The Innocent Third Party: Victims of Paternity Fraud

BY RONALD K. HENRY*

*The public good is in nothing more essentially interested, than in the protection of every individual's private rights.***

I. Introduction

During her divorce proceedings, Bonnie repeatedly claimed that Doug Richardson was the father of her child, but the child told Doug that Bonnie stated that Abraham Flores was his real father. The court refused Doug's request for a continuance to obtain counsel to assist in contesting paternity.[1] The Michigan Court of Appeals affirmed.[2] A paternity test excluded Doug as a possible father of the child.[3] Bonnie resumed living with Abraham, but Doug was forced to pay child support into the household of the child's real father. Later, Bonnie and Abraham broke up with a formal change of custody from Bonnie to Abraham. The Michigan State Court

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** WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAW OF ENGLAND 135.

1. Transcript of Hearing at 3, 6, Richardson v. Richardson, Court No. 91-7019, (Cir. Ct. Bay Cty., Mich., Mar. 23, 1992) (on file with author). Bonnie's counsel showed some pity, stating on the record: "I'm not trying to deny Mr. Richardson his opportunity to have counsel. I believe that people ought to have an attorney if they want to." *Id.*

2. Richardson v. Richardson, No. 157567 (Mich. Ct. App. Nov. 23, 1994) (unpublished, on file with author). In a two-paragraph opinion, the court of appeals wrote: "After reviewing Defendant's brief, we note he has failed to cite any authority supporting his position. We will not search for authority to sustain a party's position. We decline to address issues not properly presented." *Id.*

3. Letter from Henry Gershowitz, Ph.D., Director, National Legal Laboratories, Inc., to Richard O. Milster (Sept. 7, 1992) (on file with author).

ordered Doug, the nonfather, to pay child support directly to Abraham, the biological father.[4]

No one knows for certain the number of paternity fraud victims in America, but the lowest estimates are in the tens of thousands. The Michigan case is unusual only in that the paternity fraud victim was required to make court-ordered payments to the child's father rather than to the child's mother because of a change of custody to the father.

The subject of paternity fraud is not new.[5] In typical discussions, however, the phrase "paternity fraud" is rarely used in deference to the preferred phrase "paternity disestablishment," a seemingly more intractable and difficult problem of balanced nuances. "Paternity fraud," however, is not difficult to detect and prevent. For less than $100, a DNA test can determine with certainty whether a particular man is the father of a particular child before that man is indentured with coercively enforced obligations for eighteen years or twenty-one years[6] for someone else's child. There is nothing difficult about ending paternity fraud. This article is an argument and a plea for an end to the injustice.

Although numerous cases have addressed paternity fraud in all fifty states, the cases cannot be reconciled and are wildly inconsistent.[7] The only thing that can be seen from the cases is that there is a growing recognition that it is wrong for the courts to be parties to the injustice done to these innocent men. This article examines the justifications that have been presented for the perpetration and perpetuation of paternity fraud and finds them wanting.

II. Sources of Paternity Fraud

Paternity fraud has always been a risk for cuckolded husbands and for wealthy or famous men. As reported in one famous paternity fraud case:

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4. *See* Order, Lauria v. Richardson, Court No. 91-007019-DM-S, (Cir. Ct. Bay Cty., Mich., Apr. 11, 2001), which states:

> The friend of the court has confirmed with the custodial parent that the minor child, namely Douglas Richardson, lives with Abraham Flores, whose address is 415 Campbell Street, Bay City, MI 48708, and that the payee of support should be changed to Abraham Flores with whom the minor children currently resides, effective 04/09/01.

5. *See*, *e.g.*, Kristen Santillo, *Disestablishment of Paternity and the Future of Child Support Obligation*, 37 FAM. L.Q. 503 (2003); Paula Roberts, *Truth and Consequences: Part One—Disestablishing the Paternity of Non-marital Children,* 37 FAM. L.Q. 35 (2003); Paula Roberts, *Truth and Consequences: Part Two—Questioning the Paternity of Marital Children*, 37 FAM. L.Q. 55 (2003); Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act,* 35. FAM. L.Q. 41 (2001).

6. States have different standards for emancipation from child support. *See supra* note 5; *see also*, *e.g.*, TEX. FAM. CODE § 154.002 (child support to age eighteen or nineteen if still in high school); N.Y. FAM. CODE § 413(1)(a) (child support to age twenty-one).

7. *See generally* Santillo, *supra* note 5; Roberts, *supra* note 5.

> The former wife of billionaire Kirk Kerkorian has admitted the four-year-old girl for whom he is being asked to pay more than $320,000 in support is not his child and she faked DNA tests.[8]

Several relatively new phenomena have caused a radical expansion of paternity fraud victimization beyond that perpetrated by cheating wives and gold diggers. First, recent decades have seen enormous growth in the number of nonmarital births.[9] Second, the Supreme Court held that the Constitution does not prohibit use of the "preponderance of the evidence" standard rather than the "proof beyond a reasonable doubt" standard for paternity establishment cases.[10] Third, and perhaps most importantly, the government has become a dominant force in efforts to establish paternity as part of the drive to recoup welfare costs.[11] The result is that the vast bulk of the men who are at risk for paternity fraud victimization are neither rich nor famous. Federal funds have been used to establish millions of paternities in welfare cases; most have been entered against low-income and, disproportionately, minority men.[12]

A. The Great Engine of Federal Incentives

Federal law does not directly require paternity establishment. Instead, the federal government uses the "power of the purse" to impose conditions upon state eligibility for receipt of federal funds. Since the 1980s,

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8. Araminta Wordsworth, *Kerkorian's Former Wife Faked DNA Paternity Test*, NAT'L POST, Mar. 26, 2002.

9. *See*, *e.g.*, Sarah McLanaham et al., *The Fragile Family and Child Well-Being Study: Baseline National Report* 1 (Bendheim-Thoman Center for Research on Child Well-Being, Mar. 2003) ("The proportion of children born to unmarried parents has increased dramatically during the past forty years, with close to one-third of births now occurring outside of marriage."); Subcommittee on Human Resources, Committee on Ways and Means, United States House of Representatives, June 28, 2001 (citing an article from the WASH. POST, dated Apr. 18, 2001: "A record 1.3 million babies were born out of wedlock in 1999, marking the first time that a full one-third of all U.S. births were to unwed mothers . . . ").

10. Rivera v. Minnich, 483 U.S. 574 (1987). Prior to *Rivera*, paternity establishment cases had generally been viewed as quasi-criminal proceedings against an "accused" man and were understood to require "proof beyond a reasonable doubt." The dissent of Justice Brennan predicted unjust consequences from a lower standard of proof. 483 U.S. at 583–84.

11. *See generally* Office of Inspector General, U.S. Dep't of Health and Human Services, *Paternity Establishment: Administrative and Judicial Methods* (Apr. 2000); Roberts, *Truth and Consequences: Part One*, *supra* note 5.

12. Office of Child Support Enforcement, U.S. Dep't of Health and Human Services, *The Story Behind The Numbers: Who Owes The Child Support Debt?* Information Memorandum IM-04-04 at 1 (Aug. 13, 2004) ("Most child support debtors report little or no earnings: 63% of the debtors, holding 70% of the $70 billion debt, had reported earnings of less than $10,000.") *The Fragile Families and Child Well-Being Study*, *supra* note 9, studied unwed births in twenty U.S. cities and reported that 81 percent of fathers were African-American or Hispanic, that 38 percent lacked a high-school diploma, and 67 percent earned less than $20,000 per year.

Congress has operated on the belief that federal welfare expenditures can be offset by recoupment of child support payments from noncustodial parents. Accordingly, federal law requires that a recipient of Temporary Assistance to Needy Families (TANF) must assign to the government the right to receive child support payments.[13] To maximize child support collections, the federal government requires each state to have paternity establishment procedures.[14]

The federal government also provides penalties and incentives to the states related to their performance in paternity establishment. Federal law establishes a target of paternity establishment in ninety percent of cases.[15] Failure to meet the target subjects the state to an escalating series of program improvement requirements[16] and penalties.[17] In addition, Congress has provided that states with the highest paternity establishment rates and greatest year-to-year increases in paternity establishment rates will be eligible for bonus or incentive payments from the federal government.[18] With billions of dollars of federal TANF funds and incentive payments at stake each year,[19] the states have tremendous incentives and, indeed, compulsion to pursue high rates of paternity establishment.

B. The Unintended Consequences of Good Intentions

While nothing in federal law requires or authorizes establishing paternity against the wrong man, there is also nothing in federal law that prohibits or penalizes tagging the wrong man. Eligibility for receipt of federal funds under TANF and under the incentive formula depends only upon tagging the largest possible number of men, and there is no review or requirement that it be the right men. With the enormous sums of federal funds that are at stake, the result is not difficult to predict. The states are

13. 42 U.S.C. §§ 608(a)(3), 657.

14. 42 U.S.C. § 666(a).

15. Office of Planning, Research and Evaluation, U.S. Dep't of Health and Human Services, *Final FY 2005 Annual Performance Plan, Final Revised FY 2004 Performance Plan, and FY 2003 Annual Performance Report* at 6 ("Legislation requires states to establish paternity for 90 percent of children born out-of-wedlock, an ambitious goal that stretches states to perform at the highest level possible.").

16. Any state that is below a 90-percent paternity establishment rate must show progress in subsequent years with greater amounts of yearly progress required for states that are further from the 90 percent target. 42 U.S.C. § 652(g)(1).

17. Failure to meet the paternity establishment target or the required rate of improvement can result in the loss of the state's eligibility to receive federal funds under the Temporary Assistance to Needy Families program (TANF). 42 U.S.C. §§ 609(a)(8), 652(g), 658a.

18. *Id*. § 658a(b)(6).

19. TANF is budgeted at $17,537 billion for fiscal year 2006. Congressional Research Service, *Temporary Assistance to Needy Families (TANF) Blocks Grant: FY2007 Budget Proposals*, RS22385 (Feb. 21, 2006).

hugely incentivised to establish paternities, and one man will serve as well as any other.

California has long been notorious for its high rate of "sewer service," high rate of default judgments, and high rate of false paternity establishments.[20] When the California Legislature attempted to ameliorate the problem of paternity fraud, then-Governor Gray Davis vetoed the bill, saying:

> This [Bill] would directly impact child support collections and would jeopardize California's ability to meet federally required performance measures putting California at risk of losing up to $40 million in Federal funds.[21]

Simply put, the governor of the most populous state in the Union vetoed an effort to reduce paternity fraud because a reduction in paternity fraud might cost the government money.[22] Governor Davis is not alone in his conclusion that refusing to address paternity fraud is good government and good business. As the *Tampa Tribune* reported when Florida was debating paternity fraud reform:

> Department spokesman Dave Bruns said the State would be hard-pressed to find the real fathers should a law remove the burden of child support from non-fathers, "Until we could identify who the real dad is and begin making collections, then that family is likely to go on Public Assistance."[23]

In Missouri, local media reported on a father whose DNA test excluded the possibility of paternity and wrote:

> But that made no difference. The State would consider letting Williams off-the-hook only if his attorney contacted the other two men and Williams paid for their paternity tests. Otherwise, Williams must pay child support until the two girls reach age eighteen . . . the State is just doing its job, insists Mike Shortridge, chief counsel for the DCSE. "It is in the best interest of the child to have an order for child support."[24]

The bottom line in the drive to find some man, any man, to drive up the paternity establishment rate is that "fairness was not a high concern."[25]

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20. *See, e.g.*, Matt Welch, *Injustice by Default: How the Effort to Catch "Deadbeat Dads" Ruins Innocent Men's Lives,* Reason Online, Feb. 2004, *available at* http://www.reason.com/0402/fe.mw.injustice.shtml.

21. Gov. Gray Davis, AB 2240 Veto Message (Sept. 27, 2002), *available at* http://www.ncfmla.org/pdf.vetomessage.pdf

22. After Gov. Gray Davis was removed from office, the state legislature made another run at paternity fraud reform and a compromise measure giving limited relief was signed by Gov. Arnold Schwarzenegger. *See* http:www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0251-0300/ab_252_bill_20040928_history.html

23. Joe Follick, *He's Not Dad, But Budget Trumps DNA,*, Tampa Trib., Jan. 26, 2003, *available at* http://www.tampatribune.com/MGA09CUEBD.html

24. Deb Hipp, *The Daddy Trap,* The Pitch, July 11, 2002, *available at* http://www.pitch.com.

25. Kevin Harrison, Deputy Dir., Orange County, Cal. Dep't of Child Support Services, *quoted in* Jennifer B. McKim, *Non-Dads Bearing DNA Proof Left to Pay by Davis Veto:*

C. Abusive Practices in the Initial Establishment of Paternity

False paternity establishments occur in myriad ways. There are, however, three major pathways to false paternity establishment that are the direct result of poorly designed state systems: (1) Default Judgments; (2) Lack of Legal Representation; and (3) Defective In-Hospital Paternity Acknowledgments. This section describes major deficiencies in initial paternity establishments.

1. Default Judgments

In Los Angeles County, eighty percent of paternity establishments are entered by default judgment, whereas for the State of California as a whole, the number is sixty-eight percent.[26] California is not alone. The United States Department of Health and Human Services Office of Inspector General (HHS/IG report) reported that "seven states' child support agencies report half or more of paternities established in their states occur through defaults." The inspector general further reported that "[t]wenty-four percent of local offices in focus states report half or more of paternities in their caseloads are established by default."[27]

Every year, some politician can be counted upon to rail against "Deadbeat Dads" and the ever-growing arrearages in the collection of child support.[28] Despite the most oppressive form of debt collection practiced in the United States (wage garnishment;[29] asset seizure;[30] license denial;[31] pass-

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Victims of Paternity Fraud Had Hoped Bill Would End Support Obligations, Orange County Register, Oct. 13, 2002, *available at* http://www.ocregister.com. Mr. Harrison went on to acknowledge the county's awareness of the injustice to paternity fraud victims: "Their plight is not missed. We have to come up with a public policy that balances everybody's interests." *Id.*

26. Welch, *supra* note 20.

27. *Paternity Establishment: Administrative and Judicial Methods*, *supra* note 11, at 15. The focus states were California, Georgia, Illinois, New Jersey, Texas and Virginia.

28. Elaine Sorrenson *et al.*, *Examining Child Support Arrears in California: The Collectibility Study* (Urban Institute, Mar. 2003) at Rep. 2-2, Fig. 1: Child Support Arrears: U.S. and California (Under $10 billion in 1986, total U.S. child support arrears have gone up in each subsequent year). The U.S. Dep't of Health and Human Services puts the number at $70 billion as of 2003. Office of Child Support Enforcement, U.S. Dep't of Health and Human Services, *The Story Behind The Numbers: Who Owes The Child Support Debt?*, Information Memorandum IM-04-04 at 1 (Aug. 13, 2004).

29. *See, e.g.*, Cal. Fam. Code § 5230; N.Y. C.P.L.R. Law § 5241; Ohio Rev. Code. Ann. § 3121.02; Tex. Fam. Code ch. 158.

30. *See, e.g.*, Cal. Fam. Code § 4610; N.Y. Soc. Serv. Law §§ 111-t, 111-u; Tex. Fam. Code § 152.327.

31. *See*, *e.g.*, Ohio Rev. Code. Ann. § 3123.47; Tex. Fam. Code § 232.003. Licenses subject to suspension include not only driver's licenses, but can include professional and commercial licenses issued by state agencies such as licenses to practice law, cut hair, provide occupational therapy services, etc.

port denial;[32] tax refund interception;[33] public humiliation through "most wanted" posters;[34] and arrest, criminal fines, imprisonment,[35] and other remedies), child support arrearages are growing.[36] To its credit, California commissioned the Urban Institute to investigate why. The Urban Institute reported that the number one reason for arrearages was that "orders are set too high relative to ability to pay."[37] The first two of the four listed causes for orders being set too high relative to ability to pay were: (1) establishing too many child support orders by default; and (2) setting default orders at the standard level without knowledge of the obligor's income.[38] The first recommendation of The Urban Institute was to:

> **Reduce Default Orders.** Default orders occur when a noncustodial parent fails to respond to a child support case being brought against him or her. Some default orders are expected, but *a default rate of 71 percent statewide indicates that something is terribly wrong.* Noncustodial parents are not participating in the process of establishing the child support order when default orders occur, which we find reduces collections. Every effort should be made to identify the reasons why default rates are so high and reduce them.[39]

The Urban Institute findings were that there was (1) a statewide default rate of seventy-one percent, (2) poor location information for service of process, (3) use of substitute service rather than personal service, and (4) unnecessarily complex pleadings are not the basis for a just system of paternity establishment. In reporting on the effect of default judgments in cases of false paternity establishments, the United States Department of Health and Human Services Inspector General stated that:

> Regardless of the timing, appealing a default order is not likely to be an easy process. Several state and local managers report they advise parents who wish to appeal to hire an attorney to negotiate the process. This might be financially difficult for a large number of fathers, and they may end up paying months of

32. 22 C.F.R. § 51.70(a)(8).

33. 42 U.S.C. § 664; *see also*, N.Y. SOC. SERV. LAW § 111-b(7)-(8).

34. *See, e.g.*, MISS. CODE ANN. § 43-19-45 ("The Child Support Unit may release to the public the name, photo, last known address, arrearage amount, and other necessary information of a parent who has a judgment against him for child support and is currently in arrears in the payment of this support. Such release may be included in a 'Most Wanted List' or other media in order to solicit assistance.")

35. *See*, *e.g.*, 18 U.S.C. § 228; OHIO REV. CODE. ANN. § 3123.82-88; TEX. PENAL CODE § 25.05.

36. *See supra* note 28.

37. Urban Institute, *Examining Child Support Arrears in California: The Collectibility Study*, at ES-16 (Mar. 2003).

38. *Id.* at ES-16.

39. *Id.* at ES-19-20 (emphasis added). The basis for the slight difference in statewide default rates reported by Reason Online and by The Urban Institute (sixty-eight percent versus seventy-one percent) appears to stem from differences in the time period and data sets studied.

> child support payments even if they are proven not to be the father. Even if later excluded by genetic testing, staff indicates the man may still be liable for the child support arrearages not paid during the time he was presumed to be father by default.[40]

With a false paternity establishment, a child support order that exceeds his ability to pay, and no realistic avenue for appeal, arrearages accumulate and an innocent paternity fraud victim becomes recharacterized as just another "deadbeat dad."

2. Intimidation and the Lack of Legal Representation

Paternity fraud victims who cannot afford appellate counsel are no more likely to be able to afford trial counsel. There are few settings in which one is more at the mercy of others than to be an unrepresented litigant in an American court. The defendant enters a government building purposefully designed to be imposing; addresses a judge in robes on a raised platform, is flanked by a bailiff, clerk, and court reporter; and is opposed by a government-paid lawyer representing the welfare department.[41] Does anyone seriously think that this is a fair fight for a poorly educated, low-income minority who walks into the courtroom alone?[42] Surely, some judges struggle to assist the unrepresented indigent, but anyone who has been in a child support court knows that most are run with the ruthless efficiency of a factory assembly line.

The paternity fraud victim is hustled through the formality, often in less than five minutes, and may not even realize what has happened until the first garnishment of his paycheck. The state's direct financial incentive is to establish paternity regardless of actual paternity facts. In welfare cases, there is almost always only one attorney in the courtroom and that attorney is not representing the paternity target.

3. Inadequate In-hospital Paternity Acknowledgment Procedures

In-hospital paternity acknowledgment is a cornerstone of government policy and a requirement for any state seeking TANF funds.[43] In-hospital

40. *Paternity Establishment: Administrative and Judicial Methods*, *supra* note 11, at 16–17. The HHS Inspector General did not attempt to determine the portion of the default paternity orders that were ultimately overturned. *Id.* at n.24.

41. *See* Langston v. Riffe, 754 A.2d 389, 417 n.9 (Md. 2000), in which court noted:

> In many, if not most instances, state agencies, generally the Dep't of Human Resources, are the driving force behind paternity actions. [The mother] is informed that in order to qualify for public assistance, she must name the father and permit the agency to seek child support in her name . . . if she does not name someone, she may not receive assistance for the child. Sometimes she names the wrong person.

42. The author is unaware of any study that has examined how many of the default orders are simply cases of paternity targets who are too intimidated even to step into the courtroom.

43. 42 U.S.C. § 666(a)(5)(C)(ii).

paternity acknowledgment can be a real boon for parents and children, but only if the program is well-designed. A program that fails to screen out false paternity establishments scores a temporary statistical victory but causes enormous enforcement burdens and emotional costs to the victims of the false establishments.

Hospitals do an exceedingly good job of making sure that the right mother is connected to the right baby. Any visitor to a maternity ward will observe that footprints are taken, identity bands are placed on mother and child, nurseries are staffed and guarded by twenty-four-hour surveillance cameras.

Just as technology exists to protect the mother, equally dispositive technology, DNA testing, exists to protect men as well. But no in-hospital paternity acknowledgment program is geared toward providing protection to men. Anyone familiar with in-hospital paternity establishment programs knows that the programs are not geared toward verifying that the right man is identified as the father. Instead, the programs are openly geared toward exploiting the emotional vulnerability of a man who has come to the hospital solely because he believes that it is his baby who is there.[44] The man's presence in the hospital to be with "his" baby is called the "magic moment"and the child support bureaucracy openly exploits it as the best opportunity to get a paternity acknowledgment with no questions asked. As explained by the United States Department of Health and Human Services:

> The experience of States indicates a father of a child born to an unmarried mother is more likely to be present and to admit paternity during the time surrounding the birth than later on . . .
>
> We are not requiring genetic testing for all births as a means of preventing fraudulent acknowledgments. . .
>
> Furthermore, we are not requiring hospital-based programs to offer the option of genetic testing as part of hospital-based programs.[45]

The man has come to the hospital solely because he has been led to

44. *See, e.g., The Fragile Family and Child Well-Being Study*, *supra* note 9, at 17 ("policy makers can target this 'magic moment' when the likelihood of family formation is highest."); Child Support and Fatherhood Proposals Sustaining and Growing Father Involvement for Low-Income Children, Hearing before the Committee on Ways and Means, 107th Cong. (2001) (statement of Dr. Ron Haskins, witness) ("leverage the magic moment of the child's birth"); Family Strengthening Policy Center, National Human Services Assembly, Policy Brief No. 13, December 2005, *available at* http://www.nassembly.org/fspc/practice/documents/Brief13.pdf; ("the time of birth may be a magic moment").

45. Office of Child Support Enforcement, U.S. Dep't of Health and Human Services, Action Transmittal AT-94-06 Responses Part II, at General Requirements Response No. 1 and Elements of a Hospital-Based Program Response No. 4, *available at* http://www.acf.hhs.gov/programs/cse/pol/AT/at9406r2.htm.

believe that his baby is there. He is proud, excited, trusting, and he signs the paternity acknowledgment form without first demanding a confirmatory DNA test. From that moment, actual paternity becomes irrelevant, and the paternity fraud victim is trapped.

The baby is already present at the hospital. For less than $100, a DNA test could conclusively establish the identity of that baby's father. The baby needs that information for medical reasons including the possibility of inheritable defects and diseases. The state should want the information to assure that the child is as correctly matched to its father as to its mother. The paternity fraud victim surely wants the information at once rather than after years of doubt, expense, and litigation. DNA testing should be automatic in all births and should be a mandatory precondition to a valid paternity acknowledgment.

Because courts are wildly inconsistent and greatly troubled by the perceived difficulties of paternity disestablishment, the best solution is to get things right at the front end. Fewer false establishments will serve all interests. The state has equal obligations to both men and women. The state has an obligation to protect the interests of the real father as well as an interest in avoiding a false establishment naming the wrong man. The state has an interest in assuring that each child has information about that child's real parents for both medical reasons and for the love and stability that flow naturally with the biological bond but do not flow naturally between child and paternity fraud victim. The temporary statistical advantages of "getting the numbers up" do not justify the injury inflicted upon innocent people through false paternity establishments.

D. Who and How Many?

If paternity fraud were a "one in a million event," we might shrug and say that the random strike of paternity fraud is no worse than the random strike of lightning. The reality is that the lowest estimates of the number of paternity fraud victims are in the tens of thousands, and I believe that the number may be in excess of one million. The scandal is that the child support enforcement bureaucracy has consciously chosen to make no attempt to quantify the problem.

1. The Numbers

The United States Department of Health and Human Services (HHS) spends approximately $4 billion per year on child support enforcement, sponsors enormous research efforts and demonstration projects, and claims credit for establishing more than one million paternities per year.[46] It

46. Press Release, U.S. Dep't of Health and Human Services, HHS Role in Child Support Enforcement (July 31, 2002), *available at* http://www.hhs.gov/news/press/2002pres/cse.html.

maintains a huge Web site.[47] Until recently, however, HHS has not seriously studied the number of paternity fraud victims. The lack of study is by choice rather than a lack of awareness about the gap in knowledge. For example, the HHS Inspector General report on paternity establishment issued in April 2000 noted, "We did not attempt in our research to determine the proportion of default paternity orders which were eventually overturned."[48] The Inspector General Report is one of the few government documents to even acknowledge that false paternity establishments might be worthy of quantification. The failure to quantify is not for lack of resources or opportunity. As noted in an online article, the government:

> Crunches the numbers every which way: total child support dollars collected per dollar of total expenditure, average amount collected per case, and so on. But nowhere does the state bother to count the number of citizens it has wrongfully named as fathers. The bias is overwhelming, and abuses are inevitable.[49]

Finding paternity fraud victims is not hard. Television host Maury Povich has made a career of bringing scandalous paternity fraud stories to homes across America,[50] but the child support bureaucracy has chosen not to quantify or identify them.

The only significant insight into the number of paternity fraud victims comes from the American Associations of Blood Banks which, year after year, reports that approximately twenty-eight percent of all paternity tests exclude the targeted man.[51] In California, there were 158,000 default paternity establishments in the year 2000.[52] If it is assumed that the unwed couples that comprise the great bulk of those default judgments were as monogamous as the average couple undergoing DNA testing, there would be approximately 44,000 false paternity establishments in California from default judgments every year. In eighteen years, that would be almost

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47. *Available at* http://www.acf.dhhs.gov/programs/cse/

48. *Paternity Establishment: Administrative and Judicial Methods*, *supra* note 11, at n.17.

49. Welch, *supra* note 20.

50. *See* entry for "Maury," Wikipedia, *available at* http://www.em.wikipedia.org/wiki/maury ("Who's the baby's daddy: this type of episode had almost completely dominated the series."); Chip Crews, *Paternity Ward*, WASH. POST, Mar. 28, 2006, at C1, ("A woman named Georgetta has attained legendary status by appearing twelve times to test thirteen men.")

51. American Association of Blood Banks Annual Report Summary for 1999 reports that "the overall exclusion rate for 1999 was 28.2% for accredited labs." *Id.* at 4. The Annual Report Summary for testing in 2003 reports that, "For the laboratories tracking exclusions, there were 353,387 cases completed and 99,174 (28.06%) were reported as exclusions." *Id.* at 4. *See also,* Tresa Baldas, *Parent Trap? Litigation Explodes over Paternity Fraud,* NAT'L L.J., Apr. 10, 2006 ("According to a recent study in New Hampshire, as many as 30 percent of those paying child support are not the biological fathers of the children being supported.")

52. Welch, *supra* note 20, at 5.

800,000 false paternity establishments in California alone. Default judgments are not the only way of obtaining a false paternity establishment. Extrapolated to the nation as a whole, and considering all sources of false paternity establishment and considering the eighteen to twenty-one-year lifespan of a child support order, an estimate of one million obligor paternity fraud victims in the United States might be conservative.

Regardless of whether the number is one million or one hundred thousand, or "merely" ten thousand, significant numbers of paternity fraud victims obviously exist and are suffering from the burdens imposed by false paternity establishments. Sadly, there has been no interest in counting them or in identifying them. Each paternity fraud victim is an embarrassment to the child support bureaucracy. Each paternity fraud victim is a potential reduction in performance statistics. Only the victims want to be counted and they do not control the research budgets.

2. The Facts

Although no public agency has ever counted or characterized the paternity fraud population, certain facts are well known. Government-initiated paternity establishments arise in the context of welfare payments. The paternity targets pursued by government agencies are overwhelmingly low-income and disproportionately drawn from minority communities. For example, the United States Department of Health and Human Services recently reported that total child support arrearages in the United States were approximately $70 billion in 2003, of which seventy percent was owed by obligors with reported income of less than $10,000 per year.[53] The Urban Institute's study in California reported similarly that "over 60% of debtors have recent incomes below $10,000 [per year]. Only 1% have recent incomes in excess of $50,000."[54]

One surprising aspect of the paternity fraud problem is that obligors are not only disproportionately poor and minority; a significant number are also

53. *The Story Behind The Numbers: Who Owes the Child Support Debt*, *supra* note 28, at 1 (noting that "a significant number were receiving federal benefits, such as social security and unemployment insurance benefits, which are attachable to pay child support."). *Id.* at 2. The report did not note that persons living on social security disability or unemployment compensation are unlikely to have much capacity to reduce the $70 billion arrearages without rendering the obligors homeless and completely destitute. The HHS report did acknowledge that:

> [The] best way to reduce the total national child support debt is to avoid accumulating arrears in the first place. The best ways to avoid the accumulation of arrears are to set appropriate orders initially. . . designing a system that establishes appropriate orders will encourage payment of child support. *Id.*

Avoiding false paternity establishments is an essential element of any program "to set appropriate orders initially."

54. Urban Institute, *The Collectibility Study*, *supra* note 37.

very young men.[55] The traditional view in the United States is that minors cannot make legally binding contracts. The effort to "get the numbers up" in paternity establishments, however, has resulted in abrogation of this disability in a number of states. In some states, a minor can sign a binding paternity acknowledgment without the consent of his parents and without the appointment of a guardian *ad litem.*[56] A fifteen-, sixteen-, or seventeen-year-old boy, unrepresented by counsel, his parents, or a guardian *ad litem* is an easy target for false paternity establishment, either by default judgment or by an uninformed signature on a paternity acknowledgment form.

III. The Perpetuation of Paternity Fraud

Most paternity fraud cases never result in contested litigation. The low-income, minority victim of paternity fraud receives his default judgment or his five minutes without counsel in the assembly line of a child support courtroom and is simply helpless. He cannot afford a lawyer and he cannot understand the legal process. He can only attempt to decide how to cope with what has been done to him. Many go underground. Many accumulate arrearages. Many are rounded up and subjected to the full array of coercions available to the child support industry. But what happens to those who return to the courts to try to fight for their freedom? What reception do they receive? What results do they obtain? At the moment, the answers to these questions depend upon where he is rather than what he did. Some states and some individual courts have strong policies in favor of vacating false paternity establishments.[57] Other states and some individual courts have equally strong policies perpetuating the false paternity establishment.[58] The following sections analyze and criticize the rationales that have been presented for perpetuating false paternity establishments.

A. Presumptions of Paternity

Societies and the laws governing societies have always had an interest in paternity establishment. Who will be king, who is born a citizen, who is born free or slave, and who will inherit are issues that, throughout history,

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55. *See, e.g.,* McLanaham*, The Fragile Family, supra* note 9, at 5 (13 percent of unwed fathers in a twenty-city survey were nineteen years of age or less).

56. *See, e.g.*, MASS. GEN. LAWS ch. 209, § 117 (2001); MONT. CODE ANN. § 40-5-232(3) (2000). *See also* Hermesmann v. Seyer, 84 P.2d 1273 (Kan. 1993); Stringer v. Baker, 104 P.3d 1132 (Okla. Civ. App. 1988) (requiring the male victim of statutory rape to pay child support for the resulting child).

57. *See, e.g.*, MD. ANN. CODE § 5-1038; OHIO REV. CODE ANN. §§ 3111.13, 3111.37, 3113.2111; Granderson v. Hicks, Court No. 02A01-9801-JV-00007, 1998 WL 886559 at *3 (Tenn. Ct. App. Dec. 17, 1998).

58. *See*, *e.g.*, *In re Paternity of* Cheryl, 746 N.E 2d 488, 495–97 (Mass. 2001).

have generated a focus on paternity establishment. Until quite recently, we lived in a pre-DNA world in which true paternity was often difficult to establish and in which presumptions served the useful purpose of solving the otherwise unsolvable.

Old presumptions regarding paternity establishment are too numerous and too varied for analysis here,[59] but all shared a common basis. The presumptions were a substitute for truth at a time when truth could not be obtained. We now live in a world in which truth is available. For less than $100, we can know with certainty whether a particular man is or is not the father of a particular child. If the law continues to enforce any historical presumption that conflicts with easily ascertainable truth, the law can expect to hear the voice of Mr. Bumble from Charles Dickens's *Oliver Twist* saying, "If the law supposes that, the law is a ass—a idiot."[60]

As noted by Paula Roberts in 2001: "There is a fundamental sense that it is unfair to require a man to support a child with whom he has no biological connection."[61] Old presumptions that were created where the truth could not be known should fall when the truth does become known. As stated by one court:

> We believe that all common law presumptions relating to paternity and legitimacy are rebuttable and the public policy has now been established by the General Assembly that true parentage is the end that should be pursued by the courts in paternity actions.[62]

In striking down a statute of limitations for the commencement of paternity actions, the United States Supreme Court, as far back as 1988, noted the growing availability of truth and stated that:

> Congress adverted to the problem of stale and fraudulent claims, but recognized that increasingly sophisticated tests for genetic markers permit the exclusion of over 99% of those who might be accused of paternity, regardless of the age of the child. H.R. Rep. No. 98-527, p. 38 (1983). This scientific evidence is available throughout the child's minority.[63]

Presumptions and limitations that were useful in the pre-DNA world should give way to truth and to justice.

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59. *See*, *e.g.*, *Essentials for Attorneys in Child Support Enforcement*, ch. 8, PATERNITY ESTABLISHMENT (3d ed. 2002).

60. CHARLES DICKENS, OLIVER TWIST 489 (1970).

61. Roberts, *Biology and Beyond, supra* note 5, at 54. Roberts went on to argue for adoption of the Uniform Parentage Act under which truth would be relevant but only for a period of two years. *Id* at 68. The thesis of this article is that the truth is always the truth and that no one should be allowed to perpetuate a fraud on a forward going basis merely because the fraud was successfully concealed during the two preceding years.

62. Granderson v. Hicks, Court No. 02A01-9801-JV-00007, 1998 WL 886559 at *3 (Tenn. Ct. App. Dec. 17, 1998).

63. Clark v. Jeter, 486 U.S. 456, 465 (1988).

B. Rationales for Postjudgment Perpetuation of a False Paternity Establishment

While many permutations of policy and phrasing exist, the justifications for refusing to grant postjudgment relief from a false paternity establishment all circle back to a claim that it would be unfair to the child or to the state to release the victim of a false paternity establishment. Occasionally, a court will make a bare reference to the benefits of "finality" but, almost always, the imposition of "finality" stems from a claim that finality is in the best interests of the child or the state.[64] The claimed benefits of finality are necessarily predicated on the allegedly superior interests of some other party because no one would respect a court that condemned an innocent man to future coerced payments merely to avoid the paperwork of correcting a decision that was based solely upon a now demonstrated falsehood. The pages that follow examine the various rationales that have been put forward to claim that the paternity fraud victim's interests in relief are outweighed by another party's interests in perpetuating the false paternity establishment.

Two court decisions, *In re Paternity of Cheryl*[65] from the Supreme Judicial Court of Massachusetts and *Godin v. Godin*[66] from the Supreme Court of Vermont are the most widely cited and offer the most detailed defenses among the decisions refusing to grant postjudgment relief after a false paternity establishment. Both cases involved the obligor's postjudgment discovery that he was not the father and acknowledged the court's power to grant relief from judgment under the state equivalent of Federal Rule of Civil Procedure 60(b). Both decisions refused to grant such relief. Because of the prominence of these two cases among opponents of postjudgment relief from paternity fraud, they form the core of the following discussion.

1. The Child's Interest in Refusals to Vacate False Paternity Establishments

Both the *Cheryl* and *Godin* decisions purport to be driven by the child's best interests. In *Cheryl*, the court wrote:

> Where a father challenges a paternity judgment, courts have pointed to the special needs of children that must be protected, noting that consideration of what is in a child's best interests will often weigh more heavily than the genetic link between parent and child. . . .

64. *See, e.g.*, Godin v. Godin, 725 A.2d 904 (Vt. 1998); *In re Paternity of* Cheryl, 746 N.E.2d 488, 497 (Mass. 2001) ("We differ with the [trial] judge because we conclude that, as a consequence of the father's long delay before he challenged the paternity judgment, Cheryl's interests now outweigh any interest of his.")

65. *Cheryl*, 746 N.E.2d at 488.

66. *Godin*, 725 A.2d at 904.

> [The courts] zealously safeguard the welfare, stability, and best interests of the child by rejecting untimely challenges affecting his or her legitimacy [quoting *Godin*]. . . .
>
> Social science data and literature overwhelmingly establish that children benefit psychologically, socially, educationally and in other ways from stable and predictable parental relationships. . . .
>
> An attempt to undo a determination of paternity is potentially devastating to a child who ha[s] considered the man to be the father. . . .
>
> We conclude that, as a consequence of the father's long delay before he challenged the paternity judgment, Cheryl's interests now outweigh any interest of his.[67]

The majority in *Godin* was equally effusive about the best interests of the child:

> Thus, the State retains a strong and direct interest in ensuring that children born of a marriage do not suffer financially or psychologically merely because of a parent's belated and self-serving concern over a child's biological origin. . . .
>
> We believe that the best interests of this child, and all children whose rights will be implicated by the court's decision today, must prevail over any unfairness that may result to this [former husband] by denying his challenge of paternity. . . .
>
> Whatever the interests of the presumed father in ascertaining the genetic "truth" of a child's origins, they remain subsidiary to the interests of the State, the family, and the child in maintaining the continuity, financial support, and psychological security of an established parent–child relationship.[68]

Despite all the language about family and stability and relationships, neither *Godin* nor *Cheryl* had anything to do with enforcing anything other than financial obligations. The *Godin* court acknowledged that the paternity fraud victim first heard the truth about his nonpaternity from his purported daughter.[69] The *Cheryl* court acknowledged: "We cannot protect Cheryl from learning about her genetic parentage: if Cheryl does not yet know of her father's challenge, he [or others] may disclose it to her."[70]

The only question in either *Cheryl* or *Godin* was whether the obligor would remain in involuntary servitude under state coercion to send money on the basis of a false paternity establishment. In fact, none of the courts that refuse relief from false paternity establishments is actually talking about maintaining a physical or emotional relationship between the child and the unrelated adult. We can grant the *Cheryl* court's point that "social

67. *Cheryl*, 746 N.E.2d at 495–97.
68. *Godin*, 725 A.2d at 910.
69. *Id.* at 912.
70. *Cheryl*, 746 N.E.2d at 498–99.

science data and literature overwhelmingly establish that children benefit psychologically, socially, educationally and in other ways from stable and predictable parental relationships"[71] without also concluding that one party must remain under court order to make involuntary payments. The only genuinely disputed issue in an action to vacate a false paternity establishment is whether the paternity fraud victim will be released from the state enforced coercion to make continued payments.

Every week, thousands of cohabiting couples or second marriages break apart. Many of these relationships break up after years of family life in which one adult served as a stepparent to the biological children of the other adult. The law is unambiguously clear. When these relationships break up, absent unusual circumstances the stepparents have no financial obligation to the stepchildren,[72] even though many of them will voluntarily continue physical and emotional relationships.

The only difference between a paternity fraud victim and a stepparent is that the paternity fraud victim has been subjected to a lie and, precisely because he was subjected to a lie, some courts seek to deny him the right to end financial support, a right that is uniformly given to exiting stepparents. Specifically and solely because he was victimized by the original paternity fraud, some courts will perpetuate his victimization by imposing forward going financial burdens upon him, which stepparents do not bear.

The stepparent enters the relationship with the child knowing that there is no biological connection and, despite that knowledge, affirmatively acts to begin providing support for that child. When the stepparent, male or female, wishes to exit from the financial relationship, there is no question that he or she is absolutely allowed to do so. In contrast, the paternity fraud victim has a financial relationship with the child that is founded upon a falsehood. The paternity fraud victim has not been given the chance to make a voluntary choice to provide support to a child despite actual knowledge that he has no biological relationship. When the fraud is discovered and the paternity fraud victim wishes to cease providing financial support to a child, his case should be stronger than that of a stepparent who entered into the financial support relationship with full knowledge that there was no biological connection. Instead, the paternity fraud victim is never given a choice. He is first lied to in order to establish paternity and is then denied relief when the lie is exposed. The court

71. *Id.* at 495, n.15.

72. *See, e.g.,* Miller v. Miller, 478 A.2d 351 (N.J. 1984). There have been a very small number of cases in which an adult who is not biologically related to the child is deemed by special circumstances to have taken on a burden that continues after break up of the relationship between the adults. *See, e.g.*, *In re Marriage of* Johnson, 152 Cal. Rptr. 121, 122 (Ct. App. 1979).

thus becomes party to both the perpetration and the perpetuation of the victimization.

The talk about preserving relationships as a justification for refusing to vacate false paternity establishments is a complete *non sequitur*. Our most elementary understanding of human nature informs us that a man who is free to follow his voluntary will in pursuing a relationship with a child will have a better relationship than a man who is filled with rage and resentment because he continues to be forced to make involuntary payments on the basis of a falsehood. If anyone actually cared about the best interests of the child in maintaining a relationship, they would hasten to make amends to the paternity fraud victim, compensate him for the abuses he suffered at the hands of the government, and thank him as we thank Boy Scout leaders or volunteers at Big Brothers who choose, as free men, to establish or continue a relationship with a child not their own.

The task of maintaining the relationship between the man and the child is too often the opposite of what is portrayed by the *Cheryl* and *Godin* courts. In the real world, children are too often used as economic weapons and access is purposefully cut off if the cash flow stops. Vacating a false paternity establishment does not cut off a physical or emotional relationship unless the mother chooses to cut it off[73] or the court orders a halt to visitation, as it did with Doug Richardson when it ordered him to pay child support.[74]

As to the best interests of the child, it should never be a sufficient legal argument to say that it is in the best interest of any particular child to perpetuate a fraud. The child's best and only interest in paternity establishment lies in finding that child's biological father. That child needs to know his or her genetic heritage for medical purposes. That child needs to have the opportunity to establish a relationship with his or her father. That child needs to be treated as a human being with a fundamental, moral interest in truth and integrity, rather than as a weapon to be used against an innocent paternity fraud victim.

If the defenders of paternity fraud truly considered the children rather than welfare budgets, they would ask the children themselves. It is doubtful that many children would define their "best interests" in terms of the

73. For example, Carnell Smith was willing and prepared to continue a physical and emotional relationship with the girl he once thought was his daughter but, as a black male living in Georgia, he also wanted to be a free man. When he filed a motion in 2001 to vacate the paternity judgment, the mother cut off access to the child. Carnell has not been permitted to see her even once in the succeeding five years. Statement of Carnell Smith, Apr. 15, 2006 (on file with author).

74. Transcript of Hearing, at 3, 6, Richardson v. Richardson, Court No. 91-7019 (Cir. Ct. Bay County, Mich. Mar. 23, 1992).

importance of telling lies to get money from an unrelated, innocent man. No civilized society should teach its children that lies are the path to success in our courts. The child never asked for the wrong person to be designated as child support obligor. The child rarely sees the financial benefit, since, in most cases, the child support payments made by the paternity fraud obligors have been assigned to the government as reimbursement for previous welfare payments given to the mother. No one should use the child as an excuse for paternity fraud.

2. The State's Interest in Refusals to Vacate False Paternity Establishments

The majority in *Godin,* responding to the dissent and to contrary authority from other states, said:

> We are not persuaded, however, that the State's interest in the welfare of children requires that post-judgment attacks on paternity should be made easier. On the contrary, the State's concern is to ensure that children's lives remain stable and secure, and this militates, if anything, against the liberal reopening of paternity determinations.[75]

This defense of "stable and secure" involuntary servitude relationships could have been written by any of the antebellum defenders of slavery.[76] The government does not have a legitimate interest in holding one innocent citizen in bondage to labor for another. The state has an interest in assuring that children are supported. That interest is served by finding the fathers (and noncustodial mothers) of those children. It is not served by perpetrating or perpetuating fraud against an innocent person. If the state had a legitimate interest in collecting child support from random nonfathers, it would be better to conduct a simple lottery. At least then, the child would have the chance of drawing a rich nonfather rather than one of the poorly educated, low-income minority males who disproportionately make up the bulk of the state's current targets in paternity establishment proceedings.

When the United States Supreme Court determined that the standard of proof in paternity establishment actions could be "preponderance of the evidence" rather than "beyond a reasonable doubt," it answered concerns

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75. Godin v. Godin, 725 A.2d 904, 911 (Vt. 1998).

76. *See, e.g.,* Gov. George Mc Duffie, message to South Carolina Legislature (1835) (stating if we look into the elements of which all political communities are composed, it will be found that a servitude in some form is one of the essential constituents); Sen. John C. Calhoun, speech on the reception of Abolition Petitions: Rev. Rep. (Feb. 6, 1837), *available at* http://www.wfu.edu/~Zulick/340/Calhoun2.html. ([T]he relationship now existing in the slave holding states between the two [races] is, instead of an evil, a good—a positive good . . . [T]here never has yet existed a wealthy and civilized society in which one portion of the community did not, in fact, live on the labor of the other).

that the lowered standard of proof would lead to improper temptations on the part of state governments by saying:

> Unlike the State Supreme Court, we place no reliance on the State's interest in avoiding financial responsibility for children born out of wedlock. If it were relevant, the State's financial interest in the outcome of the case would weigh in favor of imposing a disproportionate share of the risk of error upon it by requiring a higher standard of proof. In our view, however, the State's legitimate interest is in the fair and impartial adjudication of all civil disputes, including paternity proceedings. This interest is served by the State's independent judiciary, which presumably resolves these disputes unaffected by the State's interest in minimizing its welfare expenditure.[77]

Given that "the State's legitimate interest is in the fair and impartial adjudication of all civil disputes, including paternity proceedings . . . unaffected by the State's interest in minimizing its welfare expenditures,"[78] it must be assumed that the Supreme Court justices have not visited the welfare offices, the child support agencies, or the child support courts subsequent to the *Rivera* decision in 1987. Today, the government creates, enforces, and perpetuates false paternity establishments. A refusal to vacate a false paternity establishment begins with an opposition, usually filed by the government attorney from the welfare or child support office. The issue of paternity disestablishment in *Cheryl*, in fact, arose only after the child support office first filed a motion to increase the monthly child support obligations of the paternity fraud victim.[79]

The filing of an opposition by the welfare or child support office does not preserve a false paternity establishment unless the court refuses to exercise its power to vacate the judgment. In *County of Los Angeles v. Navarro*,[80] the child support office tried to maintain its default judgment against Navarro after he belatedly (five years) came forward with the results of the DNA test excluding him from paternity. The court wrote:

> Mistakes do happen, and a profound mistake occurred here when appellant was charged with being the boy's father, an error the County concedes. Instead of remedying its mistake, the County retreats behind a procedural redoubt offered by the passage of time, since it took Appellant's default. . . .
>
> The County, a political embodiment of its citizens and inhabitants, must always act in the public interest and for the general good. It should not enforce child support judgments it knows to be unfounded. And in particular, it should not ask the courts to assist it in doing so. . . .

77. Rivera v. Minnich, 483 U.S. 574, 581, n.8 (1987).
78. *Id.*
79. *In re Paternity of* Cheryl, 746 N.E.2d 488, 492 (Mass. 2001).
80. Los Angeles v. Navarro, No. B-155166 (Cal. Ct. App. June 30, 2004).

> We will not sully our hands by participating in an unjust and factually unfounded result. We say no to the County and we reverse.[81]

Undaunted by this judicial rebuke, the county requested that the appellate court ruling be "depublished" so that other paternity fraud victims would not learn of or rely upon it.[82] The paternity establishment process in the welfare system is badly broken. It is driven by a set of incentives that corrupt the unscrupulous into acts of injustice. The state should not be a procurer of involuntary servitude.

C. Blaming the Victim

In *Godin*, the court three times denigrated Mr. Godin for his "self-serving" or "self-interested" behavior:

> Thus, the state retains a strong and direct interest in ensuring that children born of a marriage do not suffer financially or psychologically merely because of a parent's belated and self-serving concern over a child's biological origin. . . .
>
> The fact that Plaintiff choose for self-serving purposes to jeopardize his relationship with Christina is beyond our control. . . .
>
> Where the presumptive father has held himself out as the child's parent, and engaged in an ongoing child relationship for a period of years, he may not disavow that relationship and destroy a child's long-held assumptions, solely for his own self interest.[83]

The dissent easily called the majority to account:

> Finally, in our decision today we are rewarding fraud. The majority calls Plaintiff's actions self-serving while ignoring that defendant misled her husband and her daughter for fifteen years and then precipitated this case by finally disclosing the truth, and doing so in a manner that caused Plaintiff to hear this revelation from a child he had thought was his daughter. The majority questions why Plaintiff did not act earlier, while ignoring that defendant intentionally kept from him the facts upon which the majority requires that he act. We are condoning affirmative misrepresentations to the court, not of collateral matters, but of the central facts upon which the divorce court must act to protect the children before it. . . .
>
> Because Plaintiff believes that there should be legal consequences stemming from the true facts, which had been withheld from him for fifteen years, he is

81. *Id.* at 4–5.

82. Cheryl Wetzstein, *Court Asked to "Depublish" Child-Support Ruling,* WASH. TIMES, Aug. 19, 2004, *available at* http://www.washingtontimes.com/national/20040818-11309-3555r.htm.

83. Godin v. Godin, 725 A.2d 904, 910 (Vt. 1998).

> labeled by the majority as disavowing his relationship with Christina and destroying her "long-held assumptions, solely for his own self-interest." . . .
>
> To the contrary, the undisputed facts demonstrate that, at its core, this is a classic case of defending an unjust result by blaming the victim.[84]

The dissent challenged the majority by noting that Mr. Godin had not done anything to "destroy a child's long-held assumptions." Instead, it was the daughter who brought the information of nonpaternity to Mr. Godin.[85] A majority opinion that must rely upon misstatement of the facts and demonization of an innocent party ("self-serving"; "self-interested") does not provide a sound basis for public policy.

The decision in *Cheryl* was no better. In *Cheryl*, the court decided that the real problem was that the paternity fraud victim had upset the apple cart by obtaining a DNA test to determine the truth:

> Because the results of a paternity test may, as in this case, lead to protracted paternity litigation, serious conflicts between the parents, identity confusion for a child, and an incentive for a parent to withdraw emotional or financial support, the agreement of the child's legal custodian or an order of the court would in most circumstances be required before the non-custodial parent may submit the child to genetic marker and blood group testing.[86]

In the eyes of the *Cheryl* court, the paternity fraud victim is the villain because he did not obtain permission from the person who committed the fraud as a precondition to any efforts to determine the truth. Defenders of paternity fraud always have an excuse:

- He held out the child as his own (when he had no reason to shun a child that had been presented as his own).
- He signed the paternity acknowledgment (when his only offense was in believing the mother's representations at the hospital).
- He failed to appear in court (when he was a victim of "sewer service").
- He didn't raise the issue at trial (when he was unrepresented by counsel or was simply naïve enough to accept the mother's representations).
- He is disrupting the child's relationships (when all he wants is to be a free man with liberty to make voluntary relationships).

Each of the defenses of paternity fraud is, at bottom, merely an exercise in "blaming the victim."

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84. *Id.* at 914–15.
85. *Id.* at 912.
86. *In re Paternity of* Cheryl, 746 N.E.2d 488, 500 (Mass. 2001).

D. Excusing the Perpetrator

In *Godin*, the majority found great significance in the fact that the false statements were submitted by the mother's lawyer (although signed by the mother) rather than filed directly by the mother herself, noting: "We conclude that to the extent mother's conduct was fraudulent, if at all, it constituted fraud upon plaintiff, not upon the court."[87] The dissent analyzed the false statements, including the stipulation signed by the mother, and politely but directly stated:

> The majority is arguing that a party, who knowingly signs a false pleading under oath, does not commit a fraud on the court, while a lawyer who delivers that pleading to the court does commit such a fraud. I find this distinction illogical since both involve fraud and the effects "on the court" are the same.[88]

Cheryl, a welfare case, similarly stretched to excuse the perpetrator. While the mother was represented by a government lawyer from the welfare office, the alleged father was unrepresented by counsel throughout the paternity establishment proceeding. On the form submitted to the Probate and Family Court, the mother "acknowledged and affirmed that he [the Defendant] was the father of *Cheryl*."[89] The court held that:

> Even if the mother knew in December, 1993 [the date of her acknowledgment and affirmation to the Court regarding the alleged father's paternity], that the father was not Cheryl's biological father (a proposition not established by this record), her failure to disclose that information to the court would not amount to "fraud on the court."[90]

Thus, the court in *Cheryl* flatly stated that a knowingly false acknowledgment and affirmation submitted to the court as the only basis for the court's judgment does not constitute a fraud upon the court. The court obviously was not serious since knowingly false statements made to a court in any state would be prosecutable as crimes. Instead, the court simply chose to conclude that fraud in pursuit of paternity establishment is to be ignored and excused.

E. Gender Bias in the Courts

The risk of babies being switched at birth was a matter subject to plausible speculation in the era of wet nurses and easy access to babies through nonfamily caregivers. Indeed, two of the popular Gilbert and Sullivan operettas ("H.M.S. Pinafore" and "The Gondoliers") hinge entirely on a

87. *Godin*, 725 A.2d at 904.
88. *Id.* at 914.
89. *Cheryl*, 746 N.E.2d at 491.
90. *Id*. at 498.

"switched at birth" plot line. Since then, elaborate safeguards and technology have been employed to protect the mother and assure that she is identified only with her own child.[91]

When the wrong mother is identified today, it is almost always despite diligent efforts to make a correct identification. The hospital takes the footprint of the baby, places a wristband on the mother and the baby, provides twenty-four-hour video monitoring of the nursery, and utilizes other steps to assure that each woman is uniquely identified to only her own child. When an error is discovered, there is automatic liability to the responsible party regardless of the absence of negligence and the rigor of the steps that were taken to prevent a misidentification. For example, in the Johnson–Conley mix-up in Virginia, $2.3 million was paid.[92]

When the wrong father is identified, it is almost always because the woman concealed the fact that she had another sexual partner. When the error in tagging the wrong man is discovered, the rush is on to excuse or ignore the woman's behavior and to "blame the victim": He didn't challenge her lie soon enough; He didn't shun the baby when it was presented to him; He was married to the adulteress; It was his fault.

Why is there a difference in the treatment of misidentified mothers and misidentified fathers? The difference is because we care about getting the right mother but our bureaucracies do not care if they get the wrong father. It would be a human tragedy if a mother was separated from her child, but no big deal if a man is indentured for eighteen or twenty-one years to support a child that is not his.

The simplest test for gender bias is to ask if you would treat a woman in the same way that you treat a man. In the case of a baby identified to the wrong mother, no one would even dare to raise the argument that she should be "estopped" because she "held the child out as her own" or because it took more than two years to discover the error. No one would do to any woman what we routinely do to thousands of men. That is gender bias.

The woman knows with whom she had sex and who could or could not be the father of the child she carries. The worst that can be said about the man is that he was wrong to have trusted the fidelity of his wife or girlfriend. As the court in *Cheryl* said: "The law places on men the burden to consider carefully the permanent consequences that flow from an acknowledgment of paternity.[93] The same court also said that the acknowledgment

91. *See generally* Victoria Naess, Exi Systems Inc., *Baby Switching: What It Is, Why It Can Happen and How It Can Be Prevented Using Technology* (May 13, 2003).

92. Margaret Cronin Fisk, *$2.3M Settlement in Va. Wrong Baby Case*, NAT' L.J., May 21, 2001, at A6.

93. *Cheryl*, 746 N.E.2d at 499.

and affirmation signed and submitted to the court by the mother did not have any adverse consequences for her.[94] Only the mother knew the true facts of her sexual activity. The alleged father did nothing other than trust his wife. Yet, it is only the man who suffers the adverse consequences. She has rights. He has responsibilities. She is excused. He is condemned. That is gender bias.

IV. Ending the Culture and Condonation of Paternity Fraud

The problem of paternity fraud as a serious social issue is a relatively recent creation that follows the increased effort in child support enforcement over the past two decades. Many unintended consequences have crept into the child support enforcement system. A system in which arrearages exceed $70 billion and continue to grow despite the expenditure of over $4 billion annually in federal funds and similar amounts in state funds is obviously broken. Among the problems are high rates of default judgments, orders that are grossly in excess of the obligor's ability to pay, failure to make modifications during employment interruptions, and paternity fraud.[95] Solutions to the paternity fraud crisis are not difficult but they do require an end to the culture and condonation of paternity fraud by agencies and courts.

A. Legislatures

Paternity establishment is a good thing. Children should know and have the opportunity to form secure, loving relationships with their fathers. Currently, federal policies create unintended and perverse incentives that foster paternity fraud to the great injury of children and men, as well as great costs in compliance efforts and in loss of public respect for a system that is seen as unjust in wide segments of the affected communities.

The most important change that can be made by the federal government is also the most simple. For purposes of state compliance with paternity establishment targets and incentive payments, the federal government should count only those paternities that are confirmed by a DNA test. Congress should also instruct the bureaucracy to count and identify the paternity fraud victims, develop mechanisms for their emancipation, and require procedures to minimize future paternity fraud victimization.

From biblical times until today, generations have been inspired by the simple statement that "the truth shall make you free."[96] The states should

94. *Id.* at 35.

95. *See, e.g.*, Ronald K. Henry, *Child Support at the Crossroads: When the Real World Intrudes upon Academics and Advocates*, 33 FAM. L.Q. 235 (Spring 1999); LAW AND ECONOMICS OF CHILD SUPPORT PAYMENT (William S. Comanor ed., 2004.)

96. *John* 8:32. (King James).

abolish all judicial or statutory barriers to the emancipation of paternity fraud victims. States should mandate in-hospital DNA testing for all newborns and should prohibit paternity establishment unless and until confirmed by DNA testing. After any default judgment, states should require DNA testing immediately upon locating the defendant for garnishment or other enforcement action. Default judgments should be reduced through improved service of process and understandable *pro se* procedures. Finally, sanctions should be imposed upon those guilty of paternity fraud, both when perpetrated by a private individual and when perpetrated by a government employee.

B. Welfare and Child Support Agencies

The United States Supreme Court has made it clear that agencies have a duty of integrity toward all citizens:

> If it were relevant, the state's financial interest in the outcome of the case would weigh in the favor of imposing a disproportionate share of the risk for error upon it by requiring a higher standard of proof. In our view, however, the State's legitimate interest is in the fair and impartial adjudication of all civil disputes, including paternity proceedings . . . unaffected by the State's interest in minimizing its welfare expenditures.[97]

Every child support agency in America knows that it has not met this duty of integrity and that it has worked injustice upon appalling numbers of innocent men in every state. Agencies need to insist upon truth even when it is inconvenient. Agencies need to correct errors rather than fight to perpetuate them. Agencies need to impose consequences on false accusers and upon employees who commit or tolerate abuses of paternity fraud victims. Agencies need to improve service of process, simplify *pro se* procedures, and give equal services to both accuser and accused.

California, especially, needs serious reform. After the veto of the reform legislation by former Governor Davis, Governor Schwarzenegger signed compromise legislation giving past paternity fraud victims a limited opportunity to come forward to seek emancipation. The California bureaucracy has not publicized this opportunity for emancipation and relatively few paternity fraud victims know of or have availed themselves of the opportunity.[98]

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97. Rivera v. Minnich, 483 U.S. 574, 581 n.8 (1987).

98. Leonard Post, *Low Turnout for Paternity Amnesty*, NAT'L L.J., June 6, 2005, at 4: "We're just not getting the business I would have expected," [Los Angeles County Child Support Court Commissioner Marshall] Reiger said. "Someone has to get out there [doing outreach] if people want it to work the way it's supposed to." But the State is not advertising the Amnesty Program, according to many in the field of child support services. And the people most likely to benefit are also least likely to be aware of the law, because they don't yet know they have been declared fathers by a court.

C. Courts, Prosecutors, and Attorneys

The courts are not required to be complicit in paternity fraud. The Thirteenth Amendment does not say that involuntary servitude is acceptable if there has been a passage of time or if a filing deadline was missed or if it would be in the best interest of a child or if the state might lose money. The Thirteenth Amendment says that involuntary servitude is abolished. The practices by which paternity fraud victims are indentured is particularly indefensible when the government is the perpetrator. The courts are the natural and fundamental protectors of the constitutional rights of all citizens. Paternity fraud will stop when the courts make it stop.

Beyond the requirements of the Thirteenth Amendment, no court is compelled to allow its judgments to work injustice. The state equivalents of Federal Rule of Civil Procedure 60(b) confirm the authority of the courts to set aside judgments and to grant retroactive or prospective relief,[99] either through a motion in the original action or by an independent action.

Most of all, the courts need to heed the admonition of the Supreme Court in *Rivera* and respect the rights of all citizens. Although paternity establishment and welfare recoupment are desirable, it is never just to allow these goals to become an excuse for indenturing a low-income minority male whose only fault is that he could not afford a lawyer and could not understand the complex legal web into which he has been thrown. A government-paid welfare attorney against an unrepresented paternity target is not a fair fight. For less than $100, the DNA truth can be known, and justice can be done. If the court perpetuates a false paternity establishment after the truth is known, it is because the court chooses to deny relief, not because it lacks power to grant relief.

Perjuries, false statements, and false filings are at the heart of the paternity fraud problem. Prosecutors have the tools and the responsibility to intervene and protect the integrity of the judicial process. Further, 18 U.S.C. § 1584 provides:

99. Distinctions can be made between prospective and retroactive relief. It is hard to think of any circumstance under which prospective relief from a false paternity establishment should not be granted. Retroactive relief may require more of an examination of the facts and circumstances of the individual case. For example, it is easier to recover funds paid under an assignment to a welfare agency than funds paid to a parent. A decision to vacate a false paternity establishment can have retroactive effect as if the judgment had never been entered. *See, e.g.,* Walter v. Gunter, Court No. 41 (Md. Ct. App. Jan. 9, 2002). The U.S. Dep't of Health and Human Services Office of Child Support Enforcement agrees that such retroactive vacatur can also have the effect of eliminating unjustly accrued child-support arrearages without violating the Bradley Amendment. *See* PIQ-03-01. (Vacatur is as if the order had never been entered, meaning there is no accrual and no conflict with the Bradley Amendment prohibition against forgiveness of accrued arrearages.)

> Whoever knowingly and willfully holds to involuntary servitude . . . any other person for any term . . . shall be fined under this title or imprisoned not more than 20 years, or both.

The Supreme Court has held that "involuntary servitude necessarily means a condition of servitude in which the victim is forced to work for the defendant . . . by the use or threat of coercion through law or the legal process."[100] Violation of 18 U.S.C. § 1584 is precisely what happens in the classic paternity fraud case.[101] Prosecutors have a responsibility to enforce the law and this responsibility is especially strong when the law is violated by persons working under the authority of the state welfare department or other governmental agency.

Paternity fraud victims are not hard to find. There are support groups that are eager to make referrals and desperate for any form of assistance.[102] Attorneys and legal defense groups can assist paternity fraud victims in an individual *pro bono* representation or in a class action.

Relief may be pursued under 42 U.S.C. § 1983, which provides:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action at law, suit in equity, or other proper proceeding.

At least one court has also found that a private cause of action exists even when there has been no criminal prosecution under 18 U.S.C. § 1584.[103] At least one court has allowed a man's action for emotional distress against a woman in connection with a paternity matter.[104] At least one court has ordered the biological father to reimburse the paternity fraud victim.[105]

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100. United States v. Kozminski, 487 U.S. 931, 952 (1988).

101. Prosecutors at the state level also have appropriate tools for prosecution of involuntary servitudes. There have been numerous prosecutions when a farm worker or a maid or a nanny has not received the full amount of compensation required by law. *See, e.g.,* CASA of Maryland Employment Rights Project, http://www.casademaryland.org; Law Enforcement Toolkit on Trafficking in Persons, http://www.polarisproject.org. The situation for the paternity fraud victim is arguably worse since he is not merely underpaid by his oppressors but must actually make payment to the oppressor.

102. *See, e.g.,* U.S. Citizens against Paternity Fraud (US-CAPF), http://www.paternityfraud.com, Carnell Smith, 404-289-3321; www.fixthefoc.com, Douglas Richardson, 989-893-4717, Dougmrich@yahoo.com

103. Manliguez v. Joseph, 226 F. Supp. 2d 377 (E.D.N.Y. 2002).

104. Jeffery M. Leving & Glenn Sacks, *Hoodwinked into Fatherhood*, HOUS. CHRONICLE, Mar. 5, 2005, (Woman took semen from condom to intentionally impregnate herself against man's wishes).

105. R.A.C. v. P.J.F., (No. A-6130-02T2) (N. J. Super. Ct. App. Div., Aug. 31, 2005).

Courts in other countries are also beginning to generate decisions authorizing compensation to victims of paternity fraud.[106]

V. Conclusion

Although paternity fraud existed in the pre-DNA era, it has become a mass phenomenon disproportionately affecting low-income minority males as a result of the recent governmental push to obtain welfare-cost recoupment through paternity establishments and child support collections. Fortunately, paternity fraud can be stopped at a cost of less than $100 and conclusive truth can be known through a simple DNA test.

In the past, injustices could occur because we were simply unable to be sure about the identity of the child's father. That excuse no longer exists, and there is no excuse for continued injustice.

106. Adam Sage, *Husband Makes Cheating Wife Pay for Time Spent Raising Lover's Child,* TIMES OF LONDON, May 3, 2005, *available at* http://www.timesonline.co.uk. (reporting that CAEN Appeal Court in Normandy, France, ordered former wife and lover to reimburse 15,000 Euros and pay 8,000 Euros in damages).