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WHY TRUTH IS NOT A DEFENSE IN PATERNITY ACTIONS†

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We are all bastards,
And the most venerable man which I
Did call my father, was I know not where
When I was stamp'd.

—WILLIAM SHAKESPEARE, CYMBELINE, act 2, sc. 5.

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I. Introduction

Legal presumptions substitute for facts that cannot be definitively proved or disproved. Presumptions that once provided efficient and effective resolutions of complex social issues, over time, may become facile substitutes for the truth. How should the law respond when advances in scientific knowledge establish that what was presumed to be true is scientifically false?

A contemporary example of this dilemma arises in the paternity context. In the absence of scientific proof to the contrary, courts dating back to the Middle Ages have employed presumptions to limit or bar the introduction of evidence to ascribe paternity. Current developments in genetic testing, however, can prove or disprove paternity and, thereby, call into question the validity of such presumptions. Consequently, courts must decide whether to preserve presumptions of paternity and legitimacy that protect children from bastardy or to yield to scientific advances that, over time, may leave us with more questions than answers.

The presumption of legitimacy holds that a child born during a marriage is the legal issue of both spouses.[1] This presumption was a fundamental principle of English common law that could be rebutted only by proof of the husband's impotence, sterility, or non-access to the wife.[2] According to Blackstone, non-access could be proven only "if the husband be out of the Kingdom of England or beyond the four seas for above nine months."[3] Additionally, 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."[4]

The social benefits served by this presumption were manifold. First and foremost, the presumption protected the legitimacy of children, which in turn entitled them to the financial support, inheritance rights, and filiation obligations of their parents.[5] It prevented children from becoming wards of the state so that neither king, nor church, or taxpayer was forced to provide for them.[6] It prevented a third-party putative father from insinuating himself onto an intact family by claiming to have sired one of the

1. *In re* Findlay, 170 N.E. 471, 473 (N.Y. 1930).

2. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (citing H. NICHOLAS, ADULTURINE BASTARDY 1, 9-10 (1836)).

3. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 456 (1826).

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

5. 491 U.S at 125. *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) (discussing the loss of right of support and inheritance from fathers if children were illegitimate).

6. 491 U.S. at 125. *See also* JENNY TEICHMAN, ILLEGITIMACY: AN EXAMINATION OF BASTARDY 54 (1982).

family's children.[7] It helped to maintain the stability of the family at a time when divorce was rare and spouses stayed married notwithstanding other social relationships. The presumption also served the judicial system by allowing courts to cut off debates between irate parents about the biological origins of their children at a time when doubts about a child's genetic origins were more a matter of suspicion than science.[8]

The presumption of legitimacy, like other legal presumptions, provides a consistent and explicit rule of law that enables courts to operate efficiently and private persons to order their private affairs with a clear understanding of the legal consequences of such undertakings. When a presumption is irrebuttable, no factual inquiry challenging the truth of the presumed fact may be entertained by the court. When a presumption is rebuttable, some factual debate as to the truth of the assumed fact is allowed. In the case of the presumption of legitimacy, the factual inquiry is limited to a few exceptions that are difficult to prove. Failure to provide such proof means that the presumption stands.

Presumptions, as legal reality principles, have their costs. For example, one thing that most people know for certain is that no one can know anything for certain. At best, one can make reasoned guesses, some of which may be right and some of which may be wrong. Presumptions, however, defy the truth of the proposition that nothing can be known for certain, for even if there is an abundance of evidence to dispute the presumed fact, the presumption bars the court from hearing such evidence. Presumptions, then, are legal constructs that serve values other than determining the truth of a particular matter. When a presumption is legally recognized, there is always something other than truth-seeking taking place. Instead, presumptions find their justification in the protection of

7. 491 U.S. at 121-30 (finding that the statutory presumption of legitimacy estopped putative father from challenging husband's paternity because under statute only mother or husband could rebut presumption; although the Court was unable to agree on an opinion, five justices agreed that the statute did not infringe the due process rights of the putative father). *See also* Ettore I. v. Angela D., 127 A.D.2d 6, 14-15 (N.Y. App. Div. 1987) (holding that the presumption of legitimacy estopped putative father from challenging husband's paternity because parent-child relationship existed between husband and child and because disproving husband's paternity would not be in child's best interest); Brinkley v. King, 701 A.2d 176, 179 (Pa. 1997) (holding that the presumption of legitimacy is irrebuttable as against a third party's assertions of paternity when the child is born of an intact marriage); John M. v. Paula M., 571 A.2d 1380, 1388 (Pa. 1990) (holding that putative father cannot invoke Uniform Act on Blood Tests to compel husband to undergo blood tests to disprove his paternity).

8. Brinkley v. King, 701 A.2d 176, 180 (Pa. 1997) (stating that the purpose of the presumption of legitimacy is to prevent marriages from being destroyed by disputes over the parentage of the children born to the marriage).

social values that sustain order and regularity and that are deemed to be more important than truth.

Sometimes legal presumptions maintain order and regularity to a degree that greatly taxes their utility as reality principles. The presumption of legitimacy, for example, starts with a given fact–marriage–and ends with a conclusion about a different fact–paternity of the issue of that marriage. Consequently, it is possible that in one case, a judge may both grant the husband a divorce on the ground of the wife's adultery and also, relying on the presumption that all children born during a marriage are the legitimate issue of that marriage, order the same husband to pay support for the child conceived as a result of the adultery.[9] To the public, this result is confusing, if not offensive, because the presumption requires acquiescence to a conclusion that is false. Adherence to a presumption under these circumstances taxes our tolerance for legally fabricated truths and renders the law an object of scorn and derision in the eyes of the public.

Until recently, American courts consistently have upheld the presumption of legitimacy. Now, however, courts increasingly are encountering credibility problems as they attempt–or avoid attempting–to reconcile the presumption of legitimacy with current advances in forensic science. Currently, genetic testing can establish to a 99.85% certainty that a particular man is *not* the father of a particular child.[10] It can also establish to a 99.99999% certainty that a particular man *is* the father of a particular child.[11] Today, DNA testing when combined with other genetic marking tests[12] can establish scientific facts that only could have been guessed at ten years ago.

As a consequence, the conflict between scientific truth and legal truth has become very disturbing. When a legal presumption is no longer consistent with the social values that previously justified its use, the presump-

9. *See* Richard B. v. Sandra B., 209 A.D.2d 139 (N.Y. App. Div. 1995) (holding husband estopped to deny legitimacy of child born to the marriage but conceived of an adulterous affair despite his suit for divorce on grounds of adultery).

10. 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) ("When combined with other genetic marking tests, such as standard blood grouping tests and HLA tests, the Probability of Paternity can be raised to a Paternity Index of over a hundred million to one, or above 99.999999 percent."). *See also* Heather Faust, *Challenging the Paternity of Children Born During Wedlock: An Analysis of Pennsylvania Law Regarding the Effects of the Doctrines of Legitimacy and Paternity by Estoppel on the Admissibility of Blood Test to Determine Paternity*, 100 DICK. L. REV. 963, 967 (1996).

11. *See* Shapiro et al., *supra* note 10, at 29. *See also* Faust, *supra* note 10, at 967.

12. *See* Shapiro et al., *supra* note 10, at 19-37 (explaining the variety of genetic marking tests, the scientific methods by which they are performed, and the precision of their results); Faust, *supra* note 10, at 967 (explaining paternity indices and their methodologies and predictive values).

tion becomes simultaneously both true and false. The incongruity between law and science invites conflict rather than constancy as the presumption obscures rather than answers the questions it was created to resolve: What is a father? Is fatherhood a biological question or a socio-legal construct? Should courts uphold legal constructs that conflict with scientific facts that may be highly disruptive of our social order? American courts have responded to the scientific assault on the presumption of legitimacy with three very different models of reality. The three views represented by these models are either extreme and unforgiving or highly discretionary and subjective.

II. The Pennsylvania Model

The oldest model upholds the presumption of legitimacy subject to the common law defenses of sterility, impotence, or non-access.[13] However, even if the husband successfully can rebut the presumption on one of these grounds, the court may still exclude DNA evidence of non-paternity under the doctrine of paternity by estoppel.[14]

Paternity by estoppel is derived from the doctrine of equitable estoppel. Equitable estoppel bars a person who made a misrepresentation from denying the truth of that statement if doing so would harm another person who relied on the representation to his detriment.[15] Typically, the person who is penalized by the imposition of equitable estoppel is the party who *made* the misrepresentation–not the party who *relied* on the misrepresentation.

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13. *See* BLACKSTONE, *supra* note 3; JAMES SCHOULER, A TREATISE ON THE LAW OF DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, SEPARATION AND DIVORCE 305 (3rd ed. 1882).

14. 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, nor will the child's mother who has participated in this conduct be permitted to sue a third party for support, claiming that the third party is the true father. . . . the doctrine . . . is aimed at "achieving fairness as between the parents by holding them, both mother and father, to their prior conduct regarding the paternity of the child."

(footnote and citation omitted). *See also* John M. v. Paula M., 571 A.2d 1380, 1386 (Pa. 1990) (stating that once the party asserting paternity by estoppel satisfies the burden of proving that the child was born during the course of the marriage, the blood tests become irrelevant because paternity is automatically established by the estoppel).

15. BLACK'S LAW DICTIONARY 632 (4th ed. 1972) defines equitable estoppel as follows: "The species of estoppel which equity puts upon a person who has made a false representation or concealment of material facts, with knowledge of the facts, to a party ignorant of the truth of the matter, with the intention that the other party should act upon it, and with the result that such party is actually induced to act upon it, to his damage."

Paternity by estoppel is both similar to and different from equitable estoppel. Like equitable estoppel, paternity by estoppel bars a married man from denying the legitimacy of a child born to his marriage if he represented to the child or to the world that he was the child's father;[16] if he developed an emotional relationship with the child[17] or provided financial support for the child;[18] or if he prevented the child from developing a relationship with his or her true biological father.[19] Unlike equitable estoppel, which penalizes the offending party, paternity by estoppel penalizes an innocent party–the husband–to avoid penalizing another innocent party–the child. The husband has not knowingly or intentionally induced the child's reliance on his misrepresentation of paternity because the husband, too, has been induced to rely on the misrepresentation of paternity perpetrated by his wife. However, paternity by estoppel prevents the husband from rebutting the presumption of legitimacy since once the husband is estopped to deny his parentage, biological evidence of non–paternity becomes irrelevant. The wife, in turn, is barred from testifying that she fraudulently induced one man to assume the parenting obligations of another man, because under paternity by estoppel, the wife's deceit is as irrelevant as the husband's DNA.

This model is well represented in the case of *Miscovich v. Miscovich*,[20] decided by the Superior Court of Pennsylvania in 1997. In 1986, Gerald and Elizabeth Miscovich married. The following year, Elizabeth gave birth to a son. Four years later, Gerald and Elizabeth divorced. The divorce decree included terms for payment of child support. Gerald did not

16. Mancinelli v. Mancinelli, 203 A.D.2d 634 (N.Y. App. Div. 1994) (holding husband estopped to deny paternity of child born of his marriage because he developed relationship with child notwithstanding his suspicion that he might not have been the child's father prior to her birth). *See also* McCue v. McCue, 604 A.2d 738 (Pa. Super. Ct. 1992) (holding wife estopped to deny paternity of husband who financially supported child born of the marriage); Gullan v. Fitzpatrick, 596 A.2d 851 (Pa. Super. Ct. 1991) (holding mother estopped to deny ex-boyfriend's paternity because she held out to the world that he was the father).

17. Zadori v. Zadori, 661 A.2d 370, 373 (Pa. Super. Ct. 1995) (holding father estopped to deny paternity of child born to marriage and with whom he had established a child-parent relationship).

18. *Id.*; Chrzanowski v. Chrzanowski, 472 A.2d 1128, 1132 (Pa. Super. Ct. 1984) (holding husband estopped to deny paternity of child born of marriage notwithstanding stipulation of lack of sexual intercourse with wife, wife's admission that husband was not the biological father, and blood test results establishing that husband had no genetic link to child, because husband parented child for three years during which he financially supported child). *See also* McCue v. McCue, 604 A.2d 738 (Pa. Super. Ct. 1992).

19. K.B. v. D.B. & another, 639 N.E.2d 725, 730 (Mass. App. Ct. 1994) (stating that the application of estoppel may be based on a finding that there was once an opportunity to pursue a relationship with the natural father that has now been lost (citing Miller v. Miller, 478 A.2d 351, 358-59 (N.J. 1984))).

20. 688 A.2d 726 (Pa. Super. Ct. 1997).

challenge his paternity of the child during that proceeding.[21] Two years later, Gerald observed that although he and Elizabeth had blue eyes, the child had brown eyes.[22] Doubting his paternity, Gerald had DNA tests performed on himself and the child. The tests conclusively established that Gerald had no genetic relationship to the boy. A few weeks later, Gerald informed the child that he was not his father and discontinued all contact with him.[23]

Eventually, Elizabeth filed a support action against Gerald on behalf of her son. The court applied the presumption of legitimacy and found that Gerald had not rebutted it with proof of impotence, sterility, or non-access.[24] The court ruled that despite the facts of Elizabeth's deceit, the termination of the family as an intact social unit, and the demise of the father-child relationship, Gerald was estopped to deny his paternity of the child.[25] The estoppel not only barred Gerald from disputing his financial obligations to the child but also rendered irrelevant the DNA tests that disproved his paternity.[26]

Not surprisingly, Gerald felt that he had been a serial victim in the perpetration of multiple frauds. First, he was betrayed by an adulterous wife, who then duped him into assuming the parenting obligations of another man. Next, Gerald was ordered to pay child support by a court that chose to uphold the obviously false assertion that he was the child's father. One might pause to ask why Gerald was the villain in this scenario. Here is the court's answer:

> We recognize that there is *something disgusting* about a husband who, moved by bitterness toward his wife, suddenly questions the legitimacy of her child whom he had been accepting and recognizing as his own . . . . Where the husband has accepted his wife's child and held it out as his own over a period of time, he is estopped from denying paternity.[27]

Under the estoppel model, the self-perceived role of the court is to protect the social institutions of marriage and families, in general, even when they no longer exist in fact; and children, in particular, who are not only the innocent victims of their parents' indiscretions but also are least capable of bearing the costs of their own upbringing. The biological facts,

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21. *Id.* at 727.
22. *Id.* at 727 n.1.
23. *Id.* at 727.
24. *Id.* at 733.
25. *Id.*
26. *Id.* at 729-33.
27. *Id.* at 732 (emphasis added) (quoting Goldman v. Goldman, 184 A. 2d 351, 355 (Pa. Super. Ct. 1962)).

no matter how scientifically compelling, are irrelevant to this view of the court as the conservator of social values. Instead, the children are treated like marital obligations that, upon divorce, are distributed equitably between the spouses, regardless of which spouse incurred the obligation.

III. The Massachusetts Model

Massachusetts has taken a wholly different approach to resolving the "nature versus nurture" paternity question. Unlike Pennsylvania, where fatherhood is a socio-legal construct, in Massachusetts, fatherhood is strictly a matter of biology.

In 1994, the Appeals Court of Massachusetts decided the case of *K.B. v. D.B. & another.*[28] K.B., the husband, and D.B., the wife, were married in 1977.[29] They had unprotected sexual relations until they separated in 1979.[30] In late January of 1980, D.B. had a sexual relationship with another man. A few weeks later, at D.B.'s insistence, K.B. and D.B. met and spent the night together. Three days later, D.B. told K.B. that she was pregnant. Based on the three-day interval between relations and announcement of pregnancy, K.B. doubted that he had fathered the child.[31]

Nonetheless, "by the end of the pregnancy," K.B. had decided "to play the role of father to the child known as Sally."[32] He attended Sally's birth, appeared as the father on Sally's birth certificate, gave Sally his last name, arranged for Sally's baptism, and selected her godfather. He purchased Christmas, birthday, and other presents for Sally. He addressed cards to "My Dearest Daughter" and signed them "Love, Daddy." K.B. signed Sally's school application and frequently took Sally to visit his relatives on weekends. Although the three never lived together as a family, K.B. allowed D.B. and Sally to live in his apartment while he stayed elsewhere. K.B. also provided a small amount of financial support to supplement Sally's welfare payments.[33]

When the Department of Revenue filed a nonsupport action against K.B., the court ordered blood tests that conclusively established that K.B. was not Sally's father.[34] At that point, K.B. renounced his relationship with Sally and sued her mother for divorce.[35] Sally was then six years old; by the time the case finally was decided, Sally was fourteen.

28. 639 N.E.2d 725, 730 (Mass. App. Ct. 1994).
29. *Id.* at 726 n.31.
30. *Id.* at 726.
31. *Id.*
32. *Id.* at 727.
33. *Id.*
34. *Id.* at 726-27.
35. *Id.*

As a threshold matter, the court ruled that the blood tests were admissible to establish K.B.'s paternity.[36] Consequently, the court never addressed the efficacy of the presumption of legitimacy. In fact, the only issue addressed by the court was the Department of Revenue's argument that K.B. should be estopped to deny his paternal obligations to Sally because he had established a parent-child relationship with her.[37] In rejecting the estoppel argument, the court said, "A married man should have no duty to support a child born to his wife during their marriage but fathered by another man, any more than a wife should have a duty to support a child fathered by her husband during their marriage but born of another woman."[38]

The court framed the question as involving two issues, one a matter of law and one a matter of policy. The court stated that as a matter of law, paternity by estoppel did not apply because Sally had suffered no legally recognized detriment.[39] The court reasoned that although K.B.'s representation to Sally that he was her father and Sally's acceptance of him as such may have satisfied the representation and reliance elements of paternity by estoppel, Sally, like most children in her situation, was benefited rather than harmed by K.B.'s provision of financial support to her.[40] The court was unimpressed that when K.B. renounced his relationship with her, Sally was six years old and, therefore, old enough to appreciate her relationship with her father.[41] The court noted that prior cases had refused to apply estoppel only when the child was too young to appreciate a meaningful relationship with his or her father and, therefore, too young to suffer a legally redressable injury.[42] However, the court rejected those cases on the ground that such age considerations "would make the exception the rule and the 'rule' applicable only to one and two year olds."[43] So finding, the court ruled as inadmissible any evidence suggesting that loss of the paternal relationship could cause psychological harm to the child.[44] In sum, the Massachusetts court completely rejected, as a matter of law, the proposi-

36. *Id.* at 728 n.4.

37. *Id.* at 730. *See also* C.C. v. A.B., 550 N.E.2d 365 (Mass. 1990) (eliminating the conclusive presumption of legitimacy).

38. K.B. v. D.B. & another, 639 N.E.2d 725, 727 (Mass. App. Ct. 1994) (citing Symonds v. Symonds, 432 N.E. 2d 700 (Mass. 1982)).

39. *Id.* at 728-29, 731.

40. *Id.* at 728-29 ("[I]t is rarely found that the husband's past provision of financial support has worsened the wife's and child's claim on other sources of support . . . .").

41. *Id.* at 731.

42. *Id.* at 729 & n.6 (citing A.R. v. C.R., 583 N.E. 2d 840 (Mass. 1992) (expressing doubt that children ages two and one "relied in any meaningful sense on any representation of paternity that the husband may have made")).

43. *Id.* at 731.

44. *Id.* at 731 n.12.

tion that severance of a parent-child relationship upon which a child had relied as a source of identification, love, and social and financial support could satisfy the "detrimental reliance" requirement of paternity by estoppel.[45]

The court also found as a matter of policy that paternity by estoppel was inconsistent with Massachusetts' interest in strengthening the family, "the basic unit of civilized society."[46] The court framed this issue as a choice between two views of the state's role in "fostering the raising of illegitimate children within the protective wing of the family unit."[47] According to the court, the policy that recognized estoppel chose in favor of children because of their loss of paternity, legitimacy, and financial support.[48] The policy that rejected estoppel chose in favor of husbands because they had "voluntarily" assumed "the role of the father to illegitimate children born to their spouses."[49] The court favored the latter policy because it "encouraged" husbands to assume fathering responsibilities of their "step children," if only temporarily, unlike the former policy, which "discouraged" husbands from assuming such obligations for fear "of becoming permanently financially obligated for child support."[50] The court concluded not only by ruling in favor of K.B. but also by ordering the Department of Revenue to reimburse him for all of his prior support payments.[51]

The Massachusetts approach appears harsh enough to be characterized as announcing "the best interests of the husband" test. Initially, the result appears to be inconsistent with the court's concern of upholding the sanctity of the family since it encourages rather than discourages husbands who wish to disaffirm their paternal status. Upon examination, however, the Massachusetts approach to resolving paternity disputes does have some redeeming social values.

First, it is interesting to note that the caption of the case is "K.B. v. D.B. & another." "Another" is the Massachusetts Department of Revenue, which drove this case into the courts in order to increase K.B.'s child support payments for Sally. In so doing, the Department also drove a wedge between K.B. and Sally because it was that action that precipitated K.B.'s decisions to renounce his relationship with Sally and divorce her mother.

45. *Id.*
46. *Id.* at 728.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* (quoting *In re* Marriage of A.J.N. & J.M.N., 414 N.W.2d 68 (Wis. Ct. App. 1987)).
51. *Id.* at 731.

There is, of course, another "another" in this story: the biological father. Though never named, the opinion makes numerous references to the court's concern that the financial costs of Sally's upbringing should be borne by her biological father.[52] Perhaps, by refusing to play ostrich and ignore the reality of such man's existence, somewhere, the court was trying to force the mother to identify the biological father so that the Department of Revenue could proceed against him rather than against the man who just happened to be the most conveniently available at the time of the child's birth. Under this approach, the role of the court is to find the truth, even if the truth hurts, because it is inconvenient or disruptive of the status quo. The Massachusetts approach tolerates no sixteenth-century legal fiction about the social conditions of the twenty-first-century family. Instead, Massachusetts recognizes that the "family unit" has undergone such significant reformulations in contemporary American society that the only "truths" to which such families should be subject in a court of law are truths that conform to contemporary realities. Hence, biological facts are not only relevant to the issue of paternity, they are dispositive.

The winners when biological facts are raised above legal fiction are the court system, whose hands are not sullied by the frauds and follies of the parties, and the former husband, who is not burdened with the financial or social responsibilities of providing for another man's child. Another winner, of course, is the biological father, whose entire role in this scenario is to be unavailable for any purpose other than procreation. The losers are the child, who is left without financial support, paternity, or legitimacy, and the welfare department, which must now apply its bureaucratic muscle against the mother's silence to ascertain the identity of the biological father.

IV. The New York Model

The third model for determining the "nature versus nurture" paternity issue is represented by the New York approach. New York courts frame the issue as an effort to reconcile the legal presumption of legitimacy with the psychological presumption that it is in a child's best interest to know the identity of his or her biological father.

Under New York law, the presumption of legitimacy can be rebutted with DNA tests that conclusively exclude the former husband as the father

52. *Id.* at 727, 730 ("The obligation to support a child primarily rests with the natural parents . . . .").

of the child.[53] Conversely, New York courts also recognize paternity by estoppel, which excludes scientific evidence of non-paternity.[54] However, under New York law, neither the presumption, nor the DNA tests, or the estoppel doctrine is regarded as absolute. Instead, each evidentiary value is factored into a determination that is intended to meet the best interests of the child.[55] Consequently, New York courts will admit or exclude DNA tests and will apply or not apply the presumption of legitimacy or the estoppel doctrine based on whether such information will assist the court in arriving at a resolution that serves the best interests of the child.[56] Hence, if a substantial parent-child relationship has developed between the husband and the child and no biological father is available to tag with the costs of the child's upbringing, the New York courts may find that it is *not* in the child's best interests to admit DNA evidence that disproves the husband's paternity.[57] Similarly, even if the biological father is available, New York courts may exclude DNA evidence that proves the biological father's paternity or that disproves the husband's paternity on the ground that forcing a father-child relationship on the unwilling parties would be detrimental to the child.[58]

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53. *See* Robert L.A. v. Sharon A.R., 185 A.D.2d 977 (N.Y. App. Div. 1992); Queal v. Queal, 179 A.D.2d 1070 (N.Y. App. Div. 1992) (holding blood tests admissible to determine if former husband is child's biological father).

54. Richard B. v. Sandra B., 209 A.D.2d 139 (N.Y. App. Div. 1995).

55. *See* Ettore I. v. Angela D., 127 A.D.2d 6 (N.Y. App. Div. 1987); *In re* Sandy M. v. Timothy J., 138 Misc. 2d 338 (N.Y. Fam. Ct. 1988); Vito L. v. Filomena L., 172 A.D.2d 648, 650 (N.Y. App. Div. 1991) (stating the paramount concern of the court is the best interests of the child).

56. 185 A.D.2d 977 (holding that blood tests are admissible to rebut presumption of legitimacy only if in the best interests of the child). *See also* N.Y. FAM. CT. LAW §418 (McKinney 1998) (stating that blood tests may be excluded on the basis of res judicata, estoppel, the presumption of legitimacy, or if such tests would not be in the best interests of the child).

57. Vito L. v. Filomena L., 172 A.D.2d 648, 651 (N.Y. App. Div. 1991) ("[T]he effect of the [paternity] tests would only confirm the presumption of legitimacy or rebut the presumption without establishing the identity of the natural father. No purpose would be served by branding the child 'illegitimate' and depriving her of the only father she has ever known."). *See also* Mancinelli v. Mancinelli, 203 A.D.2d 634 (N.Y. App. Div. 1994) (holding blood test inadmissible to rebut presumption of legitimacy by former husband because he held himself out as the father to the child and to the world); Ettore I. v. Angela D., 127 A.D.2d 6 (N.Y. App. Div. 1987).

58. *See* 127 A.D.2d 6 (holding biological father estopped from establishing paternity of child born to intact marital family where both husband and wife objected to his establishing a relationship with the child); *In re* Sandy M. v. Timothy J., 138 Misc. 2d 338 (N.Y. Fam. Ct. 1988) (holding that when both mother and biological father object, judicially imposed parent-child relationship is not in the child's best interests; however, if the putative father is available and there is neither a biological father nor a husband who has established a rela-

Has New York made the most appropriate Solomonic choice? Legal positivists would disapprove of the best-interests model because it substitutes subjective, sentimental analysis for the certainties that inure from the rule of law. Rather than placing a premium on the best interests of the child, positivists would argue that the proper role of the courts is to state clearly the legal rules as to conduct and consequences so that people can knowingly conform their behavior to comply with such legal requirements. A best-interest-of-the-child analysis leaves everyone in doubt until the judge waves her magic wand in one direction or another.

On the other hand, the New York approach has created a triage of priorities that places the best interests of the child above all other interests–husband, biological father, welfare system, judicial system–unlike that of Massachusetts, which places a premium on the husband's interests, or that of Pennsylvania, which places a premium on the judicial system's interests. Under the New York approach, the best-interests analysis takes the moral sting out of the court's fact-finding determination by untethering the judiciary from moralistic reality principles that may not hold true in contemporary society. Instead, the court acts as the arbiter of social values for the sole purpose of protecting the child. It can recognize or reject the presumption of legitimacy, the estoppel doctrine, or genetic evidence of paternity in order to achieve the overriding goal of protecting the best interests of the child.

V. Conclusion

Today, the science of genetics is challenging legal constructs that protect children from bastardy and families from state intrusion. What if tomorrow scientific advances reveal that first-trimester fetal life has high cognitive capability or that race-specific genes inhibit or promote intellectual potential? Should the law uphold time honored legal "truths" that affirm our social order at the risk that we will cleave to the notion that the earth is flat when it is really round? Or should the law yield to scientific "truths" that disrupt our social order and leave us, perhaps, with yet more illusions that we mistake for the truth?

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tionship with the child, then evidence of putative father's non-paternity is admissible if in child's best interests).