1-1-2006

Immaculate Deception: The Evolving Right of Paternal Renunciation, 27 Women's Rts. L. Rep. 139 (2006)

Diane S. Kaplan
John Marshall Law School, 7kaplan@jmls.edu

ARTICLE

Immaculate Deception: The Evolving Right of Paternal Renunciation

*Diane S. Kaplan**

"[I]n the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity."[1]

—The Honorable William J. Brennan, Jr.[2]

I. INTRODUCTION

The power of DNA to reveal that legal truths are scientifically false is somewhat akin to the discovery of gravity: once its validity is acknowledged, it is no longer possible to cleave to the notion that the earth is the center of the universe. In the realm of paternity determinations, DNA technology now makes it possible to determine who is and is not the biological father of a child.[3] "Paternal renunciation" is a newly evolving right of men who have been misled into believing that they fathered children who are not, in fact, their biological offspring.[4] The question of whether these men may be relieved of their paternal obligations is currently treated with great inconsistency by the American legal system as, in increasing numbers, they try to renounce financial and familial responsibilities for children they have parented but did not conceive.

Paternal renunciation pits man against woman, man against child, man against state. This paper presents the paternal renunciation dilemma from the viewpoint of each of these conflicting interests and examines the choices facing the American legal system as it attempts to distribute the burdens and benefits among the innocent and responsible parties.

II. LEGAL FATHERHOOD

Historically, the legal designation of "father" and consequential child support obligations were imposed on men without the benefit of genetic proof of paternity. As the law of paternity developed from the middle ages to the present, the ascription of fatherhood became vested in numerous legal constructs that substituted fiction for fact because there was no bet-

*Diane S. Kaplan is an Associate Professor at The John Marshall Law School in Chicago, Illinois. Professor Kaplan wishes to dedicate this article to her beloved friend and late research assistant, Patricia A. Gerdes.

1. Cortese v. Cortese, 76 A.2d 717, 719 (N.J. Super. Ct. App. Div. 1950).

2. In 1956, Judge Brennan of the Superior Court of New Jersey Appellate Division became a Justice of the United States Supreme Court. http://www.supremecourtus.gov/about/about.html (follow "Members of the Supreme Court: 1789 to Present" hyperlink) (last visited Apr. 13, 2006).

3. Diane S. Kaplan, *Why Truth Is Not a Defense in Paternity Actions,* 10 TEX. J. WOMEN & L. 69, 72 n.10 (2000) (citing E. Donald Shapiro et al., *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. HEALTH 1, 29 nn.159-60 (1992-93); Heather Faust, *Challenging the Paternity of Children Born During Wedlock: An Analysis of Pennsylvania Law Regarding the Effects of the Doctrines of Presumption of Legitimacy and Paternity by Estoppel on the Admissibility of Blood Tests to Determine Paternity*, 100 DICK. L. REV. 963, 967 (1996)).

4. *See* Paula Roberts, *Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children*, 37 FAM. L.Q. 35 (2003). "Paternal Renunciation" is also referred to as "disestablishment of paternity." *Id.*

[Women's Rights Law Reporter, Volume 27, Number 3, Summer 2006]

0085-8269/80/0908

ter way to establish paternity. Consequently, men became legal fathers of children with whom they had no biological relationship. For example, under the marital presumption of paternity, a married man was legally presumed to be the father of any child born of the marriage.[5] Upon divorce, the presumed father was adjudicated the legal father and that judicial determination was conclusive, final, and not subject to re-examination.[6]

More currently, married men may become legal fathers of biologically unrelated children through adoption, assisted reproduction, and estoppel. Estoppel is a legal construct that infers promises arising from conduct. It "estops" a party who took a position intending another to rely on it from changing that position if doing so would injure the relying party.[7] Courts are especially inclined to invoke paternity by estoppel when a man represents to a child that he is the child's father[8] or prevents the child from developing a relationship with the true biological father.[9] Paternity by estoppel is not intended to punish, but rather to hold a man to his promise.[10] Consequently, under the estoppel doctrine, a husband who voluntarily assumes parenting responsibilities for his spouse's child, upon divorce, may be estopped to deny his paternal obligations to the child.[11]

An unmarried man can become a legal father either voluntarily, by acknowledging the paternity of a child, or involuntarily by adjudication in a paternity action.[12] As a consequence of these varying routes to fatherhood, a man may become a father by presumption, estoppel, adjudication or biology: a man may be a biological father, a legal father, neither, or both.[13] Similarly, a child may have a biological father, a presumed father, an adjudicated father, all, or none. As in the case of divorce, once these adjudications of paternity are final, they are binding and not subject to re-examination.[14]

Before DNA paternity testing became available, these legal constructs substituted for biological facts because those facts were unknowable. However, in the mid-1990s DNA testing became available to the public.[15] Between 1995 and 2002, 25% to 30% of those tests showed no genetic link between the man and the child.[16] Although the number of men, wo-

5. The marital presumption of legitimacy stands for the proposition, "*Pater est quem nuptiae demonstrant*" [the nuptials speak for themselves]. WILLIAM BLACKSTONE, 1 COMMENTARIES, *446-54. The presumption dates back to the 18th century holding by Lord Mansfield in *Goodright v. Moss* that declarations of spouses were inadmissible to bastardize a child born of the marriage. (1777) 98 Eng. Rep. 1257 (K.B.). Historically, the marital presumption of legitimacy could be rebutted only with proof of the husband's impotence, sterility, or non-access to the wife. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (citing H. NICHOLAS, ADULTERINE BASTARDY 1, 9-10 (1836)).

6. Cynthia R. Mabry, *Who is the Baby's Daddy (and Why is it Important for the Child to Know?)*, 34 U. BALT. L. REV. 211, 219-20 (2004) (citing Doe v. Doe, 52 P.3d 255, 259-60 (Haw. 2002)).

7. BLACK'S LAW DICTIONARY 383 (6th ed. 1991).

8. Freedman v. McCandless, 654 A.2d 529, 532-33 (Pa. 1995) ("Estoppel in paternity actions is merely the legal determination that because of a person's conduct . . . that person, regardless of his true biological status, will not be permitted to deny parentage. . . ."); *see also* Mancinelli v. Mancinelli, 610 N.Y.S.2d 104, 105 (N.Y. App. Div. 1994) (holding husband estopped from denying paternity of marital child because he developed a relationship with the child notwithstanding his suspicion that he may not have been the biological father); Chrzanowski v. Chrzanowski, 472 A.2d 1128, 1129-30, 1131-32 (Pa. Super. Ct. 1984) (holding a husband estopped from denying paternity of marital child notwithstanding stipulation of lack of sexual relations with the wife, the wife's admission that the husband was not the child's biological father, and blood tests establishing that the husband had no genetic link to the child, because the husband parented and financially supported the child for three years).

9. K.B. v. D.B., 639 N.E.2d 725, 730 (Mass. App. Ct. 1994) (reasoning that application of estoppel may be based on a finding that the child's opportunity to pursue a relationship with the biological father has been foreclosed) (citing A.R. v. C.R., 583 N.E.2d. 840, 844 (Mass. 1992)).

10. Paternity by estoppel may be applied to women as well. In *L.S.K. v. H.A.N.*, estoppel invoked where the non-custodial parent in a lesbian relationship sought to renounce her obligations to the former couple's child. 813 A.2d 872, 878 (Pa. Super. Ct. 2002).

11. *See* cases cited *supra* note 8.

12. Stanley v. Illinois, 405 U.S. 645, 664 (1972) (Burger, C.J., dissenting).

13. Jeffrey A. Parness, *Federalizing Birth Certificate Procedures*, 42 BRANDEIS L.J. 105, 109-10 (2003); *see also* Draper v. Truitt, 621 N.E.2d 202, 206 (Ill. App. Ct. 1993); E.B.M. v. V.W., 586 So.2d 230, 231 (Ala. Civ. App. 1991).

14. *See, e.g.*, Langston v. Riffe, 754 A.2d 389, 423 (Md. 2000) (Wilner, J., dissenting) (reasoning that "declaration of paternity embodied in an order entered by a circuit court in a paternity case was final . . . once 30 days elapsed without the noting of an appeal or the filing of a motion [for relief from judgment] . . . the declaration of paternity became truly final and unreviewable"); MD. CODE ANN. FAM. LAW § 5-1038(a)(1) (2004) (mandating that "a declaration of paternity in an order is final").

15. Ruth Padawer, *Paternity Testing Can Leave More Questions Than Answers*, THE CHARLESTON GAZETTE, Feb. 22, 2004, at 14F.

16. *Id.* (citing statistics of the American Association of Blood Banks).

men, and children who will be affected by the power of DNA to disprove biological paternity presently is unknown,[17] it is reasonable to assume that once known the numbers will be sufficiently significant to disrupt traditional legal constructs of fatherhood. The resulting firestorm of litigation borne of sex, money, betrayal, and abandonment might befit a French bedroom farce but for the tragic choice it compels: should wrongfully adjudicated "fathers" be permitted to use DNA test results to renounce legal adjudications of paternity when doing so will subject children to trauma, illegitimacy, and abandonment? Consider the following cases:

A. The Dupe

In *Miscovich v. Miscovich*, Gerald and Elizabeth married and had a son.[18] When they divorced, Gerald did not contest either his paternity or his child support obligation and, consequently, the court adjudicated Gerald to be the boy's legal father.[19] Eventually, however, Gerald came to doubt his paternity once he realized that, although he and Elizabeth had blue eyes, the child's eyes were brown.[20] Shortly after DNA tests established that he and the child were not genetically related, Gerald renounced his familial and financial obligations to the boy and discontinued all contact with him.[21] Eventually, Elizabeth sued Gerald for child support.[22] When Gerald tried to introduce the DNA test results to disprove his paternity, the court excluded the test as irrelevant and, therefore, inadmissible.[23] The court said, "there is *something disgusting* about a husband who, moved by bitterness toward his wife, suddenly questions the legitimacy of her child whom he has been accepting and recognizing as his own."[24]

Gerald's dilemma was paradoxical. First he was betrayed by an adulterous wife who duped him into assuming the parenting obligations of another man. Then he was ordered to financially support the child born of the adulterous affair because a court refused to admit conclusive biological evidence of non-paternity to rebut the conclusive marital presumption of paternity.

The marital presumption of paternity dates back to the eighteenth century[25] when its purposes were to protect children from illegitimacy, the husband's reputation from insinuations of cuckoldry, and his property from the fraudulent claims of third party usurpers to his estate.[26] In Gerald's case, however, the marital presumption of paternity served only to treat the child like a marital debt, which, upon divorce, was distributed equitably between the spouses, regardless of which spouse incurred the obligation.[27]

B. The Absentee

While on active duty in the First Gulf War, Taron James was "named"[28] as "the father" on the birth certificate of a child he never knew existed.[29] A default judgment of paternity and support was entered against him under California law.[30] By the time James learned of the default judgment, the six-month appeal period

17. For example, the tiny state of Maryland has estimated that the recognition of a right of paternal renunciation could reopen between a quarter of a million and half a million judgments in that state alone. *See Langston*, 754 A.2d at 425 (Wilner, J., dissenting).

18. 688 A.2d 726, 727 (Pa. Super. Ct. 1997).

19. *Id.*

20. *Id.* at 727 n.1.

21. *Id.* at 727-28.

22. *Id.* at 727.

23. *Id.* at 733.

24. *Miscovich*, 688 A.2d at 732 (emphasis added) (quoting Commonwealth *ex rel.* Goldman v. Goldman, 184 A.2d 351, 355 (Pa. Super. Ct. 1962).

25. Lord Mansfield's exclusionary rule of 1777 held that under the law of England, "the declarations of a father or mother [could not] be admitted to bastardize the issue born after marriage," *Goodright*, 98 Eng. Rep. at 1257; *Michael H.*, 491 U.S. at 124 (citing H. Nicholas, ADULTERINE BASTARDY 1, 9-10 (1836)).

26. *Michael H.*, 491 U.S. at 124-25 (citations omitted); *see also* Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585, 588-89 (1991); JENNY TEICHMAN, ILLEGITIMACY: AN EXAMINATION OF BASTARDY 54 (Cornell University Press 1982); Ettore I. v. Angela D., 513 N.Y.S.2d 733, 738-40 (N.Y. App. Div. 1987); Brinkley v. King, 701 A.2d 176, 179 (Pa. 1997).

27. *See* Kaplan, *supra* note 3, at 75-76 n.2.

28. Historically, mothers have been permitted to "name" the biological father in court when seeking financial support. The practice of "naming" was an exception to the formerly accepted rule of evidence that parties to lawsuits could not testify in their own behalf. Little v. Streater, 452 U.S. 1, 10-11 (1981) (citing Booth v. Hart, 43 Conn. 480, 485 (Conn. 1876).

29. NBC4.TV, *Torrance Man Vows To Change Child Support Laws: Man Ordered To Support Child He Says Isn't His*, (Mar. 2, 2004), http://www.nbc4.tv/news/2891653/detail.html (last visited Apr. 13, 2006) [hereinafter *Torrance Man*].

30. *Id.*; CAL. CIV. PROC. CODE § 473(b) (2006).

had expired leaving him unable to contest the decision.[31] James expended $50,000 in legal fees and child support payments as he unsuccessfully sought relief from the judgment.[32] Despite DNA tests that conclusively disprove his paternity, and the mother's recantation of her prior false identification, James continues to be bound by the default judgment.[33] In a recent court ruling that denied one of James' numerous requests for relief from the judgment, the judge wrote that while "the evidence is overwhelming that [James] is a victim of fraud instigated by the woman . . . [t]his is one of the most unjust results a judge could render, but based on the laws on the books in California, there is no discretion to hold otherwise."[34]

In the *James* case, the court chose to uphold the finality of the default judgment despite DNA evidence of its falsity.[35] Finality doctrines serve many valid purposes in the law: they provide conclusive resolution of disputes so that parties can proceed with their affairs; they prevent litigious losers from monopolizing scarce judicial resources; and they protect courts from rendering inconsistent judgments in the same case.[36] In this case, however, none of the parties will benefit from the finality of this judgment because they all believe it to be wrong.[37] Protecting the finality of this judgment, however, does yield some stealth beneficiaries: the California Department of Child Welfare, which is spared the effort of searching for the true biological father; the biological father, who is spared the responsibility for his biological and parental obligations; and the judicial system, which is spared the indignity of contradicting itself.

C. The Volunteer

Patrick McCarthy never suspected that his marital daughter was not his biological daughter until his former wife suggested it after their divorce.[38] Goaded by her suggestion, McCarthy performed an at-home DNA test.[39] When the results established that he was not the girl's biological father, McCarthy said, "[i]t's an indescribable feeling: like death, like a horrible grief, like I had been the father to a stranger. Everything I thought was true suddenly wasn't true anymore."[40]

McCarthy ostensibly had two choices: he could disclose the DNA results and live with the consequences or he could disregard the test results and continue to parent the child.[41] He chose the latter.[42] Eventually his daughter learned about the DNA test from her mother.[43] When she asked McCarthy who her father was, he said he did not know, but that she would always be his daughter.[44] McCarthy's choice appears valiant, but its valor is somewhat mitigated by the advice he received from a lawyer informing him that he had no true choice at all: no court would permit him to renounce his paternity.[45]

---

31. CAL. CIV. PROC. CODE § 473(b); *see also* Email from Marc Angelucci to Anne Abramson (Feb. 25, 2006, 12:33 AM) (on file with author).

32. *Torrance Man*, *supra* note 29; *California Men Fight Paternity Claims*, UPI News, Jan. 16, 2005 (reporting James paid $12,000 in child support and $38,000 in legal fees). In September, 2005, James won a $44,868.65 default judgment against the woman who had falsely identified him as the child's father. Press Release, National Coalition of Free Men, *NCFM Los Angeles Chapter Wins Victory in Paternity Fraud Case*, http://ncfm.org/activities.php (last visited Apr. 13, 2006).

33. *Torrance Man*, *supra* note 29.

34. *Id.* In this proceeding, James tried to stop the garnishment of his unemployment compensation in a hearing before the California Appeals Board. *Id.* When asked why he was vulnerable to misidentification, James offered the following explanation: "Her father was in the Navy years ago, and she knew about the benefits. . . Here I am in the Gulf War, and if I was killed, she could make a claim on a $200,000 life insurance policy on the child's behalf." *Id.*

35. *Id.*

36. 18 CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403 at 26 (2d ed. 2002). "The deepest interests underlying the conclusive effect of prior adjudication draw from the purpose to provide a means of finally ending private disputes. The central role of adversary litigation in our society is to provide binding answers. We want to free people from the uncertain prospect of litigation, with all its costs to emotional peace and the ordering of future affairs. Repose is the most important product of [the finality doctrine]." *Id.* at 26-27.

37. *Torrance Man*, *supra* note 29.

38. Padawer, *supra* note 15.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Padawer, *supra* note 15.

45. *Id.*

III. CONFLICTING INTERESTS

A. The Wrongfully Adjudicated Father: Why Me?

A man who seeks to renounce paternity based on DNA evidence of non-paternity wants financial, emotional, and legal freedom from the child. Such a man faces a morass of conflicting legal and social norms. Some courts find the man's attempted renunciation to be reprehensible,[46] while other courts find the perpetration of a fraud on an innocent man to be reprehensible.[47] Some courts uphold the man's financial obligations despite DNA evidence of non-paternity,[48] while other courts hold that DNA evidence of non-paternity is dispositive of the man's legal obligations.[49] Some courts enforce their power to impose financial obligations on the man despite their powerlessness to enforce father-child relationships.[50] Other courts hold that the judiciary should not create financial or familial relationships by law that do not exist in fact.[51]

From a constitutional point of view, the man has protectable property and liberty interests.[52] The Fourteenth Amendment of the United States Constitution states, "[n]o state shall deprive any person of life, liberty or property without due process of law."[53] This language has been construed to mean that the state must provide a person with appropriate procedural opportunities to defend his property or liberty interest before the state can deprive him of either.[54]

When paternal obligations are disputed, the man's property interest is substantial. The legal and financial consequences of being adjudicated "the father" - whether by presumption, estoppel, consent, or decree - are onerous.[55] Until the child reaches the age of majority, "the father" is financially responsible for the child's health, welfare, and education.[56] The child is his legal heir and through him may be entitled to receive Social Security, Workers Compensation, and other social service benefits.[57] If "the father" fails to meet his financial obligations to the child, the state can seize and confiscate his property.[58] In some jurisdictions, the man can be imprisoned for failure to meet his support obligations.[59] Although society condones the imposition of such burdens when a man is the child's biological father, it is not as righteous when an innocent man is so treated.

The man's liberty interest is also substantial. A man who has been wrongfully adjudicated a "legal father" has a constitutionally protected liberty interest in freedom from government intrusion in his privacy and personhood without due process of law.[60] When a husband discovers that his marital child is not

46. *Miscovich,* 688 A.2d at 732 (citing *Goldman*, 184 A.2d at 355. "[T]here is something disgusting about a husband who, moved by bitterness toward his wife, suddenly questions the legitimacy of her child whom he has been accepting and recognizing as his own." *Id.*).

47. *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity,* 102 W. VA. L. REV. 547, 600 (2000); State *ex rel.* G.M.F. v W.F.F., 728 S.2d 144, 146 (Ala. Civ. App. 1996) (setting aside prior judgment of paternity after man's ex-wife admitted that the child was not his. The court noted, "to require [the father] to continue to pay child support for a child who is not his . . . is morally reprehensible").

48. *See, e.g., Miscovich,* 688 A.2d at 733; Hammack v. Hammack, 737 N.Y.S.2d 702, 704 (N.Y. App. Div. 2002).

49. *K.B.,* 639 N.E.2d at 731 (presumptive father not estopped from raising nonpaternity defense based on blood tests).

50. *Misovich*, 688 A.2d at 733.

51. *See, e.g., K.B.,* 639 N.E.2d at 730; Symonds v. Symonds, 432 N.E.2d 700, 703 (Mass. 1982); Sandy M. v. Timothy J., 524 N.Y.S.2d 639, 642 (N.Y. Fam. Ct. 1998); Bergan v. Bergan, 572 N.W.2d 272, 275 (Mich. Ct. App. 1997); Berrisford v. Berrisford, 322 N.W.2d 742, 745 (Minn. 1982).

52. *See* Rivera v. Minnich, 483 U.S. 574, 586 (1987) (Brennan, J., dissenting).

53. U.S. CONST. amend. XIV, § 1.

54. *See Rivera*, 483 U.S. at 586 (Brennan, J., dissenting).

55. *Id.* at 583-84 (Brennan, J., dissenting).

56. *Id.* at 576-77 n.2.

57. *See id.*

58. 42 U.S.C. § 664 (1998) (stating that the federal government may seize the federal tax refunds of a man who owes past due child support payments in order to make such payments).

59. 18 U.S.C. § 228 (2001).

60. Colegio Puertorriqueno De Ninas, Liceo Ponceno, Inc. v. Pesquera De Busquets, 464 F. Supp. 761,765 (D.P.R. 1979) (noting that privacy rights are found "in the First Amendment, in the 'liberty' protected by the due process clauses of the Fifth and Fourteenth Amendments, as well as in the strictures of the Fourth Amendment's guarantees against unreasonable searches and seizures. More characteristically, privacy rights have been described as arising from the 'penumbras' or 'shadows' of the Bill of Rights." (internal citations omitted)). Unlike the right to privacy, the concept of "personhood" does not lend itself to a precise definition. Judge Craven states that personhood "includes elements of the concepts of individuality, autonomy, and privacy." Braxton Craven, Jr., *Personhood: The Right to Be Let Alone,* 1976 DUKE L. J. 699, 702 (1976). Similarly, Professor Freund believes that personhood includes "those attributes of an individual which are irreducible in his selfhood." Lovisi v. Slayton, 539 F.2d 349, 356 n.2 (4th Cir. 1976).

his biological child but that he cannot legally escape his paternal obligations, his liberty interests in personhood and privacy suffer more than humiliation. He is caught in a prisoner's dilemma: if he disputes his parental obligations, he is stigmatized as a cad, craven and selfish, placing his own well being before that of the child. If he acquiesces to his parental obligations, he is stigmatized as a cuckold, duped into carrying another man's emotional and financial burden.

The non-marital father who tries to renounce his paternal obligations may be similarly stigmatized as irresponsible, immature, or devious.[61] This stigma may be especially harmful to his other relationships - especially those with his employer, who may be required to garnish his wages, or his spouse, or partner, or other children.[62]

In either situation, the man's liberty interest suffers punishment borne in great disproportion to fault. This punishment is greatly exacerbated when finality doctrines prevent the man from disproving his paternity with DNA evidence of non-paternity that was unavailable at the time of the original paternity adjudication. Under these circumstances, the man has been denied a constitutionally meaningful opportunity to defend his liberty and property interests.[63]

B. The Child: Is Truth in the Child's Best Interest?

By allowing a paternity determination to be challenged, paternal renunciation both protects and harms children. A child can be profoundly harmed by the abandonment of the only "father" he or she has ever known.[64] Without countervailing knowledge of the true biological father's identity, a child's own identity may become suffused with questions of fault, deception, and abandonment. On the other hand, the accurate determination of non-paternity gives the child the truth - or some truth. As a moral proposition, truth probably is more beneficial to children than deceit. However, even if paternal renunciation inures to the child's moral benefit, it may be hard to justify to a seven year old why she is better off with the truth than with a father.

From a constitutional point of view, the United States Supreme Court has held that children have a compelling interest in the accurate determination of their paternity.[65] Although children have some protected liberty interests, those interests are defined very differently from those of adults.[66] The "adult" liberty interest recognizes adults as autonomous, self-sufficient persons who are free to conduct their lives within the confines of the law.[67] Accordingly, parents have a constitutionally protected liberty interest in the care, custody, and control of their children.[68] The Constitution, however, views

61. *See Rivera,* 483 U.S. at 585 (Brennan, J., dissenting).

62. *Id.*

63. *See, e.g.*, Robert L.A. v. Sharon A.R., 185 A.D.2d 977, 979 (N.Y. App. Div. 1992) (holding that blood tests are admissible to rebut the presumption of legitimacy only if in the best interest of the child); Vito L. v. Filomena L., 172 A.D.2d 648, 651 (N.Y. App. Div. 1991) ("[S]ince the effect of the [paternity] tests would only confirm the presumption of legitimacy . . . without establishing the identity of the natural father. No purpose would be served in branding the child 'illegitimate' and depriving her of the only father she has known."); N.Y. FAM. CT. LAW § 418 (McKinney 1999) (stating that blood tests may be excluded if such would not be in the best interests of the child.); DEL. CODE ANN. 13, § 8-608 (2004); TEX. FAM. CODE ANN. § 160.608 (2003); WASH. REV. CODE § 26.26.535 (2002); WYO. STAT. ANN. § 14-2-808 (2003) (permitting courts to use the best interest of the child as a factor in determining whether to order DNA testing).

64. *See* Monroe v. Monroe, 621 A.2d 898, 905 (Md. 1993).

65. *Little,* 452 U.S. at 13.

66. *See* Gerry B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy,* 38 AM. PSYCHOLOGIST 99, 100 (1983); Bellotti v. Baird, 443 U.S. 622, 634 (1979) (noting that children's constitutional rights are not co-extensive with those of adults because of "the peculiar vulnerability of children; their inability to make critical decision in an informal, mature manner; and the importance of the parental role in child rearing."); FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE, 103-04 (1982) (stating that the law does not ascribe the full attributes of "adulthood" - such as liberty, entitlement and responsibility - to children).

67. *Bellotti*, 443 U.S. at 634 (1979); ZIMRING, *supra* note 66, at 103-04.

68. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (parents have the right to control the education of their children and the Fourteenth Amendment protects parental right to bring up children); May v. Anderson, 345 U.S. 528, 532 (1953) (reasoning parents have a fundamental "right to the care, custody, management and companionship of . . . minor children); Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children - is perhaps the oldest of the fundamental liberty interests recognized by this court"(citations omitted)); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child resides first with the parents.").

children as persons in need of protection and support.[69] Rather than liberty, children have a right to "custody" - to be kept within the protective custody of a responsible adult, or the state.[70] In recognition of the distinction between liberty and custody, Chief Justice Rehnquist once said that children, unlike adults, "are always in some form of custody."[71]

Traditionally, the child's liberty interest in custody has been evaluated under the "best interest of the child" standard.[72] In a perfect world, the best interest of the child is achieved when devoted, responsible adults unite for the common good of raising, loving, protecting, and providing for the well being of their child. Absent perfection, the best interest of the child standard must measure benefits against harms to determine either the best available or least detrimental alternative for the child.[73]

Paternal renunciation greatly challenges the best interest of the child standard. The best interest standard plays a primary role in judicial determinations of the proper placement for a child whose custody is in dispute.[74] Paternal renunciation turns the custody issue on its head. It shifts the issue from which of two parents is the best custodial placement for a child to whether the child can assert custody over the father - or at least his bank account.

Because of this twist in the custody issue, courts are seriously divided over whether the best interest standard is relevant to determine if DNA evidence should be admitted to disprove paternity. Some courts hold that biology is dispositive of legal paternity and, therefore, the best interest standard is irrelevant to that determination.[75] Other courts hold that the best interest standard becomes relevant only after biological parentage has been determined and custody is in dispute.[76] Still other courts hold that the best interest standard is wholly dispositive of the paternal renunciation issue, and admit or exclude DNA evidence based on whichever ruling is in the child's best interest.[77]

From the child's perspective, the dispute over whether the admission or exclusion of DNA evidence satisfies the best interest standard begs a more important question: what is the best interest of a child in a paternal renunciation case? Are children better served by the biological truth, even when it hurts, or by legal constructs that substitute fiction for fact even when the truth is knowable but disruptive of the status quo?

The answer to this question is neither clear nor clearly legal. While the harmful consequences of paternal renunciation must be recognized, they must also be evaluated in relation to the benefits to the child and the countervailing harms to the man. Interestingly, the weighing of harms and benefits may not make adversaries of the man and the child. Legal constructs such as the marital presumption, the estoppel and finality doctrines, and the best interest of the child standard uphold the status quo while denying both the man and the child legal recognition of the biological truth of their relationship. Before DNA paternity tests were available, these legal constructs were justified because biological paternity was unknowable. Now, however, their continued use is less justifiable since the biological truth of paternity is knowable, and frequently is known by the child, the legal father, and the court.

DNA has brought into sharp relief the conflict between legal truths and biological truths. Legal constructs that historically substituted for unknowable facts now bar recognition of facts

69. *See Prince*, 321 U.S. at 166; *see also* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Schall v. Martin, 467 U.S. 253, 265 (1984) (stating that "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves").

70. *See Prince,* 321 U.S. at 169 (noting that "[w]hat may be wholly permissible for adults . . . may not be so for children."); Vernonia v. Acton, 515 U.S. 646, 654 (1995) (stating that "[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination - including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians").

71. *Schall*, 467 U.S. at 265 (citing Lehman v. Lycoming City Children's Serv., 458 U.S. 502, 510-11 (1982)).

72. ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE 913 (4th ed. 2000).

73. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD 53-55 (1973).

74. *See* MNOOKIN & WEISBERG, *supra* note 72, at 913; Jessica Pearson & Marta A. Ring, *Judicial Decision-making in Contested Custody Cases,* 21 J. FAM. L. 703, 704 (1982-83).

75. *See, e.g., K.B.,* 639 N.E.2d at 730; Spaeth v. Warren, 478 N.W.2d 319, 322 (Minn. Ct. App. 1991).

76. *See, e.g., Langston,* 754 A.2d at 409-10 (holding that the best interest standard can be considered only in custody disputes or other related issues but not in paternity determinations).

77. *See supra* note 63.

that are knowable. For children, state sanctioned obfuscation of the truth of their biological paternity may be too great a deprivation of liberty to survive constitutional challenge. In light of DNA proof of paternity to the contrary, the child may have a constitutionally protected liberty interest in not being deceived by the government about who is or is not his father.

C. The Mother: A Hobson's Choice

Mothers do not fare well in paternal renunciation cases. More accurately, mothers are treated like the villainous Livia Drusilla who ensures her child's legitimacy through cunning and deceit.[78] The mother is vilified because, despite knowledge that she had multiple sexual partners during the period of conception, she has wrongfully identified one man as the biological father of her child, accepted his money, encouraged him to parent her child, and upon revelation of the DNA test results, tries to prevent him from disproving his paternity in court.[79]

More to the point, women are vilified in paternal renunciation cases because they are presumed to have lied to the legal father (who may or may not be their spouse), the child, the welfare department in some cases, and the biological father in others. Assuming the truth of this assumption, why do mothers lie about the biological paternity of their children? Some mothers lie because they are selfish, rotten people. Sometimes, however, the lie is compelled by circumstances. A mother may lie to protect her family, husband, and child from herself. The price of unity may be deceit. A mother may lie because she is herself a child who is afraid to identify the biological father. A mother may lie because she does not know the identity of the father.

Some lies are compelled by law. The marital presumption of paternity consigns women to perjury by preventing them from denying in court that their husband is their child's father.[80] Welfare law encourages fraud by giving mothers the Hobson's choice of naming the right man, the wrong man, or no man.[81] If she names the right man, she will be eligible to receive child support from him and welfare assistance for herself and her child. If she names the wrong man, she will still be eligible to receive child support from him and welfare assistance for herself and her child. However, if she names no man, she will not be eligible to receive financial or welfare support for either herself or the child.[82] If the aid is insufficient, she and her child will have to fend for themselves - frequently in the streets.

Whether the mother's conduct is the result of mistake or deceit, circumstances or compulsion, in a courtroom she is foreclosed from arguing that the father's renunciation is harmful to her child's best interests. In fact, the mother cannot make any arguments in court on behalf of her child. The paternal renunciation proceeding is a consequence of her conduct: both past, by falsely identifying the wrong father, and present, by trying to maintain financial support for her child while protecting herself from claims of perjury. The last thing the mother wants is a legal determination of non-paternity.[83] The mother's need to exclude DNA test results places her legal interests in conflict with her child's legal entitlement to an accurate determination of paternity.

D. The Biological Father: Who, Me?

Biological fathers do not typically bring paternal renunciation cases. Occasionally, a biological father learns that he has a child and attempts to establish his paternal rights to the child by challenging the paternity of another man, usually the mother's spouse.[84] These cases

78. *See generally* ROBERT GRAVES, I, CLAUDIUS: FROM THE AUTOBIOGRAPHY OF TIBERIUS CLAUDIUS 14-52 (Vintage International 1989) (1934).

79. *See, e.g., Rivera,* 483 U.S. at 576-77 n.2 (citing Minnich v. Rivera, 506 A.2d 879, 882 (Pa. 1986)).

80. Brief of Petitioner at *7, Wise v. Fryar, 534 U.S. 1079 (2002) (No. 01-562).

81. 42 U.S.C. § 608(a)(2) (2000); 42 U.S.C. § 602(a)(6) (2000).

82. 42 U.S.C. § 608(a)(2) provides that if an individual does not comply with a state to establish paternity for support purposes, it "(A) shall deduct from the assistance that would otherwise be provided to the family of the individual under the State program . . . [by] an amount equal to not less than 25 percent of the amount of such assistance; and (B) may deny the family any assistance under the State program. *Id.*; *see also* French v. Mansour, 834 F.2d 115, 116 (6th Cir. 1987); SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW 143 (2d ed. 2003) (discussing the problem of maternal non-cooperation with the requirement to identify the father.).

83. *See* Brief of Petitioner at *7, *supra* note 80.

84. *E.g., Michael H.,* 491 U.S. at 114. Michael H. fathered a child with a married woman. He maintained an active role

seldom succeed. More typically, the legal father will name the biological father as a defense to a suit for child support arrearages in the hope of shifting liability onto him.[85] Frequently, the biological father had no prior knowledge of his child; or, if he had prior knowledge of the child he soon learned how to evade his parental responsibilities. Such men have no protectable liberty interest in avoiding their financial and legal obligations to their children.[86] Most typically, however, the sole function of the biological father in paternal renunciation cases is to be the male available for the occasion of conception.[87]

E. The State's Interest: Ignoring the Elephant in the Room

Interestingly, state welfare departments, not adjudicated fathers, instigate most paternal renunciation actions.[88] In the typical case, a welfare department sues a legal father for child support arrearages and he defends by introducing DNA evidence, which was not available at the time of the original paternity determination, to prove that he is not genetically related to the child he has been ordered to support. Frequently, the man not only has defaulted on his support obligations but has renounced his familial relationship to the child as well. Less typically, a man will initiate a paternal renunciation action in the hope of obtaining relief from a final, non-appealable judgment that was entered before DNA evidence of non-paternity was available.[89]

The state clearly has a legitimate interest in enforcing the right man's support obligation.[90] Conversely, the state has no legitimate interest in enforcing the wrong man's support obligation, especially since the United States Supreme Court repeatedly has said that the state has an interest in providing a "fair and impartial adjudication" of paternity.[91] Consequently, the state's interests are aligned with those of the child and the legal father in obtaining an accurate determination of paternity.[92]

The state's authority to enforce its interest in child welfare, parental financial support, and fair and accurate paternity determinations is based on two common law doctrines: the *"parens patriae"* doctrine[93] and the "police power."[94] The *parens patriae* doctrine permits a state to promote the welfare of any one child in particular, whereas the police power permits the state to promote the welfare of children in general.[95] Through these powers, the state can protect children by invoking a broad arsenal of enforcement mechanisms against "deadbeat dads." For example, a man who willfully fails to obey a child support order can be held in civil contempt. The usual penalty for civil contempt is to pay the financial arrearages or go to jail and then pay the arrearages in order to be released.[96] The state also can attach a man's property and sell it, or garnish his salary, to sat-

---

in the child's life and eventually sued to be declared the child's father and receive visitation rights. The Court held that although Michael was the biological father he did not have a liberty interest in maintaining a relationship with the child because the mother's husband was presumed to be the child's father and both spouses opposed Michael's lawsuit. *Id.* at 113-14, 127.

85. *E.g.*, Pietros v. Pietros, 638 A.2d 545 (R.I. 1994)

86. *See Rivera,* 483 U.S. at 580.

87. *See* Kaplan, *supra* note 3, at 79.

88. *Langston,* 754 A.2d at 409 ("In the great majority of these cases, it is the State, on behalf of the mother, who initiates the proceeding against the putative father.").

89. *See, e.g.*, Day v. Heller, 653 N.W.2d 475 (Neb. 2002); Libro v. Walls, 746 P.2d 632, 633 (Nev. 1987) (presumed father was permitted to raise non-paternity as a defense to support arrearages); M.A.F. v. G.L.K., 573 So. 2d 862, 863 (Fla. Dist. Ct. App. 1990) (in a divorce proceeding, the court held that the wife's intentional concealment that her husband was not the biological father of the marital child was extrinsic fraud that vitiated his paternal obligation).

90. *See Little*, 452 U.S. at 14.

91. *Rivera,* 483 U.S. at 581 n.8; *see also Little*, 452 U.S. at 14.

92. *Little*, 452 U.S. at 14.

93. RAMSEY & ABRAMS, *supra* note 82, at 8-11. The "*parens patriae*" doctrine is based on English common law that requires the government to assume responsibility for persons incapable of caring for themselves - most frequently the elderly, disabled and children. In contemporary usage the *parens patriae* doctrine is the legal basis for state regulation of abuse and neglect, foster care, adoption, child support, status offense restrictions, and delinquency jurisdiction.

94. *Id.* at 10-11 (citing *Developments in the Law - The Constitution and the Family,* 93 HARV. L. REV. 1156, 1198-99 (1980)). The "police power" is an attribute of sovereignty that gives a state plenary power both to prevent its citizens from harming one another and to promote all aspects of public welfare.

95. *Id.* at 10.

96. *Id.* at 372 (citing Pettit v. Pettit, 626 N.E.2d 444 (Ind. 1993)); *see also* MNOOKIN & WEISBERG, *supra* note 72, at 334.

isfy child support arrearages.[97] A more severe sanction for failure to pay child support is available under the Deadbeat Parents Punishment Act of 1998, which authorizes criminal arrest and punishment for parents who evade child support obligations.[98] The state also has the power to subject deadbeat dads to motor vehicle, professional, occupational, and recreational delicensing.[99]

When the state uses its substantial powers to enforce its interest in child welfare through judicial determinations of paternity, orders of support, civil, criminal, and quasi-criminal enforcement mechanisms, it is engaging in "state action."[100] All state action must be constitutional to be lawful. The Constitution requires that any action a state takes against a person's life, liberty or property satisfy due process.[101] The *sine qua non* of due process is fundamental fairness:[102] to satisfy due process, the state must provide a person with a "'meaningful opportunity to be heard'"[103] before it can infringe on that person's "life, liberty, or property."[104] Although the requirements of due process vary with the context,[105] due process always asks the same question: how much process is due this person in this situation to protect his or her rights to life, liberty, and property as against action by the state? Due process does not require that the state provide the person with the most definitive procedures.[106] It does require, however, that the person be given a fair and impartial opportunity to appear and defend his life, liberty, or property before such interests can be infringed by coercive state action.

The constitutional test for determining how much process is due was articulated in *Matthews v. Eldridge*, which set forth a three point analysis a court must consider when deciding if a person has been deprived of life, liberty or property without due process.[107] The analysis requires a court to determine (1) the private interest at stake; (2) the risk of erroneous deprivation of that interest under current law; and (3) the government's interest and the burden it will sustain if the current law is altered.[108] In the paternal renunciation context, the child and the wrongfully named man have an interest in the accurate determination of the child's paternity. The risk of an erroneous paternity determination is virtually assured if DNA evidence of non-paternity is excluded from the record. Finally, the government has no legitimate interest in an inaccurate determination of paternity despite the financial burden it will incur if it fails to find the true biological father.

Before DNA paternity testing was available, paternity disputes were resolved by legal presumptions, estoppel, and finality doctrines that foreclosed the relitigation of paternity issues.[109] These constructs were legally justified because there was no better way to resolve the matter. Consequently, when paternity determinations were informed by the best available information, the legal father received as much process as was possible. The advent of DNA testing has changed the meaning of due process in the paternity context. The state's interest in adjudicating paternity and enforcing support obligations now must be redefined to recognize that advances in DNA technology have the ca-

97. RAMSEY & ABRAMS, *supra* note 82, at 367-73; *see also* MNOOKIN & WEISBERG, *supra* note 72, at 333 (noting that "if a wife can get personal jurisdiction over the husband, then the decree may be enforced like any other money judgment").

98. 18 U.S.C. § 228. The constitutionality of this Act was upheld in United States v. Crawford, 115 F.3d 1397 (8th Cir. 1997); *but see* United States v. Pillor, 387 F. Supp. 2d 1053, 1057 (N.D. Cal. 2005); United States v. Morrow, 368 F. Supp. 2d 863, 866 (C.D. Ill. 2005) (holding 18 U.S.C. § 228(b), which provides that "the existence of a child support obligation that was in effect for the time period charged in the indictment or information creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period" was unconstitutional).

99. RAMSEY & ABRAMS, *supra* note 82, at 372 (citing *In re* Petition for Disciplinary Action Against Giberson, 581 N.W.2d 351, 355 (Minn. 1998) (attorney's failure to pay child support resulted in suspension of law license)).

100. *See Little*, 452 U.S. at 9 (noting that state action undeniably pervaded the paternity determination case).

101. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides, in part, "no state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

102. *See Little,* 452 U.S. at 16.

103. *Id.* (citing Boddie v. Connecticut, 401 U.S. 371, 377 (1971)).

104. U.S. CONST. amend. XIV, § 1.

105. Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (noting that "due process is flexible and calls for such procedural protections as the particular situation demands").

106. *See id.*

107. 424 U.S. 319, 334-35 (1976); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 451 (1997).

108. *Eldridge*, 424 U.S. at 335.

109. *See* Kaplan, *supra* note 3, at 70-72.

pacity to contradict historically entrenched legal constructs about the truth of paternity. State action that bases paternity adjudications on outmoded legal constructs despite scientific proof to the contrary is like ignoring the elephant in the room. Such willful blindness to the evolving nature of truth denies both the child and the wrongfully adjudicated father a "meaningful opportunity" to defend their rights to an accurate determination of paternity.

IV. SOLUTIONS

A. Tragic Choices

Sometimes the business of law is line drawing - and sometimes line drawing yields tragic choices. The evolving right of paternal renunciation raises the inscrutable question of whether paternity is a socio-legal construct or is strictly a matter of biology. Inevitably, the law must choose what it values most - scientific facts or legal constructs. Legal constructs, such as the presumption of legitimacy, finality doctrines, and the best interest of the child standard, protect children from illegitimacy, financial hardship, and emotional abandonment. They maintain social stability and the consistent rule of law when the truth is unknowable or better alternatives are unavailable. However, when legal constructs foreclose recognition of scientific facts, the law is not trying to ascertain the truth. Rather, the law is acting as a conservator of social values in general, even when they no longer exist in fact.[110]

When the prevailing value is science, the role of the law is to accept factual accuracy, even when the facts are inconvenient or disruptive of the status quo.[111] Valuing scientific facts over legal constructs bars courts from substituting medieval legal fictions about families for the realities of twenty-first century familial relationships. The biological choice vindicates the wrongfully adjudicated father; it encourages the mother and welfare department to more accurately attempt to identify the true biological father; and it informs rather than misinforms the child about the truth of his or her biological heritage.

B. New Laws

Since 1997, nineteen states have enacted an assortment of statutes that attempt to provide legal solutions to the paternal renunciation dilemma.[112] Like the case law that preceded the statutes, these legislative models are inconsistent. For example, Louisiana permits paternity to be challenged within one year from when the father learns or should have learned of the child's birth;[113] Delaware, Illinois, and Washington permit two years;[114] Alaska and Minnesota permit three years;[115] Texas permits four years;[116] Colorado, New Jersey, Ohio, and Wyoming permit up to five years;[117] and Alabama, Arkansas, Georgia, Iowa, Maryland, Missouri, Montana, and Virginia do not place any time limits on paternity challenges.[118] Alaska and Virginia do not specify who can or cannot chal-

110. *Id.* at 75-76.

111. *Id.* at 79.

112. The states that permit paternal renunciation are Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Illinois, Iowa, Louisiana, Maryland, Minnesota, Missouri, Montana, New Jersey, Ohio, Texas, Virginia, Washington, and Wyoming. *See infra* notes 121-29.

113. LA. CIV. CODE. ANN. arts. 187-89 (Supp. 2006).

114. DEL. CODE ANN. tit. 13, § 8-607 (Supp. 2004); 750 ILL. COMP. STAT. 45/8(3) (2002) (provides putative father two years to challenge paternity after father has knowledge of "relevant facts" and does not permit two year window after child has reached age eighteen); WASH. REV. CODE § 26.26.530 (West 2005).

115. ALASKA STAT. § 25.27.166(b)(2) (2004) (provides for three years after birth or three years after father "knew or should have known" of birth, whichever is later.) ; MINN. STAT. ANN. § 257.57(1)(b) (West 2003) (provides for two years after man has "reason to believe" and no later than three years after birth.).

116. TEX. FAM. CODE ANN. § 160.607 (Vernon Supp. 2005) (provides for renunciation no later than child's fourth birthday, except: 1) when presumed father/mother did not live together nor did not have sex during the probable time of conception or 2) presumed father never held child out as his own. If either condition is met, renunciation is permitted at anytime.).

117. COLO. REV. STAT. ANN. § 19-4-107(1)(b) (West 2005); N.J. STAT. ANN, § 9:17-45(b) (1998) (provides for renunciation five years after child reached majority.); OH. REV. CODE ANN. § 3111.05 (LexisNexis 2003); (provides for renunciation five years after child reached majority.); WYO. STAT. ANN. § 14-2-807 (2005) (provides for renunciation no later than child's fifth birthday, except: 1) when presumed father/mother did not live together nor did not have sex during the probable time of conception or 2) presumed father never held child out as his own. If either condition is met, renunciation is permitted at anytime.).

118. ALA. CODE § 26-17-6(b) (LexisNexis Supp. 2005); ARK. CODE ANN. § 9-10-115(e)(1)(A) (Supp. 2005) (providing that a man who is adjudicated or deemed the father of a child without scientific testing, he is entitled to one scientific test to establish or refute paternity at any time during which he is required to pay child support); GA. CODE ANN. § 19-7-

lenge paternity;[119] Arkansas permits only adjudicated fathers to challenge paternity;[120] Maryland permits only fathers of non-marital children to challenge paternity;[121] Illinois, Iowa, and Minnesota permit the child, mother, and adjudicated father to challenge paternity;[122] Colorado, Delaware, and Wyoming permit the child, mother, adjudicated father, and welfare department to challenge paternity;[123] Missouri, New Jersey, Ohio, and Texas permit the child, mother, adjudicated father, welfare department, and the alleged biological father to challenge paternity;[124] Alabama, Montana and Washington permit any "interested party" to challenge paternity.[125] Georgia and Illinois require the adjudicated father to produce DNA proof of non-paternity as a prerequisite to filing the action.[126] Most other states, however, permit the court to order DNA testing after the paternal renunciation action has been filed.[127] Delaware, Iowa, Texas, and Wyoming rely primarily on the best interest of the child standard to determine whether to admit DNA evidence of non-paternity.[128] Conversely, Colorado, Georgia, Maryland, and Washington permit DNA to be admitted to prove non-paternity but also require courts to determine whether renunciation is in the child's best interests.[129] Most states, however, do not take into account the best interest standard when determining renunciation.[130]

C. Pandora's Box or Safety-Valve?

The overriding goal of paternal renunciation laws must be to minimize the risk of erroneous determinations[131] - if not of the past then in the future. That goal entails two tasks: making future paternity adjudications more accurate and providing safety-valve exceptions for relief from erroneous judgments.[132] While neither goal forecloses courts from using legal constructs to equitably distribute the burdens and benefits of paternity determinations, both goals require courts to recognize that DNA is relevant to that determination.

The law, however, is a blunt instrument that has the power to do harm even when it intends to do good. For example, to minimize the risk of erroneous paternity adjudications, the law could require DNA testing at all births, all divorces, all actions for child support, and all other adjudications of paternity. The law could criminalize paternity fraud and make perjurious misidentifications by women a criminal offense.[133] Although these remedies may encourage more accurate paternity determinations, they also invite excessive government intrusion into privacy and consensual relationships. Such draconian measures may be too high a price to pay for truth.

Another alternative may be private civil actions. For example, a wrongfully adjudicated father could file a paternity fraud or defamation action against the woman who misidentified

54 (2004); IOWA CODE ANN § 600B.41A(3)(a) (West 2001); MD. CODE ANN., FAM § 5-1038 (LexisNexis 2004); MO. STAT. § 210.826 (West 2004); MONT. CODE ANN. § 40-6-108(1) (2005); and VA. CODE ANN. §20-49.10 (West 2006).

119. ALASKA STAT. § 25.27.166 (2004); VA. CODE ANN. §20-49.10 (West 2006).

120. ARK. CODE ANN. § 9-10-115 (Supp. 2005).

121. Stubbs v. Colandrea, 841 A.2d 361, 369 (Md. Ct. Spec. App. 2004).

122. 750 ILL. COMP. STAT. 45/7(b) (West 1999); IOWA CODE ANN. § 600B.41A(3)(a)(1) (West 2001); MINN. STAT. ANN. § 257.57(1) (West 2003).

123. COLO. REV. STAT. ANN. § 19-4-107(1) (2003); 13 DEL. CODE ANN. tit. 13 § 8-602 (Supp. 2004); WYO. STAT. ANN. § 14-2-802 (2005).

124. MO. ANN. STAT. § 210.826 (2004); N.J. STAT. ANN. § 9:17-45(a) (West 2005); OHIO REV. CODE ANN. § 3111.04(A) (LexisNexis 2003); TEX. FAM. CODE ANN. § 160.602 (2002).

125. ALA. CODE § 26-17-6(b) (1992); MONT. CODE ANN. § 40-6-107(1) (2005); WASH. REV. CODE ANN. § 26.26.530 (West 2005).

126. GA. CODE ANN. § 19-7-54 (2004); 750 ILL. COMP. STAT. 45/(5-b) (2005).

127. *See, e.g.*, ARK. CODE ANN. § 9-10-115(e)(1)(A) (2002); MONT. CODE ANN. § 40-6-112 (2005).

128. DEL. CODE ANN. tit. 13 § 8-608 (Supp. 2004); IOWA CODE ANN. § 600B.41A(6)(a)(2) (2001); TEX. FAM. CODE ANN. § 106.608 (Vernon 2002); WYO. STAT. ANN. § 14-2-808 (2005).

129. COLO. REV. STAT. ANN. § 19-4-105(2)(a) (2005); GA. CODE ANN. § 19-7-54 (2004); MD. CODE ANN., FAM. LAW § 5-1038 (LexisNexis 2004); WASH. REV. CODE ANN. § 26.26.535 (2005).

130. *See, e.g.,* ALASKA STAT. § 25.27.166(c) (2004); ARK. CODE ANN.§ 9-10-115(f)(1) (2002); MO. ANN. STAT. §210.834(4) (2004); OHIO REV. CODE ANN. § 3111.09(D) (LexisNexis 2003); VA. CODE ANN. §20-49.10 (2001).

131. *See Langston,* 754 A.2d at 405-06 n.15 (citing Jane Bowling, *Forcing Paternity in the Name of Finality and Expediency,* DAILY RECORD, Nov. 12, 1994)

132. *See id.*

133. *See, e.g.*, IND. CODE § 16-37-21 (2002); LA. REV. STAT. ANN. § 14:125.2 (2004); MISS. CODE ANN. § 93-9-37 (1999); R.I. GEN. LAWS § 15-8-22 (2003).

him.[134] Such relief, however, would be limited to monetary damages - payable only if the woman has money. The suit could not disestablish the man's paternity because only the state, not private parties, can provide that relief. Or, the child whose paternity has been disestablished could bring a private tort action for paternity fraud - but against whom? The state for wrongful adjudication? The mother for misidentification? The adjudicated father for breach of promise? The biological father for abandonment? A right without a meaningful remedy is not a viable solution.

Another solution is the one with which nineteen states are currently experimenting - safety-valve legislation that permits wrongfully adjudicated men to obtain relief from erroneous adjudications.[135] Many states are reluctant to enact these statutes for fear that they will open a Pandora's Box of renunciation cases and consequences. However, safety-valve legislation permits but does not require aggrieved men to challenge prior paternity determinations.[136] Without safety-valve legislation, men may be compelled to seek DNA tests upon the births of their children or the dissolution of their marriages lest they be foreclosed forever from making such challenges. Those consequences may cause more harm to more children then the purported harms of safety-valve legislation.

V. CONCLUSION

The application of DNA to paternity determinations has had a profoundly disruptive effect on historically entrenched legal constructs of "fatherhood." Many men who believed they had fathered children now know that they did not. When some of these men try to renounce their paternal obligations for these children they find, despite DNA proof of non-paternity, that the legal designation of "father" is immutable. The resulting conflict between legally binding adjudications of paternity and subsequent DNA revelations of non-paternity pit man against child, man against woman, and man against state. The role of the law is to choose which set of truths - legal or scientific - to accept as final and conclusive proof of paternity. Although the values and methodologies for making this choice are currently in dispute, it is indisputable that there will be no painless resolution of the conflict.

134. *See, e.g., Day*, 653 N.W.2d at 479 (declining to recognize a cause of action for fraud or assumpsit against a women for misrepresenting who is biological father of her child); *but see* Kohl v. Amundson, 620 N.W.2d 606, 607 (S.D. 2001) (holding mother must repay child support paid to her by misidentified father); NCFM Press Release, *supra* note 32.

135. *See* statutes, *supra* notes 113-20, 122-30, 133.

136. *See, e.g.*, GA. CODE ANN. § 19-7-54 (2004); WASH. REV. CODE ANN. § 26.26.535 (2005); MD. CODE ANN., FAM. LAW § 5-1038 (LexisNexis 2004).