human Genome Project.¹ Over the next thirteen years, DNA testing became an integral part of the American consciousness. In 1992, the Benjamin Cardozo School of Law began the Innocence Project, which dealt with post-conviction DNA testing of evidence that could conclusively prove innocence.² To date, 200 people have been exonerated, fourteen of whom were facing the death penalty.³ Thirty-three states and Australia have begun their own Innocence Project Clinics.⁴ In 1995, Heisman Trophy winner O.J. Simpson was arrested, tried, and acquitted in the brutal stabbing deaths of his ex-wife and her companion, despite DNA evidence linking him to the scene of the crime. Network prime-time crime dramas such as *CSI*, *Law & Order*, *Crossing Jordan*, *Cold Case*, and numerous others revolve around finding the person who left their DNA on the victim. However, despite the level of scientific

¹ Human Genome Project Information, http://www.ornl.gov/sci/techresources/Human_Genome/project/about.shtml (last visited Apr. 28, 2007).

² The Innocence Project, <http://www.innocenceproject.org/about/> (last visited Apr. 28, 2007).

³ The Innocence Project, *Innocence Project Case Profiles*, <http://www.innocenceproject.org/know> (last visited Apr. 28, 2007).

⁴ The Innocence Project, *supra* note 2.

certainty available to law enforcement and the legal system, courts and legislatures are applying the antiquated evidentiary and policy rule known as the “marital presumption” of paternity. The rule states that a child, born during the existence of a marriage, is presumptively the biological child of the husband regardless of DNA testing excluding him as the biological father.

This paper will provide a summary of paternity law, identify problems with the current system, and suggest measures to protect the “innocent” parties in paternity disestablishment suits. Section II outlines the history and evolution of the marital presumption and describes its modern manifestations. Section III examines the impact of the marital presumption on married and unmarried men, children, women, and the legal system in general. Section IV proposes different methods of reform to the current framework such as implementing early paternity testing, creating new torts to address paternity fraud, enforcing current criminal laws regarding perjury, and redefining what courts and society should view as the “best interests” of the child. Section V will conclude by arguing that advances in medical science have rendered the marital presumption inefficient and ineffective as a method of resolving disputes over paternity.

II. The Marital Presumption

A. Historical Evolution: Lord Mansfield’s Rule

Beginning with the British Poor Laws in 1576, biological fathers have been legally obligated to provide support for non-marital children.⁵ Initially, the obligation applied only if the children at issue and their mothers were receiving public assistance.⁶ By the late 1700’s, Lord Mansfield’s Rule was the cornerstone of paternity cases. Lord Mansfield’s Rule prohibited any claims casting doubt on the

⁵ Katherine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 7 (2004) (discussing the British Poor Laws).

⁶ *Id.*

paternity of children born during a marriage.⁷ Thus, the rule prohibited any challenge to a husband's status as legal father, whether it came from a husband accusing his wife of extramarital conduct, a wife claiming her husband was not the father of her child, or from a man outside the marriage alleging paternity of the child.⁸

By the 1800's, "decency, morality, and policy"⁹ principles underlying the marital presumption of paternity were applied in bastardy cases in the U.S.¹⁰ Among these was the Ohio Supreme Court decision in *Miller v. Anderson*.¹¹ In *Miller*, the court held that if (1) a woman is visibly pregnant prior to her marriage; (2) and her husband is aware of the pregnancy at the time the marriage takes place; (3) and the child is born subsequent to the marriage ceremony, the husband is the *biological father* of that child.¹² And if the husband dies after the marriage, the mother of that child is prohibited from "bastardizing" her child by attempting to collect financial support from a different man.¹³ The court added that to allow parents to bastardize their own children

⁷ *Id.* at 12 (citing *Goodright v. Moss*, 2 Cowp. 591, 98 Eng. Rep. 1257, 1258 (1777), which describes Lord Mansfield's Rule as "a rule, founded in decency, morality, and policy, that [the husband and wife] shall not be permitted to say after marriage... that the offspring is spurious.").

⁸ Paula Roberts, *Truth and Consequences: Part II: Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55, 56 n.2 (2003) (referring to the rule as "as one of the strongest and most persuasive presumptions known to the law").

⁹ Baker, *supra* note 5, at 12.

¹⁰ See *State v. Romaine*, 11 N.W. 721 (Iowa 1882); *Davis v. Houston*, 2 Yeates 289 (Pa. 1798); *Page v. Dennison*, 1 Grant 377 (Pa. 1857); *Tioga County v. S. Creek Twp.*, 75 Pa. 433 (Pa. 1874).

¹¹ *Miller v. Anderson*, 3 N.E. 605, 609 (Ohio 1885) (widow was prohibited from collecting child support money from another man after the death of her husband because, at the time of their marriage, her husband was aware that she was pregnant and recognized the child as his own blood. The court held that "public policy, public decency, and every consideration which concerns the peace and well-being of family, cries out against the unnatural effort of the mother to bastardize her issue.").

¹² *Id.* at 606 (emphasis added).

¹³ *Id.*

“shocks our sense of right and decency, and hence the rule of law that forbids it.”¹⁴

However, courts in the 1800s were aware of problems inherent in the marital presumption. As a result, courts began to apply contract principles of reliance and estoppel to any man who married a visibly pregnant woman and then attempted to deny the mother and child financial support.¹⁵ Early decisions turned on whether or not the non-biological father had “actual knowledge” that he was taking on the child of another man when he married the pregnant woman, and thus had willingly made a non-biological child his legitimate legal heir.¹⁶ The *Miller* court held that if a man did not know his wife was pregnant at the time of their marriage, the subsequent child was illegitimate for the purposes of financial support actions.¹⁷ Thus, early analysis centered on whether

¹⁴ *Id.*

¹⁵ See cases cited *supra* note 10. The courts in these decisions focus on the reliance of the mother and child that by marrying her while pregnant, the husband would legitimize the child and protect him or her from bastardy. Moreover, the marriage to the pregnant woman is often referred to as the marriage “contract,” the pregnancy of the mother being a term of the contract implying that the husband adopt and legitimize the unborn child.

¹⁶ *Miller*, 3 N.E. at 608. The emphasis on intent and knowledge of the husband in situations where a woman is pregnant prior to the marriage was reiterated by *Johnson v. Adams*, 18 Ohio St. 3d 48 (Ohio 1985). In *Johnson*, the Ohio Supreme Court overruled the primary holding in *Miller* (that a man who marries a pregnant woman is presumptively the father under contract and decency principles), stating that “the conclusive presumption of paternity set forth in *Hall* and *Miller* deprives a child of support from its biological father, while imposing a duty of support upon another man who may have had no intention of accepting such a burden at the time that he married the child's mother...” *Johnson*, 18 Ohio St. at 50. In holding that public policy supported rebuttable presumptions of paternity, the majority noted that “a rebuttable presumption of paternity... does not relieve a man of his responsibility to provide support for the children that he has fathered.” *Id.* at 52.

¹⁷ See text, *supra* note 16, discussing *Johnson v. Adams* (holding that when a woman is pregnant prior to marriage, files a support action prior to marriage against another man, the subsequent action “did not necessarily work a discontinuance of the action [for child support]...[because] it cannot be conclusively presumed that the man who marries a pregnant woman is the father of the child”).

there was an implicit agreement between a man and a pregnant woman as to who the legal father of the child would be.¹⁸

B. Modern Application: The Uniform Parentage Acts and Estoppel

Early evidentiary rules and decisions, described above, form the basis for various paternity presumption rules in use today.¹⁹ To date, eighteen states have adopted the Uniform Parentage Act (UPA) of 1973.²⁰ The 1973 UPA “provides a comprehensive scheme for judicial determination of paternity, and was intended to rationalize procedure, to eliminate constitutional infirmities in then existing state law, and to improve state systems of support enforcement.”²¹ The UPA declared “all children should be treated equally without regard to marital status of the parents,” and “established a set of rules for presumptions of parentage, shunned the term ‘illegitimate,’ and chose instead to employ the term ‘child with no presumed father.’”²² The UPA was revised in 2000 and amended in 2002²³ out of recognition of the “incredible scientific advances in parentage testing” that had developed since 1973.²⁴ The revision also attempted to remedy inconsistent application of the 1973 version which did not address the relation between divorce proceedings and parentage determinations.²⁵ The amended version of the UPA sets out (1) basic guidelines for

¹⁸ Baker, *supra* note 5. When a woman became pregnant and gave birth to a child during the course of the marriage, the child was conclusively presumed the biological descendant of the husband.

¹⁹ See, e.g., CAL. FAM. CODE §7611 (West 2006).

²⁰ These states are: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming.

²¹ *In re Adoption of Michael H.*, 10 Cal. 4th 1043, 1051 (Cal. 1994).

²² Prefatory Note, Uniform Parentage Act, *available at*, <http://www.law.upenn.edu/bll/ulc/upa/final2002.htm>.

²³ Full text of the 2002 Uniform Parentage Act as approved and recommended for enactment by the National Conference of Commissioners on Uniform State Laws, *available at* <http://www.law.upenn.edu/bll/ulc/upa/final2002.htm>.

²⁴ *Id.*

²⁵ *Id.* The new amended Uniform Parentage Act (2002) has been adopted by Texas, Washington, and Wyoming.

applying the marital presumption rule, (2) the impact of voluntary acknowledgements of paternity, (3) how acknowledgements can be rescinded, and (4) how to rebut the marital presumption of paternity once it has been raised.²⁶

1. *Marital Presumption*

All states have a statute or common law rule that presumes children born during the marriage, absent any agreements between parties at childbirth,²⁷ are the biological children of the husband. The presumption typically required proof that the husband had physical access to his wife during the period of conception and that he was not sterile during that time.²⁸ In most cases, a husband is presumed father when:

[...]he and the child's natural mother are, or have been, married to each other and the child is born during the marriage . . . he and the child's natural mother have married, or attempted to marry [and] with his consent, he is named as the child's father on the child's birth certificate, [or] he is obligated to support the child under a written voluntary promise or by court order, [or] he receives the child into his home and openly holds out the child as his natural child.²⁹

²⁶ *Id.*

²⁷ See Roberts, *supra* note 8, at 63 for a discussion of state statutes with provisions that allow a husband, wife, and biological father to sign documents acknowledging that the husband is not the biological father at the birth of the child. Such a document becomes legally binding if not rescinded within sixty days and establishes that the biological father is the legal father for the purposes of child support and custody rights.

²⁸ *Contra* B.E.B. v. R.L.B., 979 P.2d 514 (Ala. 1999) (holding that despite a vasectomy procedure eight years prior to the birth of the child at issue, the husband was still presumed the father because the child was born during the marriage).

²⁹ CAL. FAM. CODE § 7611 (West 2006). There are several other methods of becoming a presumed father articulated in California that apply when the child is born outside the U.S. or after the death of the father, but those requirements and their implications are outside the scope of this article. See also UNIF. PARENTAGE ACT § 204 (2002) (language was adopted

The rights of non-marital fathers (i.e., not married to the mother of the child) are dependent on whether or not he can be considered a presumed father. A non-marital father must attempt to physically bring the child into his home immediately after birth, reside with the mother during the period of conception, or make an attempt to marry the mother of the child in order to be a “presumed” father under most statutes.³⁰ This rule effectively prevents a man who has conceived a child with a married woman from asserting any rights of paternity as to the child because the husband of the married woman is already a “presumed father.”³¹ Courts reason that men who engage in sexual relationships with married women have no rights as to their biological children because they have “taken the risk” their children will be born into another relationship.³²

2. *Voluntary Declarations*

When a child is born to an unmarried woman, men are encouraged to sign a voluntary declaration of legal paternity immediately after the birth.³³ For example, Connecticut has established a program that encourages voluntary paternity declarations in facilities that deliver babies.³⁴ One of the

almost verbatim by California in 2006 revisions to California Family Code, section 7611).

³⁰ *In re Tanis H.*, 59 Cal. App. 4th 1218 (Cal. Ct. App. 1997).

³¹ However, as discussed by Roberts, *supra* note 8, at 63, most states allow the husband, wife, and biological father to vest legal paternity in the biological father by mutual agreement.

³² Maura Dolan, *Court Denies Parental Rights to Unwed Father*, L.A. TIMES, Apr. 7, 1998, at Part A-1 (discussing the ruling of the California Supreme Court against a non-marital father’s desire to get visitation and custody of a child he conceived with a married woman while she was separated from her husband).

³³ Some states require voluntary declarations in order to be listed as the father on the birth certificate. As a result, unmarried men are required to sign voluntary declarations of paternity before their name can be listed on the certificate. See Virginia Ellis, *Fathers’ Legal Ties That Bind*, L.A. TIMES, Mar. 8, 1998, at Part A-1 (discussing a California law passed in 1997 making a birth certificate a legally binding document).

³⁴ CONN. GEN. STAT. § 17b-27 (2004). The program must ensure that the participants are “informed, are competent to understand and agree to an

purposes of the program is to notify the signatory of his right to either establish paternity in a court action or to challenge paternity altogether.³⁵ The signatory also must be informed that signing the declaration will make him liable for financial support until the child's eighteenth birthday, and that he has enforceable custody and visitation rights.³⁶

3. *Rebuttal, Estoppel, and Rescission*

Most statutes and common law purport to provide some method of rebutting the marital presumption, but in practice rebuttal is nearly impossible.³⁷ Most courts are extremely hesitant to find that the husband is not the legal father of the child, especially if the marriage is "intact" and the non-biological marital father desires to continue acting as the child's legal father.³⁸ Courts typically decide these sorts of cases on public policy grounds favoring protection of the family from outside "interference." The reasoning is that it is in the best interest of the child to prevent disestablishment of paternity because the marital father is usually the only father the child has known.³⁹ However, court decisions are not clear

affirmation or acknowledgement of paternity, and that any such affirmation or acknowledgement is voluntary and free from coercion." *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ See, e.g., CAL. FAM. CODE § 7630 (West 2006) A child, the mother, or the presumed father may bring an action to declare the existence of the parent child relationship under section 7611 or declare the nonexistence of the parent child relationship under section 7611 if the action is brought within a reasonable time after knowledge of the relevant facts were obtained.

³⁸ See, e.g., *Rodney F. v. Karen M.*, 61 Cal. App. 4th 233 (Cal. Ct. App. 1998), (non-marital father was unable to rebut the presumption even when he and the mother had lived together for the period of time that the child was conceived, she had filed for divorce from her husband twice in two years, DNA testing showed there was 99.5% chance he was the biological father, and he filed an action for physical and legal custody within a month of the child's birth).

³⁹ See *Randy A.J. v. Norma I.J.*, 259 Wis. 2d 120, 132 (Wis. Ct. App. 2002) (holding that a natural father gains only the right to rebut the presumption, and when the married father desires to continue his role as the legal father the presumption is not rebutted, no matter what genetic testing conclusively proves; there is no reason to disrupt the home of the

about how “intact” and “stable” a family must be in order to be protected from “outside interference”⁴⁰ and this raises the question of when and how a non-marital father could ever take action to establish paternity of children born during a marriage that has not been dissolved by divorce proceedings.

Husbands seeking to disestablish their legal paternity during or after divorce proceedings face a different set of obstacles. Problems for presumed fathers stem from the silence of the 1973 UPA on the effect of divorce proceedings on paternity issues; complicating things further are *ad hoc* court decisions regarding how the marital presumption applies when genetic testing conclusively shows the presumed father is not the biological father.⁴¹ Most courts and legislatures have continued to apply (contract law) estoppel principles to paternity cases in order to prevent a man (who initially recognized a child as his own) from disestablishing paternity after medical evidence shows he is not the biological father.⁴²

In general, paternity estoppel applies when (1) one party has made a misrepresentation concerning paternity; (2) knowingly or with constructive knowledge of the truth of paternity; (3) deliberately or under circumstances where it is natural and possible it will be relied on; (4) and the other party has relied on the misrepresentation; (5) and has changed his position to his detriment as a result of the misrepresentation.⁴³ While on its face paternity estoppel seems to favor

child when the husband is present, intends to remain present, and wants to be the person paying support for the child).

⁴⁰ Pennsylvania common law applies the marital presumption to protect families from “interference” only when there is an existing marriage. Thus, if the biological father is seeking to establish paternity after the marriage has ended, the marital presumption does not act as a barrier because the rationale for the presumption (protection of families) no longer exists. See *Green v. Good*, 704 A.2d 682 (Pa. Super. Ct. 1998), and *Doran v. Doran*, 820 A.2d 1279 (Pa. Super. Ct. 2003).

⁴¹ See Roberts, *supra* note 8 (discussing in detail the various common law and statutory barriers to presumed fathers seeking to disestablish paternity).

⁴² David M. Cotter, *Putting Family Ties First...Science Second*, 25 FALL FAM. ADVOC. 22, 24 (2002).

⁴³ *Id.* at 23.

disestablishment because a man who discovers he is not the father of a child born during the marriage easily meets the elements, the doctrine is not only applied as between a husband and wife, but as between the husband and the child being disestablished.⁴⁴ As a result, if the child's reliance on the presumed father's presence in his or her life meets the elements, the presumed father is estopped from disestablishing paternity of the child regardless of genetic testing proving he is not the biological father.⁴⁵

Voluntary declarations of paternity are rescindable if done within a certain period of time, or if they were signed under fraud, duress, or material mistake of fact,⁴⁶ with the

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See, e.g.*, ARIZ. REV. STAT. § 25-812 (LexisNexis 2006) (describing that any application to overcome paternity after the sixty day period must be based on fraud, duress or material mistake of fact, with the burden of proof on the party seeking to rescind the acknowledgement. The statute further reads that "if the court finds by clear and convincing evidence that genetic tests demonstrate that the established father is not the biological father of the child, the court shall vacate the determination of paternity and terminate the obligation of that party to pay ongoing support."). *See also* TENN. CODE ANN. § 24-7-113 (2005) (allowing genetic testing only after the court has found that fraud, duress, or material mistake of fact existed when the acknowledgement was executed); KAN. STAT.ANN. § 38-1138 (2005) (allowing the acknowledgement form to create a permanent father-child relationship that may only be revoked within sixty days of signing or before the child is one year old and upon showing that the acknowledgment was based on fraud, duress (threat) or an important mistake of fact); IOWA CODE § 600B.41A (2005) (discussing even if the court finds that genetic testing excludes the established father as the biological father, the court may dismiss the action to overcome paternity and preserve the paternity termination if and only if: (1) Established father requests paternity be preserved and that the parent child relationship continue, (2) the court finds that it is in the best interest of the child to preserve paternity, which is determined by considering the age of the child, the length of time since establishment of paternity, the previous relationship between the established father and the child, the duration and frequency of time periods in which the father and child resided in the same household, the possibility that actual paternity establishment could benefit the child, and any additional factors the court determines are relevant to the individual situation, and (3) the biological father is a party to the action and

caveat that a rescission of the declaration does not harm the best interests of the child.⁴⁷ In most states either the father or the mother may bring an action within sixty days to rescind the declaration or to have paternity established through genetic testing.⁴⁸ If genetic evidence establishes that the man who signed the voluntary declaration is not the biological father of the child, the court may set aside the declaration unless there is a determination that rescinding the declaration is contrary to the best interest of the child.⁴⁹ Thus, even in cases where there is fraud and a non-paternity rescission action is filed within sixty days, courts can still refuse to rescind a voluntary declaration of legal paternity if there is a determination that it is best for the child to maintain legal parentage with the signatory.⁵⁰

does not object to termination of his parental rights, or the established father petitions the court for termination of the biological father's rights).

⁴⁷ California law, like most states, provides a list of factors for the court to consider in determining if disestablishment of paternity is in the best interest of the child. The factors range from the age of the child, to length of time the child resided with the man, any desire of the man to continue the parent-child relationship, notice by the biological father that he does not oppose preservation of a parent-child relationship between the man and the child, whether the conduct of the man who signed the voluntary declaration has impaired the ability to ascertain the identity of, or get support from, the biological father, or any additional factors the court deems relevant to the determination of what is in the best interest of the child in order to determine whether or not a voluntary declaration of paternity may be rescinded. CAL. FAM. CODE § 7575 (West 2006).

⁴⁸ In California, and most states that use voluntary declarations, the declaration can be rescinded within sixty days of the declaration by either the father or the mother unless a court order for custody, visitation, or child support has already been entered. CAL. FAM. CODE § 7575(a) (West 2006).

⁴⁹ CAL. FAM. CODE § 7575(b)(1) (West 2006). Under California Family Code, section 7575, subdivision (3)(A), genetic testing must be requested within two years of the child's birth by any party based on the voluntary declaration of paternity.

⁵⁰ See CAL. FAM. CODE § 7575 (West 2006), for the various factors that California courts take into consideration when rescinding the voluntary declaration. The most disturbing among them, is whether or not rescission will result in an inability to collect support for the child. Thus, in California, when rescission of a voluntary declaration would require a search for another man that may or may not be fruitful, the court can

III. Arguments Against the Marital Presumption

A. Responsibility for Progeny

The marital presumption arose because of the social stigma accompanying illegitimacy, a lack of medical technology to accurately identify biological fathers, and policies meant to encourage personal responsibility for children.⁵¹ Over time the legal and social stigma attached to children born out of wedlock has decreased significantly, in part because out-of-wedlock births have become more commonplace and socially acceptable.⁵² The UPA specifically prohibits denial of inheritance and welfare benefits to children based on the marital status of their parents, reflecting a distinct public policy against unequal social and legal treatment of children born out of wedlock.⁵³

Medical technology has also advanced significantly, not only since Lord Mansfield's Rule was established, but since the first UPA was drafted in 1973. It is now possible to exclude or prove a man is the biological father with almost 100% accuracy through DNA testing.⁵⁴ Since the marital presumption was formulated, in part, because of the lack of

decide that it is in the best interest of the child to continue to collect support from the signatory.

⁵¹ Niccol D. Kording, *Little White Lies that Destroy Children's Lives—Recreating Paternity Fraud Laws to Protect Children's Interests*, 6 J.L. & FAM. STUD. 237, 242 (2004).

⁵² According to the Center for Disease Control, in 2003, 34% of all births were to unmarried women. NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., BIRTHS: FINAL DATA FOR 2003, Volume 54, Number 2, (2005), available at http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_02.pdf (last visited Apr. 11, 2006).

⁵³ See 2002 UPA Prefatory Statement, available at <http://www.law.upenn.edu/bll/ulc/upa/final2002.htm>.

⁵⁴ *Contra* Mary R. Anderlik, *Issue Facing Family Courts: Disestablishment Suits: What Hath Science Wrought?* 4 J. CENTER CHILD. & CTS. 3, 16 (2003) (discussing varying standards of testing from lab to lab that leads to inconsistent results not regularly discussed when genetic testing is praised. Thus, in implementing a mandatory testing scheme, attention must be paid to implementing uniform standards admissibility of genetic test results).

medical science available to definitively prove paternity,⁵⁵ the law should be revised to reflect advances in technology that reduce the need for a presumption of biology. The law should also encourage testing as soon as it becomes safe and non-invasive for both the mother and the child in order to protect the non-biological father and child from forming an emotional bond based on the mother's misrepresentation of paternity.⁵⁶

Personal responsibility for progeny is the only remaining justification for the marital presumption due to the lack of stigma attached to illegitimate children and the advances in medical science that can conclusively disprove paternity. Indeed, the government holds men responsible for child support payments based primarily on personal responsibility theories: if a sexual union results in the birth of a dependent child, the man is responsible for the financial health and well-being of this child until the child's eighteenth birthday.⁵⁷ The cornerstone of enforcement, especially when the child is born out of wedlock, is the biological connection between the child and father. The biological relation gives rise to a legal, social, and moral obligation to provide for the child.⁵⁸ The marital presumption does not serve personal responsibility goals because it presumes, without regard to biology, that the husband is the responsible party by virtue of marriage to the mother.

⁵⁵ See Roberts, *supra* note 8, for a general discussion of the need for a presumption of paternity due to the lack of medical technology available to conclusively determine paternity.

⁵⁶ Paternity testing can be done prior to the birth of the child by chorionic villus sampling (CVS) between 10 and 13 weeks and amniocentesis between 14 and 24 weeks. Both tests are far more invasive than the more commonly known buccal swab and pose significant risks to the fetus. Most common risks are miscarriage and premature labor, and CVS carries a small risk of deformation of the fingers if performed too early. WebMD, *Chorionic Villus Sampling (CVS)*, <http://www.webmd.com/sexual-conditions/chorionic-villus-sampling-CVS> (last visited Apr. 28, 2007).

⁵⁷ See, e.g., Lammons v. Lammons, 481 So. 2d 390 (Ala. Civ. App. 1985), for a discussion of why child support payments only terminated upon the youngest child reaching the age of majority.

⁵⁸ Baker, *supra* note 5, at 7.

This lack of emphasis on personal responsibility is the key problem with the application of the marital presumption today. By presuming the husband is the biological father of a child born during a marriage, and estopping disestablishment regardless of DNA testing (which disproves a biological connection), the marital presumption allows men to father biological children with married women (who are not their wives) and avoid legal and financial responsibility for those children. The responsibility for the subsequently born child is placed on the husband (who is not the biological father), whose primary error was assuming that all children conceived during his marriage were biologically his. While the presumption is administratively convenient for state welfare agencies and family courts, convenience should not require that a husband remain financially responsible for the actions of other men. Legislators and courts should promote a system of *true* personal responsibility that holds men responsible for children resulting from sexual union. This requires eliminating the above described marital presumption loopholes that allow men to father as many children as they please with married women without holding them responsible for their actions.

B. Father-Child Relationship

Proponents of the marital presumption and paternity estoppel argue that any impact on a man who learns he is providing emotional and financial support to children fathered by another man carries little or no weight in disestablishment suits.⁵⁹ As Professor Elizabeth Bartholet explains: “[...] we should feel free to hold men responsible (for the support of children) regardless of whether or not they were in some way misled into parenthood by women.”⁶⁰ According to Bartholet, a man has a “hand in creating” all children born during his marriage (regardless of their biological connection to him)

⁵⁹ See Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN’S L.J. 323, 340 (2004); Melanie B. Jacobs, *When Daddy Doesn’t Want to be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193, 196 (2004).

⁶⁰ See Bartholet, *supra* note 59, at 196.

because the emotional bond that forms between the husband and child is *part* of the “creation” of that child.⁶¹ The primary justifications that proponents cite for according little or no weight to a man’s interests in disestablishing paternity are: 1) preventing emotional harm to a child;⁶² 2) a view of the emotional bond with the child as a contractual promise; 3) and an emphasis on functional parenthood that has arisen from the prevalence of adoption, egg donation, and sperm donation in modern society.⁶³

1. Preventing Emotional Harm to Children and Contracts

Proponents of the marital presumption often fully ignore or substantially minimize key aspects of disestablishment suits. First, by the time paternity is being disestablished, it is unlikely that the father-child relationship could be repaired, or that the child in question is somehow unaware that her “father” is questioning his paternity.⁶⁴ Second, and most importantly, when a couple marries, there is an implicit, natural, and unspoken agreement that all children born during the marriage will be the biological offspring of the husband and wife unless they agree to form a family by other artificial, non-biological means. While there is no question that a child may argue for recognition of an implied promise of emotional support from the man she identifies as her

⁶¹ Bartholet, *supra* note 59, at 240. Professor Bartholet posits that it is not biology that dictates the “hand” a man has in creating a child, but the nature of his relationship with the woman. Thus, it follows that married men have a hand in creating a child regardless of a sexual union producing the child because they have entered into a relationship that naturally progresses into the “creation” and rearing of children.

⁶² See Jacobs, *supra* note 59, at 209.

⁶³ See generally sources cited, *supra* note 59.

⁶⁴ Paternity cases are filled with situations where men have “removed themselves as painlessly as possible” from the lives of children they discover are not theirs, sometimes years prior to disestablishment suits. As insensitive as these actions seem, the majority of them come from a place of deep concern that the child be raised with the truth about parentage and allowed to be in a relationship with his or her biological father. See *Misovich v. Misovich*, 688 A.2d 726 (Pa. Super. Ct. 1997); *Doran v. Doran*, 820 A.2d 1279 (Pa. Super. Ct. 2003).

“father,” it is often overlooked that a man in a marriage is *also* operating under the assumption that his “hand in creating” children during his marriage will necessarily include his biological contribution unless he agrees otherwise. Thus, when there is scientific medical evidence that the children born during the marriage have a different biological father, the implicit promise between a husband and wife has been broken and the law (and marital presumption proponents) should recognize this aspect in disestablishment suits.

2. Functional Parenthood

Proponents of the marital presumption have characterized it as a triumph of law and policy over biology; a recognition of the importance of “functional” parenthood in the upbringing of children.⁶⁵ However, arguments that preventing men from disestablishing legal paternity is necessary to preserve the father-child relationship rely on the assumption that disestablishment suits are meant to terminate the emotional relationship between a man and a child.⁶⁶ On the contrary, men seeking to disestablish paternity typically express a strong desire to stay connected emotionally to the children they have helped raise. In reality, the primary reason why men seek disestablishment is to end their personal financial responsibility for children born as a result of infidelity—children they have been defrauded into forming an emotional bond with.⁶⁷ Further, some men seeking to disestablish paternity do not want to prohibit the biological father from establishing a relationship with the child, if that possibility made itself available.⁶⁸

⁶⁵ Brie S. Rogers, *The Presumption of Paternity in Child Support Cases: A Triumph of Law Over Biology*, 70 U. CIN. L. REV. 1151 (2002).

⁶⁶ See Jacobs, *supra* note 59, at 193.

⁶⁷ See, e.g., *S.R.D. v. T.L.B.*, 174 S.W.3d 502 (Ky. Ct. App. 2005), where upon discovering after divorce proceedings that he was not the biological father of the youngest of three children born during the marriage, S.R.D. sought to be relieved of financial responsibility for the youngest child, while simultaneously continuing visitation with and joint custody of all three children because of his concern that to remove the youngest child from his affection would cause “irreparable harm.”

⁶⁸ *Id.*

3. Artificial Reproductive Technologies

The popularity of egg donation, surrogacy, and adoption are also cited by proponents as reasons why biology is no longer a relevant consideration in determining legal parentage.⁶⁹ Proponents of the presumption imply that allowing disestablishment based on the lack of biological connection between the husband and the child raises concern as to the parentage of children created by surrogacy, adoption, and egg or sperm donation.⁷⁰ However, numerous court decisions have reaffirmed parentage of children born from artificial reproductive technology for the “intended” parents, not for the people who contributed the genetic material for the reproductive process.⁷¹ By analogy, disestablishment of a husband as the legal parent raises no concerns as to the legal parentage of adopted and surrogate children because disestablishment should be based on a lack of ‘intent’ to parent children that are not biologically related to the presumed father. As discussed above, an agreement to marry is an implicit agreement that all children born will be biologically related to the married parties unless otherwise agreed. Thus, a husband’s intent in this situation is to parent children biologically related to him. The core of the disestablishment suit is that a husband had no intent to parent children who were not biologically related to him. At a minimum, the husband was deprived the opportunity to decide whether or not to parent children resulting from sexual union with another man. This distinction effectively separates issues of the legal parentage of adopted children or children born from artificial reproductive technologies from those naturally conceived and born into a marriage but not biologically related to the husband.

⁶⁹ *Id.*; Anderlik, *supra* note 54.

⁷⁰ See generally Kording, *supra* note 51; Jacobs, *supra* note 59; Bartholet, *supra* note 59.

⁷¹ See, e.g., *In re Baby M.*, 109 N.J. 396 (N.J. 1998); *J.R. v. Utah*, 261 F. Supp. 2d 1268 (D. Utah 2002).

C. Disparate Treatment of Men Based on Marital Status

As the marital presumption doctrine continues to evolve without resolving the issues raised by DNA testing, the adjudication of men as legal fathers is largely dependent on marital status.⁷² Under the UPA, most state statutes, and common law, men that establish long term parent-child relationships, but are neither married to nor reside with the mother of the child, are not considered to be “sufficiently holding the child out as their own.”⁷³ As a result, unmarried men that come into a child’s life for a significant period of time after birth are not bound by law to provide for this child, despite the existence of a meaningful bond between them.⁷⁴ In order to establish a parent-child relationship, the unmarried man must physically bring the child into his residence.⁷⁵ This construction of the father-child relationship effectively gives the custodial parent “unilateral control” over the legal status of the other biological parent.⁷⁶ Therefore, a biological father may not have any legal or practical means by which to bring a child physically into his home and establish a legally binding and enforceable father-child relationship and all the rights that

⁷² See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), where the Court refused to allow a non-marital father to establish legal rights of visitation and custody, even though there was a four-year period of time that he and the child’s mother lived together and he referred to the child as his daughter and held her out as his own.

⁷³ See, e.g., statutes cited, *supra* note 46; see also Kording, *supra* note 51, at 245-46.

⁷⁴ See Kording, *supra* note 51, at 245-46. Kording discusses the UPA’s paternal identification limitation to fathers that live with children during the first two years of the child’s life. Thus, a man could come into the child’s life at the age of five, live with her, and provide all the support of a marital father, but be exempt from coverage under the UPA.

⁷⁵ See *Rodney F. v. Karen M.*, 61 Cal. App. 4th 233 (Cal. Ct. App. 1998) (even if a biological father has attempted to bring the child into his home and is prevented from doing so only by the mother, that is not sufficient to rebut the presumption that the child is the legal child of the mother’s husband).

⁷⁶ *Id.* at 239. The court held the purpose of the law was unilateral control by one parent to protect an intact marriage, even if at the time of conception the marriage was not intact and the mother may have intended to co-parent with her lover. *Id.* at 241.

flow from it, unless there is a voluntary declaration of paternity, a pre-determined custody arrangement, or a notification about the existence of a child soon after birth.

Hence, if a husband is trying to disestablish paternity or if a man outside the marriage is seeking to establish paternity, the application of paternity estoppel is based primarily on the marital status of the mother and the existence of a father-child relationship.⁷⁷ Therefore if a man marries a woman who withholds information that the children are a result of an extramarital affair, the husband will still be bound to support her children if there is evidence of an emotional bond.⁷⁸ But it is important to note that when another man impregnates a married woman who then decides to remain married to her husband, that other man is at the mercy of the woman and her husband to decide what role he will play in the child's life.⁷⁹ His role may be complete exclusion, regardless of his willingness to establish a father-child relationship, ability to financially support the child, or any promise the woman may have made during the extramarital affair regarding the parenting of the child.⁸⁰

Marital status should not be the controlling factor in the establishment and disestablishment of paternity. The child support system was established to make men financially responsible for the children they fathered. Men seeking to foster a relationship with, and take personal responsibility for, their children are denied any legal rights as to that child because they are not married to the child's mother.⁸¹ Moreover, married men are legally required to provide for children they did not have a biological or physical "hand in

⁷⁷ See Cotter, *supra* note 42, at 23.

⁷⁸ See *Richard W. v. Roberta Y.*, 240 A.D.2d 812 (N.Y.A.D. 1997), where the court held that a parent-child relationship existed between a man and a four-month old baby such that the biological father could not interfere and establish legal rights of custody and visitation. Though the analysis turned mainly on the husband's desire to raise the child, there was little discussion of the existence of the child's bond to the husband at that point.

⁷⁹ See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Richard W.*, 240 A.D.2d 812.

⁸⁰ *Id.*

⁸¹ *Id.*

creating” because they are married to the child’s mother and assumed that they were the biological father of the child.⁸² The law should reward the actions of men seeking relationships with their children regardless of the marital status of the mother, therefore absolving married men from financial responsibility that rightfully belongs to another.

D. Reputation of Women and the Legal System

The structure of the marital presumption does not provide for consideration of the impact estopping disestablishment has on a man who discovers his wife’s infidelity resulted in an extramarital child who is not biologically his.⁸³ The legal system seems to focus only on a husband’s ability to pay child support, without acknowledging the actual factual circumstances which led to the disestablishment suit.⁸⁴ This perceived disregard by the legal system has fostered an angry, disenfranchised sub-culture of men who believe the law punishes victims of infidelity and instead rewards women who conceal infidelity by allowing, if not encouraging, them to “trap” men into child support obligations.

A Google search of the term “paternity fraud” will generate 1,040,000 links to various websites.⁸⁵ These websites offer support and information to define the parameters of “paternity fraud.” They aid in providing definitions of key terms that come up in actions that seek to disestablish paternity, give insight on how to obtain DNA tests that are admissible in a paternity proceeding, explain how to

⁸² See *B.E.B. v. R.L.B.*, 979 P.2d 514 (Ala. 1999), where a man that had undergone a vasectomy 8 years prior to the birth of the child was still presumed the father because the child was born during his marriage, despite DNA evidence excluding him as the father.

⁸³ See, e.g., *Randy A.J. v. Norma I.J.*, 259 Wis. 2d 120 (Wis. Ct. App. 2002).

⁸⁴ See text, *supra* note 51 (discussing California Family Code section 7575, which instructs the court to consider whether or not disestablishment will result the child being without financial support).

⁸⁵ A search was performed on February 9, 2007 using the Google search engine and the search phrase “paternity fraud.” Google, <http://www.google.com> (last visited Feb. 9, 2007).

go about succeeding in a disestablishment suit, and how to build effectual arguments influencing politicians and government to cause change in marital presumption laws.⁸⁶ Common emotions expressed by men on paternity fraud websites are astonishment and anger at finding themselves in such a painful situation. However, much of the anger is also directed at how the law seems to encourage the actions of their former wives and girlfriends while holding men “prisoner” to financial responsibility for a child that DNA testing has shown is not his biological descendant.⁸⁷

The men and families that find themselves embroiled in paternity fraud suits have a distinct vision of their former wives and girlfriends.⁸⁸ They refer them as “fraud moms,” “fraudulent mothers,” scam artists, con artists, prostitutes, thieves, and much more.⁸⁹ Men that discover they are not the

⁸⁶ See, e.g., U.S. Citizens Against Paternity Fraud, www.paternityfraud.com; www.lbduk.org/paternity_fraud.htm (last visited Apr. 16, 2007); Fathers for Life, www.fathersforlife.org (last visited Apr. 16, 2007); Petition Online, www.petitiononline.com (last visited Apr. 16, 2007); Canadian Children’s Rights Council, *Paternity Fraud and Children’s Human Identity Rights*, www.canadiancrc.com/Paternity_Fraud.htm (last visited Apr. 16, 2007); Angry Harry, *Paternity Fraud*, www.angryharry.com/esPaternityFraud.htm (last visited Apr. 16, 2007).

⁸⁷ The forerunner of these sites is www.paternityfraud.com, whose slogan is “If the genes don’t fit, you must acquit.”TM Men that post their stories on the “Hall of Victims” portion of the site express feelings of abandonment and betrayal by the legal system. Though there are portions of the website that focus on legal reform and ways to contact the state legislature and push for change in the way the presumption is applied and rebutted, the websites are devoted mostly to providing information on how to prevent becoming a “duped dad.” The information states over and over again that the law does not care that the “innocent” husband is being held accountable for children that are not biologically linked to him or that the mother withheld information that could have prevented the husband from forming a parent-child relationship. Preventative strategies focus on DNA testing as soon after the child is born as possible, and instruct that if a wife or girlfriend refuses to submit to testing, the husband or boyfriend should hire a lawyer as soon as possible to begin the process of establishing legal paternity through court-ordered testing.

⁸⁸ *Id.*

⁸⁹ See U.S. Citizens Against Paternity Fraud, *About Us*, http://www.paternityfraud.com/pf_about_us.html for the most prevalent

father of children born during their marriage but are unable to rebut the marital presumption refer to themselves as slaves, bank rolls, sucker dads, duped dads, defrauded dads, ATMs, and prisoners, among other terms.⁹⁰ They characterize their ex-wives and ex-girlfriends as women that purposefully became pregnant by other men in order to generate options as to who would be financially responsible for her children.⁹¹

While these characterizations of women as ‘gold-diggers’ and scam artists are extreme, a sense of unfairness and inequity is understandable. These men had no idea that if their wives gave birth to children who were not biologically descended from them they would still be held liable for child support payments.⁹² Indeed, intuitively, there is something unsettling about allowing a woman who has engaged in an extramarital affair resulting in a pregnancy to collect child support from her husband; had he known the child would be a product of an extramarital union, he could have weighed his options and made an informed decision. He could have chosen to end the relationship prior to the birth of the child and included non-parentage as part of the divorce decree, or chosen to remain married with the knowledge that the child was not biologically descended. This intuitive sense of unfairness leads men in paternity fraud situations to conclude that the reason their former wives and girlfriends prefer to remain silent regarding their extra-marital affair is not because they ‘honestly’ (even though mistakenly) believe that the child is biologically a descendant of the husband or boyfriend, but because they have ‘chosen’ to impose a financial responsibility that they know belongs to the ‘other’ men that impregnated them.⁹³

use of the discussed terms. *See also* U.S. Citizens Against Paternity Fraud, *Hall of Victims*, http://www.paternityfraud.com/pf_victims.html.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *See* accompanying text, *supra* note 87.

⁹³ It should be noted that in the majority of the websites discussing paternity fraud, the issue of the parent-child relationship is rarely discussed. When the non-paternity is discovered late in the relationship with the child, most men will continue to refer to the child as their

Reform of presumed paternity laws is necessary to stop the perpetuation of derogatory stereotypes about women. While in some cases women may actually be aware that their child is not the product of sexual union with their husbands, it is just as likely that a woman may truly believe the child's father is the man she has married. Thus, women may want to try and make their marriage work to establish a stable emotional and financial environment for their child despite the circumstances that led to infidelity. However, current media coverage of the issue and paternity fraud websites are attacking the integrity of the women in paternity fraud suits.⁹⁴

Therefore, some balance is necessary to counteract the negative stereotypes that the publicity has perpetuated regarding disestablishment suits. The pregnant woman is usually the only person that could possibly know if there is more than one potential biological father, and withholding that information prevents men from making important and informed decisions regarding their financial and emotional future. Reform should include a legal burden on women to disclose to their boyfriends or husbands the possibility of another father, and impose legal sanctions for failure to do so.

E. Encouraging Bad Conduct

Current application of the marital presumption comes dangerously close to encouraging women to keep valuable (and life changing) paternity information to themselves.⁹⁵ When a woman keeps silent, the child is presumed to be the biological descendant of the husband and is therefore entitled

“daughter” or “son,” explaining that they have chosen to continue the relationship for themselves, not because it was forced on them. When the non-paternity is discovered early on in the relationship, the child is referred to as the ex-wife's son or daughter. In all cases, these men clearly identify the presumed biological connection as the reason for the formation of the relationship with the child.

⁹⁴ A cursory search of the term “paternity fraud” on GoogleNews done April 18, 2006 brought up 40 news stories written in the last 30 days discussing paternity fraud suits and various reform bills being passed all over the country.

⁹⁵ See discussion *supra* Section III.B.

to his financial support.⁹⁶ Despite the fact that divorce proceedings are subject to perjury laws, women are not sanctioned for asserting ‘false paternity’ in divorce pleadings or proceedings, even once testing has conclusively shown her husband or former boyfriend is not the biological father.⁹⁷ The law should act to encourage honesty and forthrightness in relationships, because when women keep quiet about paternity, they are risking serious emotional harm to both their husbands and their children later in life.⁹⁸ A system that either encourages or requires disclosure of biological paternity at the earliest possible point protects men and children from serious psychological trauma that is likely to result from paternity disclosure once an emotional bond has already been formed.⁹⁹

The presumption also provides a loophole whereby men may engage in sexual relationships with married women with little fear of being held liable for child support.¹⁰⁰ While the presumption may protect marriages from “interference” by other men claiming children as the product of an extramarital affair, it does nothing to discourage other men – who have no interest in financially supporting a child – from engaging in unprotected sex with married women. The law should hold men responsible for their biological children, regardless of the marital status of the child’s mother.

F. Accurate Genetic History and Identity

When seeing a doctor for the first time, patients usually fill out a questionnaire regarding their family history, including the sorts of diseases and ailments their parents and grandparents may have had. In the emergency room, a quick review of the medical history of a patient’s parents can be decisive in diagnosis and treatment of an illness.¹⁰¹ These

⁹⁶ *Id.*

⁹⁷ See Jeffrey A. Parness, Comment, *Old-Fashioned Pregnancy, Newly Fashioned Paternity*, 53 SYRACUSE L. REV. 57, 83 (2003).

⁹⁸ Donald Hubin, *Daddy Dilemas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL’Y 29, 38-39 (2003).

⁹⁹ *Id.*

¹⁰⁰ See discussion *supra* Section III.A.

¹⁰¹ Hubin, *supra* note 98, at 33-34.

forms and questions demonstrate the importance that genetics play in the way the medical establishment treats patients.¹⁰² Children under false impressions of who their parents are risk misdiagnosis in a medical procedure; they are also at risk of making decisions on whether or not to procreate based on false information about a hereditary disease they may or may not carry (such as Parkinson's or Huntington's disease).¹⁰³ More disturbing is that children under false impressions of paternity may also be deprived of a large group of potential organ donors in the event of a traumatic injury or chronic illness.¹⁰⁴

The best interest of the child at issue in disestablishment suits should include the child's right to obtain an accurate medical history. Fortunately, some courts are recognizing that children unaware of their biological parentage are at a significant disadvantage medically and perhaps socially.¹⁰⁵ Proponents of the presumption argue that this is not a significant enough factor because adopted children and children born from sperm or egg donation are in the same situation.¹⁰⁶ However, these proponents fail to consider that in adoption and sperm donation contexts, the child and the doctor are likely aware that there is a missing branch in their medical history and can therefore act accordingly. However, in false paternity cases, the realization may come too late and may prove damaging to the child.¹⁰⁷

Arguably, children are psychologically benefited by knowing who their biological parents are,¹⁰⁸ and men that

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Hjarne v. Martin*, No. FA000631333, 2002 Conn. Super LEXIS 1599, at *1 (Conn. Super Ct. May 7, 2002) (discussing, in dicta, that a child may have a legitimate property interest in who his or her father is and a right to be certain that the person identified is actually his or her father).

¹⁰⁶ See Bartholet, *supra* note 59, at 328.

¹⁰⁷ See Hubin, *supra* note 98, at 33-34.

¹⁰⁸ The debate on this topic is heated and extremely broad. Some authors disregard any evidence that biology has a positive impact on raising children as "junk science," while others accept sociological studies that conclude children raised by biological parents are more confident in

have a biological relationship to a child may be more likely to provide financial and emotional support to the child.¹⁰⁹ Children who discover that their genetic history may be partially, or completely, unknown may feel incomplete or deprived of information that is important to who they are.¹¹⁰ Adopted children, and children by sperm and egg donation, often seek out the unknown biological parent out of a sense of incomplete identity.¹¹¹ The desire is not necessarily to establish an emotional bond, but to find out exactly “where” they come from.¹¹² There is no reason to think that marital children would benefit any less from full knowledge of who their biological parents are.

IV. Reform

A. Mandatory or Strongly Encouraged Testing in First Two to Five Years After Birth

States encourage men to sign a voluntary declaration of paternity immediately after the birth of a child without requiring DNA testing.¹¹³ However, given the ease and non-invasive nature of DNA testing, there is little reason not to conduct such a test before a voluntary declaration is signed.¹¹⁴ Encouraging or mandating DNA testing as soon as possible would provide notice to men that they have a right to paternity testing prior to signing acknowledgements, and provide a

themselves and their personal identity. *Contra* Bartholet, *supra* note 59, at 329; Hubin, *supra* note 98, at 38-40. My personal view is that the sociological and psychological impact on the child has a lot to do with how the “functional parents” present the issue of adoption, surrogacy, and egg and sperm donation to their child.

¹⁰⁹ Hubin, *supra* note 98, at 36.

¹¹⁰ *Id.* at 37.

¹¹¹ Hubin, *supra* note 98, at 39-40. A Google search of the term “finding birth parents” on April 18, 2006 brought over 23 million hits, most of which consisted of suggestion pages (www.geneologytoday.com and www.reunion.com) with advice on how to go about mounting a search for birth parents.

¹¹² Hubin, *supra* note 98, at 38-40.

¹¹³ See Ellis, *supra* note 33.

¹¹⁴ See accompanying text, *supra* note 56.

setting where testing is accessible and convenient.¹¹⁵ This alternative may alleviate any pressure a man may feel in questioning the paternity of a child. One can only imagine the reception a man would receive from a woman and her family when he arrives at the hospital requesting paternity testing prior to holding the baby, signing an acknowledgement, or allowing his name to be listed on the birth certificate!

Opponents of conducting DNA testing at the hospital soon after birth often argue that when women are unmarried, it is less likely that a man will be at the hospital and this removes the possibility of early paternity test for single women.¹¹⁶ Further, they note that even when women are married, husbands may still be unavailable for DNA testing at birth or soon after if they are on military deployment, overseas on business, or for any legitimate reason.¹¹⁷ However, these arguments illustrate why testing should not be limited to the hospital setting right after the birth, but they do not pose an obstacle for creating a time period in which the husband or father can have a paternity test conducted without the consent of the mother.

A revised system for “acknowledging” paternity at hospitals that includes paternity testing reduces the likelihood of controversy in the courtroom later on. It also protects a non-biological father from creating emotional attachments based on false information. Most importantly, early testing protects children from creating a parental relationship with a man that may seek disestablishment when he discovers the child is not his biological descendant. The marital presumption and voluntary acknowledgement systems should be replaced or complimented with mandatory or highly encouraged genetic testing within the first two to five years of a child’s life.¹¹⁸ DNA testing should be allowed *without* the

¹¹⁵ See Parness, *supra* note 97.

¹¹⁶ Kording, *supra* note 51, at 267.

¹¹⁷ Jacobs, *supra* note 59.

¹¹⁸ Two years is the generally accepted statute of limitations for contesting paternity, but I do not want to accept it without recognition that in some situations it may be impossible for a man to undergo paternity testing during the first five years of the child’s life. The purpose of mandatory or

mother's consent, allowing husbands and alleged fathers to determine paternity on their own without rocking the boat at home. Thus, by implementing DNA testing as early as possible, the child has a lower risk of developing a relationship with a man who is incorrectly presumed as the biological father, and men are given a more realistic opportunity to obtain all relevant information required to make important decisions about their emotional and financial future *without* having to rely solely on the assertions of the child's mother.

B. Legal Consequences

Reform should not only encourage men to get tested early in their relationships with their children, but should also discourage women from making uninformed assumptions about the paternity of their children when they know more than one man could be the potential biological father. Enforcing current criminal penalties and creating a new tort to remedy injuries caused by withholding paternity information will serve this end.

1. Criminal Penalties

Divorce, custody, and support actions involve legal pleadings and hearings that carry the obligation of candor to the court. Parties to any proceeding involving assertions or stipulations about paternity should be warned and admonished that offering false information will result in perjury charges. This is applicable particularly in cases where there are assertions made in divorce and custody proceedings that a certain man is the *only* possible father of a child and subsequent testing reveals that he is not. Subsequent scientific evidence that the husband is not the father at the time of the divorce proceedings should serve as *prima facie* evidence of perjury, thereby shifting the burden of proof to the woman that her former husband had actual knowledge of his non-paternity.

encouraged testing is to give men a protected environment in which to get tested, and so the time period may have to be extended in some situations where a man did not have a readily available opportunity for testing due to work or other considerations.

2. *Tort Reform*

Arguments in favor of a non-marital biological father's right to establish custody or visitation rights are more difficult when a woman and her husband have remained married and her husband wants to remain the legal parent of the child. These situations pose a serious risk to the emotional well-being of the child because they disturb an otherwise intact home that may never have been subject to the uncertainty of a paternity adjudication.

Nonetheless, a non-marital biological father in this situation is deprived of a relationship with his child. I propose a new tort action for men who have been barred from establishing a parent-child relationship with their biological child because the mother has chosen to exclude the biological father to allow her husband to become the child's "father." This would apply solely to men who have biological children with married women and seek to establish a relationship with the child, but doing so would disrupt an intact home environment beneficial to the child's emotional well-being. The remedy would only be monetary, in order to keep the child's home as "intact" as possible. However, mere recognition of the harm to the biological father may be enough to compel the parties to seek a resolution or settlement allowing the biological father contact with his child in a way that keeps the husband involved in the child's life. Social and legal policy should actively protect men that want to build long term relationships with their biological children, regardless of the mother's marital status.

C. Redefining the Best Interests of the Child: My Two Dads

In all paternity suits and legislation, the best interest of the child is the primary concern. However, the "best interest of the child" is rarely rooted in psychological or sociological studies and is most often a conclusory statement by a judge or legislator with little chance of being challenged. Justice Scalia famously pronounced that "nature does not recognize two fathers, and neither does the Constitution,"¹¹⁹ relying on the

¹¹⁹ See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

history and tradition of family in the United States to support his statement. However, in the years since he made that proclamation, homosexual couples have begun to adopt children, lesbians have begun bearing children resulting from in vitro fertilization, and “blended” families consisting of multiple parents and step-parents are more commonplace than 50 year wedding anniversaries.

At the heart of the disestablishment debate is how to foster a stable and nurturing relationship for a child, not just provide financial support.¹²⁰ The law cannot force an emotional bond between a man and a child; similarly, forcing child support payments does not also ensure that a bond will exist.¹²¹ However, the best interest standard can be reworked to actually reflect what is best for the child: to maintain an emotional connection with, and receive financial support from, the *biological* father. Moreover, the duties of fatherhood do not need to be vested in only one man. As Professor Jacobs acknowledges, “functional parenthood” is becoming more and more important than biology.¹²² Step-parents are ever-present in children’s lives, but their affection and voluntary financial contributions are not construed as establishing legal parenthood.¹²³ When a husband seeks disestablishment of legal parenthood, he should be able to step into the role of a step-parent with visitation rights. This protects both the husband and the child, by allowing the established relationship to continue. It also leaves the door open for biological fathers who want to form a relationship with a child and provides the state with accurate information on which man’s actions are personally responsible for the creation of the child.

¹²⁰ See Jeffrey A. Parness, Comment, *Old-Fashioned Pregnancy, New Fashioned Paternity*, 53 SYRACUSE L. REV. 57, 83 (2003); Bartholet, *supra* note 59, at 339; Jacobs, *supra* note 59, at 206; Rogers, *supra* note 65, at 1172.

¹²¹ See *Misovich v. Misovich*, 688 A.2d 726 (Pa. Super. Ct. 1997), where the court ordered payment of support while simultaneously removing all custody and visitation rights of the husband.

¹²² Jacobs, *supra* note 59, at 197.

¹²³ Cotter, *supra* note 42, at 26 (discussing *W. v. W.*, 248 Conn. 487 (Conn. 1999)).

V. Conclusion

The marital presumption is outmoded, ineffective, and cumbersome due in large part to the modern technological ease of proving and disproving paternity. It poses significant loopholes in the personal responsibility policies that motivate child support laws, and sets up a system where women have nothing to lose by lying to their husbands and boyfriends about the potential paternity of their children. In the end, the parties that pay the high cost of the marital presumption are the very parties the law should protect: the wronged husband and the unknowing child.

If family law and the marital presumption are truly aimed at protecting the best interests of the child, then the entire spectrum of interests must be considered. The law should focus on maintaining the child's relationship with the only father he/she has known while also attempting to identify and locate the biological father to take financial responsibility and provide an accurate genetic history as early as possible. The earlier an accurate paternity determination is obtained, the lesser the emotional damage to the child and the presumed father, and the likelier a meaningful relationship with a biological father can be established.