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Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children

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

*Jane C. Murphy**

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INTRODUCTION

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

The dramatic shift in family composition over the last several decades in the United States has made the marital presumption increasingly inadequate as the sole definition of fatherhood under the law. The United States government's 2000 census made clear that married mothers and traditional families are on the decline.⁴ The number of women raising children in the United States without a husband grew both in number and in percentage of total households in the last decade alone.⁵ Although divorce contributed significantly to this in-

1 WILLIAM BLACKSTONE, 1 COMMENTARIES *457. The only recognized exceptions were cases where a man was sterile or impotent, or outside the country. *Id.*

2 For a discussion of the privileged status accorded the marital or "unitary" family in Anglo-American jurisprudence, see *Michael H. v. Gerald D.*, 491 U.S. 110, 124–30 (1989). See also Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 888 (1984) (discussing the role of natural law in the law's view of the nuclear family as "the basic building block of this social order").

3 See *infra* note 40 and accompanying text.

4 TAVIA SIMMONS & GRACE O'NEILL, U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2000, at 2–3, 7 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf>.

5 *Id.* at 7. Nearly 25 million American children did not live with their fathers in 2000, compared with fewer than 10 million in 1960. William C. Smith, *Dads Want Their Day: Fathers Charge Legal Bias Toward Moms Hamstrings Them as Full-Time Parents*, 89 A.B.A. J. 38, 40 (2003).

crease, the number of births to unmarried parents has also increased dramatically in the last several decades.⁶ Only one quarter of American households now fit the traditional family model of married parents and children.⁷

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

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

6 See *infra* note 40 and accompanying text.

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

8 ARLIE RUSSELL HOCHSCHILD, *THE TIME BIND* 131–32 (1997) (describing how the idea of a “family man” retains a negative connotation in much of the corporate world); see also MONA HARRINGTON, *CARE AND EQUALITY: INVENTING A NEW FAMILY POLITICS* 102–18 (1999); ARLIE HOCHSCHILD WITH ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) (describing the challenges that face two working parent families); Naomi Cahn, *The Power of Caretaking*, 12 *YALE J.L. & FEMINISM* 177, 181–86 (2000) (summarizing studies demonstrating that mothers still assume a greater share of child caretaking); Naomi Gerstel, *The Third Shift: Gender and Care Work Outside the Home*, 23 *QUALITATIVE SOC.* 467, 470–76 (2000); Theresa Arendell, *‘Soccer Moms’ and the New Care Work* (Berkeley Ctr. for Working Families, Working Paper No. 16, 2000) (discussing how fathers are more likely to work more hours and spend less time with their children than mothers).

9 See generally KATHLEEN GERSON, *NO MAN’S LAND: MEN’S CHANGING COMMITMENTS TO FAMILY* (1993) (examining the gender revolution’s effects on American fathers); NICHOLAS W. TOWNSEND, *THE PACKAGE DEAL: MARRIAGE, WORK, AND FATHERHOOD IN MEN’S LIVES* (2002) (describing the meaning of fatherhood in the lives of American men).

10 See generally JANET L. DOLGIN, *DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE* (1997) (examining the evolution of the nature and concept of family in light of modern developments in reproductive technology); *Developments in the Law—The Law of Marriage and Family, Changing Realities of Parenthood: The Law’s Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 *HARV. L. REV.* 2052 (2003) (discussing the impact of social changes on parenthood as a legal status).

11 405 U.S. 645 (1972). See *infra* notes 46–57 and accompanying text.

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

While these developments have fostered a broader and more multi-dimensional legal conception of fatherhood, a series of recent

12 See *infra* notes 74–75 and accompanying text.

13 See, e.g., Dana Milbank, *A Marriage of Family and Policy*, WASH. POST, Apr. 15, 2001, at A1; see also Deb Price, *Fatherhood Defines Bush Pick*, DETROIT NEWS, June 17, 2001, at 13A (describing President Bush’s choice of Wade Horn to oversee the nation’s change in the welfare system by shifting its focus more to dads).

14 The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.), provided federal funding to states to promote the formation and maintenance of marriage as well as the reduction of out-of-wedlock pregnancies. THEODORA OOMS ET AL., *BEYOND MARRIAGE LICENSES: EFFORTS IN STATES TO STRENGTHEN MARRIAGE AND TWO PARENT FAMILIES* 5 (2004), available at www.clasp.org/publications/beyond_marr.pdf. PRWORA included “illegitimacy bonuses,” funding made available to the top five states to reduce the rate of births to unmarried parents with no increase in abortion rates. DORIAN SOLOT & MARSHALL MILLER, *LET THEM EAT WEDDING RINGS: THE ROLE OF MARRIAGE PROMOTION IN WELFARE REFORM* 4 (2002), available at <http://www.unmarried.org/rings.pdf>. Other state marriage promotion programs funded by the Temporary Assistance for Needy Families (TANF) include a program in West Virginia, where families receiving TANF benefits are awarded a \$100 bonus if the family is headed by a legally married couple. *Marriage on the Public Policy Agenda: What Do Policy Makers Need To Know From Research?*, POVERTY RES. INSIGHTS (Nat’l Poverty Ctr., Univ. of Mich., Ann Arbor, Mich.), Winter 2004, at 1, 4. Arizona, Oklahoma, Utah, and Wisconsin are also using TANF funds to promote marriage through “marriage handbooks” and media campaigns. SOLOT & MILLER, *supra*, at 3. In 2005, the Personal Responsibility, Work and Family Promotion Act of 2005, H.R. 240, 109th Cong., was introduced in the House to strengthen PRWORA. The Senate Finance Committee approved the Personal Responsibility and Individual Development for Everyone Act (PRIDE), S. 667, 109th Cong. (2005), sending it to the full Senate for consideration. Both H.R. 240 and S. 667 incorporate funding for promoting marriage and provide funds of \$100 million annually for activities like public advertising campaigns on the value of marriage, marriage education and skills programs for unmarried expectant parents, skills training for married couples, and divorce reduction programs. Both bills also provide an additional \$100 million for “research, demonstrations and technical assistance.” H.R. 240, 109th Cong. (2005); S. 667, 109th Cong. (2005).

15 See, e.g., Ronald B. Mincy & Hillard Pouncy, *There Must Be 50 Ways To Start a Family*, in *THE FATHERHOOD MOVEMENT* 83, 83–104 (Wade F. Horn et al. eds., 1999).

judicial decisions and legislative enactments around the country threaten to push fatherhood back into a narrow box. The once limited definition of fatherhood based on marriage is now being replaced by an equally limited definition based on biology. This new definition of fatherhood has developed in the context of a series of cases in which men have assumed the role of father in children's lives and later, often after many years, seek genetic testing in order to be relieved of the legal obligations of fatherhood.¹⁶ While such "delegitimizing" of children would not be permitted under rules establishing fatherhood based on marriage or caretaking, these definitions of fatherhood are being increasingly rejected in favor of a single criteria for fatherhood based on biology. Over the last several years, many states have adopted policies by judicial decision or statute that relieve men of their legal status as fathers if genetic testing excludes them on biological grounds.¹⁷ As a result, children are becoming fatherless and losing the emotional connection, companionship, nurturing, and economic support that fathers can provide.

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

16 See *infra* notes 184–89 and accompanying text.

17 See *infra* notes 184–89 and accompanying text.

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

19 See *infra* Part II.A.

20 See *infra* Part II.A. Throughout this Article, I refer to custodial parents as mothers and noncustodial parents/child support obligors as fathers. While the number of single fathers who serve as custodians for children is increasing, the vast majority of children in single parent families are in single mother households. SIMMONS & O'NEILL, *supra* note 4, at 2–3; see also Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 708 (1998) ("[M]others overwhelmingly are the custodians and caretakers of children . . .").

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

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

21 See *infra* notes 187–90 and accompanying text.

22 Much scholarship analyzing the changes in child support in the early 1990s, including the author's, focused on how to make the new child support bureaucracy more effective in collecting support. See Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 226–31 (1991) (arguing that the move from discretion to rule-based child support guidelines with enhanced enforcement is a much needed reform); Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 475, 479–81 (1994) (book review) (detailing how inefficiencies in child support collection contribute to child poverty rates). But a few scholars and researchers saw the risks of unintended consequences of the new directions in welfare and child support policy as early as a decade ago. David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 VA. L. REV. 2575, 2577 (1995) (discussing a suspicion "that although improved enforcement programs would likely produce substantial positive results for many women and children, they would also, for a substantial and immeasurable number of men, women and children, inflict unintended and undesirable harms that we would regret. As is often true in our society, these negative consequences would be borne disproportionately by the poorest persons and by persons of color"); Sara S. McLanahan, *The Consequences of Single Motherhood*, AM. PROSPECT, Summer 1994, at 48, 57 (recognizing the risks of "stricter" child support enforcement on the poor).

23 In this section and elsewhere in this Article, I use the terms "child support reform" and "welfare reform" interchangeably. This reflects the fact that since the early 1970s child support collection has been strongly linked to the goal of reducing welfare costs. See, e.g., Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 254 (1999) ("The history of child support law represents a literal joining of family law and welfare law. The original federal child support program was limited to families receiving [welfare] because, quite simply, the government wanted to recoup welfare costs through child support collections.").

child support enforcement with the overarching goal of keeping fathers in children's lives.

I. HISTORICAL DEFINITIONS OF FATHERHOOD

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

A. *Fathers as Husbands: The Marital Presumption*

The presumption that the husband of a married woman is the father of any children born to that woman was a fundamental principle at common law.²⁴ Dating back to Roman law, the presumption was conclusive unless the husband was sterile, impotent, or had no access to his wife during the relevant time period prior to birth.²⁵ Non-access could only be proven by testimony from third parties²⁶ that "the husband be out of the kingdom of England . . . for above

24 BLACKSTONE, *supra* note 1, at *457.

25 NICHOLAS HARRIS NICHOLAS, A TREATISE ON THE LAW OF ADULTERINE BASTARDY 1 (London, William Pickering 1836).

26 This rule of evidence provided that neither the husband nor the wife could be a witness to prove access or non-access where the effect of such testimony would result in the illegitimacy of a child. This rule is generally referred to as Lord Mansfield's rule. HOMER CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 398 (1968). Lord Mansfield described the evidentiary conclusion as "a rule, founded in decency, morality, and policy, that [the husband and wife] shall not be permitted to say after marriage . . . that the offspring is spurious." *Goodright v. Moss*, (1777) 98 Eng. Rep. 1257, 1258 (K.B.).

nine months.”²⁷ The marital presumption remained “one of the strongest presumptions known to law” in eighteenth and nineteenth century England and America.²⁸

There are two principle policy justifications for the marital presumption. The first is the need to protect children from the stigma and legal disabilities resulting from illegitimacy.²⁹ An illegitimate child was considered to be no one’s child.³⁰ This social stigma was reinforced by prevailing religious and legal principles that held that “all progeny . . . not begotten” in a marriage were unlawful.³¹ The child of unmarried parents had no right of inheritance or succession.³² Unmarried biological fathers had neither an obligation to pay child support nor custodial rights to their children.³³ Thus, when mothers died or were unable to care for their children, nonmarital children often became wards of the state.

The marital presumption was also justified as necessary to protect the sanctity of the most protected unit under Anglo-American family law: the marital family.³⁴ By preventing the possibility that either

27 BLACKSTONE, *supra* note 1, at *457 (describing the four seas or *extra quatuor maria* doctrine).

28 See, e.g., *Espree v. Guillory*, 753 S.W.2d 722, 724 (Tex. App. 1988).

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

30 MARTHA T. ZINGO & KEVIN E. EARLY, NAMELESS PERSONS: LEGAL DISCRIMINATION AGAINST NON-MARITAL CHILDREN IN THE UNITED STATES 17 (1994); see also HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 3 (1971) (“In common law, the illegitimate was *filius nullius*, no one’s son—no more, but no less.”).

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

32 JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 175 (New York, O. Halsted 1827).

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

34 See, e.g., MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 201–02 (1985); Alison Harvison Young, *Reconceiving*

spouse would testify to establish a third party had fathered a child with the wife, the "peace and tranquility of states and families" were preserved.³⁵ As discussed in an eighteenth century English case, "It is a rule founded in decency, morality and policy that [the husband and wife] shall not be permitted to say after marriage that they have had no connection and therefore that the offspring is spurious; more especially the mother who is the offending party."³⁶

The common law rules on fatherhood also reflected the view that "the father-child relationship was primarily an economic one."³⁷ The rights and responsibilities that attached to legal—i.e. marital—fathers were primarily economic in nature. Married fathers had an obligation to provide financial support and children of married fathers could inherit from them. In turn, marital children were viewed as property and fathers were entitled to their labor, and after the Industrial Revolution, to the earnings of their children.³⁸

B. Unmarried and "De Facto" Fathers: Adding Biology and Caretaking as Alternative Bases for Fatherhood

In practice, then, the marital presumption limited legal fathers to married men. If a child's mother was married, her husband, with few exceptions, was viewed as the father. If a child was born to an unmarried woman, the child had no father.³⁹ In either circumstance, unmarried biological fathers were not recognized under the law. This rigid system that narrowly defined fatherhood by marital status began to change as the social, demographic and scientific supports for the system eroded. First, the numbers of nonmarital births in this country increased dramatically in the last three decades of the twentieth century.⁴⁰ At the same time, the legal distinction between legitimate and

the Family: Challenging the Paradigm of the Exclusive Family, 6 Am. U. J. Gender Soc. Pol'y & L. 505, 519–33 (1998) (describing the evolution of the Supreme Court's position on the marital presumption).

35 Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (quoting J. SCHOUER, LAW OF DOMESTIC RELATIONS § 225, at 306 (Boston, Little, Brown, & Company 1882)).

36 Goodright v. Moss, (1777) 98 Eng. Rep. 1257, 1258 (K.B.).

37 Kisthardt, *supra* note 31, at 588; see also James Kent, *Commentaries on American Law* (describing parents' legal obligations to provide economically for their children), reprinted in 1 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 363 (Robert H. Bremner ed., 1970).

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

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

40 The rapid growth in the illegitimacy rate did not begin until 1970 when it went from eight percent of births in 1970 to thirty-two percent in 1992. Gertrude Himmel-

illegitimate children began to be stricken from the law on constitutional grounds.⁴¹ Finally, science's ability to determine biological fatherhood improved dramatically.⁴² All of these circumstances led to two developments in the last half of the twentieth century that resulted in the expansion of both the legal definition of father and the perceived functions of fatherhood: (1) a weakening of the marital presumption; and (2) a recognition that unmarried biological fathers have constitutionally protected relationships with their children.

While marriage continues to play an important role in defining fatherhood, the marital presumption has weakened in the last quarter

farb, *A De-Moralized Society: The British/American Experience*, PUB. INT., Sept. 22, 1994, at 57, 59. The nonmarital birth rate has remained relatively stable since 1990. CHILD TRENDS, FACTS AT A GLANCE 2 (2003), available at www.childtrends.org/Files/FAAG2003.pdf. When illegitimacy rates are broken down by race, the picture is somewhat different. For white children the ratio went up from 1.5% to a little over two percent between 1920 and 1960, and then advanced at an even steeper rate than that of blacks: to almost six percent in 1970, eleven percent in 1980, and nearly twenty-two percent in 1991. The black illegitimacy ratio did not accelerate as much because it started at a higher level: from twelve percent in 1920 to twenty-two percent in 1960, over thirty-seven percent in 1970, fifty-five percent in 1980, and sixty-eight percent by 1991. *Id.* at 3-4; see also NAT'L INST. OF HEALTH, COUNTING COUPLES: IMPROVING MARRIAGE, DIVORCE, REMARRIAGE, AND COHABITATION DATA IN THE FEDERAL STATISTICAL SYSTEM (2001), available at <http://childstats.ed.gov/americaschildren/pdf/countingcouples/ccr.pdf> (providing highlights from the National Institute of Health National Workshop December 13-14, 2001); Cynthia Grant Bowman, *A Feminist Proposal To Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 736-42 (1996) (discussing the cultural and legal impediments to formal marriage among both African Americans and poor white populations in the United States in the eighteenth and nineteenth centuries).

41 CLARK, *supra* note 26, at 155-72.

42 Two common paternity tests are human leukocyte antigen (HLA) tissue typing paternity testing and DNA fingerprinting. See Deborah A. Ellingboe, *Sex, Lies, and Genetic Tests: Challenging the Marital Presumption of Paternity Under the Minnesota Parentage Act*, 78 MINN. L. REV. 1013, 1015 n.12 (1994). Although invasive HLA tissue typing can provide up to ninety-eight percent probability of paternity, see *id.*, buccal swab DNA testing has become the most common method of determining paternity due to its noninvasiveness and convenience. *Who Can Collect a Buccal Swab?*, FORENSIC PATERNITY TESTING NEWSL. (Divorcenet.com), Apr. 2003, <http://www1.divorcenet.com/newsletter03/fptn008.html>. Swab testing, which does not require lab technicians to collect, is available through home test kits provided by online services with turn-around times as minimal as three to five days for costs ranging from \$205-\$440. SwabTest.com, Fee Schedule, <http://www.swabtest.com/fee.php> (last visited Sept. 8, 2005). Legal DNA testing, due to the necessary chain of custody, requires collection by appointment at a testing facility, such as Gene Tree. Gene Tree DNA Testing Center, DNA Paternity Testing for Legal Purposes, <http://www.genetree.com/product/dna-legal-tests.asp> (last visited Sept. 25, 2005).

century.⁴³ Although the nature of the evidence necessary to rebut the presumption varies widely, putative unmarried fathers can become "legal" fathers in a number of states by presenting evidence of both the biologic connection to the child and the extent of the relationship they have established with the child.⁴⁴

Other changes in the law resulting in legal recognition based on both biology and caretaking functions have been grounded in constitutional protections for unmarried fathers. In a series of decisions beginning in the 1970s, the United States Supreme Court recognized (1) the fathers of nonmarital children have legal rights and (2) the functions of fatherhood go beyond economic support.⁴⁵

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

43 See Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 566-71 (2000); Traci Dallas, Note, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 374 (1988). A sharply divided United States Supreme Court upheld the constitutionality of a strong marital presumption statute in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). A few years later, however, California joined the majority trend and amended and weakened its marital presumption statute. CAL. FAM. CODE § 7611 (West Supp. 2005).

44 The marital presumption can now be challenged in many states by the mother, husband, or the child. See, e.g., IND. CODE ANN. § 31-9-2-35.5 (West Supp. 2004); KY. REV. STAT. ANN. § 403.270 (West Supp. 2004); MINN. STAT. ANN. § 257C.01 (West Supp. 2005). But such challenges are often unsuccessful when subjected to a "best interests of the child" test. See *In re Marriage of Wendy M.*, 962 P.2d 130, 132 (Wash. Ct. App. 1998).

45 John A. Bluth, *Can an Unmarried Biological Father Recover Damages?*, 2002 Utah L. Rev. 577, 578-82.

46 405 U.S. 645 (1972).

47 *Id.* at 658.

48 *Id.* at 651-53.

Three decisions following *Stanley* reaffirmed the principle that an unmarried biological father's efforts to establish a relationship with his children—both as financial provider and nurturer—determine whether the law recognizes him as father. In the 1978 case *Quilloin v. Walcott*,⁴⁹ the Supreme Court held that a putative father who had not attempted to establish a relationship with his eleven-year-old child could not prevent the child's adoption by the mother's husband when that adoption was in the best interests of the child.⁵⁰ A year later, in *Caban v. Mohammed*,⁵¹ the Court reaffirmed the connection between establishing an ongoing relationship with one's children and legal recognition of fatherhood.⁵² The Court invalidated a New York statute on equal protection grounds that precluded an unmarried father from adopting his biological children. In so doing, the Court held that there must be an "established . . . substantial relationship" between the unmarried father and the child in order for the father to exercise his rights.⁵³

Finally, in *Lehr v. Robertson*,⁵⁴ the Supreme Court found that states can impose a time limitation for a putative father to establish a relationship with his nonmarital child.⁵⁵ The majority resisted the dissent's position that the biological connection itself was enough to create the legally protected status as father.⁵⁶ Instead, the majority held that "[t]he significance of the biological connection is that it offers the natural father an opportunity . . . to *develop a relationship* with his offspring."⁵⁷

49 434 U.S. 246 (1978).

50 *Id.* at 254.

51 441 U.S. 380 (1979).

52 *Id.* at 392–94.

53 *Id.* at 393.

54 463 U.S. 248 (1983).

55 *Id.* at 262–65.

56 Justice White wrote a dissent in *Lehr* which was joined by Justices Marshall and Blackmun. It was their position that the "biological connection" is itself a relationship that creates a protected interest.

Thus the "nature" of the interest is the parent-child relationship; how well developed that relationship has become goes to its "weight," not its "nature." Whether *Lehr's* interest is entitled to constitutional protection does not entail a searching inquiry into the quality of the relationship but a simple determination of the *fact* that the relationship exists—a fact that even the majority agrees must be assumed to be established.

Id. at 272 (White, J., dissenting).

57 *Id.* at 262 (majority opinion) (emphasis added); see also 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, 50–70 (2004) (dis-

These developments in the law—the weakening of the marital presumption and the recognition of the importance of caretaking in *Stanley* and its progeny—resulted in the emergence of an expanded legal definition of fatherhood. Marriage to the child's mother, a biological connection, and an established relationship were all recognized as important elements in establishing legal fatherhood. Not all were required elements of fatherhood, but all were recognized as potential bases for establishing legal fatherhood. By expanding the category of men who could be legally recognized as fathers, the law also began to support an expanded conception of the functions of fatherhood that goes beyond economic support and includes the important functions connected with nurturing and caring for children's day-to-day needs. This re-envisioning of fatherhood has been strengthened by other developments in family law that reflect recognition of the importance of the child caretaking function of fatherhood.

In the area of custody, one of the first developments of this kind was the introduction of the concept of joint custody. The first joint custody statute was passed in 1979 in California,⁵⁸ and most states eventually followed suit, either by joint custody statutes or through case law.⁵⁹ While many scholars have critiqued the implementation of

cussing the Supreme Court's constitutional view of nonmarital fathers' personal relationships with their children).

58 Stephanie N. Barnes, *Strengthening the Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L. REV 601, 611-14 (1999).

59 About forty-one states and the District of Columbia have statutes authorizing courts to order joint or shared custody. Of these forty-one, twenty-nine authorize the court to order joint custody but do not require it. ALA. CODE § 30-3-152(a) (LexisNexis 1998); ALASKA STAT. § 25.20.060 (2004); ARIZ. REV. STAT. ANN. § 25-403.1(A) (Supp. 2005); ARK. CODE ANN. § 9-13-101(b)(1)(A)(ii) (Supp. 2003); COLO. REV. STAT. ANN. § 14-10-124(1.5)(b) (West 2005); DEL. CODE ANN. tit. 13, §§ 722, 727 (1999); HAW. REV. STAT. ANN. § 571-46.1 (LexisNexis 2005); 750 ILL. COMP. STAT. ANN. 5/602.1(b) (West 1999); IND. CODE ANN. § 31-17-2-13 (West 1999); KY. REV. STAT. ANN. § 403.270 (West Supp. 2004); LA. REV. STAT. ANN. § 9:335 (2000); MD. CODE ANN., FAM. LAW § 5-203(d) (LexisNexis 2004); MASS. ANN. LAWS ch. 208, § 31 (LexisNexis 2003); MICH. COMP. LAWS ANN. § 722.26a (West 2002); MO. ANN. STAT. § 452.375 (West Supp. 2005); NEB. REV. STAT. § 42-364(5) (2004); N.J. STAT. ANN. § 9:2-4 (West 2002); N.C. GEN. STAT. § 50-13.2 (2003); OHIO REV. CODE ANN. § 3109.04(A)(2) (LexisNexis 2003); OKLA. STAT. ANN. tit. 43, § 109(B) (West 2001); OR. REV. STAT. ANN. § 107.105(a) (West 2003); 23 PA. CONS. STAT. ANN. § 5304 (West 2001); S.D. CODIFIED LAWS § 25-5-7.1 (1999); TENN. CODE ANN. § 36-6-101(a)(1) (Supp. 2004); UTAH CODE ANN. § 30-3-10.2 (Supp. 2005); VT. STAT. ANN. tit. 15, § 665(a) (2002); VA. CODE ANN. § 20-124.2(B) (2004); W. VA. CODE ANN. § 48-9-207(a) (LexisNexis 2003); WYO. STAT. ANN. § 20-2-201 (2005). Twelve states and the District of Columbia have some form of presumption in favor of joint custody. CAL. FAM. CODE § 3080 (West 2004); CONN. GEN. STAT. ANN. § 46b-56a (West 2004); D.C. CODE ANN. § 16-914(a)(2) (LexisNexis 2005); FLA. STAT. ANN. § 61.13(2)(b)(2) (West

joint custody statutes,⁶⁰ the enactment of such statutes reflects a legal recognition of fathers' roles as caretakers of their children.

Another development over the last decade that has promoted involvement of fathers in children's lives when parents live apart is the growing use of court-ordered "parenting classes" in custody cases.⁶¹ "Parenting plans" emphasize the importance of both parents in caretaking of children by requiring the parties to delineate each parent's responsibilities for the care of the children and decisions about education, health care, and discipline.⁶² About thirteen states currently require parties to submit proposed parenting plans prior to a grant of custody.⁶³ Another nine states and the District of Columbia have stat-

Supp. 2005); IOWA CODE ANN. § 598.41 (West Supp. 2005); KAN. STAT. ANN. § 60-1610(a)(4) (Supp. 2004), *amended by* S. 7, 2005 Leg., Reg. Sess. (Kan. 2005), *available at* <http://www.kslegislature.org/legsrv-bills/showBill.do?id=38833>; ME. REV. STAT. ANN. tit. 19-A, § 1653(2)(D)(1) (1998 & Supp. 2004); MINN. STAT. ANN. § 518.17(2) (West Supp. 2005); MISS. CODE ANN. § 93-5-24(4) (West Supp. 2004); NEV. REV. STAT. ANN. § 125.490 (LexisNexis 2004); N.H. REV. STAT. ANN. § 458:17 (LexisNexis Supp. 2004); N.M. STAT. ANN. § 40-4-9.1 (LexisNexis 1999); WIS. STAT. ANN. § 767.24(2) (West Supp. 2004). Nine states do not have statutes but can order joint custody under the courts' general equitable powers. GA. CODE ANN. § 19-9-1 (2004); IDAHO CODE ANN. § 32-717 (1996); MONT. CODE ANN. § 40-4-212 (2003); N.Y. DOM. REL. LAW § 240 (McKinney Supp. 2005); N.D. CENT. CODE § 14-09-06 (2004); R.I. GEN. LAWS § 15-5-16 (2003); S.C. CODE ANN. § 20-3-160 (1985); TEX. FAM. CODE ANN. § 152 (Vernon 2001); WASH. REV. CODE ANN. § 26.09.002 (West 2005).

60 *See, e.g.*, Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767 (1997) (arguing in favor of resolving custody issues through agreements made by parents, rather than by the imposition of joint custody by courts); Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201, 207-16 (1998) (arguing that studies supporting joint custody are misleading because research tools are flawed and the ultimate success of a joint custody arrangement depends on cooperation between the parents).

61 *See* Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Education*, 37 FAM. & CONCILIATION CTS. REV. 219, app. (1999) (providing brief program descriptions of parent education programs in each state); *see also* Special Issue, *Parent Education in Divorce and Separation*, 34 FAM. & CONCILIATION CTS. REV. 9 (1996).

62 *See* Don R. Ash, *Bridge over Troubled Water: Adoption and Custody Law in Tennessee*, 27 U. MEM. L. REV. 769, 804-05 (1997); Francis J. Cantania, Jr., *Learning from the Process of Decision: The Parenting Plan*, 2001 BYU L. REV. 857 (2001).

63 ALA. CODE § 30-3-153 (LexisNexis 1998) (requiring parents in joint custody cases to submit a plan regarding the care and custody of the child); ARIZ. REV. STAT. ANN. § 25-403.02(A) (Supp. 2005) (requiring that parents must submit a proposed parenting plan before a court awards joint custody); 750 ILL. COMP. STAT. ANN. 5/602.1(b) (West 1999) (providing that in cases where a court considers an award of joint custody, the court requests that the parents produce a joint parenting agreement specifying each parent's powers, rights, and responsibilities regarding the child); MASS. ANN. LAWS ch. 208, § 31 (LexisNexis 2003) ("At the trial on the merits, if

utes that give judges discretion to require parenting plans in custody cases.⁶⁴

. . . either party seeks shared legal or physical custody, the parties, jointly or individually, shall submit . . . a shared custody implementation plan.”); MO. ANN. STAT. § 452.375(b)(9) (West Supp. 2005) (“Any judgment providing for custody shall include a specific written parenting plan setting forth the terms of such parenting plan arrangements Such plan may be a parenting plan submitted by the parties . . . or, in the absence thereof, a plan determined by the court . . . the custody plan approved and ordered by the court shall be in the court’s discretion and shall be in the best interest of the child.”); MONT. CODE ANN. § 40-4-234(1) (2003) (“In every dissolution proceeding, proceeding for declaration of invalidity of marriage, parenting plan proceeding, or legal separation proceeding that involves a child, each parent or both parents jointly shall submit . . . a proposed final plan for parenting the child”); N.M. STAT. ANN. § 40-4-9.1(F) (LexisNexis 1999) (stating that prior to the award of joint custody, a court shall approve a parenting plan—including division of child’s time and care between parents—for the implementation of the custody arrangement); OHIO REV. CODE ANN. § 3109.04(G) (LexisNexis 2003) (“If a pleading or motion requesting shared parenting is filed, the parent or parents filing the pleading or motion also shall file with the court a plan for the exercise of shared parenting by both parents.”); OKLA. STAT. ANN. tit. 43, § 109(C) (West 2001) (“If either or both parents have requested joint custody, said parents shall file with the court their plans for the exercise of joint care, custody, and control of their child.”); OR. REV. STAT. ANN. § 107.102(1) (West 2003) (“In any proceeding to establish or modify a judgment providing for parenting time with a child . . . there shall be developed and filed with the court a parenting plan to be included in the judgment.”); UTAH CODE ANN. § 30-3-10.8 (Supp. 2005) (stating that in any divorce proceeding, any party requesting custody shall file a proposed parenting plan); WASH. REV. CODE ANN. § 26.09.181 (West 2005) (“In any proceeding . . . each party shall file and serve a proposed permanent parenting plan.”); WIS. STAT. ANN. § 767.24(1m) (West Supp. 2004) (providing that in any action in which legal custody or physical placement is contested, a party seeking custody or physical placement shall file a parenting plan with the court).

64 CAL. FAM. CODE § 3040(a)(1) (West 2004) (providing the court with discretion to require parties to submit a plan for the implementation of the custody order); COLO. REV. STAT. ANN. § 14-10-124(7) (West 2005) (stating that in allocating parental responsibilities, both parties may submit parenting plan(s) for the court’s approval that shall address both parenting time and the allocation of decisionmaking responsibilities, and if no parenting plan is submitted or if the court does not approve a submitted plan, the court shall formulate a plan); D.C. CODE ANN. § 16-914 (LexisNexis 2005) (“In any custody proceeding under this chapter, the Court may order each parent to submit a detailed parenting plan which shall delineate each parent’s position with respect to the scheduling and allocation of rights and responsibilities that will best serve the interest of the minor child or children.”); KAN. STAT. ANN. § 60-1607(a) (Supp. 2004) (stating that a court may require mediation between the parties in order to develop a parenting plan); MINN. STAT. ANN. § 518.17 (West Supp. 2005) (stating that if both parties agree to use a parenting plan, but cannot agree on the terms, the court may order one and may require the parties to submit proposed parenting plans); NEB. REV. STAT. § 42-364(1) (2004) (“When dissolution of a marriage or legal separation is decreed, the court may include a parenting plan developed under the Parenting Act”); N.J. STAT. ANN. § 9:2-4(e) (West 2002) (stating

A new standard for resolving custody disputes proposed by a group of academics, judges, and lawyers from the American Law Institute (ALI) has also contributed to an expanded definition of fatherhood that, in some instances, places caretaking on the same level as marriage and biology in establishing parental rights.⁶⁵ The ALI proposes a substantive standard for custody that limits the court's ability to resort to parental stereotypes, shifting the paradigm in custody cases from parents to children.⁶⁶ Instead of asking which parent has deviated from the prescribed role,⁶⁷ the new approach states that a child's best interest is served by "continuity of existing parent-child attachments" and giving responsibility to "adults who love the child, know how to provide for the child's needs, and place a high priority on doing so."⁶⁸

A number of scholars have also made the case for legal recognition of "de facto" parents by challenging the law's adherence to the concept of exclusive parenthood based on marriage or biology.⁶⁹ Katharine Bartlett, one of the first to advocate for "non-exclusive

that the court may require each party to submit a custody plan in cases in which the parties cannot agree); TENN. CODE ANN. § 36-6-403 (2001) (stating that a temporary parenting plan shall be incorporated in any temporary order of the court in actions for absolute divorce, legal separation, annulment, or separate maintenance involving a child, and if the parties cannot agree to one, the court may require each party to submit a proposed temporary parenting plan); TEX. FAM. CODE ANN. § 153.007 (Vernon 2002) (stating that if the court finds that the parenting agreement reached by the parties is not in the best interests of the child, it may require the parties to submit a revised agreement); W. VA. CODE ANN. § 48-9-201 (LexisNexis 2004) (stating that if the parents agree to one or more provisions of a parenting plan, the court shall so order unless it is not voluntary or it would be harmful to the child, but if an agreement is not accepted by the court, it shall allow the parties to negotiate another agreement).

65 See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.18 (2002) [hereinafter ALI PRINCIPLES].

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

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

68 ALI PRINCIPLES, *supra* note 65, § 2.02(1)(b), (d); see Murphy, *supra* note 20, at 695-96; see also NANCY E. DOWD, REDEFINING FATHERHOOD 4-13 (2000) (arguing for a legal definition of fatherhood based upon nurture rather than biology or marriage).

69 An early explanation of the importance of the de facto or psychological parent is found in the landmark work of psychologists Joseph Goldstein, Anna Freud, and Alfred Solnit:

Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either—by a biological parent or by an adoptive

parenthood,” argues that when the nuclear family has broken down, children should have “the opportunity to maintain important familial relationships with more than one parent or set of parents . . . in the growing range of circumstances in which these relationships are formed outside the nuclear family.”⁷⁰ Other scholars have argued for a more expansive view of non-exclusive parenthood, advocating for a “rewriting of the definition of the family.”⁷¹ Under these proposals, the law’s recognition of adults who have assumed one or more parental roles is not predicated on the breakdown of the child’s parents’ marriage. These scholars reject the privileged status of the nuclear family, finding it insufficient to meet the needs of children.⁷² Instead, these proposals envision broader, more fluid family networks, that one scholar has called “webs of care.”⁷³

While these proposals for non-exclusive parenthood vary in the criteria that would be deemed sufficient to trigger legal recognition of caretakers, they all place caring for the child as the condition for such recognition. Thus, they replace biology and, in most instances, marriage, with a functional definition of parenthood. They offer a theo-

parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 19 (1973).

70 Bartlett, *supra* note 2, at 882–83; see also William C. Duncan, *Don’t Ever Take a Fence Down: The Functional Definition of Family—Displacing Marriage in Family Law*, 3 J.L. & FAM. STUD. 57 (2001) (advocating a functional view of family based on relationships that fulfill the functions of marriage and parenting and where the relationships are defined according to the family members’ emotional and financial commitment and interdependence); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parental Rights*, 14 CARDOZO L. REV. 1747, 1751–59 (1993) (arguing that the biological mother’s unmarried partner who cared for mother and child throughout pregnancy and early childhood should be given legal parental status).

71 Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 143 (2004); see also Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, 1996 UTAH L. REV. 461, 480 (arguing that the basis for granting of parental rights and duties should be the sustained performance of the functions of parenthood); Gilbert Holmes, *The Tie that Binds: The Constitutional Right of Children To Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 410 (1994) (calling for recognition of the child’s independent interest in continuing a child-parent relationship through visitation regardless of the adult’s biological relationship with the child); Young, *supra* note 34, at 554 (calling for recognition of the contributions made by the community in the upbringing of a child and claiming that the “paradigm of the exclusive family has outlived its value”).

72 Kavanagh, *supra* note 71, at 93; Young, *supra* note 34, at 512–13.

73 Kavanagh, *supra* note 71, at 141; see also Young, *supra* note 34, at 515–18. While recognizing the need for placing decisionmaking authority for children in a “core family unit,” these proposals recognize that parental roles may be allocated among several adults and argue that the law should recognize multiple caretakers.

retical framework that appropriately challenges the “all or nothing” biology-based definition of fatherhood emerging from the paternity disestablishment cases.

The work of scholars arguing against exclusive parenthood is also reflected in the *ALI Principles*, which accord legal protection to “social” or “functional” fathers and others similarly situated.⁷⁴ In addition to legal parents, the ALI recognizes parents “by estoppel.” A parent by estoppel is a person who acts as a parent in circumstances that would estop the child’s legal parent from denying the claimant’s parental status. Parent-by-estoppel status is created when an individual: (1) is obligated for child support; (2) has lived with the child for at least two years and has a reasonable belief that he is the father; or (3) has had an agreement with the child’s legal parent since birth (or for at least two years) to serve as a co-parent, provided that recognition of parental status would serve the child’s best interest.⁷⁵ Both legal parents and parents by estoppel are entitled to presumptive allocations of custodial and decisionmaking responsibility.⁷⁶

Building on the work of researchers and scholars, legislatures and judges have also begun to recognize “functional” parents when deciding custody and visitation cases. Over the last three decades, a few states⁷⁷ and a number of courts⁷⁸ have granted nonbiological,

74 The ALI, courts, and legislatures use a variety of terms to describe an individual who has, based on caretaking over a period of time, formed a strong bond with a child. The terms include “de facto,” “social,” “functional,” or “psychological” parent. While these terms may have slightly different meanings attributed by different scholars or courts, they are used interchangeably throughout this Article. See ALI PRINCIPLES, *supra* note 65, § 2.18.

75 ALI PRINCIPLES, *supra* note 65, § 2.03(1)(b).

76 ALI PRINCIPLES, *supra* note 65, § 2.09(2). The *ALI Principles* also recognize “de facto parents.” Under the ALI analysis, a de facto parent is a person, other than a legal parent or parent by estoppel, who has regularly performed an equal or greater share of caretaking as the parent with whom the child primarily lived; lived with the child for a significant period (not less than two years); and acted as a parent for non-financial reasons (and with the agreement of a legal parent) or as a result of a complete failure or inability of any legal parent to perform caretaking functions. See *id.* § 2.03(1)(c). While a de facto parent may acquire some parental rights, the *ALI Principles* still privilege the legal parent’s rights over the de facto parent’s. A de facto parent is precluded from receiving a majority of custodial responsibility for the child if a legal parent or a parent by estoppel is fit and willing to care for the child, unless the legal parent or parent by estoppel has not been performing a reasonable share of parenting functions or the available alternatives would cause harm to the child. See *id.* § 2.18(1)(a). Similarly, a de facto parent’s rights may be limited or denied if the custodial allocation would be impractical in light of the number of other adults to be allocated custodial responsibility. See *id.* § 2.18(1)(b).

77 See, e.g., OR. REV. STAT. ANN. § 109.119 (West 2001) (granting rights to “a person who establishes emotional ties creating child-parent relationship or ongoing per-

nonmarital caretakers such as stepfathers or partners in same-sex relationships rights similar to those granted to legal fathers. While most of these statutes and decisions continue to distinguish between legal parents and third parties, they are a step toward recognition of social fatherhood in that rights are accorded based on the adult's caretaking relationship to the child rather than the adult's biological status.⁷⁹ As one leading family court trial judge commented:

sonal relationship"); WIS. STAT. ANN. § 767.245 (West 2003) (granting rights to a person who "maintained a relationship similar to a parent-child relationship").

78 *Carter v. Broderick*, 644 P.2d 850 (Alaska 1982) (finding that the legislature intended to allow third party visitation and that where a stepparent is *in loco parentis*, a stepchild is considered a "child of the marriage"); *Elisa B. v. Superior Court*, 117 P.3d 666, 670-71 (Cal. 2005) (holding that children born to same sex couple can have two mothers, both of whom have custody rights and support obligations); *A.G. v. D.W.*, No. B175367, 2005 WL 1432744, at *1 (Cal. Ct. App. June 21, 2005) (deciding that former same sex partner had standing to seek visitation under Uniform Parentage Act); *Weinand v. Weinand*, 616 N.W.2d 1 (Neb. 2000) (granting visitation rights to former stepparent); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (granting visitation to the lesbian co-parent of twins but denying joint custody); *Seger v. Seger*, 547 A.2d 424 (Pa. Super. Ct. 1988) (granting partial custody and visitation rights to nonbiological father who was married to child's mother and assumed the role of child's father for eight years); *In re Parentage of L.B.*, 89 P.3d 271 (Wash. Ct. App. 2004) (recognizing a common law claim of "de facto or psychological parentage" for former same-sex partners and their right to visitation), *cert. granted*, 101 P.3d 107 (Wash. 2004); *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995) (holding that where a nonbiological adult proves she has a parent-like relationship with a child, a court may grant visitation if it is in the best interests of the child). While these cases generally limit the parental rights to visitation, some courts have extended custodial rights or standing to seek such rights to de facto parents. *See In re E.L.M.C.*, 100 P.3d 546 (Colo. Ct. App. 2004) (awarding joint custody to mother's same sex partner because of the parent-child bond and the emotional harm to the child, should that parental tie be broken); *P.B. v. T.H.*, 851 A.2d 780 (N.J. Super. Ct. App. Div. 2004) (affirming trial court's grant of custody to neighbor over aunt because neighbor was psychological parent); *R.E.M. v. S.L.V.*, No. FD-15-748-98N (N.J. Super. Ct. Ch. Div. Nov. 2, 1998) (awarding nonbiological mother both visitation and joint legal custody); *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1322 (Pa. Super. Ct. 1996) (finding that a functional parent may have standing to seek partial custody of biological child of former lesbian partner if she can establish that she stood *in loco parentis* to child during relationship); *In re Clifford K.*, No. 31855, 2005 WL 1431514, at *1 (W. Va. June 17, 2005) (holding that a deceased mother's lesbian partner has standing to seek custody of the child born during their relationship because she is a psychological parent); *see also* Robyn Cheryl Miller, *Child Custody and Visitation Rights for Non-Biological "Parents": Analyzing V.C. v. M.J.B.*, N.J. LAW. MAG., Feb. 2001, at 17 (discussing an attorney's thoughts on her participation in *V.C. v. M.J.B.*).

79 The United States Supreme Court's recent decision in *Troxel v. Granville*, 530 U.S. 57 (2000), endorsing the common law tradition of autonomy for legal parents, may be seen as evidence of a trend in the opposite direction. However, the *Troxel*

Biology is not always determinative of a man's role in the life of a child. When I examine the ultimate issue of what is in the child's best interest, I have found that a biological connection is not necessarily required for a paternal link to grow between the man and the child. At the same time, while there may be a biological tie, biology alone does not make a good father.⁸⁰

Thus, by the late twentieth century, the law had begun to recognize men as fathers based on marriage, biology, caretaking, or some combination of these. These legal developments supported a view that fathers have a rich, complex role in their children's lives. This role includes not only financial support but also the emotional and physical support that comes from ongoing connection and care.

II. FATHERHOOD AS BIOLOGY AND ECONOMIC SUPPORT: THE IMPACT OF CHILD SUPPORT ENFORCEMENT AND WELFARE REFORM ON FATHERHOOD

A. *Child Support and Welfare Reform*

Against a backdrop of laws expanding the view of fatherhood, welfare and related child support policies have pushed the law in the opposite direction. Three decades of welfare "reform" have resulted in policies that threaten to limit the meaning of fatherhood to biology and financial support. While the primary goal of modern child support law was to reduce welfare costs,⁸¹ many hoped that improved child support collection would reduce poverty in low-income custodial households.⁸² These efforts, however, have had a number of unintended consequences that have adversely impacted low-income families, particularly the relationship between fathers and children in those families.

Court clearly supported continued legal recognition of nonparents based on their assumption of caretaking duties for the children. *Id.* at 64.

80 Sharon S. Townsend, *Fatherhood: A Judicial Perspective, Unmarried Fathers and the Changing Role of the Family Court*, 41 FAM. CT. REV. 354, 354 (2003).

81 See, e.g., Ann Laquer Estin, *Moving Beyond the Child Support Revolution*, 26 LAW & SOC. INQUIRY 505, 505 (2001) ("Much of the motivation for the enormous national effort and expense devoted to the child support revolution was the promise that better support enforcement would help keep single-parent families off the welfare rolls and allow the government to recoup its growing expenditures for public benefits."); see also Brito, *supra* note 23, at 250–51, 259; Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 510 (1987–1988) (describing the 1974 Act as "explicitly sold on the basis of reducing welfare costs and caseloads").

82 See *supra* note 22.

The connection between legal recognition of fatherhood and welfare law begins with the requirement that custodial parents—overwhelmingly mothers—seeking public benefits for their children must identify the fathers of those children.⁸³ The principle that noncustodial parents should reimburse the state for its costs in supporting their children has been in place since the beginning of the child support “revolution” in the mid-1970s.⁸⁴ In 1974, Congress enacted Title IV-D of the Social Security Act which created the Child Support Enforcement Act and established the Federal Office of Child Support Enforcement.⁸⁵ The Act required welfare recipients to assign their rights to child support to the state⁸⁶ to offset welfare costs of the federal government. Because identifying the noncustodial parent is the initial step in child support enforcement,⁸⁷ welfare recipients were required to cooperate in identifying the noncustodial parent.⁸⁸

83 The overwhelming majority of children who live with only one parent live with their mothers. See JASON FIELDS, U.S. DEP'T OF COMMERCE, *AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003*, at 7 (2004). This Article, therefore, follows the rhetoric and reality of welfare “reform” in assuming the named welfare recipient is a mother caring for children and the child support obligor who the state looks to for reimbursement is the father.

84 D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 763 (1998) (describing child support enforcement techniques as having “undergone a revolution in recent decades as a result of federal involvement”). For a complete history of the “federalization” of child support, see Naomi Cahn & Jane Murphy, *Collecting Child Support: A History of Federal and State Initiatives*, 34 CLEARINGHOUSE REV. 165 (2000).

85 Social Services Amendment of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2337, 2351–58 (1975) (codified as amended in scattered sections of 42 U.S.C.). The Act created a partnership between federal and state government wherein each state administered child support enforcement programs under the direction of federal policy and was reimbursed for a portion of the enforcement expenditures. ELAINE SORENSEN & MARK TURNER, NAT'L CTR. ON FATHERS & FAMILIES, *BARRIERS IN CHILD SUPPORT POLICY: A REVIEW OF THE LITERATURE* (1995), available at <http://www.ncoff.gse.upenn.edu/litrev/sb-litrev.pdf>.

86 42 U.S.C. § 602(a)(26)(A) (1975) (current version at 42 U.S.C. § 608(a)(3) (2000)).

87 E. Wattenberg, *Paternity Actions and Young Fathers*, in *YOUNG UNWED FATHERS: CHANGING ROLES AND EMERGING POLICIES* 213, 216–17 (Robert I. Lerman & Theodora J. Ooms eds., 1993).

88 42 U.S.C. § 654(29)(A) (2000) (requiring that, as a condition for receiving child support, a parent must provide the name “and such other information as the State agency may require” with respect to the noncustodial parent) (corresponds to § 101(c)(5)(C), 88 Stat. at 2359–60).

In response to exceedingly low child support collection⁸⁹ and a belief that a “lack of a strong child support enforcement system contributed to child poverty and welfare dependency,”⁹⁰ Congress enacted more rigorous enforcement tools in the Child Support Enforcement Amendments of 1984.⁹¹ This statute required that states create fixed formulae for establishing the level of child support and impose sanctions, such as income withholding, for child support obligors who fail to comply with child support orders.⁹²

Four years later, Congress passed the Family Support Act of 1988,⁹³ which marked the real beginning of the focus on paternity establishment as the cornerstone of the modern child support and welfare system.⁹⁴ Prior to this federal legislation, the state was relatively uninvolved in the establishment of paternity, leaving the resolution of the issue to parents.⁹⁵ This Act required that each state establish a minimum number of paternity declarations or face financial penalties.⁹⁶ The Act also allowed for, but did not require, genetic testing in contested paternity cases⁹⁷ and imposed time limits for states to process paternity cases.⁹⁸

89 The average child support award in 1983 was \$2521. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-23, NO. 148, CHILD SUPPORT AND ALIMONY: 1983 (SUPPLEMENTAL REPORT) 10 tbl.G (1986). A conservative estimate of annual expenditures that could have been expected to be made on behalf of two children in a two-parent, medium income family in 1983 was \$10,028. THOMAS J. ESPENSHADE, INVESTING IN CHILDREN: NEW ESTIMATES OF PARENTAL EXPENDITURES 3 (1984) (analyzing Espenshade's 1981 estimates updated to 1983 dollars using the Consumer Price Index).

90 SORENSEN & TURNER, *supra* note 85, at 2.

91 Pub. L. No. 98-378, § 18(a), 98 Stat. 1305, 1321-22 (codified as amended at 42 U.S.C. § 667(a) (2000)).

92 *See id.*

93 Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 5, 26, and 42 U.S.C.).

94 “[Paternity establishment] may be considered the foundation of the [Child Support Enforcement] program. To improve the lives of children, one of [the] major goals is to increase paternity establishment rates for those children born outside of marriage.” *Oversight of the Child Support Enforcement Program: Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 106th Cong. 9 (1999) (statement of Honorable Olivia A. Golden, Assistant Secretary for Children and Families, U.S. Dep't of Health and Human Servs.).

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

96 42 U.S.C. § 652(g) (2000) (corresponds to § 111(a), 102 Stat. at 2348-49); Daniel R. Meyer, *Paternity and Public Policy*, in 1 PATERNITY ESTABLISHMENT: A PUBLIC POLICY CONFERENCE 3 (1992).

97 42 U.S.C. § 666(a)(5)(B)(i) (corresponds to § 111(b)(2), 102 Stat. at 2349).

98 *Id.* § 652(h) (corresponds to § 121(a), 102 Stat. at 2351).

Congress continued the push to increase and streamline paternity establishment when it enacted the Omnibus Budget Reconciliation Act of 1993.⁹⁹ Noting that the “first step in securing child support is the establishment of paternity,”¹⁰⁰ the Act mandated, among other things, that states develop a simple administrative process for a “hospital-based program for the voluntary acknowledgement of paternity.”¹⁰¹ More aggressive performance standards for establishing paternity were also included in the 1993 statute.¹⁰²

In 1996, Congress launched its most comprehensive effort “to end welfare as we know it,”¹⁰³ and enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA).¹⁰⁴ This law affects nearly every aspect of child support services, particularly paternity establishment. To further facilitate paternity establishment, the Act requires states to permit paternity establishment at any time before a child is eighteen years old.¹⁰⁵ States were again mandated to simplify the process for voluntary paternity acknowledgment, such as by enacting programs based in hospitals and other designated sites.¹⁰⁶ States also risk federal penalties unless they meet the ultimate goal of paternity establishment in ninety percent of welfare cases statewide.¹⁰⁷

Under PRWORA, the state is only required to provide genetic testing upon request and in certain contested cases.¹⁰⁸ To further encourage paternity establishment, the Act strengthened the “cooperation requirement” in which a mother seeking public assistance must

99 Pub. L. No. 103-66, 107 Stat. 31.

100 Charlotte L. Allen, *Federalization of Child Support: Twenty Years and Counting*, 73 MICH. BUS. L.J. 660, 661 (1994).

101 42 U.S.C. § 666(a)(5)(C)(ii) (corresponds to § 13721(b)(2), 107 Stat. at 659).

102 Compare § 111(a), 102 Stat. at 2348-49, with § 13721(a), 107 Stat. at 658 (codified as amended at 42 U.S.C. § 652(g)).

103 Francis X. Clines, *Clinton Signs Bill Cutting Welfare; States in New Role*, N.Y. TIMES, Aug. 23, 1996, at A1. PRWORA was soundly criticized by advocates for the poor for its caps on eligibility for benefits. See Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 43-45 (criticizing PRWORA based on its effects on low-income single mothers and their children). The emphasis on streamlining paternity establishment, however, was largely ignored. Paul Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 526 n.42 (1996).

104 Pub. L. No. 104-193, 110 Stat. 2105.

105 42 U.S.C. § 666(a)(5) (corresponds to § 331(a), 110 Stat. at 2227).

106 See *id.*

107 *Id.* § 652(g) (corresponds to § 341(c), 110 Stat. at 2232).

108 *Id.* § 666(a)(5)(B)(i) (corresponds to § 331(a), 110 Stat. at 2227).

aid in identifying the father of the child.¹⁰⁹ Failure of women to cooperate in identifying putative fathers without a showing of good cause will result in a reduction of benefits or a complete denial of assistance.¹¹⁰ These policies were further strengthened by federal legislation in 1998¹¹¹ that provided significant monetary incentives to states to maximize paternity establishment.¹¹²

PRWORA also strengthened a variety of sanctions for nonpayment of child support that had been enacted in previous legislation. These included income withholding, state and federal income tax refund intercept, and revocation of professional motor vehicle and recreational licenses.¹¹³ While the imposition of sanctions had traditionally been dependent upon judicial findings after a hearing, PRWORA made the imposition of most sanctions automatic.¹¹⁴

109 *Id.* § 608(a)(2) (corresponds to § 103(a), 110 Stat. at 2135). Good cause may be shown where naming a putative father may result in violence against the mother and/or child. Other circumstances such as rape, incest, artificial insemination, and single parent adoption may result in a good cause showing. However, where the mother may simply not want assistance from the father or the father's involvement, the state will generally demand such involvement when there is a request for state assistance. See Susan Notar & Vicki Turetsky, *Models for Safe Child Support Enforcement*, 8 AM. U. J. GENDER SOC. POL'Y & L. 657, 668 (2000). See generally Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121 (2002) (listing the bonuses and sanctions that PRWORA employs to compel states to ensure maternal cooperation in the establishment of paternity).

110 42 U.S.C. § 608(a)(2) (corresponds to § 103(a), 110 Stat. at 2135). The Act specifies that applicants for TANF assistance and Medicaid must assign support rights, including distribution, to the state and cooperate in establishing paternity. The state must deduct a minimum of twenty-five percent from a family's cash assistance grant, and may end the family's eligibility for grants altogether, for "non-cooperation" in establishing paternity, or if a child support order is modified or unenforced without good cause. Additionally, if the federal government finds that states are not enforcing non-cooperation sanctions against individuals, the state will be penalized up to five percent of the TANF block grant for the next fiscal year. Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality, and a Federalism-Based Constitutional Challenge*, 9 STAN L. & POL'Y REV. 115, 117 (1998).

111 Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, 112 Stat. 645 (codified as amended in scattered sections of 29 and 42 U.S.C.).

112 42 U.S.C. § 658a (corresponds to § 201(a), 112 Stat. at 648-56).

113 For a summary of sanctions added by child support legislation in the 1980s and 90s, see generally Cahn & Murphy, *supra* note 84, at 165; see also Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618, 618-19 (codified at 18 U.S.C. § 228(c)) (increasing penalties under the Child Support Recovery Act of 1992 from misdemeanor to felony).

114 42 U.S.C. § 666(c)(1) (corresponds to § 325(a)(2), sec. 2, § 228(c), 110 Stat. at 2224).

The federal system, then, has established a framework for paternity establishment for men identified by custodial mothers seeking public benefits through two principal methods.¹¹⁵ Under the most common method,¹¹⁶ parents can sign a voluntary paternity acknowledgement in the hospital, the birth record agency, or other designated site.¹¹⁷ No paternity order is issued. After sixty days, the acknowledgement itself is the legal finding of paternity and is entitled to full faith and credit in other states.¹¹⁸ Although the acknowledgements must contain a statement of the legal consequences of signing the documents, there is no requirement that counseling or genetic testing be offered or conducted before the acknowledgement is signed and becomes legally binding.¹¹⁹

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

116 Nationally, according to the Federal Office of Child Support Enforcement (OCSE), paternity was established or acknowledged for over 1.5 million children in fiscal year 2003, the last year for which data is currently available. Of these, 662,500 were the result of legal actions and almost 862,000 were through the voluntary acknowledgment process. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT FY 2003 PRELIMINARY DATA REPORT tbl.2 (2004), available at http://www.acf.dhhs.gov/programs/cse/pubs/2004/reports/preliminary_data/table_2.html. In some states, the percentage of paternity establishments through voluntary acknowledgment has been particularly high. In Massachusetts, for example, seventy-seven percent of fathers voluntarily acknowledge paternity in the hospital. *Welfare Reform: Building on Success: Hearing Before the S. Comm. on Finance*, 108th Cong. 53, at *2 (2002) (statement of Marilyn Ray Smith, Deputy Comm'r and IV-D Dir., Child Support Enforcement Div., Mass. Dep't of Revenue) (LEXIS, Testimony Library, Fed. Doc. Clearing House Cong. Testimony). The voluntary paternity process was used for 74.74% of unmarried births in New Jersey to establish paternity in 1997. *Oversight of the Child Support Enforcement Program: Hearing Before the Subcomm. on Human Resources, H. Comm. on Ways and Means*, 106th Cong. 73 (1999) (statement of Alisha Griffin, Assistant Dir., N.J. Div. of Family Dev.).

117 42 U.S.C. § 666(a)(5)(C). In some states, voluntary acknowledgment is permitted at a wide variety of sites including community centers, health centers, and preschool programs. The law gives states the option to allow voluntary acknowledgment at sites other than hospitals and birth records agencies if they use the same forms and materials. 45 C.F.R. § 302.70(a)(5)(iii)(B), (C) (2004).

118 42 U.S.C. § 666(a)(5)(C)(iv).

119 *Id.* § 666(a)(5)(C)(i)(I). Federal law does require that the acknowledgement form meet certain requirements. *Id.* § 666(a)(5)(C)(iv). Action Transmittal 98-02 sets forth those requirements. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., ACTION TRANSMITTAL OCSE-AT-98-02 (1998), available at <http://www.acf.hhs.gov/programs/cse/pol/AT/at-9802.htm>. They include current name, social security number, and date of birth of the mother and the father; current

The second method of establishing paternity is through a judicial proceeding typically initiated by the state after the mother applies for welfare and identifies someone as the putative father.¹²⁰ Although the child support agency must make genetic testing available and can order the tests without court supervision,¹²¹ there is no federal requirement that genetic tests be conducted before paternity is established by this method either. In most cases these court based paternity proceedings are resolved by consent or default without genetic testing.¹²² After the consent or default, the court enters an order and usually sets child support at the same time.¹²³ In contested cases of paternity, federal law has also streamlined the adjudication process in court and administrative proceedings in a variety of ways, including eliminating the right to a jury trial.¹²⁴

B. From "Deadbeat" and "Duped" Dads to "Dead Broke" and "Disappearing" Dads

Over the last three decades, then, both the federal and state governments have constructed massive bureaucracies focused on making noncustodial parents—mostly low-income fathers—pay child support. This “revolution” in child support was, for the most part, enthusiastically received by many scholars and policymakers, particularly advocates for women and children.¹²⁵ The goals of “legalizing” the father-child relationship for more children of unmarried parents and increasing and enforcing court-ordered child support for all children in single parent households held the promise of reducing child poverty. Thirty years later, however, it is time to reexamine the underlying as-

full name, date of birth, and birthplace of the child; a brief explanation of the legal significance of the document; a statement that either parent can rescind within sixty days; a clear statement that the parents understand that signing is voluntary and what the rights, responsibilities, and consequences of signing are; and signature lines for the parents and witnesses/notaries. *Id.*

120 See *supra* notes 86–88 and accompanying text.

121 See 42 U.S.C. § 666(a)(5)(B)(ii)(I), (a)(5)(F)(iii), (c)(1)(A).

122 See *infra* notes 159–60 and accompanying text.

123 42 U.S.C. § 666. Neither the acknowledgement process nor judicial proceedings establishing paternity typically provide an opportunity to address visitation or other noneconomic issues related to developing a relationship between the newly recognized father and the child. Instead they are focused exclusively on establishing the legal basis for child support orders. Daniel Hatcher & Hannah Liebermann, *Breaking the Cycle of Defeat for "Deadbroke" Noncustodial Parents Through Advocacy on Child Support Issues*, 37 J. POVERTY L. & POL'Y 5, 8 n.19 (2003).

124 42 U.S.C. § 666(a)(5).

125 See *supra* note 22.

sumptions driving these reforms as well as the impact of these reforms on low-income families.

1. The Flawed Assumptions Underlying Child Support and Welfare Policy

a. Child Support and Child Poverty

The first assumption that needs to be reexamined is that the enhanced child support enforcement scheme is critical to putting food in the mouths of children in poor families.¹²⁶ While there has been some success in improving child support collection,¹²⁷ the child support regime has largely failed to reduce child poverty.¹²⁸ There is some evidence that the receipt of child support may be important for non-welfare custodial households.¹²⁹ But the same research shows that aggressive child support enforcement has not reduced poverty for welfare families.¹³⁰ The reasons for this are multifaceted but not particularly complex. First, there has been limited success in obtaining child support orders for never married mothers, the population most likely to be receiving welfare benefits.¹³¹ Even for those children who have support orders, custodial mothers receiving welfare obtain no

126 Juliet Eilperin, *House Bill Targets Deadbeat Parents*, WASH. POST, May 13, 1998, at A10 (stating that one effect of potential child support enforcement law would be a reduction in child poverty); Cokie Roberts & Steven Roberts, *Going After Those Deadbeat Dads at the Federal Level*, NEW ORLEANS TIMES-PICAYUNE, Aug. 1, 1997, at B7 (reporting Congressman Henry Hyde's statement in support of aggressive child support enforcement that "[a] lot of little kids are undergoing economic child abuse").

127 PAUL LEGLER, ANNIE E. CASEY FOUND., *LOW-INCOME FATHERS AND CHILD SUPPORT: STARTING OFF ON THE RIGHT TRACK 6* (2003) [hereinafter CASEY STUDY] (describing that child support collections increased from \$8 billion in 1992 to \$18 billion in 2000).

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

129 KRISTINE WITKOWSKI, INST. FOR WOMEN'S POLICY RESEARCH, *HOW MUCH CAN CHILD SUPPORT PROVIDE? WELFARE, FAMILY INCOME AND CHILD SUPPORT 6* (1999) (finding that for many non-welfare low-income families, child support contributes to a lower poverty rate but child support does not have the same effect on single-mother families receiving welfare).

130 *See id.*

131 ELAINE SORENSEN & HELEN OLIVER, THE URBAN INST., *CHILD SUPPORT REFORMS IN PRWORA: INITIAL IMPACTS 16-17* (2002). In 1999, 39.8% of never-married mothers had a child support order, compared with 57.9% of divorced or separated mothers, and 63.6% of currently married mothers. *Id.* In addition, for never-married mothers who had a support order, 55.6% received some portion of ordered support,

benefit unless the support paid exceeds their welfare benefits. As noted earlier, under the child support distribution scheme for families on welfare, the custodial parent assigns her right to support and the state retains support paid by noncustodial parents as reimbursement for welfare benefits.¹³² Thus, the ever-increasing resources devoted to collect child support from low-income fathers have no direct impact on the financial well being of children on welfare.

In addition to the structural issues in welfare law that redirect child support from families to the state, the desperate economic circumstances of most fathers of children on welfare¹³³ almost ensures the failure of the child support system to effectively address child poverty. As Marsha Garrison writes:

Child support policy can avert poverty only if that poverty derives from an income loss associated with family dissolution or nonformation. If parents lack the resources to avoid poverty when together, child support alone cannot remedy the problem. . . . Because most poor children do not have “deadbeat dads” who can contribute significantly to their support, child support policy will offer the most help to the least needy: it cannot be expected to achieve a major reduction in children’s poverty.¹³⁴

compared to 71.1% and 72.2% for divorced or separated mothers and currently married mothers, respectively. *Id.*

132 See *supra* note 86 and accompanying text. Experts estimate that “approximately 50 percent of all child-support debt—which is \$90 billion on a national level—is owed to the government.” Ann W. Parks, *One Dad’s Dilemma*, DAILY REC. (Md.), Apr. 1, 2005, at 1B.

133 See *infra* notes 141–46 and accompanying text.

134 Marsha Garrison, *The Goals and Limits of Child Support Policies*, in CHILD SUPPORT: THE NEXT FRONTIER, *supra* note 128, at 16, 22, 24–25 (citations omitted); see also JOEL F. HANDLER & YEHESEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* 223 (1991) (detailing how early critics of welfare policy concluded child support enforcement efforts would have little impact on poor families because of low earnings of poor fathers). Although beyond the scope of this Article, a number of promising proposals have been made to reduce child poverty by guaranteeing children a minimum level of income that is not linked to the amount of child support collected from their parents and is guaranteed through the child’s minority without regard to parents’ work choices or eligibility for welfare. See, e.g., MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2003) (arguing that poor children can only gain autonomy if there is an equalization of resources such that a floor is created below which no one is allowed to fall); Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523 (1995) (proposing a system of child support assistance for children in one-parent households to be run by Social Security).

Thus, the shift of focus for support of children from entitlement to public benefits to making fathers pay did not signal a positive change for the financial well being of children.

b. Low-Income Fathers and the “Deadbeat” Stereotype

A related assumption that needs to be reexamined is that the low-income fathers who are the target of aggressive enforcement are all “deadbeats.”¹³⁵ The image of the “Deadbeat Dad” is well entrenched in American culture.¹³⁶ It evokes an image of a noncustodial father who has impoverished his children while improving his own standard of living after separation from the family.¹³⁷ Media coverage¹³⁸ and political rhetoric¹³⁹ paint a picture of a father, usually divorced, who is middle-aged, middle class, and ignoring his children’s needs while enjoying a prosperous lifestyle. As one commentator has noted:

[T]he public’s anger has spread to all noncustodial fathers owing support. These fathers have emerged as the new villains in our culture. “The irresponsibility of fathers takes three forms: they bring

135 Daniel Borunda, *Roundup Nabs Alleged Deadbeat Dad*, EL PASO TIMES, June 20, 2003, at 4B; Robert E. Pierre, *States Consider Laws Against Paternity Fraud; Child Advocates Worry About Effects*, WASH. POST, Oct. 14, 2002, at A3; Carlos Sadovi, *Dragnet Out for Deadbeat Dads*, CHI. SUN TIMES, June 14, 2003, at 1.

136 See sources cited *supra* note 135.

137 See generally LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323 (1985) (finding that female and child poverty increase after divorce, creating an overwhelming gap in the standard of living for divorced men compared to that of their children and ex-wives); James B. McLindon, *Separate but Unequal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L.Q. 351 (1987) (citing studies conducted in California, Ohio, and Vermont that indicate a grim economic outlook for women in the years following divorce).

138 Joe Mahoney, *Deadbeats in N.Y. Owe Kids \$3B*, DAILY NEWS (N.Y.), June 30, 2000, at 5 (discussing New York’s challenges in collecting child support from non-paying fathers who hide income by working off the books, moving to states lax in child support enforcement, and putting assets in others’ names); *Pay for Kids or Pay the Price*, L.A. TIMES, Aug. 26, 2002, at B8 (discussing the arrest of several parents with significant child support arrearages, including a doctor with a six figure income who owed \$86,000 and a disbarred lawyer who writes software who also owed \$86,000); Robert Pear, *U.S. Agents Arrest Dozens of Fathers in Support Cases*, N.Y. TIMES, Aug. 19, 2002, at A1 (discussing the arrest of a professional football player who makes approximately \$1.1 million per year and owes \$101,000, a Texas engineering company employee who owes \$264,000, and a psychiatrist who owes \$64,976).

139 See *supra* note 126; see also Ronald B. Mincy & Elaine J. Sorensen, *Deadbeats and Turnips in Child Support Reform*, 17 J. POL’Y ANALYSIS & MGMT. 44, 48 (1998) (distinguishing between fathers who could pay child support but do not and fathers who lack the means to provide meaningful support and calling for policy changes that distinguish between the two groups).

into the world 'illegitimate' children they do not intend to support; they leave marriages they should remain in; and, whether married or not, they fail to pay support for the children they leave behind." It would not be an exaggeration to say that politicians of all stripes have taken up a moral crusade against nonsupporting fathers, condemning their immorality and selfishness.¹⁴⁰

While these stereotypical "deadbeats" exist, many of the men owing child support are in fact dead broke.¹⁴¹ Researchers estimate that as many as 33.2% of young, noncustodial fathers are unable to pay child support due to poverty.¹⁴² Many low-income fathers have substandard education, lack marketable skills, and often have criminal histories that hinder employment.¹⁴³ Many are minors, without strong family support.¹⁴⁴ Many are substance abusers or have mental or physical disabilities which can contribute to economic and family instability.¹⁴⁵ They are often immigrants for whom English is a second

140 Brito, *supra* note 23, at 264 (citing Chambers, *supra* note 22, at 2576).

141 In Baltimore, where I directed a family law clinical program from 1989–2003 that included a paternity and child support practice, most of the noncustodial parents in state-initiated child support proceedings are young, poorly educated African-American males with little work experience. See Robert J. Rhudy & Joe Surkiewicz, *Dead Broke, Not Deadbeat: Child Support System Hurts Children, Families*, DAILY REC. (Md.), July 18, 2003, at 7B (noting that more than eighty-four percent of noncustodial parents in Baltimore do not have the income to pay child support).

142 Mincy & Sorensen, *supra* note 139, at 47.

143 PAUL OFFNER & HARRY HOLZER, THE BROOKINGS INST., LEFT BEHIND IN THE LABOR MARKET: RECENT EMPLOYMENT TRENDS AMONG YOUNG BLACK MEN 4 (2002), available at <http://www.brookings.edu/dybdocroot/es/urban/publications/offnerholzer.pdf> (finding that nationally, the employment rate for black men in central cities in 1999 and 2000 was 46.99%, compared to 53.24% in metropolitan areas overall and 63.09% in the suburbs); see also ELAINE SORENSEN, THE URBAN INST., OBLIGATING DADS: HELPING LOW-INCOME NONCUSTODIAL FATHERS DO MORE FOR THEIR CHILDREN 1 (1999), available at http://www.urban.org/UploadedPDF/sf_2.pdf (noting that low-income fathers who do not pay child support tend to be "young and disproportionately African-American, with limited education"); ELAINE SORENSEN & CHAVA ZIBMAN, THE URBAN INST., POOR DADS WHO DON'T PAY CHILD SUPPORT: DEADBEATS OR DISADVANTAGED? 2 (2001), available at http://www.urban.org/UploadedPDF/anf_b30.pdf (finding that forty-three percent of poor nonresident fathers who do not pay child support lack a high school diploma or equivalent).

144 PAULA ROBERTS, CTR. FOR LAW & SOC. POLICY, NO MINOR MATTER: DEVELOPING A COHERENT POLICY ON PATERNITY ESTABLISHMENT FOR CHILDREN BORN TO UNDERAGE PARENTS 1 (2004), available at http://www.clasp.org/publications/no_minor_brf.pdf (finding that there are "roughly 150,000 babies born each year to unwed parents at least one of whom is a minor [typically under 18]").

145 WENDELL PRIMUS & KRISTINA DAUGIRDAS, THE ABELL FOUND., IMPROVING CHILD WELL-BEING BY FOCUSING ON LOW-INCOME NONCUSTODIAL PARENTS IN MARYLAND 3, 24–25 (2000), available at http://www.abell.org/pubsitems/cd_improving_child_900.pdf.

language.¹⁴⁶ All of these circumstances have created a substantial group of noncustodial fathers who are subject to child support obligations they are simply unable to meet. Unlike the stereotypical “dead-beat” who can respond to sanctions with payments, these fathers will accrue large arrears, be subject to sanctions, and fall further into the cycle of poverty.

2. The Impact

A number of child support establishment and modification policies place special burdens on these low-income child support obligors. The first impact of the new policies is the pressure placed on putative unmarried fathers to voluntarily acknowledge or consent to paternity orders. As discussed earlier, a cornerstone of the federal effort to reduce welfare costs has been to increase paternity establishment.¹⁴⁷ On its face, this aspect of “welfare reform” has been a success with the number of paternity establishments increasing dramatically over the last decade.¹⁴⁸ Strengthening the bond between children of unmarried parents and their fathers can certainly yield important social¹⁴⁹ and economic¹⁵⁰ benefits. While the legal establishment of paternity may have some connection to these social and economic benefits, such benefits do not automatically follow from a paternity order.¹⁵¹

146 See, e.g., Mark Greenberg & Hedieh Rahmanou, *Looking to the Future: Commentary I*, THE FUTURE OF CHILD., Summer 2004, at 139, 139 (noting that “one-quarter of the nation’s low-income children . . . are now immigrants or the children of immigrants” and that “[a]ny national strategy for reducing child poverty, promoting child well-being and helping low-wage workers advance must address the needs and circumstances of immigrants and their children”).

147 See *supra* notes 93–96 and accompanying text.

148 Between 1992 and 2000, paternity establishment increased from 500,000 to 1.5 million. CASEY STUDY, *supra* note 127, at 6; see also Virginia Ellis, *Fathers’ Legal Ties that Bind*, L.A. TIMES, Mar. 8, 1998, at A1 (highlighting the increase in paternity filings since the January, 1997 enactment of PRWORA and finding there was a 600% increase in the number of fathers signing paternity declarations in 1997).

149 See, e.g., DAVID BLANKENHORN, FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM (1995) (summarizing research demonstrating the importance of the involvement of fathers in children’s emotional development, success in school, and adult relationships); JAMES A. LEVINE WITH EDWARD W. PITT, NEW EXPECTATIONS: COMMUNITY STRATEGIES FOR RESPONSIBLE FATHERHOOD 26–27 (1995) (explaining that nurturing father involvement during infancy dramatically improves a child’s cognitive, intellectual, and social development throughout childhood).

150 Judith Selzer, *Child Support and Child Access: Experiences of Divorced and Nonmarital Families*, in CHILD SUPPORT: THE NEXT FRONTIER, *supra* note 128, at 69, 73–74.

151 Because of other differences between fathers who establish paternity and those that do not, “[r]esearch cannot yet answer the question of how the legal establish-

Moreover, the efforts to encourage early and easy paternity establishment may cause more harm than good for fathers and children. The child support enforcement bureaucracy can destabilize relationships between parents, and easy paternity establishment has led to increased efforts to disestablish paternity several years later.

The demographic profile of many of the fathers who fall behind in child support discussed earlier—young, poor, uneducated¹⁵²—make them particularly vulnerable in the paternity establishment process. What was once a full quasi-criminal adversarial process often including a jury trial,¹⁵³ has become, more often than not, a nonjudicial process that involves little more than signing a piece of paper.¹⁵⁴ While federal law requires oral and written disclosure of information about the legal consequences of paternity establishment before voluntary acknowledgment,¹⁵⁵ the disclosures are not an effective substitute for legal counsel, or even the advice of an informed layperson. The concerns of advocates for low-income parents make clear the limitations of written disclosures in meaningfully informing putative fathers of the legal consequences of acknowledging paternity.¹⁵⁶ In addition, many acknowledgments occur in a hospital setting shortly after the child's birth. This heightens the emotional pressures that tend to result in acknowledgments by nonbiological fathers.¹⁵⁷

ment of paternity—by itself, after other differences between parents who do and do not establish paternity are taken into account—affects the emotional and financial support available to children of unmarried parents.” NAT’L WOMEN’S LAW CTR. & CTR. ON FATHERS, FAMILIES, & PUB. POLICY, *FAMILY TIES: IMPROVING PATERNITY ESTABLISHMENT PRACTICES AND PROCEDURES FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN* 7 (2000) [hereinafter *FAMILY TIES*]; see also *infra* note 216 (showing that the legal establishment of paternity does not always lead to establishment of child support order).

152 See *supra* notes 141–46 and accompanying text.

153 KRAUSE, *supra* note 30, at 109–11.

154 See *supra* notes 101–06 and accompanying text.

155 42 U.S.C. § 666(a)(5)(C)(i) (2000).

156 *FAMILY TIES*, *supra* note 151, at 17–18. These observations confirm the author’s experience in interviewing pro se litigants in paternity and child support proceedings in the Circuit Court for Baltimore City. See Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 *FORDHAM L. REV.* 1879, 1903–04 (1999) (describing the Baltimore City Circuit Pro Se Divorce Project, which was developed by the University of Baltimore and the University of Maryland Law School clinics).

157 Participants in the Common Ground Project, which brought together advocates and representatives of low-income mothers and fathers to discuss paternity establishment practices and procedures, described the hospital locale as “problematic” and “expressed concerns about the hospital setting because current hospital maternity stays are brief and the period surrounding childbirth is emotionally stressful. Thus, parents are often not emotionally or mentally equipped to digest the paternity

The judicial process for establishment of paternity orders offers more procedural safeguards than the voluntary acknowledgment process, but there are still substantial risks in the judicial context that men will become legal fathers with little understanding of the legal consequences. In the case of judgments entered by default, putative fathers often do not get actual notice of the proceedings and the judgment is entered without their knowledge or participation.¹⁵⁸ Even if they are present in court, putative fathers are rarely represented by counsel,¹⁵⁹ and both the volume of cases and the routine treatment of cases by the child support agency or its counsel leave many fathers misinformed about the significance of the proceedings.¹⁶⁰ As a result of all these circumstances, many men acknowledged or consented to paternity with very little understanding of the legal ramifications of their actions.

Another factor leading to the ultimate push to disestablish paternity is the potentially unfair child support orders established for low-income fathers following the establishment of paternity. As noted, since the late 1980s, states have made initial awards of support based on a variety of fixed formulas. The most common approach to establishing an initial award of child support is the Income Shares

acknowledgment form and/or make a decision during the hospital maternity stay." FAMILY TIES, *supra* note 151, at 17. The pressure to acknowledge paternity in this setting is increased by the statutory requirement that a nonmarital father's name cannot appear on a child's birth certificate unless he has signed an acknowledgment of paternity or has been adjudicated to be the father by a court or administrative tribunal. 42 U.S.C. § 666(a)(5)(D)(i)(I)-(II).

158 CASEY STUDY, *supra* note 127, at 18-22; see also Susan McRae, *Rare Ruling Reverses Default Paternity Judgment*, L.A. DAILY J., July 2, 2004, at 1 (describing case in which court reversed default judgment of paternity after six-month limitation to challenge the order where putative father testified that he had never received a summons and complaint or notice of the default judgment).

159 Steven K. Berenson, *A Family Law Residency Program?: A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 110 (2001) (describing a 1991-1992 study of sixteen large urban areas nationwide finding that seventy-two percent of all domestic relations cases involved at least one unrepresented party); see also DEP'T OF FAMILY ADMIN., MD. JUDICIARY, 2003 ANNUAL REPORT OF THE MARYLAND CIRCUIT COURT FAMILY DIVISIONS & FAMILY SERVICES PROGRAMS 29-30 (2003) (stating that sixty-four percent of litigants in family disputes in Maryland were self-represented).

160 Stacy L. Brustin, *The Intersection Between Welfare Reform and Child Support Enforcement: D.C.'s Weak Link*, 52 CATH. U. L. REV. 621, 642-43 (2003); see also Transcript of Record at 28-32, *Gantt v. Sanchez*, No. PD 60-104431 (Md. Cir. Ct. Balt. City Nov. 8, 1999) (providing one father's testimony describing his confusion about the legal ramifications of signing a paternity acknowledgement and lack of explanation about the process) (on file with author).

Model.¹⁶¹ These formulae base child support obligations on the marginal costs of raising children in a two-parent family.¹⁶² This “one size fits all” approach to child support can result in unreasonably high awards for low-income obligors. The income shares formulae take a larger percentage of income from low-income obligors because low-income families have to spend a greater percentage of their income on their children.¹⁶³ In addition, as one scholar observed, for most nonmarital families where children have never lived in an intact household, the Income Shares Model’s “replication of past expenditures is pure fiction.”¹⁶⁴

In addition to formulae skewed against low-income obligors, several other policies and circumstances at the establishment stage contribute to punitive awards for low-income fathers. The definition of income embodied in statutes and case law permit courts or agencies to impute income to obligors if, under varying criteria, the court believes the obligor is earning less than he should be.¹⁶⁵ The theory behind such imputation of income statutes is that they can be used to both discourage obligors from underreporting income and encourage full employment.¹⁶⁶ However, when such policies are applied to obligors who are chronically unemployed or in seasonal or other part time employment, they result in unpayable support and ever increasing arrearages.¹⁶⁷ Even where legitimate defenses to imputation of income exist, without legal counsel these obligors often are unable to present them.¹⁶⁸ Moreover, given the high rate of default judgments

161 WEISBERG & APPLETON, *supra* note 84, at 735.

162 ESPENSHADE, *supra* note 89.

163 CASEY STUDY, *supra* note 127, at 11 (finding that both the Income Shares Model and other provisions of state guidelines such as the child care and medical expenses provision and adjustments when fathers have multiple families contribute to “regressive” guidelines “requiring low-income custodial parents to pay a larger share of their income toward child support than higher-income non-custodial parents”); *see also* Vicki Lynn Bell, *Alimony and Child Support Generally: Amend Child Support Calculations*, 12 GA. ST. U. L. REV. 169, 176 (1995) (finding that many Income Shares guideline models for child support take a higher percentage of income from low-income obligors than is taken from high income obligors).

164 Marsha Garrison, *Child Support Policy: Guidelines and Goals*, 33 FAM. L.Q. 157, 168 (1999).

165 LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION § 2.04[a], [c] (Supp. 2004).

166 *Id.*

167 OFFICE OF CHILD SUPPORT ENFORCEMENT, *supra* note 116, at tbl.11, *available at* http://www.acf.dhhs.gov/programs/cse/pubs/2004/reports/preliminary_data/table_11.html.

168 *See supra* note 159.

for child support orders,¹⁶⁹ many obligors are not even present to provide testimony about their income and ability to pay.

The problems associated with excessive initial awards are often compounded by child support modification policies. First, state laws on when modification is justified vary considerably.¹⁷⁰ Some states do not permit downward modification in situations in which an obligor is clearly unable to maintain the income earned or imputed at the point of the initial award. For example, in some states, incarceration is not a sufficient basis for a downward modification.¹⁷¹ Even in those situa-

169 CASEY STUDY, *supra* note 127, at 18–22; NAT'L WOMEN'S LAW CTR. & CTR. ON FATHERS, FAMILIES & PUB. POLICY, DOLLARS AND SENSE: IMPROVING THE DETERMINATION OF CHILD SUPPORT OBLIGATIONS FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN 14, 29 (2002) [hereinafter DOLLARS AND SENSE]; McRae, *supra* note 158, at 1 (reporting that default judgments are entered in forty-seven percent of California's paternity judgments).

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

171 See, e.g., *Mascola v. Lusskin*, 727 So. 2d 328 (Fla. Dist. Ct. App. 1999) (ruling that father's reduction in income due to his incarceration was insufficient to relieve him of his child support obligation because the reduction was caused by his voluntary acts); *Staffon v. Staffon*, 587 S.E.2d 630 (Ga. 2003) (ruling that where the natural and foreseeable consequences of father's voluntary conduct resulted in his imprisonment, placing him in a position where he was unable to earn income, a downward modification of child support was not warranted); *In re Marriage of Thurmond*, 962 P.2d 1064 (Kan. 1998) (refusing to reduce or suspend support obligation where parent's incarceration was the only change of circumstances); *Mooney v. Brennan*, 848 P.2d 1020 (Mont. 1993) (holding it was not unconscionable to refuse a downward modification of father's child support obligation when the changed circumstances were due to his incarceration for the commission of a crime); *Knights v. Knights*, 522 N.E.2d 1045 (N.Y. 1988) (denying ex-husband's application for modification of child support because his financial hardship was a result of wrongful conduct resulting in his incarceration); *Koch v. Williams*, 456 N.W.2d 299 (N.D. 1990) (holding that former husband's incarceration for incest was voluntary and self-induced, failing to constitute a material change in circumstances warranting a modification of child support); *Yerkes v. Yerkes*, 824 A.2d 1169 (Pa. 2003) (adopting the "no justification" approach, holding that criminal incarceration was not sufficient to justify a reduction in child support based on the best interests of the child and principles of fairness in not allowing obligor to benefit from his criminal acts); *Carlsen v. Utah Dep't of Soc. Servs.*, 722 P.2d 775 (Utah 1986) (holding that ex-husband must reimburse state for public support given his child while he was incarcerated and unable to make child support payments). *But see* VT. STAT. ANN. tit. 15, § 660(f) (2002) (allowing the court discretion to modify an order as to past support installments accruing after noncustodial parent's incarceration); *Bendixen v. Bendixen*, 962 P.2d 170 (Alaska 1998) (holding that a father's incarceration was not equivalent to voluntary unemployment and requiring him to establish a substantial reduction in income to secure a reduction in child support payments); *Glenn v. Glenn*, 848 P.2d 819 (Wyo. 1993) (finding that the district court did not err in reducing father's child support obligation due to his sentence of

tions where the law supports a reduction of child support, lack of legal representation often prevents timely application for modification.¹⁷² Since 1986, federal law has prohibited retroactive modification of arrearages.¹⁷³ This is sound policy when applied as a check against judicial discretion that was often exercised to forgive arrearages for middle- or high-income obligors who repeatedly evaded their support obligation. When rigidly applied to low-income obligors, however, this policy becomes another example of the unintended consequences of the welfare policy.¹⁷⁴ For example, a father may become disabled or become custodian of the children. Unless he initiates a court action promptly, he will continue to owe child support and arrearages will accumulate indefinitely to a point where payment is no longer possible.¹⁷⁵

Whether through inappropriate guidelines, imputation of income, or modification policies, unrealistically high awards lead to high arrearages.¹⁷⁶ Low-income obligors are then subject to child support enforcement sanctions. As noted, these sanctions include income attachment, motor vehicle and professional license suspension, credit reporting, and incarceration.¹⁷⁷ While enforcement actions were once judicial proceedings, most, except incarceration, are now

life imprisonment). See generally SUSAN C. ANTOS, GREATER UPSTATE LAW PROJECT, INC., CHILD SUPPORT ARREARS (2005), available at <http://www.courts.state.ny.us/ip/partnersinjustice/child-support.pdf> (criticizing New York's rule prohibiting modification and recommending that more equitable policies be crafted); *Prisons Offer No Escape from Paying Child Support*, N.Y. TIMES, Sept. 17, 2000, § 1, at 35 (describing disparity in policies regarding the collection of child support from prisoners and noting some "unforgiving policies that may whisk a man back to prison because he could not pay debts that built up while he was behind bars").

172 See *supra* note 159; see also *Wheeler v. State*, 864 A.2d 210, 217-18 (Md. Ct. Spec. App. 2004) (denying a pro se incarcerated father's motion to terminate child support during his prison term and, instead, suspending the obligation and ordering that it be automatically reinstated within three days of his release).

173 42 U.S.C. § 666(a)(9)(c) (2000). Child support obligations are also not dischargeable in bankruptcy. 11 U.S.C.A. § 523(a) (West 2003 & Supp. 2005).

174 Daniel L. Hatcher & Hannah Lieberman, *Breaking the Cycle of Defeat for "Dead-broke" Noncustodial Parents Through Advocacy on Child Support Issues*, 37 CLEARINGHOUSE REV. 5, 9 (2003).

175 *Id.*

176 The Federal Office of Child Support Enforcement reported that there were 90 billion dollars worth of accumulated child support arrearages in fiscal year 2002. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD SUPPORT ENFORCEMENT (CSE) FY 2002 PRELIMINARY DATA REPORT (2003), available at http://www.acf.hhs.gov/programs/cse/pubs/2003/reports/prelim_datareport/. About half the debt is owed to the state for welfare reimbursement and about two-thirds of the people who owe the debt earned less than \$10,000 per year. *Id.*

177 See *supra* note 113 and accompanying text.

done administratively without an opportunity for a hearing before imposition of the sanction.¹⁷⁸ The impact of these sanctions is further strengthened by a system of tracking and collecting information on fathers who owe child support¹⁷⁹ that “creates a detailed profile of who you are, what you do and what you are likely to do.”¹⁸⁰ Under “the most onerous form of debt collection practiced in the United States,”¹⁸¹ jobs, credit history, and housing are lost, and economically fragile circumstances become desperate.

In the past, these sanctions often led to legal fathers going “below-ground.”¹⁸² In recent years, many fathers have discovered a new way to defend these child support actions by challenging the underlying order of paternity.¹⁸³ Courts have responded to these paternity

178 Most enforcement actions are triggered by a missed child support payment tracked by the computer for the agency. Those that the agency can take without seeking a court or administrative order include income withholding, securing assets (including bank accounts, workers' compensation payments, employment compensation payments, retirement and pension funds), imposing liens, voiding fraudulent property transfers, suspending professional and recreational licenses, and revoking passports. PRWORA, Pub. L. No. 104-193, §§ 362, 364, 368-370, 110 Stat. 2105, 2242-47, 2249-52 (1996) (codified as amended in scattered sections of 5, 10, and 42 U.S.C.).

179 42 U.S.C. § 666(a)(5)(C) (2000). See generally Robert Pear, *Vast Worker Database To Track Deadbeat Parents*, N.Y. TIMES, Sept. 22, 1997, at A1 (describing the national directory of new hires).

180 Samuel V. Schoonmaker, IV, *Consequences and Validity of Family Law Provisions in the "Welfare Reform Act,"* 14 J. AM. ACAD. MATRIMONIAL LAW. 1, 51 (1997). There is some recognition in the statute that the massive information sharing contemplated under the statute may violate the privacy of obligors. 42 U.S.C. § 654(26) (requiring that safeguards established to ensure access to confidential information is limited to authorized persons). But commentators point out that these provisions are rendered “practically meaningless by other provisions in the law that permit broad information sharing.” Brito, *supra* note 23, at 263.

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

182 Hatcher & Lieberman, *supra* note 174, at 5.

183 Under traditional state law, final civil judgments can only be reopened in cases of fraud, duress, or material mistake of fact. See, e.g., *Tandra S. v. Tyrone W.*, 648 A.2d 439 (Md. 1994). State law varies on what constitutes mistake, fraud, or duress but many states now permit reopening based on an exception to this final judgment rule or based on the father's assertion that he was “defrauded” about the biological link with his child. Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children* 37 FAM. L.Q. 35, 82-85 (2003). While many of these disestablishment actions are triggered by onerous child support burdens, they are facilitated by changes in the DNA testing technology making such testing more accessible. Until a few years ago, paternity testing was invasive, required the participation of both parents and the child and cost from \$700 to \$1,000. Recent advances allow DNA testing through a simple cheek swab, no longer require the participation of the mother, and

challenges in a variety of ways. While no coherent patterns have emerged,¹⁸⁴ not surprisingly, children of married parents are generally more protected than children of unmarried parents. Courts hearing competing claims for fatherhood of children of married parents or requests to disestablish paternity by married fathers often preserve the relationship between the child and the married father where the husband is the psychological rather than the biological father.¹⁸⁵ In a

can cost as little as \$200 when done through a private rather than court-ordered lab testing. A January 15, 2005 web search revealed over fifty sites that mentioned paternity testing kits. Dozens of these sites advertised home testing kits free or at low cost. *See, e.g.*, Gene Tree DNA Testing Center, Free DNA Paternity Test Collection Kit!, <http://www.genetree.com/product/free-kit.asp> (last visited Sept. 3, 2005) (offering to ship free kits and requiring payment to send the samples back for testing); Prophase Genetics, Paternity Testing Services, <http://www.prophase-genetics.com> (last visited Sept. 3, 2005) (offering kits and results for \$165).

184 For a thorough analysis of paternity disestablishment statutes and case law, see Roberts, *supra* note 183; Memorandum from Paula Roberts, Ctr. for Law & Social Policy, to Interested People (June 17, 2004), available at http://clasp.org/publications/Paternity_Update2.pdf.

185 *See, e.g.*, *In re Marriage of Pedregon*, 132 Cal. Rptr. 2d 861 (Ct. App. 2003) (ruling that where the husband held out a nonbiological child as his own, he established the paternal relationship and was required to pay child support); *Rodney F. v. Karen M.*, 71 Cal. Rptr. 2d 399 (Ct. App. 1998) (finding that an alleged biological father could not bring a paternity action due to the presumption of paternity of marital father); *Leger v. Leger*, 829 So. 2d 1101 (La. Ct. App. 2002) (ruling that wife had no legal authority to rebut presumption of husband's paternity when the child was born during the marriage or within 300 days after the divorce); *Evans v. Wilson*, 856 A.2d 679 (Md. 2004) (denying unmarried paramour's attempt to establish paternity in light of mother's husband's status as legal father); *McHone v. Sosnowski*, 609 N.W.2d 844 (Mich. Ct. App. 2000) (holding that alleged biological father could not bring claim unless there was a prior determination that child was not the product of the marriage); *Watts v. Watts*, 337 A.2d 350 (N.H. 1975) (denying husband's motion for blood tests where parents were married and father acknowledged children for fifteen years); *Strauser v. Stahr*, 726 A.2d 1052 (Pa. 1999) (rejecting DNA evidence excluding husband as father of parties' youngest child based on marital presumption and best interest of child born to married parents); *John M. v. Paula T.*, 571 A.2d 1380 (Pa. 1990) (holding that marital presumption can be overcome only by proving non-access or impotency); *Amrhein v. Cozad*, 714 A.2d 409 (Pa. Super. Ct. 1998) (holding that presumption of paternity was not overcome by DNA test eliminating husband as biological father); *Culhane v. Michels*, 615 N.W.2d 580, 589-90 (S.D. 2000) (denying genetic testing where father challenged paternity of marital children whom he had acknowledged as his own for eighteen years); *In re T.S.S.*, 61 S.W.3d 481, 487 (Tex. App. 2001) (refusing to admit DNA evidence excluding husband as biological father where parents were married and father had acknowledged child as his own for fourteen years); *Godin v. Godin*, 725 A.2d 904, 910-11 (Vt. 1998) (denying husband's motion for paternity testing, citing the marital presumption of paternity and the superior interests of the state, the family, and the child in "maintaining the continuity, financial support, and psychological security of an established parent-

few states, paternity disestablishment requests have been denied for both children of married and unmarried parents under statutes of limitations or on estoppel grounds that cut off a man's right to challenge paternity after a period of time.¹⁸⁶ But in a growing number of

child relationship"); *Betty L.W. v. William E.W.*, 569 S.E.2d 77, 86 (W. Va. 2002) (ruling that nonbiological father's acknowledgement of marital child as his own for six years during marriage and four years after divorce precluded him from terminating or modifying child support). *But see K.S. v. R.S.*, 669 N.E.2d 399 (Ind. 1996) (holding that Indiana law permits a man who claims to be the biological father of a child born during the marriage of the child's mother and another man to file a paternity action while that marriage remains intact); *Nunn v. Nunn*, 791 N.E.2d 779 (Ind. Ct. App. 2003) (holding that marital father had a right to visitation or custody, despite DNA proving he was not the biological father, because of the existing parent-child bond); *Witso v. Overby*, 627 N.W.2d 63 (Minn. 2001) (granting DNA testing to a man who asserted that he had an affair with a married woman who had a child); *Poskarbiewicz v. Poskarbiewicz*, 787 N.E.2d 688 (Ohio Ct. App. 2003) (ruling that, although the child and the mother's husband were not blood-related, severing the parent-child relationship between child and mother's husband would not be in the best interest of the child); *Brinkley v. King*, 701 A.2d 176, 181 (Pa. 1997) (admitting DNA evidence that proved the husband was not the biological father of the child produced during marriage because the parents were no longer married at the time of action and therefore there was no institution of marriage to protect).

186 *See, e.g., People ex rel. J.A.U. v. R.L.C.*, 47 P.3d 327 (Colo. 2002) (stating that judgments may only be reopened within a "reasonable time"); *D.F. v. Dep't of Revenue ex rel. L.F.*, 823 So. 2d 97 (Fla. 2002) (denying motion to reopen paternity judgment filed after one year); *People ex rel. Dep't of Pub. Aid v. Smith*, 818 N.E.2d 1204 (Ill. 2004) (denying the motion of a man to disestablish paternity because he originally voluntarily acknowledged paternity but then delayed bringing the motion for more than sixty days); *In re Marriage of Kates*, 761 N.E.2d 153 (Ill. 2001) (noting that under the Illinois Parentage Act, 750 ILL. COMP. STAT. 45/8(a)(4) (West 2000), a paternity action cannot be brought more than two years after adjudicated father obtains "actual knowledge of relevant facts"); *In re Paternity of Cheryl*, 746 N.E.2d 488 (Mass. 2001) (denying a motion to disestablish under the rule that judgment may only be reopened within a "reasonable time"); *DeGrande v. Demby*, 529 N.W.2d 340 (Minn. Ct. App. 1995) (applying the three-year statute of limitations in the Minnesota Parentage Act, MINN. STAT. § 257.57 (Supp. 1993), to the reopening of paternity judgments); *F.B. v. A.L.G.*, 821 A.2d 1157 (N.J. 2003) (denying motion of putative father to vacate paternity judgment several years after he waived right to genetic tests and acknowledged paternity because he did not prove fraud and he had acted as the father for eight years); *Romine v. Trip*, No. 00CA12, 2000 Ohio App. LEXIS 4602 (Ct. App. Sept. 29, 2000) (applying the one-year statute of limitations for the reopening of paternity judgments pursuant to OHIO REV. CODE § 5101.314 (repealed 2001)). *But see Ex parte J.Z.*, 668 So. 2d 566 (Ala. 1995) (ruling that incarceration at the time a default judgment of paternity was entered against nonbiological legal father does not constitute a truly compelling circumstance to overcome the policy in favor of finality or the "reasonable time" requirement of Rule 60(b) when paternity judgment had been established for twelve years); *Dixon v. Pouncy*, 979 P.2d 520 (Alaska 1999) (stating that a man's motion to set aside a divorce decree establishing paternity was not

jurisdictions—even where disestablishment will leave a child fatherless—courts¹⁸⁷ and legislatures¹⁸⁸ have opted for a rule based on biology. Under various articulations of this rule, if a man, who has been

made within an unreasonable time when it was brought two and one-half years after the divorce).

187 State *ex rel.* A.T., 695 So. 2d 624 (Ala. 1997) (admitting DNA evidence based on ALA. CODE § 26-17A-1 (1975), which permits reopening of paternity cases based on DNA evidence); Dep't of Revenue, Child Support Enforcement Div. v. Button, 7 P.3d 74 (Alaska 2000) (allowing DNA evidence to be admitted nine years after paternity acknowledgement by nonbiological father); *In re* Marriage of Adams, 701 N.E.2d 1131 (Ill. App. Ct. 1993) (permitting disestablishment of paternity despite ten-year relationship with child, finding best interests of the child not relevant to decision); Walter v. Gunter, 788 A.2d 609 (Md. 2002) (holding that DNA evidence was admissible in challenging paternity, and once it was established the unmarried man was not biological father, he could not be held liable for arrearages in child support); Langston v. Riffe, 754 A.2d 389 (Md. 2000) (holding that DNA testing is available to any putative father who seeks to challenge a paternity declaration entered against him); K.B. v. D.B., 639 N.E.2d 725, 730 (Mass. App. Ct. 1994) (ruling that husband need not pay child support seven years after the child's birth when DNA proved the child was not his because it is the duty of the "natural parents" to support the child); State *ex rel.* Div. of Child Support Enforcement v. Hill, 53 S.W.3d 137 (Mo. Ct. App. 2001) (permitting unmarried man to admit DNA evidence to challenge paternity); Dep't of Human Servs. v. Chisum, 85 P.3d 860 (Okla. Civ. App. 2004) (granting motion to disestablish paternity finding that genetic testing excluding father created "material mistake of fact" and that neither equity nor the best interests of the child applied in paternity cases where genetic testing excluded the movant); Brinkley v. King, 701 A.2d 176 (Pa. 1997) (vacating the superior court's order denying mother's motion for blood tests where presumption of paternity did not apply). *But see In re* Bethards, 526 N.W.2d 871 (Iowa Ct. App. 1994) (terminating child support obligations based largely on blood tests disestablishing paternity, stating it would be wrong of the court to endorse and continue the fraud on the child who believes his mother's ex-husband is his biological father); Smith v. Jones, 566 So. 2d 408 (La. Ct. App. 1990) (admitting DNA evidence presented by biological father but finding that the child may have two "fathers," i.e. "dual paternity"); Williams v. Williams, 843 So. 2d 720 (Miss. 2003) (holding that it would be unjust to require divorced husband to support a child when DNA tests prove he is not the father); M.A.S. v. Miss. Dep't of Human Servs., 842 So. 2d 527 (Miss. 2003) (allowing DNA evidence to be admitted nine years after paternity acknowledgement by minor nonbiological father because it would be "profoundly unjust" to require him to continue to make payments); Doran v. Doran, 820 A.2d 1279 (Pa. 2003) (disestablishing paternity despite the parent-child relationship because the father would not have held the child out as his own had he known he was not the biological father as determined by DNA testing).

188 ALA. CODE § 26-17-12 (LexisNexis 1992 & Supp. 2004); ALASKA STAT. § 25.27.166 (2004); ARK. CODE ANN. § 9-10-115 (2002 & Supp. 2003); COLO. REV. STAT. ANN. § 19-4-107(1)(b) (West 2005); GA. CODE ANN. § 19-7-54 (2004); 750 ILL. COMP. STAT. ANN. 45/7(b-5) (West 1999); IOWA CODE ANN. § 600B.41 (West 2001); MD. CODE ANN., FAM. LAW § 5-1029 (LexisNexis 2004); MINN. STAT. ANN. § 257.57(b) (West 2003); MONT. CODE ANN. § 40-6-105(3)(b) (2003); OHIO REV. CODE ANN. § 3119.961-.967 (LexisNexis 2003); VA. CODE ANN. § 20-49.1 (2004).

the legal father by conduct or by a paternity judgment or acknowledgement, has suspicions about his biological connection to the child, he is entitled to have DNA testing on demand.¹⁸⁹ If tests exclude him as the biological father, he is no longer a father under the law and has no legal, social, or other obligations to his child.

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

C. Case Study: Maryland

Maryland is one of several states that has opted to define fathers by biology in response to legal fathers of nonmarital children who defend against child support enforcement actions by seeking paternity disestablishment. The leading Maryland case, *Langston v. Riffe*,¹⁹⁰ involved three consolidated cases that arose in response to child support proceedings involving men who had voluntarily acknowledged paternity of their nonmarital children.¹⁹¹ The state's highest court held that pursuant to 1995 amendments to the state's paternity statute,¹⁹² the fathers were allowed to set aside the paternity judgments when genetic tests excluded them as biological fathers. The court further noted that the best interests of the child standard is not relevant when considering requests for DNA testing or requests to set aside judgments after DNA testing excludes the legal father as the biological father.¹⁹³ The court also held that, although the decision would leave

189 See, e.g., MD. CODE ANN., FAM. LAW § 5-1029, as interpreted by *Langston v. Riffe*, 754 A.2d 389, 389 (Md. 2000).

190 754 A.2d 389.

191 *Id.* at 390–92.

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

193 As stated by the court in *Langston*:

Simply stated, the fact of who the father of a child is cannot be changed by what might be in the best interests of the child. . . . [T]he “best interests” standard is only to be considered by the trial court in matters corollary to the paternity declaration, such as custody, visitation, “giving bond,” or “any other matter that is related to the general welfare and best interests of the child.”

the children involved fatherless because the biological fathers would likely never be found, these considerations should not “diminish the immediate substantive effect of setting aside an established paternity declaration.”¹⁹⁴

In 2002 Maryland’s highest court revisited the issue of paternity disestablishment and child support in *Walter v. Gunter*.¹⁹⁵ Again, the context was a legal father’s attempt to set aside a paternity judgment as a defense to a child support arrearage case. In 1993, Nicholas Walter voluntarily consented to a paternity judgment for a child born to his girlfriend, Michele Gunter. Walter was then ordered to pay child support and throughout the next several years numerous proceedings were instituted against Walter to enforce the support obligation. In 2000, he filed a petition to modify support as well as a motion for genetic testing. The testing excluded Walter as the biological father and the trial court followed its earlier decision in *Langston* and terminated his future support obligations.¹⁹⁶ A separate hearing was held to determine Walter’s liability for his child support arrearages and whether he was entitled to recover support payments that he had already paid to Gunter.¹⁹⁷ Based on the well established statutory prohibition against retroactive modification of child support,¹⁹⁸ the trial court denied his request for release from the arrearage obligation and recoupment of payments.

Walter appealed the judgment holding him liable for arrearages and the Maryland Court of Appeals reversed the ruling of the trial court and found that Walter was not responsible for payment of the arrearages.¹⁹⁹ The court found that although the record showed that

754 A.2d at 399–400, 405.

194 *Id.* at 426.

195 788 A.2d 609 (Md. 2002).

196 *Id.* at 611.

197 *Id.*

198 *See supra* note 173 and accompanying text. The federal prohibition on retroactive modification is codified in MD. CODE ANN., FAMILY LAW § 5-1038 (LexisNexis 2004).

199 The Maryland court did not require the mother to reimburse the legal father for child support. *Walter*, 788 A.2d at 613. Some states have allowed tort actions to proceed against mothers to recover child support in a related context. *G.A.W. v. D.M.W.*, 596 N.W.2d 284 (Minn. Ct. App. 1999) (holding tort claim of ex-husband against mother to recover child support was not barred by *res judicata*, collateral estoppel, or public policy considerations where he discovered he was not the biological father during dissolution of marriage); *Haller v. Haller*, 839 A.2d 18 (N.H. 2003) (dismissing tort action against the state, but suggesting in dicta that plaintiff might be able to sue mother or biological father); *Miller v. Miller*, 956 P.2d 887 (Okla. 1998) (permitting claims of ex-husband who discovered he was not the biological father of a child for whom he had paid support for ten years); *see also* Andrew S. Epstein, *The*

Walter had questions about his paternity for some time before the action, the genetic test “extinguished” Walter’s parenthood. As a result, the child support order, including arrearages in excess of \$11,000 was vacated.²⁰⁰ The court relied on the state’s history of placing child support “‘squarely upon the shoulders of the *natural* [biological] *parents*’”²⁰¹ as well as principles of natural law.²⁰² In so holding the court clearly equated fatherhood with biology:

Without question, the biological and legal status of “parenthood” in Walter’s situation is now extinct; the genetic test extinguishes the prior, and the vacatur of the paternity declaration extinguishes the latter. In the absence of “parenthood” status, the duty that is normally cast upon parents, e.g. the duty of child support, can no longer exist.²⁰³

Maryland’s “biology rule” in *Langston* and *Walter* exemplifies an approach to defining fatherhood that does not serve the interests of families, particularly low-income fathers or children. A brief look at one of the author’s clinical program’s typical cases demonstrates the link between child support policies, the “biology rule” and the breakup of fragile families.

The clinic’s child client, Maria M., was fourteen years old when the court appointed the clinic to represent her in an action by her father to vacate his paternity judgment.²⁰⁴ Until Maria was about four years old, she lived with her mother. Her mother’s boyfriend, James,

Parent Trap: Should a Man Be Allowed To Recoup Child Support Payments if He Discovers He Is Not the Biological Father of the Child?, 42 BRANDEIS L.J. 655, 665 (2004) (addressing fundamental fairness analyses regarding child paternity cases when a man has been scientifically eliminated as the father). In addition, at least one state statute authorizes repayment of child support after disestablishment when such support has been paid to the state. CONN. GEN. STAT. ANN. § 46b-171(b) (West 2004) (providing that if a court reopens a paternity case in which the person adjudicated to be the father of a child is not the father of the child, and the person has paid child support to the state (as opposed to the mother), the Department of Social Services will refund the money paid to the state). *But see* Bouchard v. Frost, 840 A.2d 109 (Me. 2004) (dismissing tort action to recover money paid for child support to mother or state).

200 788 A.2d at 609.

201 *Id.* at 615 (quoting Knill v. Knill, 510 A.2d 546, 548 (Md. 1986)).

202 “The duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world.” *Id.* (quoting Brown v. Brown, 412 A.2d 396, 402 (Md. 1980)).

203 *Id.*

204 *Gantt v. Sanchez*, No. PD 60-104431 (Md. Cir. Ct. Balt. City Nov. 8, 1999) (on file with author). Although the use of first names for clients is not customary in the author’s clinical program, first names have been used for easy identification and to protect the parties’ identities.

had assumed the role of Maria's father. He lived with her and her mother at various times during these four years but did not provide regular financial support. When the mother applied for public benefits, she identified James as Maria's father. He consented to paternity without genetic testing.

James and Maria's mother grew apart, the mother became drug addicted, and Maria went to live with her grandmother when she was four years old. Ten years later, James sought to reopen the paternity judgment after his truck driver's license was revoked and he was subjected to criminal prosecution for nonsupport. Since he never had a genetic test prior to signing the paternity decree, he was able to challenge his paternity under the Maryland statute by requesting a blood test. At the hearing on his motion for blood test, a child development expert testified that, given Maria's circumstances, even the act of requiring her to go through a blood test and thereby learn of her father's effort to "disown" her would cause her substantial harm.²⁰⁵ James testified that he, too, had some emotional attachment to the child.²⁰⁶ Under existing law, however, James had to make a choice between risking harm to her or facing financial ruin for himself and his biological children.

Given the *Langston* biology rule, Maryland courts and those in other states following this approach must permit genetic testing when requested and vacate paternity orders in all cases where there is no biological connection between child and father, regardless of the family's circumstances. Moreover, given the inflexibility of the current child support policies, courts have little or no discretion to reduce arrearages, suspend child support obligations, or provide fathers like James with some equitable remedies that will permit them to maintain their legal status as father. Instead, children like Maria are left fatherless for life.²⁰⁷

The threat of DNA testing on demand destabilizes the relationships between parents as well as those between father and child and

205 Transcript of Record at 7-8, *Gantt*, No. PD 60-104431 (testimony of Dr. Leon Rosenberg) (on file with author).

206 *Id.* at 37-40 (testimony of Desmond Sanchez).

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

undermines all existing policies favoring fathers' continued involvement in children's lives. In many cases, particularly those involving older children, there is no one "waiting in the wings" to be the child's father. Vacating the paternity judgment or acknowledgment leaves the child fatherless for life, with the attendant loss of emotional support, companionship, child support, inheritance rights, and other benefits. Even where the child has already lost contact with the legal father, the child's loss is further exacerbated by finding out that the only father she has ever known does not want to be her father anymore.²⁰⁸ Many fathers who would be willing and might prefer to stay in a child's life are forced to seek disestablishment of paternity or face loss of employment, credit standing, jail, or permanent poverty.²⁰⁹

III. PROPOSALS FOR REFORM

To develop meaningful reform, policymakers must reconceive child support as primarily an issue of family law rather than welfare law. As such, protection of children replaces state and federal fiscal concerns as the goal that drives child support law and policy.²¹⁰ Once that goal is clear, the foundation will be laid for a number of reforms. These include: (1) refining paternity establishment policies to reduce the number of fathers who assume the role of fatherhood mistakenly or with little thought about the consequences;²¹¹ (2) refining child support establishment and modification policies to treat low-income fathers more fairly so that they are not pushed into paternity disestablishment as the only alternative to financial ruin; and (3) creating paternity disestablishment policies that place the best interests of the child above the interests of the adults and recognize multiple bases for legal fatherhood.

208 Transcript of Record at 7-8, *Gantt*, No. PD 60-104431 (testimony of Dr. Leon Rosenberg); see also JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP* 219 (1980) (noting that children choose to maintain established parent-child relationships even where the relationship is poor or has deteriorated).

209 See, e.g., *All Things Considered: DNA and Family Law* (NPR radio broadcast Apr. 9, 2001) (reporting about father seeking to disestablish paternity to stop child support obligation who expressed continuing affection and concern for child at issue).

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

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

A. *Rethinking the Link Between Welfare and Child Support*

As scholars and policymakers begin to evaluate the impact of the last three decades of federal legislation, many are beginning to question the link that body of legislation established between welfare and child support.²¹² While a careful evaluation of this link is beyond the scope of this Article, a brief assessment of the impact of linking child support with welfare law reveals both its policy limitations and its negative impact on low-income families.

As discussed earlier, aggressive child support enforcement has done little to reduce child poverty.²¹³ The linking of child support collection with welfare eligibility has also largely failed in meeting its other goal: to increase revenues for the state.²¹⁴ Although the initial data was promising,²¹⁵ the policy's success in reimbursing the state for its welfare costs is decidedly mixed. Increasing the number of paternity establishments may end up having some noneconomic benefits for children but it has done little to increase the number of support orders for children on welfare.²¹⁶ Even if more orders were obtained and more support was collected from noncustodial fathers, one widely cited study predicted that, given the poverty of this population of obligor fathers, even full payment of child support would only reduce combined spending for cash assistance, food stamps, and Medicaid by eight percent.²¹⁷ Moreover, there is substantial evidence that administrative costs of collecting child support may exceed the dollars collected to offset welfare costs.²¹⁸

212 Brito, *supra* note 23; see also Martha Albertson Fineman, *Child Support Is Not the Answer: The Nature of Dependencies and Welfare Reform* (claiming that child support is not the best solution and discussing the need to extend responsibility outside the realm of the private family), in *CHILD SUPPORT: THE NEXT FRONTIER*, *supra* note 128, at 209, 209.

213 See *supra* notes 127–34 and accompanying text.

214 See *supra* notes 81–88 and accompanying text.

215 CASEY STUDY, *supra* note 127, at 4–10 (noting initial data showing overall increase in child support collection post-1996).

216 Garrison, *supra* note 134, at 17 and sources cited therein; see also JESSICA PEARSON & NANCY THOENNES, CTR. FOR POLICY RESEARCH, *THE CHILD SUPPORT IMPROVEMENT PROJECT: PATERNITY ESTABLISHMENT 50* (1995) (finding that fifteen months following birth, only twenty-six percent of parents who voluntarily acknowledged paternity and were in the child support system had a child support order); Brustin, *supra* note 160, at 625 (noting that in the District of Columbia in 2000 less than twenty percent of TANF (welfare) recipients had a child support order).

217 Laura Wheaton & Elaine Sorensen, *Reducing Welfare Costs and Dependency: How Much Bang for the Child Support Buck?*, 4 GEO. PUB. POL'Y REV. 23, 30, 34 (1998).

218 Office of Child Support Enforcement data for fiscal year 1999 collections in the welfare caseload totaled only \$0.62 for every dollar in enforcement costs. OFFICE

In addition to its ineffectiveness in reducing welfare costs, the linking of child support to welfare benefits harms low-income families in a variety of ways. The principle provision of the legislation that creates this link is the requirement that, as a condition of receiving full public benefits, recipients assign their rights to child support to the state.²¹⁹ Welfare recipients must also fulfill a “cooperation requirement” by identifying the fathers of their children so the state can pursue those men for child support.²²⁰ Federal law had long required assignment of support and cooperation but the PRWORA eliminated any “pass through”—a portion of child support paid by fathers goes to families instead of the state.²²¹ The 1996 statute also gave states broad discretion in determining what constitutes “cooperation” and whether “good cause” exists for non-cooperation.²²²

Both the assignment and cooperation requirements create a number of problems for low-income families. An assignment requirement that prevents children from benefiting from support paid by

OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., ANNUAL STATISTICAL REPORT FOR FISCAL YEARS 1999 AND 2000 tbl.1 (2001), *available at* http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/datareport/table_1.html. Even this figure may overstate the cost-effectiveness of child support collection since some portion of child support would be paid without the enhanced bureaucracy. *See* VICKI TURETSKY, CTR. FOR LAW & SOC. POLICY, CHILD SUPPORT TRENDS PRESENTATION ON POWERPOINT, http://www.clasp.org/publications/cstrends_0503.ppt (last visited Sept. 4, 2005) (finding that the federal child support program has not paid for itself since 1988 and the gap between program costs and revenues is widening).

219 *See supra* note 86 and accompanying text.

220 *See supra* note 88 and accompanying text.

221 Prior to 1996 and PRWORA, the federal government required that the first fifty dollars of child support collected on time each month was to be passed through to the family. Family Support Act of 1988, Pub. L. No. 100-485, § 102, 102 Stat. 2343, 2346; *see also* TERESA A. MYERS, NAT'L CONFERENCE OF STATE LEGISLATURES, CHILD SUPPORT PROJECT, ISSUE BRIEF: STATE CHILD SUPPORT PASS-THROUGH PROGRAMS, *available at* <http://www.ncsl.org/programs/cyf/csissue.htm> (last visited Sept. 18, 2004) (explaining the federal government's child support reform legislation, including the elimination of the pass-through requirement and its effect). Even this modest benefit to welfare families was repealed under PRWORA. While the states may (but are not required to) provide a pass-through of any amount they wish, it will not be financed by the federal government. 42 U.S.C. § 657(a)(1)(B) (2000). The funding must come from the state's portion of collected support. The majority of the states (thirty) no longer pass through any amount of the child support collection. PAULA ROBERTS & MICHELLE VINSON, CTR. FOR LAW & SOC. POLICY, STATE POLICY REGARDING PASS-THROUGH AND DISREGARD OF CURRENT MONTH'S CHILD SUPPORT COLLECTED FOR FAMILIES RECEIVING TANF-FUNDED CASH ASSISTANCE (2004), *available at* http://www.clasp.org/publications/pass_thru3pdf (listing all 50 states and the District of Columbia's child support pass-through and income disregard policies as of August 31, 2004).

222 *See supra* notes 83–88, 109–10 and accompanying text.

their father hurts those children in a variety of ways. Studies have long suggested that fathers are more willing to pay child support if they know their money is actually going to the children.²²³ And fathers who are able to pay child support and do so tend to be more active in their children's lives.²²⁴ In addition, even modest pass-through payments can assist low-income families for whom child support may constitute about twenty-five percent of the average family income.²²⁵ Finally, eliminating the pass through may have an adverse impact on reducing welfare costs. Those states that have opted for generous pass throughs have increased both the number of families leaving welfare and the amount of child support collected.²²⁶

The cooperation requirement is also harmful to low-income families. First, the process of meeting the cooperation requirement is, at best, intrusive and demeaning for custodial mothers. In some circumstances, it may also place mothers at grave risk of harm when putative fathers retaliate with intimidation, threats, and violence after being identified.²²⁷ While there is a good cause exception for victims of do-

223 Participants [in the Common Ground Project] agreed that [assignment of support to the state] is one of the most alienating features of the current [welfare] system: that many of the children most in need, those receiving public assistance, receive nothing from the fathers who may be struggling the hardest to pay child support.

FAMILY TIES, *supra* note 151, at 10; see Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197 (1999).

224 In 1999, seventy-nine percent of children born out of wedlock who had a child support order and received payments saw their father in the previous year, whereas only forty-three percent of children who had no child support order and received no payments saw their father in the previous year. HEATHER KOBALL & DESIREE PRINCIPE, URBAN INST., DO NONRESIDENT FATHERS WHO PAY CHILD SUPPORT VISIT THEIR CHILDREN MORE? 4 (2002), available at <http://www.urban.org/uploadedPDF/310438.pdf>. In 2001, 85.3% of custodial parents with child support orders had joint custody or visitation agreements with the noncustodial parent. Of these, 77.1% of the noncustodial parents received some support payments. For those noncustodial parents without joint custody or visitation agreements, 55.8% received any child support payments. TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001, at 8 (2003), available at <http://www.census.gov/prod/2003pubs/p60-225.pdf>.

225 *Enhance Child Support Enforcement Overview, FDCH Federal Department and Agency Documents*, REG. INTELLIGENCE DATA, Feb. 26, 2002 (LEXIS, News Library, Allnews File).

226 See OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., 1999 REPORT TO CONGRESS: ANALYSIS OF THE IMPACT ON WELFARE RECIDIVISM OF PRWORA CHILD SUPPORT ARREARS DISTRIBUTION POLICY CHANGES (1999), available at <http://www.acf.hhs.gov/programs/cse/rpt/1999rpt/1999report.htm>.

227 The PRWORA permits "good cause" and "other exceptions" to the cooperation requirement in situations when an exception would be "in the best interests of

mestic violence to the cooperation requirement,²²⁸ states have wide discretion in implementing this exception. This discretion creates the potential that a state will limit the availability of this exception “to remove the difficult cases from their welfare rolls.”²²⁹ Its effectiveness has also been limited because women “either did not know of its existence or could not verify their status as victims of abuse.”²³⁰

Even where the relationship between the mother and father is not violent, the requirement that mothers cooperate and participate in child support enforcement proceedings to recoup money for the state hurts those relationships. Young unmarried mothers and fathers may live apart but forge some bond based on mutual love of their children and function without extensive acrimony prior to state involvement. Being forced into repeated court appearances with mother as plaintiff (although the state initiated the case) and father as defendant undermines relationships in these fragile families. State involvement often includes contempt actions where the father is brought into court with the threat of incarceration. The mother’s name on the case may make it look like she instigated the case, though she actually has no control in the decision to begin a contempt action and is often not informed about the action until she, too, receives a summons.²³¹ Forcing an adversarial proceeding between unmarried parents may also trigger counter demands for cus-

the child.” 42 U.S.C. § 654(29)(A) (2000) (corresponds to PRWORA, Pub. L. No. 104-193, § 333, 110 Stat. 2105, 2230–31 (1996)). Federal regulations define good cause as a situation where, among other things, identification would lead to physical and emotional harm to the child or caretaker. See 45 C.F.R. §§ 232.42(a), 303.5(b) (2004).

228 45 C.F.R. §§ 232.42(a), 303.5(b).

229 Paul K. Legler, *The Impact of Welfare Reform on the Child Support Enforcement System*, in *CHILD SUPPORT: THE NEXT FRONTIER*, *supra* note 128, at 46, 57; see also Shelby A.D. Moore, *Understanding the Connection Between Domestic Violence, Crime, and Poverty: How Welfare Reform May Keep Battered Women from Leaving Abusive Relationships*, 12 *TEX. J. WOMEN & L.* 451, 480 (2003) (arguing that states are encouraged to compete with each other by moving recipients off of welfare).

230 Moore, *supra* note 229, at 477; see also Mark Matthew Graham, *Domestic Violence Victims and Welfare “Reform”: The Family Violence Option in Illinois*, 5 *J. GENDER RACE & JUST.* 433, 450 (2002) (discussing the burdens placed on battered women by the cooperation requirement); Naomi Stern, *Battered by the System: How Advocates Against Domestic Violence Have Improved Victims’ Access to Child Support and TANF*, 14 *HASTINGS WOMEN’S L.J.* 47, 56–57 (2003) (arguing that many battered women who are welfare recipients are not aware of the “good cause” option and few good cause claims have been filed).

231 Interview with Daniel Hatcher, Assistant Professor, Univ. of Balt. Sch. of Law, in Balt., Md. (Dec. 13, 2004) (notes on file with author).

tody from the father, leaving mothers vulnerable in a process in which their interests are not represented by the state.²³²

Most troubling in the context of paternity disestablishment, the cooperation requirement may also encourage identification of men who have neither a biological connection nor a desire to become the child's psychological father. Both the pressure imposed by making financial support dependent upon identification and the informality of the setting in which these identifications are made lead to paternity establishments that are later challenged when serious child support enforcement begins.²³³

Thus, the link between welfare and child support does little to benefit the state and can hurt families. This central tenet of welfare policy should be reexamined in light of its often devastating impact on poor families.

B. *Refining the Current System*

Eliminating the compulsory assignment and cooperation requirements from federal child support law could do much to reduce the number of paternity disestablishments that lead to fatherless children.²³⁴ But even if such sweeping change is not feasible at this time, more modest modifications to the current framework can help to avoid the chain of unintended consequences described in this Article. These proposals focus on three critical points in the child support

232 Paula Roberts & Michael Allen, *An AFDC Mother's Right to Counsel: Custody Issues in Proceedings Instigated by the IV-D Agency*, 19 CLEARINGHOUSE REV. 278, 278 (1985).

233 See *supra* notes 147–58 and accompanying text. “Our system kind of encourages [paternity identification and future contests] In order for a mother to collect AFDC . . . she has to name someone for the office of child support enforcement to go after. . . . [Naming the father] is done under pressure, and without the formality that would encourage truth-telling.” *Langston v. Riffe*, 754 A.2d 389, 405 n.15 (Md. 2000) (second alteration in original) (internal quotation marks omitted) (quoting Jane Bowling, *Forcing Paternity in the Name of Finality and Expediency*, DAILY REC. (Md.), Nov. 12, 1994 (quoting Jane C. Murphy, Professor of Law, Univ. of Balt. Sch. of Law)).

234 While such a change would require a major rethinking of welfare policy, it could be achieved without changing the work and time limitations that were central to PRWORA and welfare reform in the 1990s. 42 U.S.C. § 602(a)(1)(A)(iii) (West 2003 & Supp. 2005). Without conceding the value or viability of these limitations on welfare, they could be maintained as part of the conditions for welfare receipt without requiring the recipient to identify the father or assign her rights to support to the state.

process: paternity establishment, child support establishment, and paternity disestablishment.²³⁵

1. Paternity Establishment

An obvious solution to the problem of paternity disestablishments is to require genetic testing in all cases before legal recognition of paternity.²³⁶ More genetic testing would certainly reduce the number of later paternity disestablishments. But mandatory testing presents a number of problems. First, the obvious problem with such an approach is cost. Even though the costs of such testing have come down significantly in the last decade,²³⁷ the average cost for court approved laboratories is still at least \$200.²³⁸ Imposing such costs on parties or the state for all paternity establishments—voluntary and contested—would significantly undermine the goal of obtaining child support orders for as many children as possible.

A genetic testing requirement might also present noneconomic obstacles to the goal of having fathers in as many children's lives as possible. Practitioners in the field report that an undetermined but substantial number of fathers who acknowledge or consent to paternity do so having doubts that they are biologically related to the children who are the subject of the paternity establishment.²³⁹ While some of these fathers will later seek to disestablish paternity,²⁴⁰ many will not. Those that do not seek disestablishment have stayed because of a bond with the child's mother or with the child or with both.²⁴¹ Many children, who might otherwise be fatherless, will get fathers

235 Many of the proposals discussed in this Article come from the Common Ground Project. This innovative project, a collaboration of the National Women's Law Center and Center for Fathers, Families, and Public Policy, is an effort to develop areas of consensus between low-income mothers and fathers to "develop and advance public policy recommendations on child support and interrelated welfare and family law issues that promote effective co-parenting relationships and ensure emotional and financial support for children." DOLLARS AND SENSE, *supra* note 169, at 1.

236 See, e.g., Roberts, *supra* note 183, at 42; Louis J. Tesser, *Dad or Duped? Post-Appeal Challenges to Paternity Judgments Disestablishing the Paternity of Non-Marital Children*, FAM. ADVOC., Fall 2002, at 29.

237 See *supra* note 183.

238 FAMILY TIES, *supra* note 151, at 19.

239 Telephone Interview with Martin J. McGuire, Assistant State's Attorney, Chief, Support Enforcement Unit (Jan. 10, 2005) (notes on file with author).

240 Some state statutes prohibit paternity disestablishment when the father consents to paternity knowing he was not the biological father. See, e.g., MD. CODE ANN., FAM. LAW § 5-1038(a)(2)(ii) (LexisNexis 2004). In practice, however, it is difficult to prove prior knowledge to prevent a disestablishment.

241 Telephone Interview with Martin J. McGuire, *supra* note 239.

through this process. If genetic testing were required in all cases, many child support professionals believe these “volunteer” fathers would opt-out after they are confronted with the test that removes any doubt about the lack of a genetic link with their children.²⁴² As a result, many potentially strong families would never be formed.

Rather than *require* testing in all cases, testing should be *encouraged* in a number of ways. First, more resources must be devoted to giving putative fathers the verbal and written legal information required by federal law about the consequences of acknowledging or consenting to paternity.²⁴³ Ideally, this information should be explained before consents are obtained, by lawyers, or, at a minimum, by informed lay staff present at paternity acknowledgment sites. The Common Ground Project has proposed a series of reforms to provide both better written materials and more informed and accessible staff in locations where paternity acknowledgments are made.²⁴⁴ The use of these improved resources should help ensure that more putative fathers undergo genetic testing before acknowledging paternity, and that those who choose to forgo such testing do so knowingly and voluntarily.

In addition to educating putative fathers about their legal rights and obligations, the government should waive the costs of testing in all cases where testing is requested by the parties. Federal law currently requires the child support agency to advance the cost of the test if there is a financial need.²⁴⁵ But costs can be assessed later against putative fathers who deny paternity and are not excluded by the test.²⁴⁶ Waiving costs of all tests for low-income litigants regardless of

242 *Id.*

243 *See supra* notes 159–60.

244 FAMILY TIES, *supra* note 151, at 16–18, 24–25. Some experts have argued that the state would do a better job of informing putative fathers of the implications of consenting to paternity if the federal system of incentives for paternity establishment was tied to the accuracy of paternity establishment, not just the number of such orders. Interview with Daniel Hatcher, *supra* note 231.

245 *See* 42 U.S.C. § 666(a)(5)(B)(ii)(I) (2000); *see also* Little v. Streater, 452 U.S. 1, 16–17 (1981) (finding that a state’s failure to advance the costs of blood testing for an indigent paternity defendant violated due process).

246 FAMILY TIES, *supra* note 151, at 19. Despite the federal protection, some child support agencies routinely require prepayment for testing. *See, e.g.,* Wiggins v. Griner, 843 A.2d 887, 888, 890 (Md. Ct. Spec. App. 2004) (vacating the lower court’s order denying waiver of prepayment for a putative father claiming indigency and remanding for a determination of whether “the cost of . . . genetic test[ing] shall be borne by the county where the proceeding is pending”) (quoting MD. CODE ANN., FAM. LAW § 5-1029(h)(2) (LexisNexis 2004)); MAM v. State Dep’t of Family Servs., 99 P.3d 982 (Wyo. 2004) (permitting legal father to reopen paternity judgment because, among other things, the court record did not establish that the man had been in-

result will result in greater “up front” costs for the state. But learning that the putative father is not the biological father at this early stage will avoid forfeiture of arrearages for those who later seek paternity disestablishment. In addition, getting this information at the time of establishment will provide an opportunity to determine whether a good cause exception exists to excuse the custodial mother from identifying the biological father, and will provide the opportunity to investigate alternative putative fathers at a point when there is still a possibility of identifying another man as the biological father. Most importantly, it will avoid the trauma of paternity disestablishment for the children when they are older.

2. Child Support Establishment and Modification

A variety of reforms can be made to the current child support establishment and modification process to strike a balance between effective child support enforcement and fair treatment of low-income obligors. As a guiding principle for reforms at this stage, federal and state law should seek to “develop targeted, specific initiatives” to deal with the problems faced by the “special population[]” of low-income obligors.²⁴⁷ These reforms should not signal a retreat from the rule-based formula approach to child support and a return to the discretionary approach that yielded low awards and inconsistent treatment even among families with the same income.²⁴⁸ Rather, these refinements recognize the particular burdens the current system places on low-income obligors and should reduce the number of legal fathers who now view paternity disestablishment as the only defense against aggressive child support sanctions.

The first point of reform in the development of child support orders is to develop procedures that facilitate obligor participation. Under current procedures, child support orders are routinely entered without actual notice and participation by the noncustodial parent.²⁴⁹

formed of his right to genetic testing). Attorneys in the field report that state child support workers and judges only provide information about where to get tests and how much they cost and routinely fail to advise putative fathers that paternity testing fees can be waived. Interview with Daniel Hatcher, *supra* note 231.

247 Policy Briefing, Ctr. For Fam. Policy and Practice, OCSE Releases 2005–2009 Strategic Plan for Child Support Enforcement 1 (2004) [hereinafter Policy Briefing], http://www.cffpp.org/briefings/pdfs/brief_0410.pdf (describing the United States Office of Child Support Enforcement’s (OCES) 2005–2009 Strategic Plan for Child Support Enforcement).

248 For a critique of the pre-guideline approach to child support establishment, see Murphy, *supra* note 22.

249 See *supra* notes 153–55 and accompanying text.

Where support is set by administrative agencies rather than courts, service may be done by first-class mail rather than personal service and hearings may be dispensed with entirely.²⁵⁰ Even where support is set in a judicial process, unrepresented obligors, not understanding the significance of the notice to appear, frequently do not attend hearings.²⁵¹ There is, therefore, a high likelihood that support orders will be set by default order without income information and other input from the obligor. Given these circumstances, states should develop easy-to-use procedures for obligors to obtain relief to adjust the orders quickly so substantial arrearages do not accrue. A few states have experimented with making child support orders set by “provisional or temporary [orders] to permit changes if the noncustodial parent appears and provides actual income information.”²⁵² Alternatively, some states have extended the time for modifying or vacating default orders to permit obligor input.²⁵³

Once the obligor is before the court or agency, the guidelines used to determine the amount of the support order need to be restructured to avoid unrealistically high orders. While the needs of low-income fathers must always be balanced against the needs of custodial mothers and children,²⁵⁴ finding the right mix of incentives and sanctions is challenging at best. A variety of proposals have emerged from the American Law Institute,²⁵⁵ the Common Ground Project²⁵⁶ and others²⁵⁷ that create the potential for greater fairness

250 CASEY STUDY, *supra* note 127, at 41. The OCSE’s 2005–2009 Strategic Plan includes proposals to increase the use of “expedited and administrative processes.” OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONAL CHILD SUPPORT ENFORCEMENT STRATEGIC PLAN 12 [hereinafter STRATEGIC PLAN], available at http://www.acf.hhs.gov/programs/cse/pubs/2004/Strategic_Plan_FY2005-2009.pdf (last visited Sept. 18, 2005). Such plans include “recourse to courts to ensure that parents perceive procedural justice.” *Id.* The lack of legal advice and representation to file appeals and appear in court, however, certainly weakens any assurance of procedural fairness. See *supra* note 159.

251 See *supra* note 159; see also Paula Roberts, *If You Don’t Know There’s a Problem, How Can You Find a Solution?: The Need for Notice and Hearing Rights in Child Support Distribution Cases*, 36 CLEARINGHOUSE REV. 422 (2002) (analyzing notice and hearing issues).

252 CASEY STUDY, *supra* note 127, at 41.

253 *Id.* at 40–41.

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

255 ALI PRINCIPLES, *supra* note 65, § 3.01–.05.

256 DOLLARS AND SENSE, *supra* note 169, at 37.

in child support orders for low-income obligors. While the proposals vary in their details, all include adjustments to minimize the unjust results for low-income obligors from the marginal expenditure approach of the Income Shares Guideline.²⁵⁸ For example, when determining the obligor's financial capability, guidelines should be structured to include an adjustment to the mandated support amount to create an adequate "self-support reserve" for the obligor's basic living expenses.²⁵⁹ Other proposals critique the use of "presumptive minimum orders."²⁶⁰ These support orders, typically from twenty to fifty dollars per month but may run higher, authorize courts and agencies to order support even where the obligor has no income.²⁶¹ Such orders may be appropriate where the obligor has "the realistic capability of making a current financial contribution."²⁶² Where no such capability exists because of chronic unemployment or part time or seasonal employment, the courts should not order support. Instead, courts should set regular reviews and require these fathers to participate in job training, parenting classes, and, if applicable, substance abuse programs to assist them in meeting their support obligations.²⁶³

257 CASEY STUDY, *supra* note 127, at 13.

258 WEISBERG & APPLETON, *supra* note 84, at 735.

259 CASEY STUDY, *supra* note 127, at 11. Some states have included such an adjustment in their guidelines but these often fall short of assuring obligor minimum living expenses because the reserve set aside is "considerably below the federal poverty level for one person." *Id.*; see also Grace Ganz Blumberg, *Balancing the Interests: The American Law Institute's Treatment of Child Support*, 33 FAM. L.Q. 39, 44-45 (1999) (discussing the American Law Institute's child support formula).

260 DOLLARS AND SENSE, *supra* note 169, at 11.

261 *Id.* at 12.

262 CASEY STUDY, *supra* note 127, at 26. Some experts suggested that minimum awards should not be imposed unless the obligor's income is at least at or above fifty percent of the federal poverty level. DOLLARS AND SENSE, *supra* note 169, at 13.

263 CASEY STUDY, *supra* note 127, at 55 n.9 (describing Partners for Fragile Families as "a ten site demonstration project in which faith-based and community-based responsible fatherhood programs are working together with welfare, workforce development, and child support agencies to assist young, low-income, unwed parents: 1) establish paternity, 2) increase their financial ability to pay support, and 3) work together in raising their children"); see also Joe Lambe, *First-of-its-kind Program Getting Results and Kudos*, KAN. CITY STAR, Jan. 11, 2005, at B1 (describing Missouri program that allows noncustodial fathers facing long term unemployment, substance abuse, and other barriers to child support compliance, an opportunity to participate in a program providing job training, parenting classes, and substance abuse treatment as an alternative to incarceration and other sanctions); Jennifer McMenamin, *Jobs Program Aimed at Helping Parents Make Child Support Payments*, BALT. SUN, Dec. 27, 2004, at B1 (describing Baltimore area court-based pilot program that "pairs chronic underpayers" of child support with employment coordinator for weekly meetings to as-

Refinements in the law also need to be made to address the substantial numbers of low-income obligors who are currently subject to unrealistically high orders and are facing sanctions for mounting arrearages.²⁶⁴ For example, federal law should be strengthened to encourage states to forgive arrearages when they are owed to the state and where the obligor's income is at or near poverty level. While current federal policy permits states to forgive arrearages in limited cases,²⁶⁵ states have done little to develop arrearage forgiveness policies to assist low-income fathers.²⁶⁶ Child support agencies should also be more prudent in seeking sanctions. For example, instead of automatic revocation of all licenses when support is overdue, agencies should consider permitting work-restricted licenses where the obligor's income is dependent on a professional or motor vehicle license. For the same reasons, when incarceration is used as a sanction for failure to pay child support, the sentence should include work release when it will facilitate the payment of child support.

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

sist in job search and monitor child support payments); Libby Sander, *Judge's Proposal Gives Fathers Another Option*, CHI. DAILY L. BULL., Oct. 21, 2003, at 3 (describing Family Court judge's proposal to permit fathers who owe child support to participate in parent education and job training as an alternative to incarceration).

264 See *supra* note 176.

265 The Federal Office of Child Support Enforcement has developed a policy intended to permit states to develop standards to guide courts to exercise discretion to forgive state-owed arrearages in appropriate circumstances. Memorandum from David Gray Ross, Comm'r, Office of Child Support Enhancement, to IV-D Dirs. (Mar. 22, 1999), available at <http://www.acf.dhhs.gov/programs/cse/pol/PIQ/piq-9903.htm>.

266 See, e.g., Hatcher & Lieberman, *supra* note 174, at 10–11 (describing the Maryland Child Support Enforcement Administration's consistent refusal to grant the Legal Aid Bureau's "requests for forgiveness of state-owed arrearages on behalf of obligors who are reunited with their children" despite the existence of a pilot project in Baltimore to encourage forgiveness of arrearages with participation in counseling and job skills programs); see also *Harvey v. Marshall*, No. 109, 2005 WL 2573357 (Md. Oct. 14, 2005) (upholding the intermediate appellate court's refusal to set aside arrearages owed to the state for a father who had assumed care of his four children). There are hopeful signs from the 2005–2009 OCSE Strategic Plan which includes among its strategies for the coming years: "Leverage debt, relieving uncollectible debt owed to the State, or [to the custodial parent (obligee)] with obligee's permission, in return for regular, reliable payment of current support." STRATEGIC PLAN, *supra* note 250, at 10; Policy Briefing, *supra* note 247.

custody of children.²⁶⁷ Poverty legal assistance programs should also consider redirecting resources to systemic reform for low-income non-custodial fathers, a group that has not been the traditional beneficiary of resources of such programs.²⁶⁸

C. Paternity Disestablishment

Perhaps the most complex challenge for reform in this area is the development of sound policies for paternity disestablishment. A number of competing interests are present in many situations in which a legal father who is not the biological father seeks to disestablish paternity.²⁶⁹ The factual circumstances underlying these disestablishment cases are many and varied. The mothers may have identified a nonbiological father for “good” reasons—to get needed public benefits for her children while avoiding the threat of harm from the child’s abusive biological father.²⁷⁰ Or she may have identified a nonbiological father under less sympathetic circumstances. She may have had multiple partners and been unsure about the paternity of the child, or she may have identified a putative father to solidify her relationship with

267 Although the need for legal representation for family law litigants continues to far exceed the supply, pro se assistance programs have developed around the country in response to the lack of affordable legal representation in family law disputes, even for those who qualify for free legal assistance. See, e.g., Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 *FORDHAM L. REV.* 1573 (2001). Where these pro se assistance projects exist, noncustodial fathers are frequent users of the services. An evaluation of three pro se programs in California indicated that in Los Angeles County, 38,521 individuals utilized the pro se program in fiscal year 2001–2002. Paternity cases make up twenty-seven percent of the caseload (the second largest category of cases). In all three programs combined, child support cases make up twenty-one percent of the requests for assistance. Overall, fifty-eight percent of the individuals requesting assistance were women and forty-two percent men. In Los Angeles County, fifty-five percent of clients were women and forty-five percent men. JUDICIAL COUNCIL OF CAL. ADMIN. OFFICE OF THE COURTS, A REPORT TO THE CALIFORNIA LEGISLATURE—FAMILY LAW INFORMATION CENTERS.: AN EVALUATION OF THREE PILOT PROGRAMS 26–27, 39–40 (2003), available at <http://www.courtinfo.ca.gov/programs/cfcc/pdffiles/FLIC-full.pdf>.

268 Hatcher & Lieberman, *supra* note 174, at 6 (describing a pilot project developed by the Maryland Legal Aid Bureau focused on the needs of low-income fathers by providing assistance in addressing barriers to sustained employment and economic stability as a result of child support problems or policies).

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

270 See *supra* notes 227–28 and accompanying text.

him because of a strong emotional, financial, or other bond with him. Nonbiological fathers, too, consent to paternity for a variety of reasons, some engendering more sympathy than others. The putative father may indeed be a “duped dad”²⁷¹ who was misled by a partner into believing he was the biological father and consented to paternity to meet his legal and emotional obligations to the child. Or he may have known he was not the biological father or had doubts but wanted to solidify his relationship with the mother, child, or both, regardless of genetic link.²⁷² Or he may have anticipated benefiting from the welfare payments that followed paternity establishment, unaware of the child support obligations he would face as a consequence.

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

1. Statute of Limitations

A statute of limitations which provides a clean “cut off” for claims of paternity disestablishment has the virtue of certainty, predictability, and simplicity. Putative fathers can be easily informed about their rights to challenge a paternity determination and custodial mothers know when a paternity acknowledgment or order will be permanent. When combined with social science research on child development, such an approach also contributes to decisions that are in the best interests of the children.

271 Kathy Boccella, *Men Seek ‘Paternity Fraud’ Law: Many Must Pay Support for Children Who Aren’t Theirs*, PHILA. INQUIRER, Dec. 23, 2003, at A1; Alex Tresniowski, *Dads by Default: Forced To Help Support Three Sons He Did Not Father, Morgan Wise Speaks Out on Behalf of Other Deceived Dads*, PEOPLE WKLY., Nov. 25, 2002, at 78.

272 Although the claim that the father consented to paternity knowing he was not the father is often a defense under state law, in practice it is unlikely to successfully bar disestablishment. See *supra* note 240.

Two issues that must be resolved in developing a child focused statute of limitations are (1) the point in time that triggers the statute and (2) the appropriate length of time for the statute of limitations. Some statutes run from the time of the child's birth and others run from the time the father learns of the "fraud" that led to his status as legal father. If the statute of limitations is tolled until the father alleges he learned of the "fraud," the proceeding may be brought long after a strong bond with the child has formed.²⁷³ If the child's interest is to take precedence over fairness to fathers, the time limit should run from the child's birth.

In deciding the number of years for the statute of limitations, states that have such statutes vary in length from one year²⁷⁴ to five years.²⁷⁵ While the time within which a father and child will bond varies with the frequency of contact and the temperaments of the parties involved, most child development specialists feel that with at least minimal contact between father and child, this bond forms within the first two years of the child's life.²⁷⁶ Thus, a statute of limitations that protects children from the possibility of genetic testing and potential disestablishment after the child reaches the age of two is best suited to protect the child's interests. While most existing statutes of limitations are triggered by the legal father's discovery, this is the approach followed under the Uniform Parentage Act of 2000²⁷⁷ and has been

273 Although state law often regulates when tests can be ordered and admitted into evidence, the wide availability of genetic testing kits makes testing without either a court order or the custodial parent's permission possible. See *supra* note 183.

274 See LA. CIV. CODE ANN. art. 189 (Supp. 2005) (enforcing one-year time limitation strictly unless the child is born more than 300 days after the parents are legally separated).

275 ALASKA STAT. § 25.27.166 (2004) (providing a three-year statute of limitations from the date of child's birth or the time the putative father knew or should have known of paternity); COLO. REV. STAT. § 19-4-107(1)(b) (2005) (stating that action must be brought within a reasonable time after obtaining knowledge of relevant facts, but no later than five years after the child's birth).

276 UNIF. PARENTAGE ACT § 607 cmt. (2002) (finding that allowing such paternity actions after the child's second birthday will have severe consequences for the child); see also Joan B. Kelly & Michael E. Lamb, *Using Child Development Research To Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297, 298, 304 (2000) (suggesting that children develop attachments to parents and caregivers during the first year of life and that the loss of a significant relationship can cause anxiety and a sense of loss). The child's bond to the father can occur even without frequent contact and even where the father does not reciprocate. See Transcript of Record at 8-10, *Gantt v. Sanchez*, No. PD 60-104431 (Md. Cir. Ct. Balt. City Nov. 8, 1999) (testimony of Dr. Leon Rosenberg) (on file with author).

277 UNIF. PARENTAGE ACT § 607(a) (2002).

adopted in a handful of states.²⁷⁸ The only exception to the bar should be in situations (1) where the biological father has been identified, and (2) he has established a relationship with the child that is stronger than that of the legal father.

Imposing a uniform statute of limitations with such a limited exception will result in requiring greater numbers of nonbiological social fathers to remain legal fathers. But legal recognition of such fathers is consistent with the sound child-centered policies that are developing in the custody area²⁷⁹ and should have equal application in paternity decisions.

2. Best Interests Test

Even where the request to disestablish paternity is made within the statute of limitations, all decisions concerning paternity disestablishment should be made under a "best interests of the child" standard. A custodial parent's decisions on behalf of her child are often presumed to be in the child's best interests.²⁸⁰ There are, however, a number of circumstances in paternity contests in which the custodial mother may support the legal father's request for paternity disestablishment regardless of the interests of the child. Even if she believes the legal father is the biological father, she may not be interested in any support from him. She has supported the child herself without any help from the legal father or is not likely to receive his support because of the father's poverty or the welfare assignment rules or both. In other cases where there is genuine doubt as to the legal father's biological link, she may agree it is only fair to let the legal father "off the hook." Or she may believe the legal father voluntarily became the psychological father to the child, but the legal father may have intimidated or regularly harassed the mother about "setting the record straight." The mother may acquiesce under pressure from the legal father or because she feels that she and her child would be better off without the negative presence of the legal father. Thus, courts should not "rubber stamp" a mother's acquiescence in a request but should make an independent determination as to whether a paternity disestablishment is in the best interests of the child.²⁸¹

278 CAL. FAM. CODE § 7575(a)(3)(A) (West Supp. 2005); OKLA. STAT. ANN. tit. 10, § 3 (West 1998); WASH. REV. CODE ANN. § 26.26.305 (West 2005).

279 See *supra* notes 65-73 and accompanying text.

280 See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000).

281 Given the potentially conflicting interests of the parents and child in paternity cases, a provision requiring separate counsel to guide the court in its best interests analysis may be needed. The UPA's model statute contains such a provision. UNIF. PARENTAGE ACT § 612 (2002); see also Jane C. Murphy & Cheri Wyron Levin, *When*

While some states have adopted the best interests approach,²⁸² many have not.²⁸³ And even those that have adopted the standard have not applied it with any consistency, often articulating the standard but giving greater deference to fairness for fathers.²⁸⁴ Thus, courts need specific factors to assist them in applying the best interest standard in paternity disestablishment cases.

Factors that should guide the court in this context include examining

1. the past relationship and existing bond between the child and the legal father;
2. whether there is an existing relationship with another de facto or biological father or the potential to create such a relationship;
3. the child's current physical and emotional needs; and
4. the child's need to ascertain genetic information for the purpose of medical treatment or genealogical history.²⁸⁵

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

Daddy Wants Out: The Issue of Paternity, 33 MD. BAR J., Mar.–Apr. 2000, at 10 (2000) (discussing the need for separate representation of children in paternity modification proceedings).

282 See, e.g., *State ex rel. J.A.U.*, 47 P.3d 327, 333 (Colo. 2002); *Baker v. Baker*, 582 S.E.2d 102, 104 (Ga. 2003); *Ferguson v. Winston*, 996 P.2d 841, 844 (Kan. Ct. App. 2000); *In re Paternity of Adam*, 903 P.2d 207, 211 (Mont. 1995); *Crago v. Kinzie*, 733 N.E.2d 1219, 1222 (Ohio 2000); *In re Sleeper*, 929 P.2d 1028 (Or. Ct. App. 1997); *McDaniels v. Carlson*, 738 P.2d 254, 261 (Wash. 1987); *In re Marriage of Wendy M.*, 962 P.2d 130, 132 (Wash. Ct. App. 1998); *Randy A.J. v. Norma I.J.*, 677 N.W.2d 630, 639 (Wis. 2004).

283 See *supra* notes 187–88.

284 *Cochran v. Cochran*, 717 N.E.2d 892 (Ind. Ct. App. 1999) (holding that correctly identifying parents and offspring is a more important policy consideration than the best interests of the child); *Williams v. Williams*, 843 So. 2d 720 (Miss. 2003) (noting that “it would have been unjust and unfair to require [the legal father] to continue paying child support,” the court set aside paternity because it was in the ten-year-old child's best interests to know the identity of his biological father).

285 *Turner v. Whisted*, 607 A.2d 935, 940 (Md. 1992). While Maryland courts have approved a best-interest standard in the context of a request to reopen paternity where the mother of the child was married, it has not applied this standard in cases where the mother is unmarried. Compare *Langston v. Riffe*, 754 A.2d 389 (Md. 2000) (holding that blood or genetic tests are available, upon motion, to any putative father seeking to challenge a prior paternity declaration), with *Stubbs v. Calendra*, 841 A.2d 361 (Md. Ct. Spec. App. 2004) (holding that trial court did not abuse its discretion when it determined that ordering a blood test to determine paternity would not be in the child's best interest).

CONCLUSION

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

The legal definition of fatherhood must be broad and flexible enough to resolve paternity conflicts in ways that stabilize families and protect children. This requires rethinking the current welfare and child systems to develop policies that discourage uninformed paternity consents on the front end. And, if challenges to paternity are permitted, legislatures and courts need to define fatherhood broadly enough so that decisions about paternity disestablishment are grounded in the child's best interest at the backend. In addition, while rigorous child support enforcement policies are essential to middle- and upper-income custodial parents and children, the application of these policies to low-income, fragile families must be reexamined to discourage functional fathers from seeking paternity disestablishment. Creating a legal definition of fatherhood to account for the complexity of modern families is a difficult task but one that must have as its goal protecting children and preventing the loss of fathers in their lives.