Adam and Eve sitting in a tree, k-i-s-s-i-n-g. First comes love. Then comes marriage. Then comes Cain and Abel in the baby carriage. The schoolyard ribbing describes the vision of the ideal family situation — two parents with two children, living happily ever after. That is, as long as there is no reason to question the biological paternity of Cain and Abel. As long as Adam is sure Cain and Abel are his biological offspring — that they look like him — he should have no reason to question their paternity. That is how it is supposed to be. That way, daddy can be sure his little boys really are his.

This sentiment is not really new at all. It is the driving force behind paternity fraud laws and court decisions in many states that allow fathers to use the lack of a biological relationship with their children to defeat claims for child support under the guise of determining the privileges and responsibilities of paternity. Some fathers want it both ways — they want the legal right to play daddy but they also want to trump the responsibilities that go along with fatherhood — child support.

I told [the children] I was still their daddy, and I loved them as much as the day they were born — the only thing that was different was I was not their birth father....I would still like to go on doing things for them, directly, but I don't see why I

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1 “Fatherhood,” “Father” and “Paternity” are used interchangeably because, although this article takes a critical look at the courts’ and legislatures’ rhetoric, it is this author’s contention that the truth in identifying a father is equivalent to determining fatherhood and paternity.
should be writing checks to a woman who deceived me all those years. ²

The man behind this bitter-sweet declaration, attempting to disestablish his paternal relationship with three of his four children, along with other vocal fathers³ fighting for the skewed perspective once biology excludes them from the child’s gene pool, are no longer fathers of the children they raised, they have become poster children for the proponents of a biological preference in paternity legislation.⁴ The biological preference in paternity fraud and related laws promotes a conclusive presumption of non-paternity when there is no biological connection between the father and the child, regardless of the marital status of the man at the time of the child’s birth or the parent-child relationship. Mr. Wise’s story, a tale of a marriage in which marital infidelity resulted in three of the couple’s four children being genetically unrelated to the husband, is becoming more common in the era of for better or better.⁵ Mr. Wise, like many of the proponents of legislative change, wants to remove res judicata and related laws making paternity adjudications final, blocking post- and pre-judgment genetic exclusions. Mr. Wise wants his children in his life and not just in his pocketbook because he was not the sperm donor when they were conceived.

The biology preference in the form of paternity fraud laws and related statutes exists only in a minority of states, whereas the marital presumption still exists in a majority of states. The marital or legitimacy presumption assumes that a child born or conceived

³ See Lisa Sandberg, DNA doesn’t define ‘dad’, SAN ANTONIO EXPRESS-NEWS, April 21, 2002, calling Wise the “poster boy for the emerging father’s rights movement.” See also Nicholas Riccardi, DNA Shakes Up Child Support Law Rights: System is challenged by men forced to pay for children who are not theirs, LOS ANGELES TIMES, April 15, 2002 (calling Caron a “child-support celebrity”).
while the parents were married or cohabitating is the biological offspring of the husband or male cohabitatere. The presumption, however, only applies to certain types of families. These are families where the parents were married, tried to get married, or cohabitated with the child, and the father held the child out as his biological child. It does not apply to many types of nontraditional families, such as families where the couple never marries, legally cannot marry as in same-sex families, or either fail to live together at all or do not live together once the child is born but maintain a family. Therefore, even in states that have the marital presumption, not all families are protected against biological-based paternity challenges.

Because nontraditional families are becoming more prevalent, we are headed towards a society where the biological preference is in our future if there is no limit to the biological privilege. A biology-based paternity system will destroy the American family, traditional and otherwise, because it eliminates familial certainty. A family cannot survive without the certainty of its existence. When parents divorce, the family structure changes, but the sense of family that the children have can remain intact. If biology-privilege laws allow a father, who raises a child for five or ten years, to leave the family as he leaves the wife, it replaces what little familial certainty the child has left — the identity of his parents.

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7 Id.
Ironically, the use of biology in determining paternity under the marital presumption was designed to create certainty where scientific medicine could not. Biology has been the preferred basis of paternity determinations since the beginning of time. Biology as a defense to paternity issues, which typically arise in child support or custody suits, is also not new. It is the foundation upon which paternity, support, inheritance and related privileges and responsibilities are based. Before DNA\textsuperscript{8} testing, there was Human Leukocyte Antigen testing, and, before that, there was blood typing. Before that, there was bald eagle evidence, which allowed the parent to offer evidence of the child's likeness to the father, or lack thereof, as a basis for establishing or contesting paternity.\textsuperscript{9} If the child looks like the father, sounds like

\textsuperscript{8}Deoxyribonucleic Acid.

\textsuperscript{9}See Jeffries v. Moore, 559 S.E.2d 217 (N.C. App. 2002), cert. granted 565 S.E.2d 665 (N.C. 2002), cert. denied 576 S.E.2d 323 (N.C. 2003); Brown v. Smith, 526 S.E.2d 686 (N.C. App. 2000) (Child's physical resemblance to father considered along with other evidence considered in finding paternity); A.B. v. C.D., 690 N.E.2d 839 (Mass. App. 1998) (Bald eagle evidence, along with DNA test results and other facts were considered in determining father's paternity of child); People v. Horace, 658 N.Y.S.2d 802 (N.Y. 1997) (Although bald eagle evidence in the form of photographs of the child were generally deemed inadmissible to prove resemblance to the father, they were admitted, along with DNA evidence, to show the child's African-American and Caucasian biracial characteristics in rape case to establish identity of defendant charged with raping comatose woman); State v. Parham, 636 So.2d 991 (La. App. 5 Cir. 1994); Miller v. Kirshner, 1990 WL 276614 (Conn. App. 1990); Walker v. State ex rel. Lyles, 558 So.2d 947 (Ala. Civ. App. 1990) (Trial court was not required to exclude bald eagle evidence because other man the defendant claimed was the father was absent); Lonning v. Leonard, 767 S.W.2d 577 (Mo. App. 1988); Mason v. Reiter, 531 So.2d 348 (Fla. App. 3 Dist. 1988) (Bald eagle evidence considered along with HLA test results and father's admission of paternity); S.A. v. M.A., 531 A.2d 1246 (D.C. 1987) (Must show striking or peculiar non-resemblance to admit bald eagle evidence); Clark v. Whiten, 508 So.2d 1105, 1109 (Miss. 1987) (Equated to scientific evidence "given what we know about the genetic passage from father to child of certain physical characteristics, may be most valuable efforts in the search for truth ..."); State v. Santos, 702 P.2d 1179 (Wash. 1985); State ex rel. Munoz v. Bravo, 678 P.2d 974 (Ariz. App. 1984) (Bald eagle evidence, including photographs of the defendants other children at about the same age as the child in question, was admissible); State v. Green, 284 S.E.2d 688 (N.C. App. 1981) (Forehead and side view of child compared to father); Schigur v. Keck, 286 N.W.2d 917 (Mich. App. 1980) (Child's hair, hands, jaw, ears and feet compared to father); D.W.L. v. M.J.B.C., 601 S.W.2d 475 (Tex. App. 1980); Tatum v. State, 260 S.E.2d 747 (Ga. App.
the father — perhaps even walks like the father, then, congratulations, you are the father. If not, even if the father raised the child for the past five, ten or even eighteen years, he can avoid the legal and financial responsibilities of fatherhood and family. The father was sometimes even able to recover those past expenditures from the child’s biological father.

Bald eagle evidence is the predecessor, and, as this article argues, the current catalyst and force behind the movement toward allowing current biology evidence — DNA — to skew the perception of paternity. Today, the preference for biological parentage, whether through bald eagle or DNA evidence, assumes biology is the sole route to paternity. The solution under a biological privilege paternity system is that when a man has no biological connection to a child, he is not the child’s father, and, more importantly, should not be burdened with the financial responsibility of supporting another man’s child — the money connection.

1979); Dorsey v. English, 390 A.2d 1133 (Md. App. 1978); State v. Clay, 236 S.E.2d 230 (W.Va. 1977); Plourde v. Magee, 552 P.2d 1341 (Or. App. 1976); Comish v. Smith, 540 P.2d 274 (Idaho 1975); Interest of R.D.S., 514 P.2d 772 (Colo. 1973) (Bald eagle evidence admitted if accompanied by expert testimony); Glascock v. Anderson, 497 P.2d 727 (N.M. 1972); Hess v. Whitsitt, 65 Cal. Rptr. 45 (App. 2d Dist. 1967); Hassler v. District of Columbia, 122 A.2d 827 (D.C. 1956); State ex rel. Fitch v. Powers, 62 N.W.2d 764 (S.D. 1954); Hall v. Centolanza, 101 A.2d 44 (N.J. Super. App. Div. 1953); Roberts v. State, 240 P.2d 104 (Okl. 1952); Feagins v. Conn., 162 P.2d 72 (Kan. 1945); Thomas v. United States, 121 F.2d 905, 910 (D.C. 1941) (Bald eagle evidence must be “so striking as to leave no doubt as to its existence.”); Lohsen v. Lawson, 174 A. 861 (Vt. 1934); Shannon v. Mace, 1933 WL 1386 (Ohio App. 9 Dist. 1933); Narrell v. State, 117 So. 609 (Ala. Civ. App. 1928); Hogan v. State, 282 S.W. 984 (Ark. 1926); State v. Anderson, 224 P. 442 (Utah 1924) (Allowed to testify about 8-month-old baby’s features and show child to the jury); Anderson v. Aupperle, 95 P. 330 (Or. 1908) (Dismissed claims that a three-month-old child was too young to display to the jury and that the bald eagle evidence was vague); Land v. State, 105 S.W. 90, 91 (Ark. 1907) (Held child’s age goes to weight); Shaier v. Bullock, 61 A. 65, 66 (Conn. 1905); State v. Saidell, 46 A. 1083 (N.H. 1900) (Allowed to show racial characteristics to jury to establish child was Jewish); Gilmanton v. Ham, 1859 WL 3723 (N.H. 1859).

See infra notes 22-48 and accompanying text.

This perception of paternity is not usually discovered when the paternity, custody, visitation or even child support judgment is entered, but, rather, later, when the father decides, for reasons ranging from the child’s health as in Wise’s case to the color of the child’s eyes in another, a “rumor” in yet another, and a child support wage garnishment order in another, that knowledge of the child’s biological paternity has been beyond his reach, and, once genetic evidence proves the child is a biological stranger, he wants this new perception of paternity to set him free – free of child support obligations, but not necessarily free of custody, visitation or the other aspects of the father-child relationship. The impetus is usually one of four things: bald eagle evidence; DNA self-help testing; money; or a desire to hurt the child’s mother.\textsuperscript{12}

As Mr. Wise put it, “I was still their daddy, and I loved them as much as the day they were born... but I don’t see why I should be writing checks to a woman who deceived me all those years.”\textsuperscript{13}

A biological preference is also where we are headed if states continue to adopt paternity fraud laws. With the perceived certainty of DNA evidence in determining paternity and the uniform acceptance of it as a means of determining biological parentage,\textsuperscript{14} it is the one thing to which the courts and legislatures can point in support of their decisions because appearances are deceptive, people lie and money is the ultimate motivator in paternity challenges.

Biology is preferred either through paternity fraud laws, as in Ohio,\textsuperscript{15} Maryland,\textsuperscript{16} Alabama\textsuperscript{17} and other states,\textsuperscript{18} or to some

\begin{itemize}
  \item Daniel, 695 So.2d 1253, 1254 (Fla. 1997); Swain v. Swain, 567 So.2d 1058 (Fla. App. 5 Dist. 1990).
  \item See supra note 2.
  \item Allan S. Livotsky & Kirsten Schultz, Note, Scientific Evidence of Paternity: A Survey of State Statutes, 39 JURIMETRICS J. 79, 83 (Fall 1998) (stating that by 1998, “every state and the District of Columbia had statutes governing the admissibility of scientific paternity tests.”).
  \item OHIO REV. CODE ANN. § 3119.962 (2003).
  \item MD. CODE ANN., FAM. LAW § 5-1038(a)(2)(i)2 (1995)
  \item ALA. CODE § 26-17A-1(a) (1994).
  \item ARK. CODE ANN. § 9-10-115; 750 ILL. COMP. STAT. § 45/7-8 (1998) (allowing a challenge to paternity at any time within two years after the father has
\end{itemize}
extent, through statutes that allow the marital presumption to be rebutted by clear and convincing evidence in the form of genetic testing excluding the established father as the child's biological parent. This biology preference irreparably harms families long after the parent-child bonds have formed. Long after the lure of playing house dissipates, parentage is determined and child support is ordered, a father can abort the parent-child relationship if he lives in a state that adheres to an absolute biological preference. The ability to abort the parent-child relationship, financially and emotionally, destroys the family and parent-child relationship based on a mistaken belief that children, like fathers, legislatures and the courts, define family and fatherhood on the basis of a genetic truth. In reality, children do not understand biology; they understand love.

In this article, I will address the role a preference for biology plays in destroying families under paternity fraud legislation by addressing the impact that Bald Eagle, and now, DNA evidence plays in paternity decisions and legislation. To do so, I will examine the unspoken, but inferential connection between the marital presumption, bald eagle evidence, DNA

knowledge of facts that suggest he may not be the child's biological parent; MD. CODE ANN., FAM. LAW § 5-1038(a)(2)(i)(2)(1995); 750 ILL. COMP. STAT. § 45/7 (1998); OHIO REV. CODE ANN. § 3119.962 (2003); GA. CODE ANN. § 19-7-54 (2002); IOWA CODE § 600B.41A(3) (2000); ALASKA STAT. § 25.27.166 (2002); ARK. CODE ANN. § 9-10-115 (2001); VA. CODE ANN. § 20-49.10 (2001).

evidence, and money as the underlying catalyst to paternity decisions. In Part I of this article, I will present and describe the biological privilege through paternity fraud laws, other biological privilege laws and biology trump laws that rebut the marital presumption as evidence of where we are headed — toward a biology privilege that trumps all other avenues of paternity. Part II reviews where we have been — from biology in theory in the marital presumption and admission of bald eagle evidence to biology in scientific certainty through blood, HLA and DNA testing, and finally biology as a sociobiological construct that promulgated the policies and evolution towards a biological-privileged society.

Part III explores a number of flawed assumptions judges and legislators make in pursuing the preference for biology: 1) that the family dies at divorce, making the marital presumption moot; 2) that genetic certainty promotes paternity certainty; 3) that biology is the basis for establishing financial responsibility for children; and 4) that the search for the truth in biology, in addition to establishing the truth in paternity, benefits the child and family. In attempting to define the connection between biology, society and paternity, I will examine the extension of bald eagle evidence to the reliance on DNA evidence as a way of looking from the outer to inner child in disestablishing paternal responsibility. Likewise, this article addresses the flawed premise in paternity determinations that creates a financial reward for denying paternity, ordering genetic testing before determining the admissibility of test results; replacing an established father with a biologically-related stranger; and giving preference to men to punish women who allegedly misrepresent, either directly or by omission, the paternity of the child over the child’s interests.

Finally, in Part IV, I propose a paternity fraud statute that focuses on the child and the family as they exist in America today rather than on the white picket fence fiction or fantasy that existed when the marital presumption was originally adopted. Under the proposed statute, a child’s mother and father would not be entitled to obtain information through genetic testing that would give rise to questions concerning the child’s biological paternity. For this statute to work, a non-rebuttable preference in favor of the existing father-child relationships is proposed as the starting point for all paternity challenges or filiation claims. Biological truth is
substituted with the truth children understand – the relationship with their parents.

Only in the absence of a relationship would biology prevail. Paternity decisions will be determined based first on family, then on biology. There would be few prospective post-judgment challenges to paternity because, under the statute proposed in this article, they will be unnecessary. In addition, to avoid back-alley genetic testing, criminal legislation is proposed, making it illegal to perform genetic testing for purposes of determining the inclusion or exclusion of parentage without a court order. Under this statute, a father can be a father without doubts and a child can be certain that his father is his father, regardless of whether he is the spitting image of dad.

This discussion, therefore, is limited to biology and paternity fraud laws in the context of traditional and non-traditional families, not in circumstances where there is no relationship between the father and child. In addition, it is limited to the parental rights, not those of the child. The child would still have the right to seek a determination of his genetic lineage at the age of majority or under court order in the case of a medical emergency requiring the child’s genetic history.

I. WHERE WE ARE HEADED – EXISTING LAWS DEMONSTRATE A BIOLOGICAL PRIVILEGE

If paternity fraud legislation is deemed cutting edge law, several states are where the rest of the country is headed by enacting some form of biological privilege or paternity fraud laws that purport to protect men from the financial burden of caring for another man’s child.20

There are three main types of biological privilege laws: 1) absolute privilege or paternity fraud laws, allowing the father to challenge paternity at any time during the child’s minority; 2) common law biology-privilege laws, allowing paternity challenges

based on post-judgment relief rules when there is newly discovered evidence or fraudulent concealment and the equities of the case merit relief; and 3) biology trump laws where, at the time of divorce, a father may challenge the child’s paternity, in an attempt to alleviate himself of the obligation to financially support the child.

All three of these exist today in some form or another. If paternity fraud proponents succeed, the absolute privilege will exist across the country, eliminating states with no biology privilege and heightening the privilege in those states with partial or absolute biology trump laws. Even if they fail, each of these options has the effect of destroying the family by allowing the father to choose not to be a father anymore based on anger and hurt stemming from the relationship with the child’s mother, forever damaging the relationship with the child, merely because of his genes.

True paternity fraud laws allow the father to disclaim paternity at any time after the child is born based on genetic test results. They do not consider the social or functioning relationship between the father and the child. The main thread of these laws is that biology, or, in paternity challenges, the lack thereof, alleviates the father from his financial obligations, even where he raised the child in his home, acknowledged paternity, and, as far as the child is concerned, is his father.

While some states do not allow the father unlimited time to challenge paternity, they do allow him to disclaim paternity at the time of divorce or within a certain period of time after having acknowledged paternity and “played” dad. Those laws appear more palatable at first glance because they seem to place limits on challenges to paternity. In practice, however, they can have the same effect if a father of two, four, or even ten years is allowed to deny paternity at the time of divorce or when the child’s mother seeks a child support order.

Because of the social outrage created by paternity fraud celebrities such as Morgan Wise, Gerald Miscovitch, Dennis Caron, and Carnell Smith,21 paternity fraud legislation is an

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21 See Anderlik & Rothstein, supra note 4 at 219, 227. See also The New Paternity, DNA adds twist to definition of ‘Dad’, S. F. CHRON., June 17, 2001, at
inevitable part of America's future and the end of the family as we know it if the courts and legislatures allow it to persist over the parent-child relationship.

A. Absolute Biology – Paternity Fraud Laws Prefer Biology Over Existing Parent-Child Relationships

While paternity fraud laws are recognized in at least nine states,22 statutes in other states often operate in a similar, but more limited manner, allowing paternity challenges when the father was unaware of the lack of a biological connection to the child at the time paternity was adjudicated or acknowledged.23

Paternity fraud laws privilege biological paternity over all other forms of fatherhood, allowing a paternity challenge based on genetic evidence long after the father's legal status is established.24 A typical paternity fraud law allows a father to challenge paternity within a reasonable time after he learns that he may not be the child's biological father,25 relieving the father of the rights and responsibilities of fatherhood upon proof of genetic test results excluding him as the biological parent.26 In addition to relief from child support, visitation, and custody obligations, the father's name is also removed from the child's birth certificate.27 Illinois is a typical biological-privilege statute, stating, in part:

25 See supra, note 24.
An action to declare the non-existence of the parent and child relationship may be brought subsequent to an adjudication of paternity in any judgment by the man adjudicated to be the father... if, as a result of deoxyribonucleic acid (DNA) tests, it is discovered that the man ... is not the natural father of the child... the adjudication of paternity and any orders regarding custody, visitation, and future payments of support may be vacated.28

Another provision of the Illinois paternity fraud statute sets forth the time limitation for making a post-judgment paternity challenge: “an action to declare the non-existence of the parent and child relationship ... shall be barred if brought...more than 2 years after the petitioner obtains actual knowledge of relevant facts....”29

While there are similarities between the various paternity fraud laws, they differ in many aspects. For example, while several statutes allow a father to challenge paternity at any time during the child’s minority,30 others require the father to challenge paternity within two years after he has reason to believe he is not the child’s biological parent.31

In addition, some states require the father to obtain genetic tests excluding him as the child’s biological father prior to petitioning to set aside the paternity determination, while others allow the father to request testing at the time of the challenge.32

28 750 ILL. COMP. STAT. 45/7(b-5) (1998).
31 See 750 ILL. COMP. STAT. § 45/8(4) (1998); MINN. STAT. ANN. § 257.57 (2002). See also ALASKA STAT. § 25.27.166(b) (2002) (applying a three year statute of limitations).
While many of the paternity fraud statutes create an exception to the ability to challenge an existing paternity determination when the father acknowledged paternity after knowing he lacked a biological parental relationship with the child, three states do not limit such contests regardless of the father's knowledge.

Another form of biological-privilege laws allows a father to challenge paternity within a set period of time after the child is born. For example, the Wyoming and Colorado biological-privilege statutes allow a father to deny paternity within a reasonable time after discovering that he may not be the child’s biological father, however, the challenge must be made before the child reaches the age of five. While more limited in scope, these laws have the same impact as paternity fraud laws in allowing the father to abandon the child and family after a relationship has already been established.

The policy underlying biological-privilege-based laws is rooted in the common law, where the courts sought to protect the father tricked by the child’s mother from having to support a child who was biologically unrelated to him. Favoring a biological truth, one court stated:

While it is the policy of this state to require fathers to support their minor children, it is not the policy to extort such support from persons who are not in fact fathers.


Id. at 96.
The biological privilege is bolstered when a biological father is capable of supporting the child or the child is already receiving welfare as the courts see the child’s financial needs as a primary purpose of paternity determinations. In pursuit of the biological privilege, the father is characterized as a victim who should not be punished for his willingness to assume responsibility for a child he erroneously believes is his biological offspring.

For example, after learning that his former girlfriend slept with other men while they were cohabitating, the father in *Smith* sought to set aside a consent paternity order adjudicating him the father of two children born while the couple cohabitated. Because the case was brought before Georgia had enacted paternity fraud laws, when genetic tests proved he was biologically unrelated to one of the children, he petitioned to set aside the paternity order based on his girlfriend’s fraudulent concealment of the child’s biological paternity. The court reasoned that where the father had no reason to doubt the child’s biological heritage or the mother’s loyalty, admitting paternity would be reasonable and admirable, and the father should not be punished for not seeking genetic testing when the child was born. The Georgia appellate court addressed the impact a demand for genetic testing could have on an existing family and parent-child relationship, stating:

A contrary rule would invite suspicion and distrust and essentially require all purported fathers, upon divorce or separation, to accuse their spouses or partners of infidelity by demanding proof of paternity. In addition to fostering animosity between the parties, ... [the challenge] could also have a negative impact on the father-child relationship.

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39 *Id.*
40 *Id.*
41 *Id.* at 95.
42 *Id.*
43 *Id.* at 96.
44 *Id.*
When an Alabama court addressed the policy behind the state's paternity fraud statute, it pursued the same logic as the Smith court, reasoning that a father should not be punished for not challenging paternity before he had reason to believe he might not be biologically related to the child.\textsuperscript{45}

The same policies applied in the Smith and S.W.M. cases are reflected in the paternity fraud statutes' language that does not require a father to challenge paternity until he actually discovers or has reason to know he is not the child's biological father.\textsuperscript{46}

Similarly, the policy that a man should not be required to support another man's biological child is reflected in paternity fraud laws that mandate extinguishing all rights and obligations associated with the status afforded legal fathers upon a demonstration that there is no biological relationship between the father and child.\textsuperscript{47}

However, consistent with the notion that a father should not be punished for his ignorance, paternity fraud laws may prevent a father from setting aside a paternity determination when the father knew he lacked a biological relationship with the child at the time of the original paternity determination.\textsuperscript{48}

While paternity fraud laws focus on the mother's and father's conduct and expectations, they do not afford similar protections of the child's interests. The negative impact on the father-child relationship which the Smith court sought to avoid is the inevitable result when paternity fraud laws and biology are prioritized over the child's interest.


B. Common Law Biological Privilege – Fraud and Equity Policies Favor Biological Relationships Over Social Ones

Some courts favoring a biological-privilege allow fathers to set aside paternity judgments in the absence of paternity fraud statutes based on the mother’s fraudulent concealment of the child’s paternity.\textsuperscript{49} The reasoning behind such decisions is essentially the same as in the case of the underlying paternity fraud statutes. Equity rules allowing a party relief from a judgment as inequitable are also available to the courts as an avenue for setting aside paternity judgments.\textsuperscript{50} For example, under Michigan Court Rule 2.612(C)(1)(e), the court may grant relief from a final judgment where “it is no longer equitable that the judgment should have prospective application.”\textsuperscript{51}

Under a fraudulent concealment approach, the court is not limited by the rules of court for opening final judgments, and can apply general fraud principles to the paternity context.\textsuperscript{52} For example, in \textit{Libro}, the Nevada Supreme Court allowed a father to set aside a nine-year-old paternity judgment even though the father confirmed through blood tests that he was excluded as the child’s biological father five years earlier.\textsuperscript{53} There, the father acknowledged paternity when the parents divorced, then, a year later, pursued blood testing to ascertain paternity.\textsuperscript{54} Although the blood tests excluded Libro as the child’s biological father, he waited to contest paternity until his former wife moved to reduce his child support arrearages to judgment.\textsuperscript{55} In the absence of a paternity fraud statute, the father raised paternity as a defense to

\textsuperscript{49} See Libro v. Walls, 746 P.2d 632, 633 (Nev. 1987); Marriage of M.E., 622 N.E.2d 578 (Ind. Ct. App. 1993) (setting aside the paternity determination based on the mother’s extrinsic fraud under T.R. 60(B)(8));
\textsuperscript{51} See MICH. CT. R. § 2.612(C)(1)(e). \textit{See also} Franzel, 516 N.W.2d at 496.
\textsuperscript{52} See Libro, 746 P.2d at 633.
\textsuperscript{53} 746 P.2d at 633.
\textsuperscript{54} Id. at 633.
\textsuperscript{55} Id.
the motion. The Nevada Supreme Court held that the former wife's concealment of the child's biological parentage constituted extrinsic fraud, and that she had a duty to tell her husband he might not be the child's biological father, stating:

Where the fraud is so successful the other party is not even aware he has a claim or defense, it may be said he had no reasonable opportunity to present it.

Depicting the father as a victim " lulled by ignorance of the true facts," the Court reasoned that the mother's silence justified equitable relief of setting aside the earlier judgment.

Similarly, the DeRico v. Wilson court found that a father could contest paternity two years after a final paternity determination, reasoning that the former wife fraudulently concealed the identity of the biological father of two of the couple's three children. The court remanded the case to determine the amount of reimbursement the father should receive for child support paid since the date the father challenged paternity. The dissent relied on the father's shared parental responsibility and two-year delay in seeking to modify the paternity determination, as well as the former wife's uncertainty as to the biological paternity of the children, in arguing that there was no fraud justifying relief from the paternity determination.

In applying a biological privilege without specific paternity fraud provisions, the courts created common law paternity fraud law. As such, even when there is no specific paternity fraud statute enacted, the courts can use relief from judgment rules and fraudulent concealment theories to achieve the same result.

56 id.
57 id.
58 id. at 634.
59 id. at 633.
60 714 So.2d 623 (Fla. 5 Dist. App. 1998).
61 id. at 624.
62 id.
63 id. at 625.
C. Biology Trump Laws – When Biology Prevails Over the Marital Presumption

Biology trump laws, laws that allow a father to challenge paternity and the legal presumption of legitimacy at the time of divorce, are the most common type of biological-privilege laws. These laws acknowledge the presumption of legitimacy, but then allow the father to rebut the presumption based on genetic test results that exclude him as the child’s biological father. He can also establish that someone else is the biological father. The New Hampshire statute is an example of an exclusionary law, providing that:

The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, show that the husband is not the father of the child.

While New Hampshire and several other states only allow the father to rebut the presumption of legitimacy by admitting genetic test results that exclude him as the child’s father, the Uniform Parentage Act of 2002 ("UPA") allows the father to rebut paternity by either excluding himself or including another

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66 Id.


individual as the child's biological father.\textsuperscript{69} Fathers seeking to deny paternity under either exclusive or combination exclusive-inclusive laws will likely use the exclusion option to rebut paternity as it does not require involving another, possibly unwilling, individual, the reputed father, in the genetic testing process. A father can perform the test when he has custody or visitation of the child, and he does not have to tell the child the nature of the tests since a DNA test can be performed by taking a swab sample on the inside of the child's mouth.\textsuperscript{70}

Other legitimacy presumption laws allow a father to rebut the presumption by clear and convincing evidence,\textsuperscript{71} leaving open the possibility that a court could interpret that language to include proof that the father is not biologically related to the child. Given that paternity challenges by the former husband are "the most common challenge to paternity at the time of family dissolution," there are going to be more instances where the child is left with no father than those like \textit{Stitham v. Henderson},\textsuperscript{72} where two fathers asserted rights to the child.\textsuperscript{73} In addition, the ability to challenge paternity at the time of divorce can be used as a weapon to deny the father custody, visitation and decision-making rights over his children when the mother wants to eliminate his involvement in her life by removing him from the child's life.\textsuperscript{74}

When the \textit{Stitham} court decided the issue of paternity between the presumed marital father and the mother's new husband, Stitham, who was also the child's biological father, it applied Maine's exclusionary law, which makes the marital presumption inapplicable when genetic test results exclude the marital father as the biological parent.\textsuperscript{75} In that case, the former

\begin{itemize}
\item \textsuperscript{69} Uniform Parentage Act § 631 (2002). \textit{See also} Wash. Rev. Code § 26.26.600(1).
\item \textsuperscript{70} A swab DNA test is performed by wiping a sterile swab on the inside of the child's mouth and placing it in a container provided by the testing company. \textit{See} swabtest.com.
\item \textsuperscript{72} 768 A.2d 598 (Me. 2001).
\item \textsuperscript{73} \textit{See} Theresa Glennon, \textit{Expendable Children: Defining Belonging in a Broken World}, 8 DUKE J. GENDER L. & POL'Y 269, 271 (2001).
\item \textsuperscript{74} Id. at 271.
\end{itemize}
husband, Henderson, challenged the biological father’s paternity claim and fought to maintain his parental relationship with his five-year-old daughter.\textsuperscript{76} Even though the child’s mother and the biological father married just a few months after the divorce judgment was entered, the court refused to accord the divorce judgment res judicata effect over the biological father.\textsuperscript{77} The court reasoned that his interests were not protected by the child’s mother because she may not have wanted him involved in the child’s life or he may have been less financially able to support the child.\textsuperscript{78}

The only time the court considered the child’s interests was in addressing Henderson’s counterclaim for equitable parental rights based on the father-child relationship with the child.\textsuperscript{79} Deferring to the lower court’s continuing jurisdiction over the divorce judgment, the Maine Supreme Court acknowledged the “undisputed facts” supporting the existing parent-child relationship and “hoped” that the parties would consider the child’s interests in coming to an agreement regarding Henderson’s role in her life given the loss of his legal status as her father.\textsuperscript{80}

In the concurring opinion, the biological privilege was credited with creating accuracy that allows the marital presumption to “be swept aside by a simple test.”\textsuperscript{81} Recognizing the conflict between the marital and biological presumptions, Judge Saufley wrote:

Although DNA testing may provide a bright line for determining the biological relationship between a man and a child, it does not and cannot define the human relationship between father and child....\textsuperscript{82}

Also deferring to the lower court’s discretion, Judge Saufley made an even stronger plea for the preservation of the parent-child relationship between Henderson and his daughter,

\textsuperscript{76} \textit{id.} at 600.
\textsuperscript{77} \textit{id.} at 601.
\textsuperscript{78} \textit{id.} The court also indicated that the mother may not have wanted to “complicate” the divorce by challenging paternity at that time.
\textsuperscript{79} \textit{id.} at 603. The counterclaim was dismissed as a matter properly before the lower court in the context of the divorce
\textsuperscript{80} \textit{id.}
\textsuperscript{81} \textit{id.} at 605.
\textsuperscript{82} \textit{id.}
indicating that "the courts have a responsibility" to maintain the
child's relationship with the defacto parent.

While the Stitham court's reasoning seemed balanced
between the two fathers' interests in the child, neither the majority
nor concurring opinions did more than encourage the lower court
or parties to consider the child's interests. Rather than allowing
the "factually involved father," Henderson, to be swept aside by
biology with a hint of a possibility that he might get a minimal
right to preserve a non-paternal relationship with his daughter, the
court should have upheld the father-child relationship. The fact
that the biological father married the child's mother gives him the
same rights of any stepparent, which is what he is given
Henderson's established role as her father. While acknowledging a
relationship between Henderson and the child, the court failed to
recognize the family that existed even after the divorce and
mother's remarriage. Instead, it asked the people who were
fighting over a child to put aside the last five years of hostility and
allow Henderson to be involved in the child's life.

Without defining the terms of that involvement, it is
unlikely that the biological newlyweds will want the perceived
intrusion of a man they consider an outsider to the family. For
instance, the biological father may see Henderson as an
impediment to his ability to develop a father-child or parental
relationship with the child, and the mother may desire to make a
clean break from her former husband. Likewise, the lower court
may decide that the now eight-year-old child may benefit more
from a single traditional family unit than a blended family, given
the current marital status of the biological parents. Either way, the
biology trump law ended the existing family in favor of a
biological one.

II. WHERE WE HAVE BEEN: THE BALD EAGLE - DNA
CONNECTION

The preference for biological parentage, whether maternal\(^83\)

or paternal, has existed in some form or another since the
beginning of time – possibly since Adam and Eve. If, as the first

\(^{83}\) Maternal paternity is not addressed in this article.
symbolic parents, when Adam and Eve were evicted from the Garden of Eden, they forewent a traditional marriage in favor of monogamous cohabitation, and, in due time, Eve gave birth to two sons, Cain and Abel. If it turned out that when the boys were about seven and nine, Cain bore no physical resemblance to Adam while Abel was the spitting image of dad down to the color of his eyes.

Then, Eve might later decide her relationship with Adam was less than fulfilling and file a paternity, custody and child support action against him. Although Adam might accept the decision and agree to child support in the form of two sheep per month at first, under current biological-privilege laws, and common law decisions as early as the late 1940s, Adam would not be bound by that determination if he could disestablish biological paternity.

Later, when Cain is fourteen, after having spent every other weekend and two days a week at Adam’s place, Adam, in an effort to lower his child support obligation, might be inclined to take a harder look at Cain. Maybe his new girlfriend or a friend points out that Cain really does not resemble Adam. A rumor starts. Adam sees an Internet site about paternity fraud. If he was not suspicious before, he is now. It might dawn on Adam that he really was not at home that much 14 years and 9 months ago, having been visiting with God or tending the sheep.

Assuming current paternity fraud or other biological privileges are in place, Adam could challenge the paternity of Cain while acknowledging the paternity of Abel since parentage, even with the marital presumption, which also applies to cohabiters, is based on a preference for biology over the family and father-child relationship. In fact, as early as the 1600s, Adam could refute Cain’s paternity with biological evidence to the contrary.

As such, Adam might first offer a defense allowed under Lord Mansfield’s rule that he was *extra quarto maria*, beyond the four seas for beyond nine months; in this case, visiting God or tending his sheep. Sterility, another biological-based and equally acceptable defense to paternity, is an unlikely option if Adam

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84 See Vorvila v. Vorvila, 31 N.W.2d 586 (Wis. 1948).
acknowledges his paternity over Abel. However, impotence, which can be either psychological or physical, would be admissible biological proof to refute Adam’s paternity over Cain.

He might go one step further and offer what has been identified as bald eagle evidence. Simply put, Adam may argue that Cain bears no physical resemblance to Adam, and, therefore, could not be his biological child.

As science advances, Adam might be able to exclude himself as a possible father of Cain through blood groupings that show his blood type is A+, Eve’s is B and Cain’s is O, which creates a biological impossibility regarding Adam’s potential paternity of Cain. If that is not enough, Adam can offer Human Leukocyte Antigen (HLA) blood test results that may be able to exclude him as Cain’s biological father with over ninety-nine percent accuracy.\(^8\)

Then Adam can point the finger – it must be the devil’s child. Adam can even testify that he saw Eve consorting with the devil under the old apple tree in the Garden of Eden. Lucifer himself can testify that it is possible he is the father, especially if Lucifer wants to develop a relationship with Cain.

Adam now wants a DNA test. He can request that he, along with Eve, Cain and Lucifer, be tested to determine Cain’s “true biological” parentage. If he cannot wait for the court to approve his request for genetic testing and wants to bolster his paternity contest, he can enlist self-help testing. He can order a swab test off the internet, swab the inside of his and Cain’s mouths and send in the swabs to a testing lab that will tell him the possibility of a genetic connection between himself and Cain.

If the test excludes Adam as Cain’s biological father, it conclusively decides the issue in favor of Adam, relieving him of further financial and emotional responsibility as Cain’s father. If it includes him by less than 98 or 99 percent, depending on the state where the family resides, the evidence is admissible, and is usually weighed with all the evidence in favor of and against paternity. Only when the DNA evidence includes Adam by more than 99 percent in most states will Adam be presumed to be Cain’s biological father. Even then, Adam may doubt his biological

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connection with Cain since his paternity cannot be determined with 100 percent biological certainty.

Essentially, that is how paternity has evolved over the past nine centuries, with biology at the core of the determination.

A. Biology as a Legal Precept – Paternity Laws’ Roots Are in Biology

The connection of biology and paternity laws can be seen in the evolution of paternity laws from looking at the external physical resemblance of the child and father when science could do no more to assure the father that the child was biologically-related to him, to looking at the internal resemblance between the father and child by blood, HLA and DNA testing. Evidence in support of or opposition to paternity challenges has always revolved around discovering the biological parent-child relationship.

1. Bald Eagle Evidence – DNA’s Biologically-Based Predecessor

Bald eagle evidence was born out of what people could easily understand. Before the advent of the Elizabethan Poor Law of 1576\(^{87}\) and the 1953 discovery of the DNA molecule by scientists James Watson and Francis Crick,\(^{88}\) there was bald eagle evidence.

Bald eagle evidence, considering the resemblance or lack of resemblance between a potential father and child to prove or disprove paternity, dates back to “the ancient city of Carthage.”\(^{89}\) A council would examine children when they reached the age of two and determine whether they lived or died based on their

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\(^{87}\) Roe v. Roe, 316 N.Y.S.2d 94 (N.Y. Fam. Ct. 1970) (Identifying Elizabethan Poor Law as the father of paternity laws, whereby the purpose of the law was to indemnify the church for the expense of supporting the children).


\(^{89}\) Shapiro, *supra* note 88 at 16, 17; Anderlik & Rothstein, *supra* note 4 at 224-225.
physical resemblance to their father. Children who did not resemble their fathers to the council's satisfaction would be killed.

This principle carried over to English common law, and, eventually, to American common law. In the 1769 Douglas Peerage case, English Judge, Lord Mansfield, set out the logic behind considering bald eagle evidence as an aid in determining parentage in terms of the likelihood of encountering two similar men in an army. Lord Mansfield wrote:

[In] an army of a hundred thousand men every one may be known from the other. If there should be a likeness of features, there may be a discriminacy of voice, a difference in the gesture, the smile, and various other things; whereas a family-likeness generally runs through all these; for in everything there is a resemblance as of features, size, attitude, and action....Among eleven black rabbits, there will scarce be found one to produce a white one.

Although some American courts rejected bald eagle evidence as unreliable, vague, or as a matter of opinion over fact,

90 Shapiro, supra note 88 at 16; Anderlik & Rothstein, supra note 4 at 224-225.
91 Shapiro, supra note 88 at 16.
92 Id.: See also infra note 72.
93 Shapiro, supra note 88 at 16.
the majority of states allowed bald eagle evidence, in some form or another, as evidence of paternity. As early as 1860, bald eagle evidence was used to disprove paternity based on a lack of resemblance between the child and reputed father. Other courts allowed consideration of everything from the child’s hair and skin color, to the appearance of the child’s hands, feet, and forehead.

In allowing the child to be brought into the courtroom for comparison with the defendant, the Bowles court reasoned that the appearance of a child could be compared with the appearance of a purported father because of the “physical and external” differences between races, and those between families. While some courts applied this policy indiscriminately, others allowed bald eagle evidence only where a question of race or “color” was involved, while still others restricted its use to situations where specific characteristics were so striking as to be determinative.

In addition, treatment of bald eagle evidence ranged from allowing the child to be exhibited to the jury without testimony to requiring expert testimony to accompany the comparison.

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See supra note 9 and accompanying cases.


See State ex rel. Feagins, 162 P.2d at 76-77 (allowing a red-headed child to be displayed before the jury to disprove paternity where mother and reputed father both had dark hair and dark complexions).

Green, 284 S.E.2d 688 (permitting as evidence the resemblance of the child’s forehead and profile to those of the mother and purported father); Schigur, 286 N.W.2d 917 (permitting as evidence the resemblance of the child’s hair, hands, jaw, ears, and feet to those of the purported father).

See Bowles, supra note 97.

Saidell, 46 A. 1083 (permitting as evidence a comparison or “race characteristics” between child and purported father); Gilmanton, 1859 WL 3723 (permitting consideration of a child’s appearance, complexion, and features in a bastardy proceeding).

Thomas, 121 F.2d at 910 (permitting evidence of resemblance only where “so striking as to leave no doubt as to its existence”; Lohsen, 174 A. 861 (admitting evidence of specific physical traits, but not general appearance). See also S.A., 531 A.2d 1246 (finding striking or peculiar non-resemblance to be admissible).

See Kennedy, 450 N.E.2d at 171-72 (stipulating that expert testimony must accompany any bald eagle evidence); Interest of R.D.S., 514 P.2d 772 (Colo. 1973) (permitting the introduction of bald eagle evidence if accompanied by expert testimony). See also Shapiro, supra note 88 at 18.
age of the child was also taken into consideration in some cases. Some courts excluded bald eagle evidence for children under an age deemed to be indicative of “settled” features. Other courts indicated that the child’s age only went to the weight of the evidence, allowing children as young as three months to be shown to the trier of fact for determination of physical resemblances.

The admission of bald eagle evidence is still expressly permitted by statute in South Carolina, as well as by common law in other states. In addition, the perceived lack of resemblance between a father and child is often a reason cited for bringing a paternity challenge. Under this standard, Adam could introduce his lack of resemblance to Cain as evidence of non-paternity and as a basis for setting aside both the paternity adjudication and the child support order.

2. Marital Presumption – Birth of a Family or Implied Biology

In the sixteenth century, the marital (or legitimacy) presumption was created under English common law. The doctrine, pater est quem nuptiae demonstrant, now codified in

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104 See Lohsen, 174 A. 861. See also Shapiro, supra note 88 at 18.
105 Anderson, 95 P. 330 (Dismissing claim that child was too young for comparison at three months old, holding that the child’s age goes to the weight of the evidence); Land, 105 S.W. at 91 (holding that child’s age goes to weight rather than admissibility of evidence). See also Shapiro, supra note 88 at 18.
107 See Jeffries, 559 S.E.2d 217; Brown, 526 S.E.2d 686; A.B., 690 N.E.2d 839; Parham, 636 So.2d 991; Miller, 1990 WL 276614; Department of Revenue v. Spinale, 550 N.E.2d 871 (Mass. 1990); Walker, 558 So.2d 947.
108 See infra note 324 and accompanying text.
110 Translated as “the nuptials show who is the father” Edward R. Armstrong, Family Law – Putative Fathers and the Presumption of Legitimacy – Adams and the Forbidden Fruit: Clashes Between the Presumption of Legitimacy and the
most states, creates a presumption that a child born during marriage or within a specified 280 to 300 day period following the dissolution of marriage is the biological child of both husband and wife.\textsuperscript{111} The assumption is based in biology; that children conceived during the period of the marriage would logically be the biological offspring of the marriage. This presumption was intended to establish biological certainty at a time when biology could not be readily ascertained by biological or medical science.\textsuperscript{112} One of the underlying goals of the marital presumption was to prevent legitimate children born of a marriage from becoming illegitimate.\textsuperscript{113}

Exceptions to the marital presumption are also based in biology. A husband can rebut the marital presumption if he is impotent or sterile, if he lacked access to his wife for nine months,\textsuperscript{114} if he was imprisoned, or if he is incapable of procreation due to his age.\textsuperscript{115} Alternatively, he can rebut paternity by establishing his wife’s infidelity as an adulteress who left him to live with another man.\textsuperscript{116} Originally, rebutting the marital presumption was difficult because American courts, adopting Lord


\textsuperscript{111} \textit{See Uniform Parentage Act} § 204 (2002), \textit{supra} note 6.

\textsuperscript{112} “The presumption permitted courts to assume a set of biological facts (and thus a history of relationships) in order to safeguard a traditional model of family.” Janet L. Dolgin, \textit{supra} note 85 at 528.

\textsuperscript{113} \textit{See} Armstrong, \textit{supra} note 110 at 372; Rogers, \textit{supra} note 109 at 1151-1152. The reasons for preserving legitimacy were threefold: 1) to protect the best interests of the child insofar as inheritance, social security benefits, life insurance and other rights of support, established medical history, and cultural heritage were tied to legitimacy; 2) to protect the family; and 3) to protect the state from the financial drain of wards of the state. \textit{See} Chezem & Nagy, \textit{supra} note 64 at 468; Roberts, \textit{supra} note 109 at 53-54; David V. Hadek, \textit{Why the Policy Behind the Irrebuttable Presumption of Paternity Will Never Die}, \textit{26 Sw. U. L. Rev.} 359, 360 (1997). “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.” Kaplan, \textit{supra} note 64 at 71 (2000).

\textsuperscript{114} Rogers, \textit{supra} note 109 at 1153-1154; Kaplan, \textit{supra} note 64 at 70. \textit{See also} Glennon, \textit{supra} note 109 at 565; Dolgin, \textit{supra} note 85 at 527; Roberts, \textit{supra} note 109 at 44.

\textsuperscript{115} Armstrong, \textit{supra} note 110 at 372.

\textsuperscript{116} \textit{Id.}
Mansfield's rule, allowed neither the husband nor the wife to testify to non-access or otherwise testify as to the child's illegitimacy. 117

By the end of the nineteenth century, Lord Mansfield's rule began to fade in popularity. By the beginning of the twentieth century, both spouses were generally allowed to testify as to facts establishing or disestablishing paternity. 118 This change facilitated challenges to the presumption. 119 In the present day, DNA test results may be used to rebut the marital presumption, although some states do not permit such rebuttal. 120

The ability to rebut the presumption with biological evidence is consistent with the presumption's biological-privileged premise. It is not, however, consistent with the presumption's policy of preserving the family; in fact, it does the opposite. Rebuttal allows an existing father with an established parent-child relationship to end the relationship and abandon the child during the child's minority. 121 It also allows third parties to challenge parentage, even where a traditional family structure is in place. 122

Some courts have reasoned that biology trump laws are consistent with the marital presumption's family protection policy in cases where there is no family structure to protect. 123 Such reasoning relies on the assumption that only an intact, traditional family structure is entitled to protection. This assumption ignores the reality that many families exist where mother and father reside in different households, but nevertheless, both parent the child. 124 In such cases, where rebuttal of the marital presumption is permitted, the family is destroyed not by marital dissolution, but by

117 Kaplan, supra note 64 at 70; Rogers, supra note 109 at 1153-1154; Glennon, supra note 109 at 563-564; Anderlik & Rothstein, supra note 4 at 223; Lynne Marie Kohm, Marriage and the Intact Family: The Significance of Michael H. v. Gerald D., 22 WHITTIER L. REV. 327, 335 (2000); Andersen, supra note 109 at 852.
118 Glennon, supra note 109 at 564.
119 Chezem & Nagy, supra note 64 at 468.
120 See Rogers, supra note 109 at 1154. See also supra notes 64-82 and accompanying text.
121 Glennon, supra note 109 at 566.
122 Id.
124 See infra notes 173-216 and accompanying text.
allowing the father to dissolve his parental and familial relationships. If Adam were allowed to abandon Cain, he would destroy not only his paternal relationship with Cain, but also the family structure he created with Cain, Abel and Eve.

3. DNA – Bald Eagle Evidence for the Inside

“He does not look like me – just look at his genes.” Where bald eagle evidence compares the outer resemblance between father and child, DNA evidence compares the inner resemblance. DNA evidence has still not completely replaced bald eagle evidence, possibly because the two are interrelated: a suspected lack of external resemblance almost inevitably leads to testing of internal resemblance.

As early as the 1930s, blood tests were admitted as exclusionary evidence in paternity proceedings, although they were not universally accepted at that time.125 By the end of the 1940s, however, blood-grouping tests were generally admitted due to their certainty and reliability.126 Since then, virtually every state has implemented some sort of statutory acceptance of genetic test results in paternity cases.127

Originally, genetic testing was considered to confirm or deny paternity for children born out of wedlock.128 It was used to determine whether a putative father owed a child support obligation. As testing evolved, its use extended from merely excluding men as potential fathers to confirming suspected paternity. Therefore, Adam, even with presumptive fatherhood, could use DNA evidence to disclaim paternity of Cain.

126 See generally, Shapiro, supra note 88 at 19.
127 See Roberts, supra note 109 at 46; Livotsky & Schultz, supra note 14 at 83-84.
128 DNA testing was originally utilized to prove paternity in welfare recipient children to recover welfare support costs. See Anderlik & Rothstein, supra note 4 at 225.
4. Paternity Fraud – The Money Connection in Paternity Decisions

Where men might find personal vindication in proving that a woman lied in wrongfully accusing him of fatherhood, with the looming of paternity fraud legislation, monetary damages became a new motive for paternity challenges. A man can avoid future and sometimes past child support arrearages by proving he is not biologically related to a child. DNA testing can conclusively exclude a man as a child’s father, and, in some sense, permits fathers to avoid child support obligations either at the time of divorce where genetic test results trump the marital presumption, or, in pure biological privilege states, at any time the father decides he no longer wishes to pay child support.

As early as 1948, a father challenged paternity and sought to avoid his child support obligation citing his wife’s misconduct in failing to disclose their child’s biological lineage. The father in Vorvilas sought to rebut the marital presumption on the basis of the extraordinary circumstance that he never actually cohabitated with his wife other than on the night of their wedding. The child, born approximately six months after the wedding, was allegedly not his biological offspring. The trial court determined that since the wife deceived the husband, and was guilty of fraud in concealing her pregnancy from her husband, the child was not of the marriage and no child support was owed.

The husband in Vorvilas had no relationship with the child, and can hardly be considered a member of her family. However, pure paternity fraud laws allow fathers who played a role in raising a child for two years or even for the child’s entire minority to challenge paternity and avoid child support. This approach

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129 DNA analysis provides a means to distinguish between all individuals, with the exception of identical twins. Shapiro, supra note 88 at 24, 29.
130 Anderlik & Rothstein, supra note 4 at 227.
131 See supra notes 64-82 and accompanying text.
132 See supra notes 23-48 and accompanying text.
133 Vorvilas, 31 N.W.2d 586.
134 Id. at 587.
135 Id.
136 Id. at 588.
137 See infra notes 361-365 and accompanying text.
would reward Adam for challenging Cain's paternity without regard for the father-child relationship or the existing family structure.

B. Biology as a Sociobiological Norm – Society Assumes a Biology-Parenting Link

According to sociobiologists, parents inherently nurture their children in order to propagate their own genetic heritage.\(^\text{138}\) Parents go to great lengths to ensure that their biological lineage continues, utilizing artificial insemination, in vitro fertilization and surrogacy as means to maintain at least one biological connection to the child.\(^\text{139}\) Even when parents cannot conceive a child, they often want to adopt children like themselves.

For example, a couple placed ads offering fifty thousand dollars for the egg from a five-foot, ten-inch tall female with 1400 college entrance scores.\(^\text{140}\) When their attorney was interviewed on CNN, he acknowledged the couple’s desire to have tall, intelligent children like themselves.\(^\text{141}\) Recognizing the implication of his declaration, the attorney added that the couple would love the child even if it was short and not very smart.\(^\text{142}\) An implication of the attorney’s statement could be that the couple will love the child because it will be theirs, at least partially.

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\(^{138}\) Anderlik & Rothstein, supra note 4, at 224. See also Dolgin, supra note 85, at 542; Elizabeth S. Scott & Robert E. Scott, Parents as Fiduciaries, 81 Va. L. Rev. 2401, 2434 (1995).

\(^{139}\) See Woodhouse, supra note 32, at 1778; Marsha Garrison, Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, 113 Harv. L. Rev. 837, 922 (2000). Artificial insemination involves spinning the man’s sperm and inserting it into the woman’s uterus while in vitro fertilization involves removing eggs from the woman, fertilizing them with the man’s sperm and reinserting them into the woman’s uterus. Both can be accomplished to ensure a shared biology between the man and woman. Surrogacy can involve the woman’s egg and man’s sperm as with in vitro fertilization, but the fertilized egg is placed in a surrogate’s uterus. Other surrogacy options include donated eggs, sperm or both. See generally, Charles Kindregan & Maureen McBrien, Embryo Donation: Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos, 49 VLLR. 169 (2004).

\(^{140}\) Dolgin, supra note 85, at 523.

\(^{141}\) Id.

\(^{142}\) Id.
biologically related to the couple if the man’s sperm is used to fertilize the egg.\footnote{143} Biology is also deemed to be the impetus for family ties; the biological relationship prompting the social one.\footnote{144} As such, biology has been described as a:

Magnetic force as a binder of individuals into communities, the sense of rootedness conferred by a family tree, the meaning of heritage within religious traditions, or any of the many manifestations of genetic connection’s positive power.\footnote{145}

Many sociologists believe that biology is the link between nature and nurture, creating a desire to ensure the child’s safety, well-being and development.\footnote{146} Describing biological offspring as “little Pictures” of their biological parents, Samuel Pufendorf, a natural law theorist, maintained that a biological connection with a child will “motivate parents to act in the interests of their children.”\footnote{147}

The biological or natural link to the nurture component of parenting is supported by research that demonstrates that parents are less likely to commit an act of violence towards their biological offspring than to other children.\footnote{148}

By this account, parents nurture their young (and have little inclination to nurture the children of others) in order to protect their genetic heritage and maximize its survival.\footnote{149}

In addition to creating an affinity and "moral obligation" to one's offspring,\(^{150}\) biology has also been linked to the family's creation.\(^{151}\) As a result, a father's willingness to commit to marriage was believed to correlate to his willingness to commit to a child.\(^{152}\) The biological precipice for marriage suggests that the reason to marry is to create a family, necessitating children.\(^{153}\) However, because of the perception that marriage is a means to biological offspring, many men view parenthood as a part of the marital relationship rather than as an independent relationship with the child.\(^{154}\) Sociologists Frank Furstenberg, Jr. and Andrew Cherlin maintain that because many men view marriage and parenthood as interrelated, once the marriage ends, so does the father-child relationship.\(^{155}\)

Not all men end their parental relationships when the marriage dissolves. However, because the parent-child contact is often less frequent and involves conflict between the parents,\(^{156}\) the non-custodial parent's bond with the child often weakens.\(^{157}\) This is evidenced by more selfish conduct by the non-custodial parent subsequent to the termination of the intimate relationship between the parents.\(^{158}\)

Because of the sociobiological role in parenthood, once DNA results disestablish biological paternity, it is difficult for a father to consider the other aspects of fatherhood, including his affinity for and relationship with the child.\(^{159}\) In addition, as biological ties are also linked to the child's identity as evidenced by the desire of adopted children to seek out and establish

\(^{150}\) Id. at 2444; Anderlik & Rothstein, supra note 4, at 218, 225.
\(^{151}\) Bartlett, supra note 147, at 888; Dolgin, supra note 85, at 524 (indicating that family relationships were believed to be based on fixed "biological truths."); Woodhouse, supra note 32, at 1763;
\(^{153}\) See Bartlett, supra note 147, at 888; Scott & Scott, supra note 139, at 2444.
\(^{154}\) See Woodhouse, supra note 32, at 1763.
\(^{155}\) Id.
\(^{156}\) Scott & Scott, supra note 139, at 2447.
\(^{157}\) See Scott & Scott, supra note 139, at 2443, 2446.
\(^{158}\) Scott & Scott, supra note 139, at 2446.
\(^{159}\) See Dolgin, supra note 85, at 544; Robinson & Paikin, supra note 22, at 25.
relationships with their biological parents, researchers believe that a child’s genes do more than determine the color of the child’s eyes. A child’s “personality and development” are also attributed to the child’s genetic heritage. Therefore, the biological-privilege approach’s reliance on the benefit to the child in developing a relationship with his biological father, as well as the injustice in requiring a father to incur financial responsibilities for a biologically unrelated child, is imbedded in the sociobiological connection.

III. A FLAWED BIOLOGICAL PREMISE – THE DAY THE FAMILY DIES

The policy behind a biological paternal truth is founded on the principle that if a man is biologically connected to a child, he will innately desire to care for the child; both financially and emotionally. That happily ever after mentality works well for fairy tales and movies, but, in the real world where the family does not always fit into the traditional family model, the courts need to consider that the biological father’s whereabouts may not be known; he may be dead, unaware of the child, or, aware of the child but have no desire to be the father.

Proponents of a biological privilege argue that it does not matter. A child is entitled to know his “real” biological father, who owes society and the child a duty of financial, if not emotional, support. Biological privilege proponents further argue that it is in the child’s best interest to know the biological father. Although there are reasons for knowing a biological parent, such as health history and identity questions, there are also

160 See Scott & Scott, supra note 139, at 2444; Woodhouse, supra note 32, at 1778; Roberts, supra note 109, at 41 (“Knowing who their genetic mother and father are can bring financial and emotional support as well as valuable information about family medical history.”).
161 Woodhouse, supra note 32, at 1778.
162 Id.
163 See supra notes 139-140, 147-148 and accompanying text.
164 See supra note 303 and accompanying text. See also Clevenger v. Clevenger, 11 Cal. Rptr. 707 (Cal. App. 1st Dist. 1961); Thomas, 584 N.W.2d at 424-425.
165 See supra notes 61-64 and accompanying text.
a whole host of potential disadvantages to both the child and biological father in this approach.

For example, when the child is the product of an adulterous affair, thrusting the child into the biological father’s life may cause his family to unravel, leaving the children from that marriage without a live-in father as well or, alternatively, thrusting the mother’s paramour into the child’s family may cause the husband and only father the child knows to abandon the family. Some of the more extreme possibilities include the potential that the biological father may not want the child, or may even neglect, abandon or harm the child.

When it excludes a father, it takes away the desire to be part of the child’s life, ending the family’s functionality. When it includes another person as a biological father, it can be equally devastating to an existing family unit, imposing an unwanted stranger into the family. Likewise, when genetic testing predates an admissibility determination, it creates a situation the family must face head on because, like an abortion, it cannot be undone.

This is especially true given the bald eagle, DNA, money connection. Bald eagle evidence creates suspicion and fuels the DNA request, which, when tied with the monetary incentive to avoid the financial obligation of child support, is an incredible lure to even those who had no doubts about their children’s paternity.166 A biology privilege also encourages a lack of diligence and perjury, something it purports to discourage in that fathers have an incentive to fabricate newly discovered evidence or incur a faulty memory about what they knew when the child was conceived or born. It also favors men in letting them challenge paternity if they choose to abandon the parent-child relationship or preserve the parent-child relationship when they want to maintain that role. Most of all, it harms families by changing the dynamics of the father-child relationship.

166 See infra note 250 and accompanying text.
A. Marriage and Biology – A Biological Preference Destroys Non-Traditional Families

Although families have changed dramatically since Lord Mansfield’s rule protected marital families, the legal system is slow. It was only in 1973 that the UPA acknowledged cohabitation as a form of family. In addition, instead of acknowledging non-traditional families, the courts and legislatures have retreated to biology as a safe haven and determined that if a father lived with the child during the child’s first two years and held the child out to the public as his own, then he is presumed to be the child’s biological father.

The biology connection in the hold-out provisions, especially as adopted in the UPA, stem from the assumption that a man who lives with the child during the infancy of the child would likely be the biological parent or, alternatively, based on socio-biological principles, the person most likely to hold out a child as his own would be the biological father, who for some reason, has not done the right thing by the child’s mother in a traditional sense of the notion, but who may be trying to make the relationship work for the sake of the child.

Families, however, have changed from the traditional dual-parent marital family to a more flexible version of the family. New models of family include anything from bi-coastal families to families where the parents have never married or cohabitated but share equally in the child rearing responsibilities to same-sex couples who raise the child as a family, with only one parent biologically related to the child.

167 The Uniform Parentage Act (1973) (UPA) has been amended in 2000 and 2002, but essentially relies on the same biology-based presumption, extending the biological privilege by limiting the period when a father may live with and hold out a child as his own without marrying or attempting to marry the child’s mother to the first two years of the child’s life. Uniform Parentage Act § 204(a)(5) (2000) (amended 2002).

168 The UPA and state laws use the term own or biological offspring interchangeably.


170 See supra notes 139-140, 147-148 and accompanying text.
Specifically, families can be created through love or money; they can be grounded in biology or intention; they can include children created through donated gametes, children with several biological mothers, children who survived the choices attendant upon genetic testing at the embryonic stage, or no children at all.171

When the biology privilege is applied to the non-traditional family, the family suffers and, at some point, can dissolve.

First, the child, the core of the non-traditional family, suffers from the loss of the only father or parent, given that the same principles apply to same-sex families, she knows and from the uncertainty of her biological heritage. In addition, the child’s siblings suffer, especially if a parent challenges the paternity of one child but not another. The fact that one child may lose the connection with the parent while the other maintains visitation, affection and financial support cannot foster the development of a healthy relationship between the children or within the family unit, now split by its genes.

Ironically, while DNA evidence is perceived to create certainty, it actually fosters doubt. It fosters doubt in the child who never knows if and when the father will decide to disclaim and abandon him, leaving him emotionally and financially destitute.

Finally, a pure biology-based system potentially allows a stranger to thrust his interests on the families, including forcing the child to engage in parental visitations with a biological father the child does not know. The child may also lose his father if his parents separate as a result of the third party’s intrusion into the family dynamics; if biology prevails, the family does not.

1. The Family Defined – What Constitutes a Parent-Child Relationship

What makes a family is almost as difficult to discern as what makes a father, which may explain the Supreme Court’s

171 Dolgin, supra note 85, at 525.
desire to hold onto traditional notions of a family. At the same
time, however, non-traditional families are becoming, if they are
not already, commonplace. The perception that a family can
only be defined by the father’s relationship to the child’s mother
assumes that families are born of the sociobiological premise that a
parent’s feelings for each other rather than for the child create a
family.

While a two-parent family is also beneficial to the child as
evidenced by the financial, academic and societal problems
sociologists have attributed to single-parent families, the
assumption that the lack of a traditional family causes these
problems is flawed. Rather, these societal problems arise when
a father, whether married to the child’s mother or living separate
and apart from the child’s inception, fails to provide the child with
emotional or financial support — putting an end to the family.
When that happens, biological-privilege proponents are right: the
family is already dead and the child will suffer the effects of that
loss. That is not, however, something the law should condone.
To do so would be to encourage lawyers to counsel fathers to walk
away from their children if they want to challenge paternity as a
strategic move to strengthen their claim that no family exists.

When a parent maintains a relationship with the child
despite the end of the intimate relationship with the child’s mother,
the family remains intact, albeit in a different structure than while
the parents were married or cohabitating. Arguably, once the

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172 See Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91
(1989).
173 About a third of all children born in the United States are not born into a
traditional family unit. See Garrison, supra note 141, at 887; Woodhouse, supra
note 32, at 1762. See also Kisthardt, supra note 153, at 641.
174 See Michael H., 491 U.S. at 110.
175 See Woodhouse, supra note 32, at 1761. See also supra notes 139-163 and
accompanying text.
176 See Woodhouse, supra note 32, at 1762,
177 Id. at 1763.
178 See Bartlett, supra note 147, at 909-910.
179 See Anderlik & Rothstein, supra note 4, at 220.
180 See Marsha Garrison, Why Terminate Parental Rights?, 35 STAN. L. REV.
423, 464 (Feb, 1983), citing J. Wallerstein & J. Kelly, Surviving the Breakup:
Children and Parents Cope With Divorce 219 (1980). Even a bad relationship
with the non-custodial parent is preferred to complete abandonment. Id. at 464-
465.
geography of the family changes – the child no longer living with both parents – the family changes.\textsuperscript{181}

That does not mean the family no longer exits. It exists in the time spent with the child during visitation or joint custody, the father’s role in decisions affecting the welfare of the child, and the father’s financial and emotional support for the child, as well as the overall relationship between the father and child. That father-child relationship is not dependant on where the child lives or the specific household functions the parent performs.\textsuperscript{182} As one scholar stated:

Parents are not fungible child rearers. The link between parent and child has substantial and intrinsic value to the child; the substitution of another parent and/or termination of the relationship is accomplished only at considerable cost to the child.\textsuperscript{183}

Once that relationship is established, the parent-child relationship cannot be destroyed by divorce alone.\textsuperscript{184} Children do not view their families in the limited construct of the white picket fence fiction, especially when many of them never lived the fantasy.\textsuperscript{185}

When a biological privilege allows the father to know the genetic heritage of the child, however, it discounts the father’s role in the family,\textsuperscript{186} as well as the child’s need to belong to a family.\textsuperscript{187} Proponents of a pure biological privilege may argue that once the relationship is compromised by the biological truth, the courts cannot force the father and child to maintain a loving, caring relationship.\textsuperscript{188} While this is true, that does not mean the legal

\textsuperscript{181} See Rogers, supra note 109, at 1172; Roberts, supra note 109, at 56.
\textsuperscript{182} Scott & Scott, supra note 139, at 2402.
\textsuperscript{183} Scott & Scott, supra note 139, at 2415.
\textsuperscript{184} Glennon, supra note 72, at 278.
\textsuperscript{185} See Garrison, supra note 140, at 887; Woodhouse, supra note 32, at 1762. See also Kisthardt, supra note 153, at 641.
\textsuperscript{187} See Bartlett, supra note 147, at 903-905.
\textsuperscript{188} See Rogers, supra note 109, at 1172-1173.
system should encourage fathers to abandon their fatherly relationships when the intimate relationship with the child’s mother ends. To do so offers a monetary reward for sacrificing the parent-child relationship. Because a biological parent has the same duty to support the child when he does not live with the child as when he does, it should not matter where the non-biological father lives when he has a parent-child relationship with the child. Consistency requires that if geography is not a criteria for parenthood when there is no established father in the child’s life, it should be even less important when there is.

A more practical approach is to acknowledge all families; including those that do not satisfy traditional family norms. Families can entail three people – mother, father, child – who never live under the same roof, where the father is active in the military, lives in another state in a bicoastal marriage or relationship, or just does not live with the child’s mother. The father may not even be a father at all but another mother in a same-sex family. The father may even be married to another woman and have children through that relationship yet still acknowledge and play a role in the non-traditional family involving another child.

The idea that the United States Supreme Court promulgated in *Michael H. v. Gerald D.* that a family is dependant upon the father’s relationship not only with the child but also with the mother as a marital family is inconsistent with the family that exists in America today. Reasoning that the integrity of the family unit should be preserved over the interests of the “adulterous father,” the *Michael H.* Court denied the biological father legal parentage rights because the mother’s marriage to another man was still intact at the time of the paternity challenge. The Court indicated that the legislature could protect the sanctity of the

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189 "[A]dults should be discouraged from searching for ways to obtain a 'clean break' from the children for whom they have voluntarily - - if not always with full knowledge of the child’s biological heritage - - accepted responsibility. Instead, the assumption of the parental role is a fiduciary responsibility that should not be easily cast aside.” Glennon, *supra* note 73, at 283.


192 Id. at 119.
family over the biological parent's interests.\textsuperscript{193} In addition, Justice Scalia, writing for the majority, distinguished situations where the husband is impotent, sterile or was not cohabitating with the mother at the time of conception on the basis that the husband would already know the child was not biologically related to him, and, therefore, a paternity claim would be less likely to "disrupt an otherwise harmonious and apparently exclusive marital relationship."\textsuperscript{194} Although the Court also acknowledged that a father-child relationship outside a traditional marriage may create comparable interests to the marital father, the Court noted that without a tie to the child's mother, the non-marital father's rights may be limited.\textsuperscript{195}

In its reasoning, Justice Scalia's majority ignored families beyond the marital unit. By calling the child's other live-in relationships "quasi-family units," it diminished those relationships as "seemingly, but not actually;...nearly,"\textsuperscript{196} families -- an imitation at best. It failed to acknowledge that families can exist when the father knows there is no biological connection to the child, after divorce, without a marriage or lasting relationship between the mother and father or between members of the same sex.\textsuperscript{197}

It was only in Justice Brennan's dissent that non-traditional families were legitimized based on the parent-child relationship rather than the mother-father relationship.\textsuperscript{198} In denouncing a state's right to define "what the family should be," Justice Brennan correctly looked to unwed fathers as an example of protected

\textsuperscript{193} Id. at 123.
\textsuperscript{194} Id. at 120, fn.1.
\textsuperscript{195} Id. at 129 (citing Lehr v. Robertson, 463 U.S. 248, 260, fn. 16, 103 S.Ct. 2985, 2993, fn. 16, 77 L.Ed.2d 614 (1983), citing Caban v. Mohammed, 441 U.S. 390, 397, 99 S.Ct. 1760, 1770, 60 L.Ed.2d 297 (1979).
\textsuperscript{197} Justice Stevens, however, acknowledged that "enduring 'family' relationships may develop in unconventional settings." Ibid. at 133, citing Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) and Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979). In doing so, he acknowledged the biological father's claim to visitation rights but concurred in the majority opinion. Id. at 134.
\textsuperscript{198} Id., at 142. Justices Marshall and Blackmon joined in Justice Brennan's dissent.
families. In addition, one of the flaws in the majority’s definition of a family, that families only exist to intact marital families, was exposed as:

The plurality has wedged itself between a rock and a hard place. If it limits its holding to those situations in which a wife and husband wish to raise the child together, then it necessarily takes the State’s interest into account in defining “liberty”; yet if it extends that approach to circumstances in which the marital union has already dissolved, then it may no longer rely on the State’s asserted interest in protecting the “unitary family”...

Justice Brennan’s dissent in Michael H. is consistent with the types of families that exist in American today, whereas the majority discounts the value of blended families where a child born of marriage or a prior non-marital relationship maintains a relationship with his father while becoming a member of an additional family born from his mother’s marriage to another man. The relationship with the child’s father can, and, according to sociologists, should, remain intact.

State courts have also relied on marriage to establish a family relationship. In Sandra S., Franzel, and Thomas, the New York, Michigan and Minnesota courts, respectively, considered the parents’ marital status in determining whether a family existed. In Sandra S., the court found that even though the

199 Id., at 143-144.
200 Id., at 147.
201 See supra notes 157-159, 163 and accompanying text. See also Anderlik & Rothstein supra note 4 at 24.
202 See Sandra S, 667 N.Y.S.2d at 633; Franzel, 516 N.W.2d at 497 (Where the court indicated that the policies applied to protecting families did not exist since the parents never married); Garst, 2003 WL 1571704 (Relying on the lack of a family where the parents lived apart within a few months of the child’s birth and the mother’s remarriage in denying the father’s argument that he was trying to preserve a relationship with the child’s mother when he initially failed to challenge paternity); Thomas, 584 N.W.2d at 425.
203 667 N.Y.S.2d at 633.
204 516 N.W.2d at 497.
205 584 N.W.2d at 421.
father had a “full and active father-son relationship for ten years,” because the father was not seeking to preserve the relationship and there was no protected “legal status,” as the father under the marital presumption, there was no family to preserve.\textsuperscript{206} The Sandra S. court also relied on the fact that the father-son relationship deteriorated to the point of no communication during the year after the father learned of the lack of a biological connection in reasoning that the child’s best interest would not be served by forcing a relationship that no longer existed.\textsuperscript{207} The court stated:

\begin{quote}
[C]ourts will be more inclined to impose equitable estoppel to protect the status interests of a child in an already recognized and operative parent-child relationship.\textsuperscript{208}
\end{quote}

In addition, the Thomas court reasoned that since the marriage was no longer intact, the “preservation of the family unit is of minimal consequence.”\textsuperscript{209}

The approach adopted by the Thomas court encourages the father to break off the parent-child relationship to avoid child support obligations.\textsuperscript{210} It also, like Michael H., assumes a family exists only if the parents are involved in an intact marriage. To make such an assumption excludes all other family relationships and makes parental choice determinative over the parent-child relationship. It also prejudices families where marriage is not an option as with gay or lesbian families since most states do not recognize the couples’ right to marry or create a family.\textsuperscript{211}

\textsuperscript{206} 667 N.Y.S.2d at 634-635.
\textsuperscript{207} Id. at 635.
\textsuperscript{208} Id. at 634, citing Matter of Baby Boy C., 638 N.E.2d 963 (N.Y. 1994).
\textsuperscript{209} 574 N.W.2d at 425.
\textsuperscript{210} See Anderlick & Rothstein, supra note 4 at 220.
\textsuperscript{211} Recently, the Massachusetts Supreme Court found that a statute that excluded a gay couple's right to marry lacked a rational basis. See Goodridge v. Dep't. of Public Health, 798 N.E.2d 941, 961-962, 965 (Mass. 2003). See also In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 570-572 (Mass. 2004)(Responding to Senate request for an opinion as to the constitutionality of a pending bill that would allow same sex civil unions but not same sex marriages, the court opined that the proposed bill was unconstitutional). In addition, San Francisco's mayor ordered the city's marriage license offices to issue marriage licenses for gay and lesbian couples during the week proceeding
Likewise, the Michael H., Thomas, Franzel and Sandra S. courts’ reliance on biology and marriage as the constraints in defining a family ignored other non-traditional families. For example, in some open adoptions, the biological and adoptive parents maintain a relationship with each other and the child. Although the biological parents have no legal rights or responsibilities over the adopted child, they may be involved in the child’s life. Some families blend in other ways, involving cousins living as a family in one household under one or multiple sets of parents, children living with adult siblings without their parents, or same-sex couples raising the biological or adopted offspring of one or both the partners. Rather than forcing the legal fiction created by a strict interpretation of the marital presumption as in Michael H., the courts need to recognize the relationship between the parent and child, not the parents, especially where adult relationships are less permanent than they were in the 1950s where the traditional family thrived.

2. Irreparable Harm – The Child Loses When Biology Determines Who Can And Cannot Be a Father

No one contests that the child will be harmed when the only father she knows severs the parent-child relationship for any reason. Unlike adults, children are less concerned about genetics, partially because of an infant or child’s need for permanence in their family. The loss of a parent can be devastating to a child,


212 An open adoption allows the biological parents to have contact with the adopted child.
214 See Bartlett, supra note 147, at 924.
215 See Harris, supra note 187, at 485.
216 See Bartlett, supra note 147, at 903. But see Cain v. Cain, 777 S.W.2d 238, 239 (Ky. App. 1989)( After the eleven-year-old child’s mother told him that her
which is even worse when the parent leaves the child or dies.\textsuperscript{217} As a result, the child may no longer be able to trust people because of the loss of the most basic trust – that in a parent. Children think "...if you can't trust your own parent, you'd better not trust anyone."\textsuperscript{218}

In addition, even if the child wants to continue the relationship with his father, he has no enforceable remedy under a biological privilege system. For example, the alleged biological father in \textit{In re Marriage of Adams}\textsuperscript{219} claimed that the child wanted to maintain a relationship with the man he knew as his father for the past ten years. The court indicated that the determination was not one of the best interests of the child, but whether a legal relationship existed between the father and child.\textsuperscript{220} Because the Illinois statute, a biology-trump statute, allowed the marital presumption to be rebutted and another man to be adjudicated the biological father, the husband was relieved of any support obligation, which was imposed on the biological father without regard to the child's desires.\textsuperscript{221}

In a concurring opinion, Justice Cook acknowledged the purpose of a two-year discovery-based statute of limitations for challenging paternity, stating:

It is wrong to make a child a part of a family unit and pass over substantial concerns regarding the child's paternity only to raise them years later in an attempt to avoid child support.\textsuperscript{222}

Even though Justice Cook was surprised by the father's decision to "abandon that relationship" with the child due to his wife's conduct, he indicated that it was the father's right to do so

\textsuperscript{217} See Sandberg, supra note 3 (citing Sandra Moore-Pope, a clinical social worker in Texas).
\textsuperscript{218} \textit{Id.}
\textsuperscript{219} 701 N.E.2d at 1134.
\textsuperscript{220} \textit{Id.}
\textsuperscript{221} \textit{Id.}
\textsuperscript{222} \textit{Id.}, citing \textit{In re Marriage of O'Brien}, 617 N.E.2d 873, 876 (Ill. App. 1993).
as long as it is within two years of obtaining knowledge of the possibility that the child is biologically unrelated to him.\textsuperscript{223} Because the issue was brought by the alleged biological father in an attempt to avoid child support obligations himself, Justice Cook acknowledge the potential harm in allowing an attack on the father-child relationship and deemed the claimed harm to the child was not credible.\textsuperscript{224} The same result was reached in \textit{D.S.M. v. L.M.}\textsuperscript{225} where the Alabama Appellate Court allowed a husband and father to disestablish a ten-year relationship with his youngest daughter and declared a stranger to be her legal father. Judge Yates specially concurred, acknowledging the potential harm to the child when a presumed father is allowed the choice to either preserve a legal relationship where no actual one exists or, as in that case, abandon the actual relationship without considering the child's interests, and stated:

A child may be psychologically damaged if the presumed father who has had less contact with the child than the biological father now asserts the presumption...and there may be harm to the child if the man the child knows as his father suddenly abandons him.\textsuperscript{226}

While Judge Yates expressed a desire to consider the best interests of the child in making paternity decisions, he agreed with the majority, finding the five-year statute of limitations did not bar the child’s father from contesting paternity.\textsuperscript{227}

Some courts justify decisions disestablishing paternity in an existing father-child relationship by finding that the child suffered no actual harm, but rather benefited from the father-child

\begin{itemize}
\item \textsuperscript{223} \textit{Id.} \\
\item \textsuperscript{224} 701 N.E.2d at 1135. \\
\item \textsuperscript{226} \textit{Id.} \textit{See also} R.E. v. C.E.W., 752 So.2d 1019, 1026, (Miss. 2000) (Where the court referred to the child as the "big loser" in the scenario, having her father of ten years taken away from her in exchange for a stranger who wanted nothing to do with her). \\
\item \textsuperscript{227} \textit{Id.}
\end{itemize}
relationship while it lasted.\textsuperscript{228} While the NPA court recognized that the child who "may have an affinity for the husband as his father, is an innocent victim of his parent's problems," it dismissed the potential harm to the child, stating:

\begin{quote}
[T]he child suffered no detriment by having been cared for and supported during the five year relationship where no legal duty to do so existed. In fact, the child has received the benefit of the husband's love and support.\textsuperscript{229}
\end{quote}

The NPA court also pointed to the fact that the mother and child could still pursue a paternity claim against the biological father as justification for allowing the father to disestablish paternity.\textsuperscript{230} By acknowledging the potential harm and countering it with the alleged benefit of the relationship, the court failed to address the emotional harm the child suffered by ending that parent-child relationship, and, instead, focused on the financial and emotional benefit the child received during the relationship.

This temporary benefit outweighs the long-term harm logic assumes that since the child was technically not entitled to the love, affection and support of the non-biological father in the first place, the child could not suffer from the removal of that relationship, ignoring the reality that a five-year-old child neither understands nor cares about entitlement or biology. It also assumes that the child's biological father will step into her life and pick up where her current father leaves off. That reasoning does not consider that the biological parent may not desire a relationship with the child, may not be locatable, or may not be alive. By failing to address these concerns, the harm to the child and family is summarily dismissed to preserve the interests of the father and a biological truth.

\textsuperscript{228} NPA v. WBA, 380 S.E.2d 178, 181, 182 (Va. App. 1989).
\textsuperscript{229} Id. at 181, 182.
\textsuperscript{230} Id. at 182.
3. Families Divided – Biological Truths Separate Siblings and Families by Splitting Biological Offspring From Non-Biological Offspring in the Same Family

When there are multiple children, some of which are the biological offspring of the father while others are not, putting the father's interests before the family's can create even more harm to the children within the family. Under a biological privilege system, the family will be preserved insofar as the biological offspring are concerned, but not for the other children. A father who has an established parent-child relationship with the children will now only visit, support and invest emotionally and financially in the biological children, excluding the others.  

This can create a rift in the family, as well as between the siblings. In addition, it would change everything the siblings, as well as the biologically-unrelated child, came to rely upon about their family. For example, in the Wise case, if the biological privilege applied, Wise could stop visiting three of his four children, only financially and emotionally supporting the biological child. He would not even be entitled to see the other children because, in a pure biological-privilege system, all rights or obligations to those children are extinguished upon proof that they are biologically unrelated to him.

Similarly, in cases where some siblings are biologically related to the father but others are not, the courts fail to address the potential harm to the family unit. In those cases, the father maintained visitation, custody, and decision-making rights over the biologically-related children, but forfeited all rights to the child where paternity was contested.

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231 See Chezem & Nagy, supra note 64 at 479. See also Glennon, supra note 73, at 272.
232 See Glennon, supra note 73, at 272.
234 See C.M. v. P.R., 649 N.E.2d 154 (Mass. 1995) (holding that ex-boyfriend of mother could not continue a relationship with a child, who he had known for several years, under the law).
235 See NPA, 380 S.E.2d 178; Smith, 487 S.E.2d at 95.
Because the courts fail to consider the rights of siblings or the impact of split visitation on an existing family, the actual harm to the family is unknown. While multiple children of one mother often have different fathers without disturbing the family dynamics, there is a difference between that situation and the one occurring with paternity challenges because the children in the latter case never believed themselves to have different fathers. The child losing the father enjoyed a parent-child relationship with the now absent, yet present, father, will be saddened seeing his siblings interact with his father to his exclusion. A worse result would occur in same sex families where the children are each biologically unrelated to the other. There, when the couple splits, the children also split, physically, and legally; never having the opportunity or right to see each other again.

This is a vastly different scenario than when several fathers have always played a role in the family dynamics. Unlike the scenario where the family unit is expanded into subunits with each child’s father playing a role in the family as a whole, in the paternity fraud scenario, only part of the family relationship among the siblings and father is lost.

4. Children in Limbo – Biology Gives Fathers 18 Years to Challenge Paternity

Another problem with pure biological privilege laws is that they lack finality for the child. If the father is allowed to challenge paternity at any time during the child’s minority, the child can never rely on a generally-accepted concept that the man he calls daddy will remain his father. Since children need a sense of security in their family relationships, this uncertainty may have long-term affects associated with a nagging doubt the child may feel, especially if the parents fight and threaten each other with the possibility of genetic testing within the child’s presence.

For example, in Knill v. Knill, when the couples’ youngest child was twelve years old, the child’s mother informed him that his father was not biologically related to him. The father, still married to the child’s mother at the time, comforted his son.

236 See Boccella, supra note 12.
and told him that although they were not biologically related, he still loved him.\textsuperscript{238} The parents separated two years later, at which time the father continued to support all three children until the mother asked for child support in the divorce action.\textsuperscript{239} At that time, the father denied paternity of the youngest child and sought relief from child support for that child, indicating that he could not be the child's biological father because he had had a vasectomy a year and a half before the child was born.\textsuperscript{240} Although the court recognized the child's reliance on the twelve-year relationship with his father, as well as his father's surname, because the child suffered no financial detriment during those twelve years, the father was no longer required to support him.\textsuperscript{241} Rather, the court indicated that the child's mother should look to the "natural" father to support the child.\textsuperscript{242}

The court's reliance solely on a monetary detriment to the child failed to consider the actual detriment to the child – the loss of the parent-child relationship and the change in the family dynamics due to the exclusion of that child only from visitation with his father.

In addition to challenging paternity, the biological privilege also leaves the child in limbo by allowing a father or mother to threaten their child with the possibility of a paternity challenge as a means of securing the child's obedience or allegiance, even if there is no basis to doubt the child's paternity. Dad could infer that he would not be obligated to pay for Junior's ivy league education, if he is not biologically related to Junior, in an attempt to force Junior to follow in his footsteps, abandon a course of study, or even deter a choice in girlfriends. Likewise, in a divorce proceeding, a husband could threaten the wife with a paternity challenge if she seeks marital property rights. It could also be used as a weapon in child support disputes whereby the father could threaten to subject the child to paternity tests if the mother seeks an increase in child support, or opposes a visitation request or modification. Women

\textsuperscript{238} Id. at 547.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Id. at 551-552.
\textsuperscript{242} Id. at 552. The court also reasoned that the child's mother created any emotional detriment by disclosing the child's illegitimacy to him, as well as their other children. Id. at 551.
would be forced to negotiate spousal and child support in exchange for protection of the child's sense of identity. Just as when mothers gave up alimony and property distribution rights to avoid custody disputes in the past, the same situation could occur to protect the children from a potential paternity challenge. Even where the mother knows there are no other potential fathers, the mere threat of the challenge and what it would do to the children emotionally may be enough to influence her other decisions during the divorce. The potential for abuse of power that comes along with a biology-privileged society would take us back to where we have been – a system where children were nothing more than the property of their fathers, and they, like families, lived and died at the whim of the father.

5. Social Strangers – Biology Allows Third Parties to Interfere With the Family

In addition, when biology is a preferred privilege, it also drives a wedge in the family by giving a third party rights to a child in the family. Because over two-thirds of the states have some sort of inclusion law that allows biological fathers to challenge paternity while the marriage or family is intact, the possibility of third-party paternity claims is not remote given biology trump laws.

The effect of allowing third-party paternity challenges is that the ties binding the marriage together begin to unravel. Even if the third-party is not the child’s biological father, the possibility

\[243\] See infra note 315 and accompanying text.
\[244\] See Anderlik & Rothstein, supra note 4 at 223 (stating, “For much of history, children had a legal status little different from property. Children born outside of marriage were in the most precarious position, legally and socially. Prompted by affection, or something else, a man might claim a child and so bestow the benefits of status.”).
\[245\] See Roberts, supra note 109 at 44-45, 56, noting that some states do not allow the intrusion into an intact family based on a best interest of the child standard while “[o]thers, emphasizing the importance of biology, allow the case to proceed.” See also K.S. v. R.S., 699 N.E.2d 399 (Ind. 1996); Russell, 682 N.E.2d 513.
that he is the biological parent is enough to plant doubt and mistrust into the marriage and family. Because some statutes allow anyone who claims to be a biological father to bring an action to establish paternity,247 the potential for third-party intrusion into the family looms inevitably unless the biological privilege is hemmed in. Likewise, this intrusion into the parent-child relationship is enough to do the same harm genetic testing does to the child.248

Third-party paternity challenges occur when the wife has an affair during the marriage and the male adulterer decides, whether based on innuendo, rumor or bald eagle evidence, that the child could be his. This conjecture leads to a paternity challenge during or after the marriage or when family dynamics change, and can occur at any time before the child is born until the child reaches eighteen. For example, in *Witso v. Overby*,249 a male paramour of a married woman brought an action to establish paternity of the woman's one-year-old child.250 Although the woman admitted that she had a sexual relationship with the paramour around the time the child was conceived, the husband and wife contested the request for genetic testing, asserting the marital presumption.251

The trial court ordered genetic testing but sealed the results and certified the issue of whether the paramour could assert the paternity claim based on the wife's admitted having sexual relations with him for appeal.252 The appellate court held that the paramour had a right to genetic testing and to establish the paternity of the child regardless of the child's parents' marital status.253 After the testing was performed, the court considered the

248 See supra note 218 and infra notes 269-322 and accompanying text.
249 609 N.W.2d 618 (Minn. App. 2000), aff'd. 627 N.W.2d 63 (Minn. 2001), cert. denied 534 U.S. 1130, 122 S.Ct. 1069, 151 L.Ed.2d 972 (2002). See also G.F.C. v. S.G., 686 So.2d 1382 (Fla. App. Ct. 5th Dist. 1997) (allowing an HLA test that determined the paramour was the child's biological father, but denied him any rights to the child because of the existing marital presumption).
250 *Witso*, 609 N.W.2d at 619.
251 *Id.*
252 *Id.*
253 *Id.* at 621-22.
competing presumptions of legitimacy and biological paternity and weighed them based on policy and logic.\textsuperscript{254} The court considered the "blood relationships, marriage, and the best interests of the child" in determining the presumed biological father to be the "legal" father.\textsuperscript{255}

The \textit{Witso} court reasoned that if genetic testing were denied, men would seek self-help measures that could be disruptive to the child's well-being.\textsuperscript{256} Although discouraging self-help testing, the court noted what it called "the limited consequence from allowing...genetic testing."\textsuperscript{257} In doing so, the court failed to address the potential harm to the child created by the doubt testing causes. Rather, it discounted the impact of the process of testing and focused on the analysis that would occur after the testing.\textsuperscript{258}

Another flaw in the \textit{Witso} court's logic is in its assumption that the knowledge of the test results would not affect the family. Given the history of men who, once paternity is disestablished, abandon their children, the harm is already done once genetic testing is ordered. In addition, because the decision leaves the door open to any man who had a sexual relationship with a married or cohabitating woman to petition for genetic testing at any point during the child's minority, the potential exists for an ex-paramour to make a claim of biological parentage of a sixteen-year-old child who has lived with his parents with no contact or relationship with the ex-paramour until, after running into the child years later, deems that the child resembles him and that he now wants to play daddy.

The nontraditional family is at an even greater risk to such an intrusion because, unprotected by the marital presumption unless the parents cohabitated during a protected period of time during the child's life, the alleged biological father will not face the weighing process afforded under the marital presumption. Instead, the biological presumption will prevail and the existing father will find himself in a position of having to overcome that presumption without any protection or basis in statutory or

\textsuperscript{254} \textit{Id.} at 623.

\textsuperscript{255} \textit{Id.}

\textsuperscript{256} \textit{Id.}

\textsuperscript{257} \textit{Id.}

\textsuperscript{258} \textit{Id.}
common law paternity laws. Genetic testing will be ordered, subjecting the child and his family to biological information they may not want to know. Likewise, a same-sex couple would have no protection from third-party paternity challenges as it is impossible that either both fathers or mothers would be biologically related to the child, making the challenge by a biologically related adult a guaranteed familial intrusion.\textsuperscript{259}

The "biological truth" may also serve no purpose in states where the marital presumption applies over a biological connection because the ex-paramour would be unable to overcome the marital presumption where the child has an established sixteen-year relationship with his father. Even so, the child's father may, if the results include the paramour and exclude himself, choose to abandon his son a week, month or even year after the proceedings, leaving the child fatherless and destroying what was a happy, functioning family.

In states where a complete biology privilege exists, the result is worse because, like the nontraditional family, even a marital family is afforded no protection against a biological paternity claim. In those situations, not only is the paramour entitled to force the family to undergo genetic testing, he is also able to thrust himself into the middle of what might be a perfectly happy, functioning family.\textsuperscript{260} This creates a class of children who are presumptively legitimate but are actually illegitimate by virtue of their biological lineage.\textsuperscript{261}

In addition, the certainty of the family unit, traditional or otherwise, would be replaced with the constant fear that it could be challenged at any moment – that a perfect stranger could step into a child's life at any time and claim to be his father. A child could never be sure that the man he calls father will not be displaced by a

\textsuperscript{259} It is possible that a lesbian couple would both have an arguable biological link to the child if one woman donated the egg that was placed in the other partner.

\textsuperscript{260} This author contends that the mere happening of an affair or sexual encounter does not mean the family cannot be happy and properly functioning given that people make mistakes and can and have been forgiven for them.

\textsuperscript{261} Chezem & Nagy, supra note 64 at 473. Hon. Chezem and Nagy argue that “… the paradox created by the Indiana Supreme Court is that such a child is per se a child born out of wedlock, regardless of the third party challenge to paternity.” See also Armstrong, supra note 110 at 395.
neighbor, colleague of his mother, or a one-night stand, who would have visitation, custody and control over the child with a simple allegation of timely sexual conduct and a swab of the mouth. 262

Arguably, with the existence of so many blended families where children live with stepparents, the rights of a paramour would be similar to those of the father when the mother remarries. 263 However, the reality is that the existing father in the remarriage scenario presumably already has a developed relationship with the child whereas the paramour may very well be a stranger to the seven-year-old child. 264

Allowing a biological truth to act as a preference over an established parent-child relationship also creates a policy privileging thirty seconds of lust over an established family unit. 265 To do so means the accidental conception is more important than the choice to create a family, 266 rewarding an act of self-indulgence in the heat of the moment over years of a loving, functional father-child relationship. It makes an act that was once illegal, adultery, a weapon against the family, not only displacing the child’s father but also privileging the adulterer’s rights over the child’s. 267 In essence the sperm donor, 268 a paramour, should have no right to destroy the child and family for his own self-indulgence.

262 See Jeffrey A. Parness, Old Fashioned Pregnancy, Newly Fashioned Paternity, 53 SYRACUSE L. REV. 57, 61 (2003). Analyzing the effect of Indiana law that allows a challenge to the marital presumption and arguing for the legal recognition of multiple fathers, Parness indicated that “... many actual fathers can never gain legal recognition; some, in fact, may be removed from their children due to a later-recognized legal paternity or legal fatherhood of another. Thus, a legal paternity designation for one man can override the actual fatherhood of a second man in some settings. Yet elsewhere, a later legal paternity designation for one man can be foreclosed by the actual fatherhood of another man.” See also Armstrong, supra note 110 at 370.
263 See Glennon, supra note 109 at 592.
264 See Armstrong, supra note 110 at 406 (arguing that a putative father is not “interchangeable” with husbands and fathers who have a developed relationship with the child.
265 Id. at 399-400.
266 Id.
267 Id. at 400, 401, 404. Equating the paramour with a sperm donor, Armstrong argues that the adulterous male, knowing he is involved in an illicit affair, should know he has no rights to the family created by the marriage, and, therefore, should have no expectation of that right.
268 Id. at 404.
B. The Wrong Kind of Certainty—A Biological Truth
Does More Harm Than Good and Often Doesn’t Change the Paternity Decision

No court can undo the damage that is done after the father learns, either through DNA or other genetic testing, that the child he raised for the past two, six or even eighteen years is not from his loins. No matter how much a father loves his son, once that piece of paper comes back “EXCLUDED,” meaning he is excluded as a possible biological father of the child, the potential ramifications must be considered. Even where the father asks the court for testing and represents that he will continue paying child support regardless of the outcome of the tests, which he wants just for his own peace of mind, \textsuperscript{269} once he knows the child’s DNA came from someone other than himself, the promise becomes meaningless.

For example, in \textit{Wachter v. Ascero}, \textsuperscript{270} the mother and father agreed to forego HLA testing ordered during the divorce proceedings when the child was about two years old. \textsuperscript{271} Two years later, the father, after having remained in contact with the child through visitation, \textsuperscript{272} petitioned to reopen the paternity determination and for HLA testing, claiming he agreed not to test earlier because of his ex-wife’s pleas to spare the child that he loved. \textsuperscript{273}

At the time of his petition, the father represented that he was not trying to avoid his financial obligation towards the child, and promised to continue paying child support, regardless of the outcome of the genetic testing. \textsuperscript{274} The court granted the testing,

\begin{footnotesize}
\textsuperscript{270} \textit{Id.}
\textsuperscript{271} \textit{Id.} at 1020.
\textsuperscript{272} \textit{Id.} at 1021.
\textsuperscript{273} \textit{Id.} at 1020.
\textsuperscript{274} \textit{Id.} See also \textit{Ince v. Ince}, 58 S.W.3d 187, 189 (Tex. App. 2001) (denying action by father who sought to have DNA testing eleven years after the divorce decree acknowledged his paternity to determine whether his daughter had a genetic problem, then, after the results excluded him as father, he sought a bill of review to set aside his child support obligation).
\end{footnotesize}
noting that it was unnecessary because paternity was decided based on the father’s promise to maintain his support obligation.\textsuperscript{275}

Once the test results excluded him as the child’s biological father, however, the man who previously gave his word that he would continue to support his child, nonetheless filed a petition to vacate the child support order.\textsuperscript{276} The appellate court affirmed the denial of the father’s petition based on res judicata and equitable estoppel principles, indicating that “blood tests should not have been ordered...even for humanitarian purposes, and should never be ordered unless it is to establish paternity in a proceeding where paternity is a relevant fact and has not already been determined in a prior proceeding.”\textsuperscript{277}

While the father may have intended all along to deny paternity once the test results were received, curiosity and doubt may have also motivated his request. The result, however, was the same. In a state such as Pennsylvania,\textsuperscript{278} which has not enacted paternity fraud legislation, the tests were irrelevant to the legal outcome of the case. Genetic testing was unnecessary, would not change the outcome of the child support obligation or visitation rights of the father, and would have no legal effect.

Even so, once performed, genetic testing would, and did, change everything. Once the father knew he was biologically unrelated to the child, no matter how much he claimed to love her before the test results were disclosed, once the biological truth was learned, he no longer wanted to be her father and petitioned to end his financial obligation to the child.\textsuperscript{279}

His motive, if one assumes money was not his initial motivation, was not revealed in the decision, but the harm to the

\begin{itemize}
  \item genetic problem, then, after the results excluded him as father, he sought a bill of review to set aside his child support obligation).
  
  \textsuperscript{275} Wachter, 550 A.2d at 1020.

  \textsuperscript{276} Id.

  \textsuperscript{277} Id. at 1021.

  \textsuperscript{278} Pennsylvania has no paternity fraud laws but does currently permit the legitimacy presumption to be rebutted by genetic test results. See 23 PA. CONSOL. STAT. ANN. § 5104 (2002) “Blood tests to determine paternity: (g) Effect on presumption of legitimacy. - - The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all the experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child.” (emphasis added).

  \textsuperscript{279} Wachter, 550 A.2d at 1020.
\end{itemize}
While he may have felt victimized by both his ex-wife and the court,²⁸⁰ the child was victimized by her own father, who only wanted her when he thought he was biologically related to her.

Furthermore, allowing a paramour to undergo genetic testing when it is not admissible or cannot impact the outcome of the case as in *G.F.C. v. S.G.*,²⁸¹ can do nothing but harm the family. In *G.F.C.*, the husband moved to dismiss G.F.C.'s petition to establish paternity of the husband and wife's child.²⁸² Before the trial court ruled on the husband's motion, the judge ordered HLA tests that confirmed that G.F.C. was the child's biological parent.²⁸³ Notwithstanding the test results, the husband's motion to dismiss was granted based on the marital presumption, as well as the following facts: 1) the husband's name appeared on the child's birth certificate; 2) the husband filed an affidavit acknowledging paternity of the child; 3) the husband held the child out as his own; and 4) the intact status of the family before and since the child's birth.²⁸⁴ The appellate court confirmed the decision, indicating that without an established relationship between the paramour and the child, there would be no basis to break up the intact family, and, therefore, the marital presumption barred the paramour's action.²⁸⁵

The trial court's logic in ordering the HLA tests first and ruling on the motion to dismiss later was flawed in that the test results were irrelevant to the outcome of the motion just as in *Wachter*, which was decided on the basis of the marital presumption and the biological father's lack of an established relationship with the child, as well as the lack of any evidence of

²⁸⁰ See Boccella, *supra* note 12. Res judicata and equitable estoppel are equated by paternity fraud proponents to the procedural technicality that unjustly imprisons him in financial jail for the next fourteen years. Assembly Committee on Judiciary April 16, 2002 Hearing, Comments. See also Jim Herron Zamora, *The New Paternity; DNA adds twist to definition of 'Dad', SAN FRANCISCO CHRONICLE*, June 17, 2001 at A-4 (indicating that while DNA evidence frees criminals, it does not necessarily free men from child support obligations); Harris, *supra* note 187.
²⁸¹ 686 So.2d 1382 (Fl. App. Ct. 5th Dist. 1997).
²⁸² *Id.* at 1383.
²⁸³ *Id.*
²⁸⁴ *Id.*
²⁸⁵ *Id.* at 1385.
abuse, abandonment or neglect by the husband.286 Had the court decided the legal issue first, there would have been no basis for ordering the genetic testing. While the child’s father wanted to maintain his relationship with the child since he was involved in the marital relationship and family unit, he may later become dissatisfied with the marital relationship and do exactly what the policy sought to avoid in the original petition – abandon, abuse or neglect the child.287 In any event, a family, albeit possibly fragile by the very adultery that occurred, is now in danger of extinction because the court privileged biology at the cost of the parent-child relationship and the family.

Allowing the father to proceed with genetic testing when the results are not admissible or through self-help mechanisms such as independent testing labs288 also creates a perceived truth that overrides the parent-child relationship regardless of the admissibility of the test results in the paternity action. The courts and legislatures might as well allow the father to set aside the paternity judgment and vacate the child support order if they are going to continue endorsing testing. By ordering genetic testing before its admissibility is determined and condoning self-help testing, the damage is already done to the child’s relationships with his family.

Some statutes even require the father to conduct DNA testing before moving to set aside a paternity determination.289 In Marriage of Kates, the father had a vasectomy prior to the child’s conception, yet claimed he was “uncertain” whether he was the

286 Id. at 1385-87.
287 This is not to suggest there is any evidence or reason to suspect abuse in this case. See supra note 158 and accompanying text.
288 See www.swabtest.com (DNA home swab tests by Genex Diagnostics, a company based in Seattle, Washington and Canada); www.prophase-genetics.com (offering home swab DNA tests for $165); www.paternity-answers.com (offering home swab DNA tests for $230); www.dnatestingplace.com. (offering free home DNA tests from Ana-Gen Technologies testing company); and www.paternity.us (offering home DNA tests for $210 from the American Paternity Center but indicating that it cannot ship to addresses in New York because of New York laws).
child’s biological father at the time of the child’s birth. When he divorced the child’s mother, he chose to remain on the child’s birth certificate and pay nominal child support, twenty dollars per week, to maintain visitation rights. It was not until his child support obligation was increased that he challenged the child’s paternity, claiming his former wife agreed not to seek increases in the amount. When he petitioned to set aside his paternity obligation under Illinois’s paternity fraud laws, the court rejected his petition because he failed to obtain DNA tests before bringing the petition, a condition precedent to filing an action to set aside paternity under the statute.293

Even in White v. Armstrong, where the court denied a father’s request for genetic testing, the father sought self-help testing and used those results to successfully challenge paternity. There, the father failed to request genetic testing when the parties legally separated, claiming he did not want to know the truth and that he relied on his former wife’s representations that their two sons were his biological offspring. Armstrong, however, claimed she told White he was not the biological father of the oldest son while she was pregnant.

After the Juvenile court denied his contest at the paternity establishment proceeding, White paid child support and exercised his visitation rights for several years before the child told White that he had two fathers, something he apparently learned from his mother. After White’s request for genetic testing was denied by the Juvenile court, he sought self-help testing that excluded him as the biological father of his oldest son. Armed with this

290 761 N.E.2d at 156.
291 Id. at 155.
292 Id.
293 Id. at 157.
294 1999 WL 33085 (Tenn. App. 1999). See also Brian B. v. Dionne B., 699 N.Y.S.2d 491 (N.Y. App. Div. 2 1999) (holding that the father be equitably estopped from contesting paternity eleven years after the original determination even though the results of self-help genetic tests indicated that he was not the biological father of the child).
295 Id.
296 Id.
297 Id.
298 Id.
knowledge, he again challenged his son's paternity, this time successfully.\footnote{Id.}

Once again, the court focused on the wrongs of the wife rather than the acts of the father in seeking self-help testing after a denial of a request for court-ordered testing. By granting the father relief from his parenting obligations, the court rewarded his conduct. This makes fathers more likely to seek self-help genetic testing because it could create an additional opportunity to contest paternity. Rather than preserve whatever family relationship exists, by condoning self-help remedies, the courts ultimately condone voluntary destruction of the family.

Self-help genetic testing may also result in the father severing relations with the child, including visitation and custody rights, before a court rules on the admissibility or effect of the test results. The father may also stop paying child support until the state garnishes his wages, if he earns any. He may even tell the child that he is not her father.

The father in Miscovich v. Miscovich\footnote{Id.} did just that. After seeking self-help DNA tests on himself and his four-year-old son, he stopped all contact with the child after telling the child that he was not his father.\footnote{Id. at 727-28.} Up until that point, Miscovich lived with his son and wife and established a parent-child relationship with his son.\footnote{Id. at 730.} Because the court did not believe the marital presumption was overcome, the self-help DNA tests were not admissible and Miscovich remained the legal father.\footnote{Id. at 733.}

Regardless of the court's ruling, the damage was done. The relationship forged during the first two years of his son's life was severed for the five years while the paternity challenge was pending. The child, then nine, had already lost his father, who walked out of his life when the DNA results revealed the skewed truth about the child's paternity - that biology, not the existing parent-child relationship mattered more to the father than the child did. The courts can order Miscovich and others like him to pay child support, but they cannot order those men who have

\footnote{Id. at 727-28.}
\footnote{Id. at 727, 733.}
\footnote{Id. at 730.}
emotionally abandoned their children to resume the parent-child relationship and restore the family to where it was before the biological truth destroyed it.

Watcher and Miscovich are not the only cases where the father’s perception of his child changed when genetic test results determined that the child was not biologically his.  

In many cases, a paying male who believes he is not the biological father will have no interest in maintaining a relationship. He will view the relationship as a financial strain, based on a legal error that is impossible to remedy. Even granting visitation will not foster a loving relationship between the two.  

This sentiment that a biological truth destroys a parent-child reality is not unusual. Many of the cases that led to legislative changes and proposed paternity laws involve fathers who cut off ties with their children after being excluded as the biological father. One such father, Franklin Simmons, attempted to sever all relations with his son, claiming he could no longer love the child. Simmons described his feelings in a court affidavit stating, “I am incapable morally and emotionally of providing any of the love, affection and nurturing that is needed and required for this young

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305 Louis J. Tesser, Dad or Duped? Post-Appeal Challenges to Paternity Judgments, 20 No. 2 GPSOLO 18 (2003).

306 See Wise, 49 S.W.3d at 453. See also Boccella, supra note 12 (reporting on the Miscovitch case where the father cut off ties to his four-year-old son after being excluded as the biological parent); Sandberg, supra note 3 (reporting on the Simmons case where the father sought to cut all ties with his thirteen-year-old son after genetic testing excluded him as the biological father).

307 Sandberg, supra note 3.
Simmons language indicates that he could not even acknowledge his child after thirteen years, calling him "this young man." The parent-child relationship could not overcome the biological truth created in the mind of the child's father. Therefore, when courts privilege biology over an existing parent-child relationship, the combination creates a harm so egregious that it cannot be undone. The father cannot return to the relationship. The mere knowledge of the biological truth undoes what years of shared experiences, parenting, love and affection created – a father and a family. Simmons is not the only example of a father who abandoned his child after obtaining genetic testing. Others such as Carnell Smith also walked away from a long-term relationship with their child.

Those who advocate the position that biology should not matter, though correct in theory, miss the point. It does matter. Proponents of paternity fraud laws cannot admit the likely result of the laws – mass re-litigation of past paternity and child support cases – because to do so would stall or kill the proposed laws. Instead, they use men like Wise and McCarthy, two men who have continued their relationships with their non-biological children, to promote the laws.

Even fathers who fought for custody and still maintain relationships with their children to whom they that they are biologically unrelated, admit that the relationship, and the way they feel about their children, changed after they learned they were

308 Id.
310 See Harris, supra note 187.
311 See Boccella, supra note 12 "'I would think if there's a close parent-child relationship, then the matter of whose DNA the child is carrying wouldn't matter that much,' said Laura Morgan, chairwoman of the American Bar Association’s Child Support Committee. 'It's too easily reducing parentage to dollars and DNA.'" The article also indicates that "Those pressing for the new laws say they do not anticipate wide-scale child abandonment. Cohen, a lawyer who has represented both men and women in these types of cases, said that 'when [fathers] have a relationship with their son or daughter, they don't necessarily walk away from the child. They just don't want to have the financial responsibility.'"
312 Zamora, supra note 21 at A-4. See also Sandberg, supra note 3; Boccella, supra note 12.
not biological parents. Wise admitted that although he still loves “‘those kids as much as ever... I can’t say my feelings haven’t changed,’”313 as evidenced by his attempt to set aside his child support obligations, and the filing of a fraud case against his ex-wife.314 Likewise, McCarthy, the New Jersey man who lost his challenge to vacate a $280 monthly child support order once he learned that his fourteen-year-old daughter was biologically unrelated to him, now has a “strained relationship” with his daughter.315

Not only is the impact of genetic testing irreversible in the eyes of the father, it is equally permanent in those of the children. This was recognized by the court in Judson v. Judson,316 where the father’s request for paternity testing was denied in a divorce proceeding under equitable estoppel and best interest of the children policy considerations.317

The court noted that even being tested would harm the children.318 Acknowledging that children are not naïve, the court implied that children would themselves begin to doubt their father’s paternity once the testing occurred.319 “Defendants...should not be provided a legal vehicle whose chief use will be to embarrass their wives and injure innocent children in a manner no decent man would use under normal circumstances.”

The acknowledgement that children, especially those old enough to comprehend that even the least invasive swab test is designed to question their relationship,321 will be harmed by the very test itself militates in favor of precluding testing. While the test results could arguably be cause for celebration of the father-

313 Zamora, supra note 21, at A-4.
314 49 S.W.3d at 453.
315 Boccella, supra note 12.
317 id.
319 Id.
320 Id, at *3..  
321 See supra note 70.
child relationship if they confirm biological parentage, the very fact that one’s father would desire to question his relationship with the child could be devastating to a child, especially in the teen years, where self-identity is a growing concern.\footnote{See Bartlett, supra note 147 at 903, 904-05, stating that Infants need continuity of attachment and the feeling of permanence gained from belonging to a group – a family where “members share a commitment to one another.” Id. at 903. Teenagers, however, need a sense of their heritage.}

Arguably, the unnecessary harm to the child and family could be remedied by adopting the approach of a complete biological privilege, which would then justify the harm by enforcing the parent’s interests over the child’s. However, since there is no way to undo genetic testing and the impact it has on the family once the results are disclosed, the only way to avoid the potential harm to the child and family is to remove the opportunity to obtain the weapon in the first place – to make unauthorized genetic testing illegal.

\section*{C. Conjecture and Rumor — Basing Paternity Challenges on Perceived Truths}

While South Carolina is the only state that formally acknowledges bald eagle evidence as admissible to prove or disprove paternity,\footnote{See S.C. Code Ann. § 20-7-956(B) (2002).} in other states, bald eagle evidence is often the impetus for challenging paternity.\footnote{See State ex rel., Russell, 2003 WL 1787326; People v. R.L.C., 47 P.3d 327 (Colo. 2002) (reviewing a case where the adjudicated father challenged paternity when the child’s mother sent him a photograph of his eleven-year-old son with whom he had no relationship and the father noticed that the child’s facial features differed from his own. The court denied the request for genetic testing based on a policy favoring finality in paternity determinations); Paternity of Cheryl, 746 N.E.2d 488; Lillibrige v. Lillibrige, 1999 WL 395385 (Conn. App. 1999); Delcore v. Mansi, 692 N.Y.S.2d 432 (N.Y. App. 2 Dept. 1999); McDaniel v. McDaniel, 716 So.2d 737 (Ala. Civ. App. 1998); Miscovitch, 688 A.2d 726; State Department of Human Resources v. Shinall, 941 P.2d 616 (Or. App. 1997); Thomas v. Rosasco, 640 N.Y.S.2d 299 (N.Y. App. Div. 1996); DCSE v. Felix M., 1996 WL 799133 (Del. Fam. Ct. 1996) (finding that father did not have valid reason to dismiss support obligations since he previously claimed to be the child’s father); Franzel, 516 N.W.2d 495; Fairrow, 559 N.E.2d 597; N.C. v. W.R.C., 317 S.E.2d 793 (W.Va. 1984). See also Moody v.}
common law required the father to establish newly discovered evidence or fraud to open a paternity determination, and many existing paternity laws require a father to bring an action to set aside a paternity determination within a certain number of years after the father had reason to believe the child was not his biological offspring. As a result, bald eagle evidence, and claims that the child’s eyes, hair, or toes now do not look like the father’s, as well as newly-discovered rumors that the child’s mother had other sexual partners at the time the child was conceived are common reasons asserted in a paternity contest.

Junior’s failure to be the spitting image of dad may not normally cause a man to question his paternity as there are a lot of families with children who resemble other relatives even though they do not resemble their parents. However, when the loving marital or family relationship ends, the father takes a second look at Junior – especially when Junior costs him eight hundred dollars a month in child support.

In the Russell case, the father suspected that his four-year-old son was not biologically related to him at the time of divorce. His doubts were partially motivated by his son’s facial features failing to resemble his own as the child grew older. Likewise, in Miscovich v. Miscovich, the color of the child’s eyes was the key to the father’s biological-based paternity challenge. There, the father had blue eyes like his then wife and their son had brown eyes. Nothing more or less was necessary

Christiansen, 306 N.W.2d 775 (Iowa 1981) (declaring testimony of similarity of father’s facial features to the child should be considered among other evidence of paternity such as timely sexual intimacy); Commonwealth ex rel. Lonesome v. Johnson, 331 A.2d 702, 704 (Pa. Super. 1974) (considering the physical resemblance of the children to the father along with sexual intimacy and other evidence of paternity in the father).

See supra notes 30-31 and accompanying text. 2003 WL 1787326.

Id. The court noted, however, that the child’s grade school photographs “reflect a striking resemblance” to the grade school photographs of Russell, the child’s mother’s second husband. Although genetic testing excluded West as the biological parent of his son, his failure to bring the challenge until more than ten years after the divorce and his suspicions gave rise to a finding of res judicata and barred his challenge to paternity and the child support order.

688 A.2d 726.

Id. at 727.
for Miscovich to challenge the child’s paternity. Still, he employed self-help DNA tests that proved what his suspicions already told him; that the child was biologically unrelated to him.\textsuperscript{330}

There have also been instances where the child’s racial features were the motivation for challenging paternity.\textsuperscript{331} The father in \textit{Paternity of Cheryl}\textsuperscript{332} used his daughter’s light-complexion (in contrast to that of both parents) as part of the basis for his motion to set aside his acknowledgement of paternity.

Similarly, the father in \textit{Jeffries v. Moore}\textsuperscript{333} also used racial characteristics to challenge paternity. There, a paramour filed an action to establish paternity and custody rights of a child born to a married woman.\textsuperscript{334} The court held that evidence demonstrating that the husband was not the biological father, beyond lack of access, impotence or sterility, included “evidence of perceived racial differences between the mother, presumed father [the husband] and child....”\textsuperscript{335}

Comparing the child to her mother and father, the \textit{Jeffries} court noted that she resembled neither of them in that they both had very white skin while the child, like the paramour, appeared to

\begin{flushleft}
330 \textit{Id.}
331 See \textit{Paternity of Cheryl}, 746 N.E.2d 480; \textit{Jeffries}, 559 S.E.2d 217; \textit{Hess v. Whitsitt}, 65 Cal. Rptr. 45 (Cal. App. 2d Dist. 1967) (relying on the “mixed blood” of the child as having black and Caucasian characteristics where the woman’s other two children were brought in, and, like her, they were fair skinned and blonde to establish paternity of father where married woman had an affair). See also Glenn Sacks, \textit{California Paternity Justice Act: If the Genes Don’t Fit, You Must Acquit}, May 27, 2003, available at http://www.glennsacks.com/california_paternity_justice.htm (describing a case where the father was black and the child was white. The father commented on his frustration with the court system, noting: “The judge refused to consider the DNA evidence - - not to mention the obvious evidence right in front of him...”); Department of Public Welfare of City of New York v. Hamilton, 126 N.Y.S.2d 240, 241 (N.Y. 1953) (indicating expert testimony would be admissible to disprove paternity based on racial characteristics).
332 746 N.E.2d 488.
333 559 S.E.2d 217.
334 \textit{Id.} at 218.
335 \textit{Id.} at 219.
\end{flushleft}
be of "a mixed ancestry, including African-American ancestry." In addition, the court noted that the child resembled the paramour, not her father. Relying on those racial differences, as well as the paramour’s access to the mother during the period of likely conception, the court found that the paramour successfully rebutted the marital presumption.

Not all bald eagle evidence revolves around the child’s appearance, skin color or physical characteristics. Sometimes, the father challenges paternity claiming the son lacked the father’s natural ability or talent as in Simmons, where the father claimed he questioned his son’s paternity because the child was not as athletic as Simmons. In another case, an adjudicated absentee father also claimed the child had a different personality than himself. Although the court failed to comment on the bald eagle allegations, it ordered blood tests in both cases.

In Lipscomb v. Wells, the father relied on both rumor and bald eagle evidence to establish a timely paternity challenge. He claimed he heard rumors that the mother saw another man around the time of conception, that the mother told him he was not the child’s father, and that the child resembled a sibling from another father. The court relied on those facts, as well as the mother’s cutting off the relationship between the father and child after the disclosure about his lack of paternity, in allowing the father to set aside the paternity determination on the basis of the mother’s fraud.

The leap from bald eagle evidence to genetic evidence came about with the Wise and Fairrow v. Fairrow cases. In

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336 Id.
337 Id.
338 Id. at 221.
339 See Sandberg, supra note 3.
341 Id.
343 Id. at 220.
344 Id. at 220, 222.
345 49 S.W.3d 450.
both those cases, the fathers challenged paternity based on a new form of bald eagle evidence – the lack of a resemblance on the inside.\(^{347}\) In *Fairrow*, the father challenged paternity eleven years after he divorced the child’s mother because tests showed that neither had the gene for sickle cell anemia while their son did.\(^{348}\) Although the child tested positive for the gene at the time of his birth, neither the father nor the mother tested for the gene at that time.\(^{349}\) The mother eventually tested negative for the gene while the father, who only saw the child on a handful of occasions during the ten years after the parents divorced, was tested at the advice of his physician when the child experienced symptoms related to sickle cell anemia.\(^{350}\) The Indiana Supreme Court relied on the newly discovered genetic evidence and the fact that the father’s motivation to be tested for sickle cell anemia was not premised on a desire to avoid child support in vacating the appellate court’s decision and remanding the case to grant the father’s requested relief.\(^{351}\)

Similarly, in *Wise*, the father tested negative for the cystic fibrosis gene while his youngest son suffered from the disease, making it impossible for him to be the child’s biological parent, as both parents must carry the gene for the disease to occur.\(^{352}\) Like *Fairrow*, *Wise* also failed to test for the gene after learning his son had cystic fibrosis, but rather waited until the child was seven years old, around the same time he petitioned for custody of the child, and claimed his former wife was not providing his son with a healthy living environment.\(^{353}\)

As a result, the admissibility of DNA evidence to challenge paternity has become the new impetus for challenging paternity – bald eagle evidence for the inside.

Sometimes bald eagle evidence is used not to show how the child differed from the father, but rather to establish that the father had no reason to doubt the child’s paternity until he noticed that

\(^{346}\) 559 N.E.2d 597.
\(^{347}\) 49 S.W.3d at 453; 559 N.E.2d at 598.
\(^{348}\) *Id.* at 598.
\(^{349}\) *Id.*
\(^{350}\) *Id.*
\(^{351}\) *Id.* at 599 – 600.
\(^{352}\) 49 S.W.3d at 454.
\(^{353}\) *Id.* at 453-54.
the child resembled a former boyfriend or friend of his wife or girlfriend. That occurred in State Department of Human Resources v. Shinall354 when the father moved to set aside an administrative order entered five years earlier adjudicating him to be the child’s father. Shinall alleged that he had no reason to believe he was not the child’s father until the child’s mother noticed the resemblance between the child and a second man whom the mother now claimed, and DNA testing confirmed, was the father.355 Likewise, the adjudicated father in Thomas v. Rosasco356 claimed he had no reason to doubt the paternity of the child until after the support order was entered and the child’s mother informed him of the other potential father who resembled the child.357 The McCann v. Guter358 court also considered the father’s bald eagle evidence coupled with rumor and speculation that he heard the child’s mother was also dating a neighbor who had the same facial features and coloring as the child in allowing the post-judgment paternity challenge.359 Even though the father in McCann waited fifteen years to contest paternity, requested blood tests after having little contact with the child and made no effort to support the child, either financially or emotionally until that time, the court allowed the blood tests.360

Reliance on bald eagle evidence to support a biology-based challenge encourages fathers to look at their children for their differences and discourages fathers from seeing the similarities that have nothing to do with biology, such as morals and environment. If a child does not resemble the mother, there is no speculation as to the child’s lineage. When she does not resemble her father, however, it is cause to set aside years of a parent-child relationship just in case a biological connection is lacking.

354 941 P.2d 616.
355 Id. at 618.
357 Id. at 300.
359 Id. at 225.
360 Id. at 226.
Proponents of paternity fraud laws argue that the “real” biological father should pay child support to the child, not the existing father. Facially, the argument sounds palatable since the law already creates an obligation on a biological parent to provide support for his biological children. It also assumes, however, that the sole basis for paternal parenthood is biology.

Yet, the lack of a duty to support non-biological children is the prevalent position in the movement behind paternity fraud laws. Many of the men leading the movement first challenged the paternity of their children in response to requests for increased child support. For example, Simmons, a Texas man who challenged the paternity of his then thirteen-year-old son, did so in response to the child’s mother’s request to increase child support. At first, he responded by suggesting that his son live with himself and his new family; however, less than six months after his son moved into his home, Simmons ordered blood tests that excluded him as his son’s biological father. He then challenged paternity and sought to vacate the child support order, which the Texas courts denied.

Likewise, paternity fraud celebrity and self-proclaimed victim, Carnell Smith, also made the decision to challenge his thirteen-year-old daughter’s paternity in March of 2000 after the child’s mother sought an increase in child support. In Smith’s case, members of his parish and friends advised him that he should have DNA tests performed.

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361 See generally Goodman, supra note 308.
362 See supra notes 165 and 308 and accompanying text.
364 See Sandberg, supra note 3.
365 See Riccardi, supra note 3; Harris, supra note 187. See also Paternity of Cheryl, 746 N.E.2d at 492 (involving a father’s challenge of paternity when his child support payment was increased).
366 See Riccardi, supra note 3; Harris, supra note 187.
In *Clevenger*, a leading California case, the court denounced the father who challenged paternity to alleviate his child support obligation. In a scathing diatribe, the court noted:

There is an innate immorality in the conduct of an adult who for over a decade accepts and proclaims a child as his own, but then, in order to be relieved of the child's support, announces, and relies upon, his bastardy. This cruel weapon, which works a lasting injury to the child and can bring in its aftermath social harm....should garner no profit to the wielder;...

Yet, the *Clevenger* court found no way to hold the father to the parent-child relationship and relieved him of the obligations and rights of fatherhood because there was no evidence that the father actually told the child that he was his father. Despite the court's contempt for the father's financial motivation for challenging paternity, it allowed him to avoid his financial and emotional parental obligations.

In other cases, such as *Hammack v Hammack*, the father made no secret of his motivation for contesting paternity. There, the father lived in a marital family with his four children, ages nine to eighteen, at the time he filed a post-judgment paternity challenge. In denying the father's motion, the court relied on the father's self-proclaimed purpose to avoid his child support obligations even though he had fought for custody two years earlier. The court reasoned that "a father should not be permitted to bastardize children born during the marriage for his

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368 *Id.* at 659 (emphasis added).
369 *Id.* at 670-671.
370 737 N.Y.S.2d 702 (N.Y. App. Dist. 2002). *See also* McConnell v. Berkheimer, 781 A.2d 206, 211 (Pa. Super. 2001) (estopping a father from denying paternity where his only motivation to avoid paternity was to end his financial obligation and he failed to contest paternity when the original child support hearing was had.)
371 *Id.* at 703.
372 *Id.* at 704.
own self-interest." The tests, however, already took place, and the court did not indicate whether the father or the children were advised of the results. If so, the father could still abandon the children, just not financially. Therefore, as the court noted, DNA tests should not be ordered, especially where the father’s motives are financially motivated, until their admissibility or lack thereof is adjudicated.

Yet, in cases such as Judson v. Judson and Thomas, the fathers wanted it both ways – they wanted to be fathers in the social and emotional sense, but they did not want to incur the corresponding financial obligation of being fathers. In Charles Judson’s divorce proceedings, the father denied paternity and requested blood tests while at the same time sought custody of the children. The Judson court denied the father’s motion for paternity testing on equitable estoppel grounds since he raised the children in the marital household for several years after they were born and admitted they were children of the marriage until six months into the divorce proceedings when he raised the challenge, apparently motivated by financial concerns.

The Judson court took a “best interest of the children” stand and determined that the children would not be served by having genetic testing done as it could potentially harm them and their relationship with their father. Instead, the court condemned the father’s self interest and cited Commonwealth v. Weston, where the court described a similar father’s attempts to deny paternity as “inherently repulsive” when brought only after

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376 584 N.W.2d 421.
378 Id. at *4.
379 This article does not address the applicability of the best interest of the child standard in paternity determinations.
380 Id.
the mother seeks child support. In *Judson*, the potential harm to the family was avoided. Even though the father wanted to destroy his family, he was not allowed to do so because the court recognized that the existence of a family was not founded on biology, but on the relationship between the parents and the children.

However, in *Thomas*, the court did not find the marital father’s desire to relieve himself of the financial obligations repulsive or immoral. Faced with two fathers who did not want to be the legal father, the court found that the importance of not impairing blood relationships obligated the biological father to be deemed the child’s legal father. The twist in that case was the former husband’s plea for visitation rights, which the court deemed appropriate.

As the costs to raise a child continue to rise, the need for additional child support will always exist as a motive to disestablish paternity. It is a factor that cannot be alleviated in a biological-privilege state. The argument that child support obligations can be separated from paternity determinations because children care about the relationship, not money fails to consider that the child needs both emotional and financial support to thrive. If a father is allowed to maintain the father-child relationship but is relieved of the financial obligation, someone else will have to provide that support so the child and family can thrive.

While the biological father may be the logical choice, imposing the obligations of parenthood on him in the form of paying child support, health insurance and educational costs will also trigger corresponding benefits of being a father. Since those benefits, including custody or visitation, have been claimed by the existing father, adding a third person to the mix creates time and emotional concerns for the child. In that event, unlike a stepparent who shares in the mother’s time and responsibilities for the child, the existing father and biological father would be competing for

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383 *Id.* at 5.
384 584 N.W.2d at 425.
385 *Id.* at 424-425.
386 *Id.* at 425.
the child's time. Fatherhood is a package deal – it includes rights and responsibilities that are intertwined to encourage the child's growth and development and ensure the child has the financial and emotional means necessary to become a productive adult.

While biology privilege proponents further argue that non-biological children benefited from the past financial and emotional support of the non-biological fathers, the children still suffer economically and emotionally. Most importantly, however, is the loss of the relationship with the father, something that history has shown is inevitable once the pursuit of the dollar is put before the salvation of the family. This is bound to be a death knoll to the family given the perception of a biologically-unrelated child as an unjust financial strain and child support as a financial prison.

E. Rewards a Lack of Diligence – Biology-Based Paternity Decisions Encourage Fathers to Reap the Rewards of a Family Without Undertaking Long-Term Obligations of Parenthood

A biology-based privilege approach to paternity also rewards fathers who do little to pursue their legal remedies until their pocketbooks are being taxed by the garnishment of their wages.

Under this approach, the father in State ex rel. Russell, who waited ten years after the divorce proceeding before challenging his son's paternity would not be barred by res judicata. A pure biology privilege state would allow him to wait

388 See Rogers, supra note 109 at 1173.
389 See Wachter, 550 A.2d 1019; Miscovich, 688 A.2d 726. See also supra notes 268-321 and accompanying text.
390 See Tesser, supra note 304.
391 See Dianna Thompson, DNA Evidence: Enough to Exonerate Dads?, CNSNews.com Commentary, April 11, 2002; Goodman, supra note 308; Smith, supra note 20 at 43. See also Sandberg, supra note 3; Harris, supra note 187.
393 2003 WL 1787326.
until he no longer wants to play daddy or until the child’s mother seeks an increase in child support to challenge the child’s paternity. This would allow him to destroy his family at his discretion, when it suits him to punish his ex-wife or girlfriend for perceived wrongs or when the new girlfriend or wife wants to start a family of her own and needs every bit of his income to do so.

Similarly, the father in *Libro* learned that he was not the child’s biological father through blood type tests five years before he challenged paternity.\(^{395}\) Even then, he only challenged paternity when, after he stopped paying child support, the child’s mother filed an action to reduce the arrearages to a judgment against him.\(^{396}\) The court, applying a paternity fraud theory, found that the father did not contest paternity during the divorce because he was “[I]ulled by ignorance of the true facts…”\(^{397}\) The court ignored the father’s lack of diligence, in failing to act on the knowledge that he was biologically unrelated to the child for the previous five years. Instead, the court focused on what it called the “egregious” facts that caused the father’s ignorance, and how it prevented him from a “fair opportunity to litigate paternity in the divorce proceedings.”\(^{398}\)

In doing so, the court rewarded the husband’s lack of diligence under the guise of punishing the mother’s fraudulent concealment. At no time did the court address the father’s obligation to challenge paternity within a reasonable time upon learning of the lack of a biological relationship with the child. Nor did the court consider the impact the five-year delay had on the child’s emotional well-being and the family. Essentially, it

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1987); Hubbard v. Hubbard, 44 P.3d 153 (Alaska 2002); Pietros v. Pietros, 638 A.2d 545 (R.I. 1994); Decker v. Hunter, 460 So.2d 1014 ( Fla. 3 Dist. App. 1984); Wright v. Newman, 467 S.E.2d 533 (Ga. 1996); Anderson, 746 So.2d 525 ( Fl. 2 Dist. App. 1999); Wise, 49 S.W.3d 450. *See also* Lynn v. Powell, 809 A.2d 927 (Pa. Super. 2002) (Estopping the wife from overcoming the presumption of paternity). This article acknowledges the effect res judicata and paternity or equitable estoppel have on post-judgment paternity challenges; however, where biology is privileged, they do not come into play, and, are therefore not addressed in this article.

\(^{395}\) 746 P.2d at 633.

\(^{396}\) Id.

\(^{397}\) Id.

\(^{398}\) Id. at 634.
sanctioned his lack of diligence by relieving him of the support obligation.

Likewise, the fathers in both *Fairrow* and *Wise* could have tested for the sickle cell anemia and cystic fibrosis genes, respectively, long before they did. Neither claimed to lack the knowledge that they had to carry the gene to be the biological father of their children. Rather, they waited, without reason, until, at least in Wise's case, the child was seven years old and had a relationship with him where he visited his son, sought custody of him, and was the only father the child knew. If Wise filed his petition in a state that applied a complete biological privilege, he could wait until the child was eighteen, test for the gene, deny paternity, seek reimbursement from the child's biological father for past child support and do to the child then what he did when the child was seven – tell them they are not really his children.

**F. Encourages Perjury – The Ends Justify the Means When Biology Prevails**

While all laws that provide a financial incentive are susceptible to perjury, paternity fraud laws encourage it in search for a biological truth. For example, in *Wachter*, the father claimed he would continue to support the child regardless of the outcome of the genetic testing but petitioned to set aside the child support order as soon as he learned he was excluded as the child's biological father. The implication is that he lied. Although the court never commented on the father's motives nor did it accuse him of misrepresenting, through his attorney, the truth, it is just as likely that he lied to get the court to order the testing as it is that he was just curious to know the child's biological paternity. While it is possible that his feelings changed once he was confronted with the lack of a biological connection to the child, it is also possible that his motive was to dispose of his child support obligation from the start.

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399 559 N.E.2d 597.
400 49 S.W.3d 450.
401 *Id.* at 452-53.
402 550 A.2d at 1020.
Ironically, it is such misrepresentations, when done by the mother, that are the source of much of the passion behind the push for paternity fraud laws—to stop the mothers from making misrepresentations.\(^{403}\)

Any case before the court on a paternity challenge poses the same question: Has the father fabricated newly discovered evidence or his motive for challenging paternity to avoid his child support obligations? Answering the question in Wise,\(^{404}\) Mr. Wise claimed he tested because he did not have cystic fibrosis and wanted to know if he was a carrier of the gene.\(^{405}\) What was there to know? If he believed he was the child’s biological father, there would be no reason to have the test; he would have to be a carrier, just as his wife would. He has not denied that he knew the biology behind cystic fibrosis—that he was unaware before the child was seven that he had to be a carrier of the disease or the child could not have it. So, why then?

Why test on the heels of a petition to modify custody in your favor? Because he was curious—“he wanted ‘to see if [he] was a carrier of cystic fibrosis.’”\(^{406}\) Why wasn’t he curious when the child was born? Because he was happily married at the time? Then why not at the time of divorce? He certainly was not happily married then. Although the courts can do little more than surmise the motives of fathers seeking to disestablish paternity, when the challenge comes in response to a request to increase child support, a wage garnishment action, or contempt proceedings, the father’s motives are less in doubt; they are financially motivated.

G. He Says, She Says—A Biology-Based Paternity System Favors Men’s Interests Over the Family’s

Biological privilege laws also often create a privilege for men over women.\(^{407}\) For example, the Alabama paternity fraud law\(^{408}\) provides that:

\(^{403}\) See Paternityfraud.com.
\(^{404}\) 49 S.W.3d at 454.
\(^{405}\) Id.
\(^{406}\) Id.
Upon petition of the defendant ...where the defendant has been declared the legal father...the case shall be reopened if there is scientific evidence presented by the defendant that he is not the father.

The Alabama statute does not allow a woman or even the child to open a paternity case. The Alabama appellate court upheld this position, denying the child’s mother’s petition to contest the child’s paternity where the former husband asserted a right to continue his relationship with the child in *S. W. M. v. D. W. M.*409

The *S. W. M.* court reiterated the trial court’s lengthy anti-fraud policy discussion and indicated that a mother would not be entitled to these protections because she “would obviously at least have reason to suspect that her husband or ‘steady’ boyfriend just might not be the biological father.” and could seek testing when paternity was originally established.410 Determining that the plain language of the statute did not intend to bestow the same rights on the mother as the father, the court avoided the mother’s claim that this provision denied her equal protection rights because she did not raise the argument at the trial level.411

Because the biological-privilege is based on an assumption that women know the biology of the child but the father does not, it offsets that situation by giving the father the power to challenge paternity to the exclusion of the mother. It also sets a precedent that the father’s interests are more important than the mother’s, the child’s and the family’s.

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410 *Id.* at 1272.
411 *Id.* at 1272 - 73.
IV. "YOU DIVORCE WIVES, NOT CHILDREN"\(^{412}\) – A STATUTORY PROPOSAL CHANGING THE FOCUS FROM MEN TO CHILDREN AND FAMILIES IN PATERNITY DETERMINATIONS

This article argues that the relationship with the child, the focal point of the family, creates a family relationship, not the parents' relationship with each other.\(^{413}\) This psychological, functional, factual or developed relationship between a parent and child does not rely on biology for its inception or growth.\(^{414}\) It is born of love and grows on "companionship, interplay, and mutuality, fulfill[ing] the child's psychological....as well as physical needs."\(^{415}\)

The solution to the monetary motivation is simple – eliminate the temptation; the reward. The Comments to the American Law Institute Principles on Family Dissolution law suggest that if fathers were not allowed to challenge child support, they would lose their motive to challenge paternity.\(^{416}\) It states:

[A] husband estopped to deny a support obligation under this section may understandably choose to relinquish his inquiry into biological paternity in order to enjoy a parental relationship with the child he is required to support.\(^{417}\)

This is a logical assumption given cases such as Clevenger, Hammack, Judson, and Smith, where the desire to eliminate the

\(^{412}\) Clueless was a 1995 Paramount Pictures movie that included social commentary on the American family in the 1990s.

\(^{413}\) The concept of a parental relationship with the child is known as a developed relationship, psychological relationship or functioning relationship. I agree with the principle that the relationship, not biology, should be determinative of parentage. That principle is the foundation for the definition of the family in this article, as well as the relationship the proposed statute is designed to protect.

\(^{414}\) See Garrison, supra note 181 at 447.

\(^{415}\) Id.

\(^{416}\) Glennon, supra note 73 at 278, citing Principles of the Law of Family Dissolution: Analysis and Recommendations Sec. 3.02A cmt. d (Tentative Draft No. 4, 2000) (ALI).

\(^{417}\) Id.
child support obligation motivated the paternity challenge.\textsuperscript{418} It is not a fool-proof solution as fathers often abandon their children even when their wages are garnished or walk away from the children based on doubts, rumors or innuendos alone. Hopefully, however, it would take away some of the monetary incentive to abandon children and preserve whatever family exists.

In addition, just because science allows society to know something with certainty does not mean that it benefits society or the individual to know that information. For example, if a child has a predisposition for a disease that has no cure and there is no way to determine whether the disease will actually manifest itself, knowing he has the gene will only create anxiety in the child, parents and family. Likewise, when a child with an established father-child relationship is told the man he called father for the past sixteen years is biologically unrelated to him and no longer wants to be his father creates no benefit to the child, just harm. As Paula Roberts of the Center for Law and Social Policy stated:

\begin{quote}
[S]cience has given us the ability to do something we maybe shouldn’t do...What you’re really saying is that all a man is, in terms of a father to a child, is a sperm donor....\textsuperscript{419}
\end{quote}

The solution is the same – remove the parents’ ability to obtain biological heritage information that history has proven consistently causes the existing father to abandon his children and leave the child’s family without the emotional and financial support necessary to thrive. This is an exception to a generally accepted concept in the law to seek the truth because, in the paternity setting, the truth is contrary to the societal goals of paternity determinations – to provide the child with emotional and financial security, certainty and stability. Instead, the truth destroys familial relationships, creates doubt as to a child’s parentage and leaves the child and family without the financial support necessary to survive.

Likewise, the certainty that genetic testing and biological-privilege laws create results in uncertainty and instability in the

\textsuperscript{418} Clevenger, 11 Cal. Rptr. 707; Judson, 1995 WL 476848; Hammack, 737 N.Y.S.2d 702. See also McConnell, 781 A.2d at 211; Weston, 193 A.2d 782.

\textsuperscript{419} Riccardi, supra note 3.
child’s life. Instead, biological certainty leaves a child in limbo during his minority, exposes him to biologically-related strangers, and causes families and relationships to fail where they once flourished. To avoid the harm biological certainty creates for children, the proposed statute creates certainty by acknowledging the established father-child relationship as the preference in paternity determinations, ensuring that the potential uncertainty a biological privilege creates cannot occur.

Finally, because families are no longer constrained by the bounds of marriage, the statute proposed in this article acknowledges that the source of a family is the relationship between the parents and children, not the relationship between the parents. In doing so, the impetus of a family, the child, is protected over the parents.

The proposed statute accomplishes all of these goals by: 1) limiting genetic testing to situations where there is no developed father-child or parent-child (in same-sex families) relationship; 2) punishing fathers and others who seek or aide in illegal testing for the purpose of disturbing the father-child or parent-child and family relationships; and 3) creating criminal responsibility for disclosing information about a child’s biological heritage that is inconsistent with his familial relationships for the purpose of destroying those relationships. As a result, while some fathers may still abandon their children, because the incentives and impetus for doing so are removed, fathers will be encouraged to continue the father-child relationship, ensuring stability, certainty and support for the child and family.

A. The Statute

Section 100. Purpose of Statute

Recognizing a need to create both certainty and finality in paternity decisions for the benefit of the child and family, this statute codifies the developed relationship approach to paternity. The developed relationship approach to paternity acknowledges the family, and, more importantly, the parent-child relationship as the basis for paternity over biology except in cases where no such relationship exists or existed during the child’s minority.
Comment:

Rather than focus on children with no paternal parent-child relationship, a situation easily solved by genetic testing, this statute concentrates on the scenario where an existing relationship is being challenged. It is necessary to do so given the lack of consistency from state to state on this issue; some allow the relationship to be set aside in favor of biology or a lack thereof regardless of the marital or family status, while others protect the marital presumption only while the parents' relationship and the marriage is intact, and still others protect the family regardless of the parents' relationship.420

Understanding that paternity is connected to child support, visitation, custody and other legal rights and responsibilities,421 this statute is designed to protect the child's and family's rights and responsibilities, not the individual's, based on the established familial relationship between the parent and child. To do so, stability and finality have to be fostered as both children and adults need certainty in their family relationships.422 That certainty is ensured by not allowing a child's father or parent to challenge parentage or even obtain genetic information or information regarding possible paternity under any circumstances.

Although proponents of the biological privilege would argue that such an approach is unfair to the father423 and unjust to the child, depriving him of a biological relationship,424 they do not consider that children do not identify parental relationships by genes but rather by what they know - that a father is more than a "sperm donor." Likewise, arguments that if the father challenges paternity, the family has probably already dissolved425 do not consider that many families exist without the white picket fence fantasy - surviving remarriage of one or both parents.

420 See Ince, 58 S.W.3d at 191 (noting that parenthood "has always meant more than simply proving the DNA necessary to create human life originated from a particular individual.").
421 Shapiro, Reifler & Psome, supra note 88, at 7.
422 Bartlett, supra note 147, at 903.
423 Anderlik & Rothstein, supra note 4, at 220; Roberts, supra note 109, at 54.
424 Roberts, supra note 109, at 54.
425 See Dallas, supra note 247, at 371.
In addition, in order to protect the child from the anger of one parent towards the other, as well as from lawyers who advise fathers to end their relationships with their children, the incentive for such conduct must be taken away. Removing the incentive for a father to deny paternity of a child with whom he has a relationship will encourage responsible conduct on his part towards his children and family. Then, the relationship can maintain the family.


A. A court, administrative agency, special master or other individual or entity adjudicating paternity shall not order genetic, blood, or other tests where:

1. The evidence establishes that there is a developed relationship between the child and the person contesting his role as father or other parent;
2. The father could have submitted to genetic or other blood tests in a prior paternity proceeding or when filing an acknowledgement of paternity but chose to forego that right;
3. The father was aware of the possibility that he was not the child’s biological parent when he either:
   a. Filed an Acknowledgement of Paternity;
   b. Allowed his name to be placed on the child’s birth certificate;
   c. Gave the child his surname;
   d. Married the child’s mother;
   e. Cohabitated with the child’s mother;
   f. Acknowledged the child on any public, employment, insurance or government record, including but not limited to:
      i. Life insurance applications or beneficiary designations;
      ii. Health insurance;
      iii. Social Security benefits;

426 See Anderlik & Rothstein, supra note 4, at 220.
427 See Harris, supra note 187, at 485.
iv. Welfare benefits;
v. Workers Compensation benefits;
vi. School records;
vii. Doctors, Dentists or other medical provider records;
viii. Child care records; or
g. Took a role as caregiver, father, parent, or the equivalent in the child’s life in any traditional or non-traditional family unit.

4. The child’s mother and father were married or attempted to marry before or after the child’s birth and a parent-child relationship existed for any significant period of time, including as little as one year, regardless of whether the parent lived in the same household as the child;

5. The child’s mother and father cohabitated either before or after the child’s birth and a parent-child relationship existed for any significant period of time, including as little as one year, regardless of whether the parent lived in the same household as the child;

6. The child’s mother and father engaged in intimate sexual conduct near the time of the child’s conception and a parent-child relationship existed for any significant period of time, including as little as one year, regardless of whether the parent lived in the same household as the child;

7. The child was conceived by artificial insemination upon the agreement of the mother and father or other parent and a parent-child relationship existed for any significant period of time, including as little as one year, regardless of whether the father or other parent lived in the same household as the child;

8. The child was conceived through a surrogate agreement of the mother and father or other parent and a parent-child relationship existed for any significant period of time, including as little as one year, regardless of whether the parent lived in the same household as the child;

9. The child was adopted by the mother and father or other parent and a parent-child relationship existed
for any significant period of time, including as little as one year, regardless of whether the parent lived in the same household as the child; or

10. The father failed to appear for genetic testing when ordered to do so by the court.

B. The court shall consider the following factors in determining whether a parent-child relationship exists between the father and the child:

1. The length of time the father/parent in question acted in the capacity of a father/parent role;
2. The nature of the relationship between the child and the father/parent;
3. The child’s age;
4. The emotional connection between the child and the father/parent;
5. The role the father/parent played in the child’s life, considering the father’s/parent’s role in caring for the emotional, financial and other needs of the child;
6. The child’s emotional attachment to the father/parent; and
7. Any other factor that may affect equities arising from the disruption of the father-child or parent-child relationship or the chance of other harm to the child.

C. Genetic tests are appropriate where:

1. The child reaches the age of majority and desires to know his biological heritage and the evidence establishes that the child’s father may not be his biological parent, except where:
   a. The child’s father opposes the tests; or
   b. The child’s father is deceased;
2. The child has a medical condition that cannot be treated without testing the father for the disease.

D. In the event that it is determined that a man other than the child’s father is the biological father of the child, the court shall prevent the dissemination of the information to

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428 These are some of the factors contained in the UPA § 608 (2002) and other states. See also WASH REV. CODE § 26.26.535 (2002); TEX. FAM. CODE § 160.608.
anyone other than the child upon the age of majority or medical professionals to further the treatment of the child.

E. There shall be no right to terminate the parent-child relationship, to terminate child support, or for reimbursement of previously incurred support or other costs.

**Comment:**

This Section eliminates the problems created by a biological privilege system by eliminating the availability of self-help genetic testing and limiting genetic testing to those cases where there is no family unit, traditional or otherwise, to protect. Instead, it protects existing families, which include families of divorce because "[y]ou divorce wives, not children, as well as nontraditional families where the parents do not cohabitate or marry or between same-sex couples but where the father or parent has a developed relationship with the child, creating a family unit. Limiting the availability to obtain genetic testing to those situations where it would be admissible, such as where there is no husband, former husband or father who has a relationship with the child, will curb the instances of fathers abandoning or neglecting their children. It will also prevent siblings from dealing with a split in the family as no child will receive the benefits of the existing father-child relationship to the exclusion of another. If the suspicion remains just that, there is at least a chance that it will dissipate. This was evident when Morgan Wise told his children that he was not their father in violation of the court’s order that he not disclose that information to the children. Although he was penalized by the court and lost visitation rights for two years, the damage was already done.

While this Section limits the parents’ ability to know the biological truth of a child’s paternity, which has generally been favored by the courts and legislature, it does so to protect the

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429 See supra note 412.
431 Boccella, supra note 12. See also Linda Kane, Biological warfare: when the DNA bomb is dropped, THE LUBBOCK AVALANCHE-JOURNAL, June 17, 2001.
432 See Garst, 2003 WL 1571704 (Relying on the public policy of determining the truth, which the court indicates “is the best way to foster healthy relationships.”); Ince, 58 S.W.3d at 194, Vance, J., dissenting.
child and the family that exists by virtue of the parent-child relationship, regardless of the marital status, living arrangements, or ongoing relationship between the child’s parents. It acknowledges that a family is created by relationships, not biology, and that the societal goal should be to preserve the family relationship in any form that is beneficial to the child over a truth that destroys it.

As a result, a list of factors is provided for the court to consider in determining whether a father-child relationship exists that must be protected. The list is not exhaustive in order to leave open the possibility that some unanticipated fact could establish the parent-child relationship.

There are only two exceptions to this sweeping rule prohibiting genetic testing when there is a parent-child relationship: 1) A child may request the information upon reaching the age of majority for self identity purposes; and 2) A court may order tests when a medical condition mandates that the parents be tested to pursue a course of treatment to save the child’s life.

This would not include the type of post-disease testing that Morgan Wise did for cystic fibrosis and the father in Fairrow\textsuperscript{433} underwent for sickle cell anemia as neither test would further the treatment of the child. In both circumstances, the tests could serve no medical purpose for the child’s benefit. The children had already contracted the diseases and could not be cured or treated with the knowledge obtained by testing their fathers. The only thing the tests could establish was the lack of a genetic connection between the children and their fathers.

The other situation where genetic testing is permitted under this Section is where there is no established family or father-child relationship. In those circumstances, testing is appropriate to identify the child’s father, leaving the door open to a potential father-child relationship. There is no need to do that when the father or familial relationship has already been identified by virtue of a relationship with the child. Because fathers should not be encouraged to abandon the relationship with their children to gain a legal advantage in a subsequent challenge to paternity,\textsuperscript{434} once

\textsuperscript{433} Fairrow v. Fairrow, 559 N.E.2d 597 (Ind. 1990).
there is a developed relationship, it cannot be legally set aside. This provision is geared at removing the incentive for pursuing a paternity challenge once a relationship exists.

This Section also promotes certainty and finality in the paternity setting. While, arguably, DNA evidence also creates certainty in paternity, the uncertainty DNA testing subjects the child to while the traditional family or marriage is intact is removed by this Section. Once the parent-child relationship exists, the child and father can be certain that the courts will uphold the relationship. Under this Section, the child will have no reason to question whether his father will abandon him when the parents no longer desire a relationship. In addition, a father will have no reason to doubt the child’s paternity because he will know with certainty that his relationship with his child is secure, neither subject to attacks by the child’s mother or a third party. The family will also benefit because it will survive the parental break up.

Two collateral benefits of this Section are: 1) Perjury by the father will be discouraged because it will have no impact on the outcome of a paternity case where there is an existing parent-child relationship; and 2) Speculation, rumor and bald eagle evidence will be eliminated once and for all. Under this section, it does not matter whose genes created the child or who the child does or does not resemble. It only matters who cared for, supported, and committed emotional and financial support to the child — the child’s father or parent.

Section 200. Penalties for Self-Help Testing or Disclosure of Non-Paternity

A. It shall be illegal to obtain or assist in obtaining any genetic testing without a court order.

B. Any parent, which, for purposes of this Section, shall be construed to include any father, mother, grandparent, same-sex partner or other individual in a parent-child relationship with the child, who seeks self-help testing, including any genetic testing obtained without a court order, shall be guilty of a misdemeanor offense punishable by not less than forty-five days and not more than one hundred and eighty days in jail and shall be required to pay additional
child support for the child to cover any counseling necessary, or which may become necessary due to subjecting the child to doubt and uncertainty about his parentage. The amount shall be equal to half a month’s child support for a period of no less than one year.

C. Any parent who, after illegally obtaining self-help genetic testing in violation of this section, or upon suspicion or actual knowledge of biological non-paternity, discloses the results of those tests or the fact of non-paternity to any individual, including but not limited to the child, the child’s mother, the child’s father (established by the parent-child relationship), the child’s siblings, or the child’s grandparents, aunts, uncles or any other relations, shall be guilty of a misdemeanor offense punishable by not less than ninety days and not more than one year in jail and shall be required to pay additional child support for the child to cover any counseling necessary, or which may become necessary due to subjecting the child to doubt and uncertainty about his parentage. The amount shall be equal to double each month’s child support for a period of no less than one year.

D. Any individual who assists in obtaining self-help genetic or other tests for the purpose of determining or disestablishing paternity when there is an established father-child or parent-child relationship shall be guilty of a misdemeanor punishable by not less than forty-five days and not more than one hundred and eighty days in jail and shall be required to pay a fine not less than one thousand dollars to compensate the child for any emotional or other damages caused by the testing.

E. Any individual who, after the parent illegally obtains self-help genetic testing in violation of this section, discloses or assists in disclosing the results of those tests to any individual, including but not limited to the child, the child’s mother, the child’s father (established by the parent-child relationship), the child’s siblings, or the child’s grandparents, aunts, uncles or any other relations, shall be guilty of a misdemeanor offense punishable by not less than ninety days and not more than one year in jail and shall be required to pay a fine of not less than three
thousand dollars to compensate the child for any emotional, psychological or other damages caused by the disclosure of the test results.

F. A court may, in its discretion, impose additional penalties on the parent or any individual assisting the parent, including loss of driver’s, professional and other licenses and community service, as deemed appropriate by the court according to the facts of the case.

Comment:
Just as paternity fraud laws seek to punish women who misrepresent or omit potential information regarding the biological parentage of their children, so, too should the laws punish men and women who, even at the advice of their attorneys, disestablish or abandon the relationship with their children in an attempt to show that there is no family to protect. This Section does just that – punish fathers and mothers who disclose genetic paternity in an effort to advance their individual interests before their family’s interests.

In addition, to deter self-help genetic testing, genetic testing to determine paternity must be illegal and it must involve penalties that will impact the parent’s rights significantly, just as self-help testing impacts the child’s life. When Wise told his children he was not their father, the court imposed a significant punishment, depriving him of visitation with his children for two years. Although severe, the act of disobeying the court order and telling the children he was not their father was also severe. The loss of visitation rights was especially devastating to Wise as he sought to maintain a relationship with the children he disclaimed. The punishment seems harsh, and, in some sense, may serve to disestablish the family relationship this proposal seeks to preserve; however, Mr. Wise already disestablished his family when he told the children he raised, fought for and had custody of at various times, that they were not his and attempted to avoid the financial responsibilities associated with his membership in their family. Therefore, a man who discloses knowledge he should not have in the first place should be punished financially and socially.

Denying a father visitation for a month or making him serve time in jail when he seeks self-help testing in violation of the law may deter the father from making the decision to end the
family unit. Undoubtedly, there will still be fathers who walk away from their children when they walk away from their children's mother, but, perhaps, it will curb some of the psychological damage to the children by eliminating the uncertainty that the abandonment can include when accompanied by a full-blown paternity challenge wrought with genetic testing, innuendos of infidelity and potential additional biological parents.

The penalties proposed in this statute recognize the need for both criminal and financial incentives to prevent the resulting harm to the child. Making self-help testing a crime is not a novel suggestion.\textsuperscript{435} Although proponents of a biological privilege may argue that fathers will still seek self-help testing just as women sought back-alley abortions when abortion was illegal, especially because tests can be obtained from all over the world through the internet,\textsuperscript{436} it is less likely that a man will risk doing so if he knows he will lose his driver's, medical, or legal license or will incur jail time and a hefty fine. Therefore, the penalty for self-help testing has to be a matter of deterrence\textsuperscript{437} because, no matter what the risk, some men will seek self-help testing anyway.\textsuperscript{438} The goal is to deter the desire to seek this testing as much as possible to preserve the family.

One of the objectives of subsections C and E of this Section is to remove the incentive for a former spouse to suddenly disclose the father's non-paternity to the child to deter a custody battle or visitation request as envisioned by the court in \textit{Day v. Heller}.

\begin{itemize}
\item[\textsuperscript{435}] The possibility of criminalizing testing without the mother's consent or a court order has been contemplated in England, as well. Bentham & Fraser, \textit{supra} note 234. \textit{See also} Anderlik & Rothstein, \textit{supra} note 4 at 228, citing comments to earlier drafts of the UPA (2002).
\item[\textsuperscript{436}] \textit{See} www.worldwidepaternity.com (offering $175 in home DNA tests and $390 legal DNA tests, both of which are advertised as ninety-nine percent accurate).
\item[\textsuperscript{437}] Perjury charges for mothers who knowingly name a man who is not the biological father in cases where there is no family via a father-child relationship is not addressed in this statute as additional laws should be enacted to address the scenario where the child does not have an established father.
\item[\textsuperscript{438}] "Many of the most difficult cases arise because a parent takes a child for 'self-help' testing and then uses the existence or non-existence of a biological connection as a battering ram on public opinion, the courts, and, far too often, even the child to obtain 'justice.'" Robinson & Paikin, \textit{supra} note 22 at 25.
\item[\textsuperscript{439}] 653 N.W.2d 475, 482 (Neb. 2002).
\end{itemize}
Again, although this provision encourages concealment of the biological truth, it does so to preserve a conflicting truth that is not dependent on the biological truth – the parent-child relationship and family.

Section 300. Civil and Criminal Liability of Testing Companies

A. Any genetic, DNA or other laboratory that conducts genetic or other blood tests for the purpose of, or with the effect of, determining paternity or the lack thereof that conducts or offers to conduct such testing without a court order shall be subject to a punitive penalty of thirty thousand dollars and punitive damages payable to the child on the first offense and loss of their business or other license and punitive damages payable to the child for the second offense.

B. Any individual who works at a laboratory that conducts genetic or other blood tests for the purpose of, or with the effect of, determining paternity or the lack thereof that conducts or aids in such testing without a court order shall forfeit any medical license and shall be subject to the same penalties as any individual who assists in self-help testing in Section 200 of this Statute.

Comment:

The same rationale that governs individuals governs corporations and other entities offering illegal self-help testing under this statute. Punitive damages are appropriate for the willful violation of the law that causes damages to the child, whether quantifiable or not. There is no doubt that testing labs’ motivations is purely financial and not humanitarian. They make money by fostering doubt where there is none and destroying the floundering family that needs a life preserver, not an anchor as evidenced by billboards and internet advertisements that encourage genetic testing in the context of avoiding child support obligations. As such, the logical penalty for violating the law, as proposed in this article, would be to penalize them as the legal system does corporations who violate the law or act in reckless disregard for the rights of others; hit them with punitive damages. In this case, a three-strikes law is too lenient. Penalizing illegal genetic testing laboratories fiscally once should be the only warning. The second
time they provide illegal genetic testing, they should suffer the same fate as that family and lose their license — permanently. Just as the family cannot survive a biological blow, nor should the testing company.

VIII. CONCLUSION

A biological privilege in paternity determinations may establish the truth of the child’s genes, but it fails to acknowledge that parents are created by the parent-child relationship, not by genetics. While history suggests that biology has always been the impetus for adjudicating who a child’s legal father is, it also suggests that when there is already an established father-child relationship, biology creates a flawed paternity at the cost of the child and family. Rather than pursue a genetic truth for the benefit of the father’s financial status, the courts and legislatures should preserve the parent-child relationship and family that develops as a result of that relationship. To protect the family, the courts and legislatures have to do two things: 1) acknowledge that not all families end with divorce or start with marriage; and 2) create laws that not only discourage, but prohibit fathers and other parents from abandoning the parent-child or familial relationships regardless of the child’s genetic heritage. The statute proposed in this article would satisfy both of those components.

While subordinating genetic truth to family preservation is contrary to long-held beliefs that the courts and statutes should pursue a truth in disputes, as sociobiologists have acknowledged that the end of the intimate relationship between the parents often ends even biological parental relationships, the significance of the biological truth does not necessarily preserve the family. While there is no guarantee that a father will not abandon his child under any statute, the proposed statute would deter unnecessary doubts about paternity by acknowledging that a parent who remains in a child’s life after the relationship with the child’s mother subsides is more important than one who plays no role in the child’s life other than in the capacity as a sperm donor.

When biology prevails, the child and family suffer. Even when a father’s initial motives are not financial, once the DNA test

\[440^4\] See supra notes 155-156 and accompanying text.
excludes him as the child’s biological parent, money and anger at
the child’s mother replace the love and history of the parent-child
relationship, harming the child and family. When the parent-child
relationship prevails, there is no reason for the father to doubt his
role in the family because he defines it by his relationship with the
child. Therefore, to save the parent-child relationship, the child
and family must come before corporate profits of DNA testing
labs, the father’s financial self-interest, the mother’s desire for a
clean break from the other parent and a flawed biological
preference. Only then will the family survive.