MEN’S RIGHTS V. THE BEST INTEREST OF THE CHILD: A NEW STANDARD FOR CHALLENGING PATERNITY

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INTRODUCTION

Family law doctrine is saturated with the best interests of the child standard. In fact, the standard is applied in all aspects of the law—in everything from deciding the custody of children subsequent to voided surrogacy contracts to determining whether refugee status should be granted to child soldiers. The best interests of the child standard recognizes that while issues surrounding children and family are “sacred private interests, basic in democracy,” the state, in its role as parens patria or super parent, carries with it the “interests of society to protect the welfare of children.” While not without limitation, states have held this standard to be far-reaching, as evidenced by the Missouri Supreme Court which noted that “[t]he welfare of the child, its life, health and moral and intellectual being are . . . to be kept well in view in all controversies concerning [his or her] custody, care and control.” Thus, it is surprising that in the arena of paternity challenges by nonmarital fathers, a complete analysis of the best interests of the child is often noticeably absent and the trend seems to be moving further away from application of such an analysis.

Paternity challenges have become a mainstream topic thanks in part to daytime talk show hosts and men’s rights groups. The former has turned the issue into popular entertainment as talk show hosts such as Jenny Jones feature episodes titled “I Slept with Two Men, Which One Fathered My Child.” Besides paying for hotel accommodations and travel for the guests, the shows also cover the bill for paternity tests—the results of which are incorporated as part of the on-air surprise element of the shows. Picking up where the talk shows leave off, men’s rights groups have focused their attention on supporting men they feel are victims of paternity fraud and on pushing society to protect these victims. According to Carnell Smith, creator of a men’s rights group, “Paternity fraud is where ‘two people walk away with no [financial] responsibility
These groups are concerned about paternity fraud because many states will not per se allow challenges to paternity judgments, even with DNA evidence proving that a man is not the biological father. Thus, a man who is not the biological father may have to continue child support payments for kids that aren’t biologically his.

While, the talk show hosts sensationalize the details by focusing on scandalous love triangles and the men’s rights groups champion their, often, adult male victims, what is getting lost in the shuffle is the children—their well-being and best interests. This is somewhat understandable, as it is often a difficult challenge for judges and for society as a whole to move past DNA evidence, questions of “who was sleeping with whom,” and games of attributing blame between adult parties in order to enter a realm where justice is child centered. This Article urges that issues such as these, which may at first seem relevant to paternity challenges by nonmarital fathers, should actually be put aside in order for child centered justice to prevail. Ignoring the best interests of the child in determining whether paternity may be challenged, ignores consideration of the effects on the children of losing an important relationship in their lives, the relationship with the men they believe to be their fathers. This can be detrimental to children especially “where there is an established parent-child bond, [because] it’s [often] not in the best interest of the children to terminate that bond.”

Part I of this Article presents a history of child support laws ending with an explanation of the laws currently in place. The section also provides an overview of how paternity and child support is legally established. The section concludes by describing the procedural mechanisms for challenging a paternity order. Part II details how the states are deciding whether men may challenge paternity orders and how they are resolving issues that arise when men are allowed to challenge the orders. This section posits that the trends in state decisions of these issues can be categorized into three theoretical modes of analysis—a natural law, a legal status, and a paternity estoppel analysis. The section provides examples from state cases that mirror the respective theories. Part III of the Article stresses that the courts should focus on the best interests of the
child theory, but depicts that the current law supporting this theory is flawed. Part III proposes a new standard that is true to protecting the interests of the child and that should be applied in determining whether persons can challenge paternity orders.

I. BACKGROUND OF CHILD SUPPORT LAWS & OVERVIEW OF CURRENT PROCEDURES

A. Origins and History of Child Support

In analyzing the factors that should be considered in determining whether one may challenge a paternity order and end his obligations toward a child, it is important to understand the history of where those obligations arose. Child support laws sprung from a myriad of ideals. They took root from the notion of marital obligations, from natural law theories, from punitive notions, and from efforts to encourage traditional, nuclear families. Only in recent years, however, has the impetus for child support laws been guided by the idea of protecting rather than punishing dependent and nonmarital children. Thus, as the basis for support laws becomes more closely aligned with considerations of the child’s interests, so should paternity termination decisions.

The origins of child support were not firmly aligned with the well-being of the child. In England, child support laws developed, in part, from the notion of reciprocal obligation—the father as head of the household had an obligation to support his children and, in return, the children had an obligation to work for the father. This stemmed from the reality of the common family as an agricultural unit. If the parents separated, usually the father received custody of the children, and his duty to support the children continued. This duty was not legalized until the adoption of the Elizabethan Poor Laws in 1601, which extended the duty to both parents to support their children. Also at work were strict societal norms and mores so the existence of nonmarital births was hardly prevalent; communities denounced nonmarital children and persuaded men to marry the mothers of their children, and women to “hide, kill or
abandon their imprudent offspring.” An analysis of the interests of the children, understandably, could barely coexist in this type of moral mindset.

The dawn of the industrial revolution elevated the mother to the head of the household. As fathers went to factories to work, the normative family was no longer an agricultural unit with the father as the head, but an absent father unit where fathers served as figureheads and financial heads and mothers took the roles of ruler of the home and proper custodian of the children. American courts followed the trend in England and fostered an implicit presumption that, in custody decisions, children should remain with their mothers if at all possible.

In 1935, the U.S. federal government began its first child support program, Aid to Families with Dependent Children (“AFDC”), but this only provided support to children “whose parents had died or deserted them.” AFDC later became a form of federal sponsored and state administered support for children whose fathers were delinquent from the homes. AFDC proved to be a very costly program for Americans; in 1973, it was distributing $7.6 billion a year. Similar to the fury against welfare mothers in the 1970s and 80s, Americans protested against their tax money supporting nonmarital children, but the focus of the fury was against fathers—those who could afford to support their offspring, but weren’t being forced to do so. In response, Congress created the Child Support and Establishment of Paternity Act of 1974, mandating that the states maintain certain standards for child support enforcement or lose federal funding for child support and welfare services.

Under the Act, the state was assigned the rights to establish paternity, obtain child support orders, and collect child support. Thus, while the interests of children were implicit in AFDC and in the creation of the ACT, their amended versions were due in large part to Americans’ rejection of social welfare.

In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act was codified, replacing AFDC with Temporary Assistance for Needy Families (“TANF”). TANF’s purpose is to allow states greater flexibility in formulating their own assistance plans to families with minor children, with the long term goals of decreasing each
family’s dependence on government support, encouraging two-parent families, reducing the number of children born to single mothers, and encouraging child care by family members. The drafters of TANF, apparently assuming that the protection of children was implied, stated no such intent in TANF’s purpose. Yet, all of these goals map many Americans views of what is in the best interests of children—such as, being raised in working families with two parents. Whether TANF and its later amendments have been successful in meeting this and its other goals is controversial.

The federally enacted provisions, such as those governing AFDC and its predecessor TANF, have had the effect, however, of bringing some uniformity to state child welfare and support laws, since states could lose welfare grants if they do not comply. Further, they reflect our society’s view for how children should be raised and cared.

B. Establishing Paternity: Voluntary Decisions between Adult Parties

Paternity must first be established before fatherhood rights arise and before support can be ordered. The establishment of paternity may also be desirable for many other reasons. It is a prerequisite for qualification for state and federal sponsored benefits, such as TANF, Social Security, and Medicaid. A mother may want to establish paternity to provide her child with the same rights as children born to married parents, such as inheritance rights and inclusion on health insurance policies. Additionally, the legal establishment of paternity aids the child in receiving access to family medical history and provides the child with legal documentation of who his or her parents are. An examination of how paternity is established, however, sheds light on whether and under what circumstances paternity may later be challenged, as it shows that the parties have many opportunities to challenge paternity before it is declared, and soon after—long before a father/child relationship develops. The process highlights that adult parties have the choice of whether or not to enter into these obligations toward a child, and thus, their decision to later seek to end the obligations should be evaluated from the perspective of the party who was denied the first choice, the child.
There are many means in which paternity can be established for nonmarital children and per the Child Support Enforcement Amendments of 1984, states must provide an eighteen-year statute of limitations for the establishment of paternity or be stripped of federal aid for child support. Parents may voluntarily acknowledge paternity, often times at the hospital immediately after the child is born, by signing a state recognized acknowledgement form in front of witnesses or by notarizing the form. Voluntary acknowledgment procedures usually include a means by which the parents are given notice of the rights and consequences of acknowledging paternity. Following the Child Support Enforcement Act, the voluntary acknowledgement is considered legally enforceable within the earlier of sixty days after signing the acknowledgement or “the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party.”

If the mother cannot gain consent to paternity by the father, the state department of child support services or attorney general can open a paternity case for her. To open a case, the mother is required to give personal information about herself, her children, and the man or men she believes to be the father. This information may include her sexual history near the time of conception, physical characteristics of all parties, and the relationship that the putative fathers have with her child or children. If the mother believes that she knows who the father is, she will be asked for his social security number, his current address, his current employment, whether he has fathered other children, and the details of his current assets. If the mother does not know the whereabouts of the non-custodial father, the state department of child support services will use the Federal and State Parent Locator Services (“PLS”). The Federal and State PLS work together to locate the missing parent by searching all available public records such as: IRS records, Social Security benefits records, federal and state employee records, driver’s license records, voter registration lists, and state prison records. This service may be free for a custodial parent receiving aid or may be available at a low cost.

Once the state has located the putative father, a summons is served upon him—starting the administrative or state court proceeding. If the father fails to respond or appear, paternity
may be ordered by default.\textsuperscript{[50]} If, after reasonable investigation, the father cannot be found, he may be served by publication, and if he fails to respond, paternity will be ordered against him.\textsuperscript{[51]}

Upon receiving the summons, the putative father can either acknowledge or contest paternity. The burden of proof varies from state to state, however, the U.S. Supreme Court held in \textit{Rivera v. Minnich} that a preponderance of the evidence is a constitutionally acceptable standard in paternity cases.\textsuperscript{[52]} To meet this standard, the mother might present evidence showing that the child looks like the putative father, that she and the alleged father were sexually active near the time of conception, or that the putative father has treated the child as his own.\textsuperscript{[53]} The putative father may raise various defenses, such as: sterility, impotence, lack of access to mother, mother’s multiple partners during time of conception, dissimilarity of looks, and that he has taken no actions that indicate he has accepted the child as his own.\textsuperscript{[54]} While the hearing and tactics in preparing for the paternity hearing may be geared toward getting to the best interests of the child, this notion is often lost in the process. Anderlik and Rothstein note that “[h]ere, the law and lawyers may play a role in hardening hearts. In accounts of [one child support] case, a lawyer is described as counseling his client, perhaps rightly, that any contact with or support for the child could hurt his case.”\textsuperscript{[55]}

During proceedings to establish paternity, either party may ask for a genetic test. Costs for genetic tests can be quite expensive, but are generally cheaper if court ordered or ordered by a state child support enforcement agency and performed by a state licensed testing center than if privately administered.\textsuperscript{[56]} The Child Support Enforcements Amendments of 1984 provide that if a state agency orders genetic testing, the agency shall pay for the costs and may assess the costs against the alleged father if paternity is established as a result.\textsuperscript{[57]} Since the state is acting on behalf of the mother, neither the amendments nor the act provide that states should assess the costs of adverse results against the mother, even if the mother represented that the man was the only person she engaged in sexual relations with near the time of conception.\textsuperscript{[58]}

If any party has misgivings as to the identity of the biological father, genetic testing as soon as possible would seem to be prudent. Interestingly, “physicians doing tissue typing for
organ donation have offered estimates ranging from five to twenty five percent for the number of donors genetically unrelated to men believed to be their biological fathers. Further, Anderlik & Rothstein note that the “DNA Diagnostics Center, one of the most aggressive laboratories performing paternity testing, has reported that thirty percent of the men tested prove to be misidentified.” The authors recognized that the figure cannot be applied to the general population, but in situations where there is doubt as to the identity of the father, the statistic may be particularly useful in encouraging testing.

There are many reasons why a putative father might not ask for genetic testing. The initial costs associated with genetic testing may influence alleged fathers not to contest, or not to ask for genetic testing. A putative father also may not ask for genetic testing because he believes the mother when she says that she was not sexually active with anyone else near the time of conception, because he hopes to reconcile with the mother and does not wish to seem untrusting, or because he hopes to reconcile with the mother and does not want to lose a valuable connection to her—the child. Of course, the man may, at that time, simply wish to be the father of the child. Whatever the reason, the putative father has many opportunities to ask for genetic testing and by not doing so his obligations toward a child may begin.

If a paternity test is ordered, challenges can still be launched against unfavorable genetic results. The dissatisfied can challenge based on improper drawing, handling, storing, or testing of the samples. Recently, the D.C. attorney general announced a decision to audit Orchid BioSciences Inc., the nation’s largest DNA analysis company, after reports in the Washington Post that the company fired one of its sample collectors for mishandling dozens of samples and another of its collectors for “botching a paternity test that showed that a man was not the father of a 7-year old girl” when a second test revealed that he was. While paternity testing costs are not normally assessed against the mother, the costs of a second test may be assessed against her, even if the second test proves paternity.

Once paternity is established, support will then be ordered. Today, support is determined by a system of guidelines that judges must follow. Even parents cannot devise their own
Support payments may be assigned directly from the non-custodial parent’s paycheck. State child support enforcement agencies can help custodial parents collect child support by reporting missing payments to credit agencies, suspending drivers’ licenses, denying passports, assessing property liens, levying funds from bank accounts or other assets, and intercepting tax refunds, lottery winnings, and worker’s compensation, disability insurance, or veteran’s insurance benefits. Finally, usually as a last resort to these methods, the delinquent parent can be charged in court for contempt.

The preceding description illustrates the many different ways paternity can be established for nonmarital children: voluntarily, by default judgment, or as the result of contested proceedings. In each situation, the adult parties have the opportunity to request genetic testing or otherwise challenge the establishment of paternity. Even if there has been a “fraud” committed by the mother, such as misrepresenting her sexual activity near the time of conception, the putative father is making sending a clear signal by not putting forth a DNA or other challenge at this time. He signifying his commitment to assume the obligations and partake in the benefits of being a father to the child.


Although the putative father did not initially challenge paternity, he may decide that he wants to at a later date—often subsequent to a claim for support arrears by the mother or the state. A man also may have waited to challenge paternity in the hopes of having a relationship with the mother. When it becomes apparent that this will not occur, perhaps due to some falling out with the mother, he may try to challenge paternity. The Pennsylvania Superior Court commented about this type of reasoning, stating “[w]e recognize that there is something disgusting about a [man] who, moved by bitterness against [the woman] suddenly questions the legitimacy of her child whom he has been accepting and recognizing as his own.” Further, if the putative father later discovers that he is not the biological father, he may move to challenge
paternity so he can stop paying money “which [he] view[s] as flowing to the [woman] who deceived [him] in two ways—cheating on [him] and by lying to [him] about a child’s paternity.”[72] The putative father may also simply not want to pay support for a child he no longer believes is his.

An order establishing paternity or a voluntary acknowledgement of paternity is generally considered to be a final order. Therefore the baseline for men who wish to challenge paternity in “an action to establish, modify, or enforce child support” is that attempts to challenge are collateral attacks barred by the doctrine of res judicata.[73] Nonetheless, the putative father is not barred from attacking the paternity judgment by launching a direct attack on the judgment, usually under Fed. R. Civ. Pro. 60(b) or its state equivalent.[74] Rule 60(b) provides relief from a judgment or order when there has been:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud[,] . . . misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged . . . or it is no longer equitable that the judgment should have prospective application; or
- (6) any other reason justifying relief from the operation of judgment.

A party petitioning under Rule 60(b) must do so within a reasonable time,[75] however, can’t invoke the provisions of 60(b)(1) - (3) “more than one year after the judgment, order, or proceeding was entered or taken.”[76] Most states have a similar statute of limitations regarding these three provisions.

How state equivalent 60(b) requirements are used in challenging paternity varies from state to state. The seeming predicament facing challengers is that the factual scenarios underlying decisions to reopen orders often align well with one of the first three provisions. For instance, if the mother represented that the putative father was the only man she had sexual relations with near the time of conception and the putative father mistakenly believed her, the man would like to establish 60(b)(3)— “fraud[,] . . . misrepresentation, or other misconduct of an
adverse party” on the part of the mother and 60(b)(1)—“mistake, inadvertence, surprise, or excusable neglect” on behalf of himself.[77] Yet, depending on the state statute of limitations, the putative father may be denied the opportunity to challenge by the time he learns all the facts. Some states, however, have used the provisions of 60(b)(5) and (6) as “catchall provisions” to do “equity” in situations like this.[78] Thus, the statute of limitations for the first three provisions of 60(b) is not a bar to many paternity challenges in states that allow paternity to be challenged using the other mechanisms of 60(b).[79] In most cases, the showing required to reopen a final judgment or order is high and reopening cases is generally disfavored[80] so as to provide finality in decisions. This is not always the case when challenging a paternity order for a nonmarital father, perhaps because of strong emotive concerns, such as men being “duped” by the mothers and men caring and paying for children not biologically theirs, as a result.[81] This Article urges that these emotive concerns be replaced by those centered on the best interests of the child.

II. CHALLENGES TO PATERNITY ORDERS: THEORETICAL MODES OF ANALYSIS AND OVERVIEW OF THE MANNER IN WHICH STATES ARE TACKLING THIS MATTER

Despite 60(b) requirements, there are a myriad of factors that could be considered in determining whether and when a paternity order can be challenged and what the ramifications of the challenge entail. For instance, should a court consider: whether DNA evidence is enough to challenge the order? Why the challenge is being launched? Who is launching the challenge? What is the child’s age and emotional status? What the relationship is between the court ordered father and the child? Whether the biological father is locatable? What the relationship is between the biological father and the child? What is the economic status of all the parties? Further, if a court decides to uphold a challenge to paternity, does this end the former father’s retrospective obligations? Does it require a reimbursement for the man?

These are questions that have plagued state courts as well. An examination of state court decisions reveals that the means in which they have attempted to resolve them could be
categorized into three theoretical modes of analysis. Generally states are determining these issues and paternity challenges based on DNA, on legal status, and on paternity estoppel. These modes are described in this section and include a depiction of illustrative state court decisions mirroring each mode. This section demonstrates that state courts are ignoring the child’s best interests, to the detriment of children, in their attempt to resolve these difficult questions. To aid in the understanding of the differences of each mode of analysis, two stories of nonmarital fathers who tried to challenge their paternity orders are also presented. To give perspective on the differences between each mode of analysis, this section will detail how each story would “end” if determined under the different modes.

A. A Tale of Two Fathers: The Impact of Their Legal Battles on Two Children

What is interesting about the following two stories is that in each situation, from an objective viewpoint, the children’s best interests were inadvertently protected. But if each situation had been brought before the tribunal of the inapposite court and the court had followed the same analysis as it did in the case it ruled upon, the cases would have come out differently and the child’s interests would not have been protected. This different court, dramatically different result notion will be highlighted in Part B, infra, where these cases will be evaluated under each mode of analysis.

The first situation, In Re Cheryl, involves John Doe, a man who voluntarily consented to paternity in 1993 for an infant nonmarital child, Cheryl. John also agreed upon support payments for Cheryl. Cheryl’s mother asked John if he would like to take a genetic test before he acknowledged paternity, but he did not do so, and the Massachusetts Supreme Court took notice that John offered no affidavit stating that “he did not know that the tests were available to him, that he believed that he was required to [take the tests], but could not afford to [] pay for the tests, that he did not understand the nature of the proceedings, or that there was any other reason why he declined to be tested.”
With the acknowledgement of paternity, John’s legal relationship with Cheryl began. The Massachusetts Supreme Court describes this relationship in this manner:

In the years following the entry of the paternity judgment, [John] behaved as though he were Cheryl’s father. He and his family visited and bonded with Cheryl. In 1995 and again in 1996, the father, acting pro se, sought successfully to expand and enforce his visitation rights with his daughter. According to the mother, Cheryl, now seven years old, has always called [John] “Daddy” and “is bonded to and loves [him] as her father.” Cheryl also has a relationship with [John’s] parents and siblings, whom she knows as her grandparents, aunts, and uncles. The [trial] judge also noted that [John] has fostered “a substantial relationship” with Cheryl. From December, 1993, [John] has regularly paid child support to the mother on Cheryl’s behalf.[85]

Despite John’s fatherly actions, in 1999, when an increase in child support payments was ordered against him, John filed a motion requesting genetic testing and motion requesting a challenge to the 1993 paternity order per the results of the genetic test.[86] The trial court judge denied the motion for genetic testing. On appeal, the Massachusetts Supreme Court discussed at length the relationship between John and Cheryl and the detriment that could result to Cheryl in losing such a bond.[87] This discussion was ultimately dicta, however, as the court rested its decision to affirm on three criteria: 1) the unreasonable length of time, five and one half years, that John waited to challenge the paternity order;[88] 2) the fact that John did not qualify for the 60(b) rule catchall provision for reopening a final order;[89] and 3) a determination that the mother had not committed fraud upon the court by failing to disclose other potential putative fathers.[90]

Thus, John’s obligations for Cheryl were not terminated. Cheryl who had enjoyed a father-child relationship with John could keep the hope of continuing that relationship. The court was realistic in noting that “[w]e harbor no illusion that our decision will protect Cheryl from the consequences of [John’s] decision to seek genetic testing and to challenge his paternity.”[91] The court continued by stating that “[n]o judgment can force [John] to continue to nurture his relationship with Cheryl, or to protect her from whatever assumptions she may have about [John].”[92] Despite this, in this situation the outcome could still and should be heralded as
one protecting the child’s best interests. The court went on to note that “[r]elieving [John] of child support obligations may itself unravel the parental ties, as the payment of child support ‘is a strand tightly interwoven with other forms of connection between father and child,’ and often forms a critical bond between them.”[93] Thus the court was sensitive to the notion that one’s affections are often tied toward where one’s enforceable obligations, albeit only financial, lie. By keeping one tie between John and Cheryl alive, that of financial support from John to Cheryl, the court hoped that John might decide to act upon the other benefits he received from this legal status, and keep other ties between the two alive as well, such as a father-child relationship. Lastly the court reasoned that at least their decision would not strip Cheryl of her legal rights of being John’s child and of the financial benefits of being his child.[94] Thus, through reasons inadvertent to best interests of the child, an outcome in Cheryl’s best interests was gained.

In another challenge to paternity, in Walter v. Gunter, the putative father, Nicholas, consented to paternity of a nonmarital child, based on the mother’s representations that Nicholas was the only man she engaged in sexual relations with near the time of conception.[95] A support order of $43 per week was ordered against Nicholas soon after.[96] Unlike John, Nicholas did not attempt to have a relationship with the child and also unlike John, Nicholas did not always follow-through on his obligation to pay support for the child, making only sporadic payments and amassing over $10,000 in child support arrears.[97] Seven years later, following an injury that had exasperated and caused Nicholas financial distress, he filed a motion requesting genetic testing.[98] Maryland, allows men to challenge paternity orders, at any time, based on genetic testing.[99] Thus, when the DNA results conclusively excluded Nicholas as the biological father, his paternity order became void, ending his obligations for the child.[100] The case set precedent, however, for holding that a voided paternity order will not only let a man off the hook for future obligations but also for past ones that he has not fulfilled—any amassed arrears.[101] This case will be discussed in further detail in subsequent sections of this Article, but it is important to note, that here it may have been in the child’s best interests to have this relationship
terminated. In this situation, it seems as if the putative father, Nicholas, was not providing consistent financial or emotional support for the child. If the biological father could be located and it seemed clear that he would be able to provide consistent financial or emotional support, it would seem that the result here did map, although again inadvertently, the best interests of the child.

The troubling aspect of these cases, is that if the cases had been decided in the opposite jurisdictions, the child’s best interests would be thwarted. Nicholas, now challenging his paternity order in a state that strictly follows 60(b) requirements, would not be off the hook because seven years would be considered an unreasonable delay in challenging the order and the mother’s “fraud” in misrepresenting her sexual history would not be considered. Thus, DNA evidence would not be enough to reopen the judgment. Further, John Doe, who had created a father daughter bond with Cheryl and who had paid for her support, would be allowed to end all of this, to the detriment of the child, based on DNA evidence. A standard, then, is needed that will ensure results focusing on the child’s interests. A review of what many of states are doing, however, reveals that such a standard is not prevalent throughout the country. The next three sections, which overview many states’ modes of analysis, illustrate this point.

B. Natural Law Analysis: Should DNA Solve the Problem?

[T]he duty of parents to provide for the maintenance of their children, is a principle of natural law; an obligation laid on them not only by nature herself, but by their own proper act, in bringing them into the world. . . . By begetting them therefore they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved.\[^{102}\]

Blackstone’s compelling words might create an initial reaction that biology should be determinative of support. Yet, throughout history, child support and biology have not gone hand-in-hand. Perhaps this is due to the historical inability to answer the question of paternity conclusively,\[^{103}\] the non-desire to investigate (to do so would require questioning on intimate subjects in eras staunchly opposed to pre- and extra-marital sexual activity), or certain policy
decisions that must be made.\textsuperscript{[104]} Amidst these competing policies, the marital presumption arose out of the notion that marriage was a bond that should be given greater recognition than biology.\textsuperscript{[105]} The marital presumption also derived from the idea that once a child had been declared legitimate it would be inequitable to make that child illegitimate. Additionally, in recent years, the best interests of the child standard has been used in various contexts to thwart biology, such as in adoptions or cases involving in vitro fertilization.

Yet Blackstone’s words still resound. A call for natural law\textsuperscript{[106]} reform, which would allow challenges to paternity orders with DNA evidence and require vacation of orders if the adjudicated father is not the biological father, is being advocated by men’s rights organizations, such as U.S. Citizens Against Paternity Fraud, with catchy trademarked slogans such as “If the genes don’t fit, you must acquit.”\textsuperscript{[107]} The media has picked up on these arguments as well, sympathizing with the male victims, most likely because of the innate notion indoctrinated in society not that one is responsible only for his biological offspring.\textsuperscript{[108]} Illustrative of the strong emotive concerns supporting a natural law analysis, Presiding Judge Blackburn wrote in a concurrence regarding this issue:

I write separately to point out the absurdity of the present state of the law that requires a putative father to pay child support after he has scientifically proven that he is not the biological father. As I stated in Smith v. Dept. of Human Resources, 226 Ga. App. 491, 493 (487 S.E.2d 94) (1997), “the law should not punish a purported father for failing to insist on a paternity test when he has no reason to believe that he is not the father.” Not only has the putative father been cuckolded, the law adds injury to insult by requiring him to pay child support even after he establishes that he is not the biological father. Once non-paternity is scientifically established, courts cannot ignore such fact by relying on policies developed when no such proof was possible. To create a fiction in this matter does not make the male the biological father of the child; it simply makes him the victim of the law. It also makes an ass of the law. While the courts may preach their false policy, they lose the respect of any citizen with common sense. The legislature should address this issue.\textsuperscript{[109]}

DNA arguments have found support in the courts and in state legislatures. In Maryland for example, its high court overturned precedent requiring consideration of the best interests of
the child in paternity termination decisions and interpreted an ambiguous state statute to mean that a conclusive blood test is sufficient to terminate the legal relationship. The court attempted to reason that the best interests of the child standard was not “unimportant, but only that [it was] irrelevant to the preliminary and essential factual determination of paternity.” While both the majority and dissent tried to gather a showing of “legislative intent” for its side, the dissent by Justice Bell noted that “the purpose driving the [ambiguous statutory] amendment in the first place” was to not leave children “‘fatherless and without support.” Justice Bell further stated that when paternity has already been ordered, “[t]he historical fact of parentage no longer stands alone; now it is intertwined with the interests of the child and no longer is capable of separation.”

Justice Bell was correct in noting that a simple blood analysis ignores all these concerns, because none of them need to be considered when DNA is the only determiner. Justice Bell cites the Supreme Court of Washington that urged that healthy child development necessitated “stability and predictability, even where the parent figure is not the natural parent . . . A paternity suit, by its nature, threatens the stability of the child’s world.”

In hypothesizing what the ending would be for the cases of John Doe and Nicholas in states like Maryland that view DNA as the bottom line, both men would successfully challenge their paternity orders. For the child of Nicholas, where this actual scenario occurred since it took place in Maryland, the loss of Nicholas as a father may have been devastating emotionally and in
regards to self-identity, but it may have opened the door for a relationship with a father that intended to provide the consistent financial and emotional support that the child was not already receiving. This is all, of course, only if another suitable father were available for the child. Oft times, “'[t]he other guy[, the biological father,] is somewhere over the hill and long gone. . . If it comes down to whether the only (available) father is going to be on the hook and pay money or this kid is going to be in a situation of having no father . . . we have to put the child first.”[[117] When it comes to the child receive sporadic payments and emotional contact versus none at all, perhaps something is better than nothing. Since Maryland did not conduct a thorough analysis, examining all factors relevant to the child’s best interests, it is difficult to speculate how the child will fare as a result of this DNA based ruling.\[118\] For Cheryl, John’s daughter, the loss of the man she had formed a close bond with and called “Daddy” would be devastating. She knew John’s family as her family and identified emotionally with him. In a state where DNA is everything, a child’s interests are, unfortunately, nothing.

These changes, however, are not always made in the courts. In Georgia, the legislators made the change, stating that men may challenge paternity with DNA evidence if they meet a myriad of requirements.\[119\] Section 19-7-54 of the Georgia Code, titled “Motion to Set Aside Determination of Paternity” provides that men may challenge paternity if support has been ordered against them and they have conclusive DNA evidence excluding them as the father.\[120\] Further, men must show that inter alia that he:

(5) [was] ordered to pay child support with knowledge that he is not the biological father of the child has not:
(A) Married the mother of the child and voluntarily assumed the parental obligation and duty to pay child support;
(B) Acknowledged his paternity of the child in a sworn statement;
(C) Been named as the child's biological father on the child's birth certificate with his consent; (D) Been required to support the child because of a written voluntary promise;
(E) Received written notice from the Department of Human Resources, any other state agency, or any court directing him to submit to genetic testing which he disregarded;
(F) Signed a voluntary acknowledgment of paternity . . . ; or
Many of these restrictions have not been fleshed out in litigation. It seems that in the cases of Nicholas and John, neither man would be able to avail himself under the statute since both voluntarily acknowledged paternity. The men could make arguments that they did not “voluntarily” do so, since the mothers either withheld pertinent information regarding their sexual histories from them or misrepresented this information to them. Those like Nicholas and John should not despair, because this statutory change came about in a state where the common law already favored allowing men to use 60(b) factors in order to bring in DNA evidence to challenge their paternity orders. Thus, since the statute does not preclude common law remedies, Nicholas and John could challenge their paternity orders with DNA evidence.

The advent of genetic testing for paternity “has reinforced the view that biological or genetic relationship and parental status are tightly coupled. . . . With genetic essentialism part of the cultural atmosphere, it is easy to slide into the view that the genetic contribution is the essence of fatherhood.” Yet, this view is inconsistent with history, discussed supra, and with the changing views of what is family, and in particular, what is fatherhood. Justice Brown from Ohio states: “A father-child relationship encompasses more (and greater) considerations than a determination of whose genes the child carries. Sociological and psychological components should be considered. The laws governing adoptions have acknowledged that parentage is comprised of a totality of factors, the least significant of which is genetics.” Most importantly, as Justice Brown touches upon, a strict genetic analysis militates against consideration of the protection of the child and the best interests of the child. Thus, a child who is seeking stability and has formed a bond with a person he or she believes and who has represented himself to be the father, may have all of that stripped away by a genetic test and subsequent court order.

B. Scalian Argument: One’s Rights and Obligations Arise from One’s Legal Status
A legal status argument does not address questions of whether the man may challenge his paternity order, but it does have bearing on his retrospective obligations—past child support payments and any child support arrears. In the context of determining whether one may terminate his prospective obligations, courts should also consider how retrospective obligations will be resolved if the man is allowed to challenge paternity. Faced with this issue, states are beginning to latch onto the argument of legal status—the notion that one’s rights and duties are determined by his legal status. The result has not been consistent, but the trend is to give back to the man any support he has paid that is within reason and to let him off the hook for any child support arrears.

Maryland’s highest court ruled that the same logic used in “acquitting” the man of future obligations should be applied retrospectively to arrears, in the aforementioned case regarding the father Nicholas, in Walter v. Gunter. Adhering closely to the idea that paternity is both a “biological and legal status,” Maryland’s highest court held that where no biological tie of paternity exists, neither can a legal obligation of paternity. Thus, when Nicholas’s paternity order was overturned based on DNA evidence, the court found that the paternity order was never valid, since it was never supported by biology.

Judge Harrell’s dissent notes the discomfort in letting Nicholas off the hook for arrears, where Nicholas’s “own lack of diligence created his current predicament and manufactured the legal issue . . . in the instant case.” Judge Wilner’s dissent was more scathing, posing concerns that:

Few of [the men who fail to pay court-ordered child support] will read this opinion, of course, but the message will quickly spread: in paternity cases, you are a fool if you actually pay the child support. If there is even the slightest doubt in your mind regarding your paternity, consent to paternity, consent to pay child support, but don’t actually pay it. In the name of protecting the rights of men who father children and then walk away from them, the Court of Appeals has so dismantled the system for enforcing child support collection that, unless you are expecting a tax refund, are looking to win the lottery, or are truly concerned about driving on a suspended license, there will be no effective sanction, and, if the time ever comes, years later, when you may be held to account, ask for a blood test. If you are lucky, you will escape all responsibility and may, when the next case is
decided, actually be able to force your child to return anything you were ever forced to pay.\footnote{130}

Going one step further than the \textit{Walter} decision, some states have decided that men who successfully challenge their paternity orders are also entitled to some of the money that they paid in child support. In \textit{Ex Parte State Dep’t of Human Resources}, the Alabama Court of Civil Appeals held that a man who challenged a paternity order seven years after it was entered could be reimbursed from the state department of child welfare services for payments he made.\footnote{131} In Alaska, a man was allowed to get back money he paid in child support from the time he filed the motion challenging the order until the order was vacated, even though he waited five years to challenge the paternity order with DNA evidence.\footnote{132} As another example, in \textit{Mathison v. Clearwater Co. Welfare Dep’t}, a Minnesota court held that per a vacated paternity order, the man could get back child support money that he paid, but in this case the period of time between the paternity order and the vacated judgment was only nine months.\footnote{133} Thus, when calculating hypothetical endings for the men Nicholas and John, a legal status argument would let Nicholas off the hook for the large amount of child support arrears he amassed, and may require the men to be \textit{reimbursed} from the mother, the biological father or the state for certain amounts of child support that they paid!

Many states, thankfully, have decided that the men, relieved of their prospective obligations are not entitled to reimbursement.\footnote{134} Further, not all states are letting “fathers” such as Walter off with “no effective sanction”\footnote{135} for the amassed arrears.\footnote{136} Although DNA evidence may let the fathers off the hook prospectively, many states differ from Maryland and find that the arrears issue implicates different factors. In \textit{Ferguson v. Alaska Dep’t of Revenue, Child Support Enforcement Division}, the Alaska Supreme Court aligned with the same reasoning as Judge Wilner in \textit{Walter}, and held that the distinction between prospective obligations and arrears was critical in creating incentives for men to pay child support orders, thus arrears could not be extinguished as easily as prospective obligations.\footnote{137} Further, states should also consider that during the time these men waited to challenge their paternity orders, but did not do so, they
were denying the child and potentially another father, the opportunity to form a father-child relationship. Thus, no one else during the 5 years or 10 years that the men waited to challenge were being granted the right to the *privileges* and *benefits* of fatherhood that these men could have taken advantage. Thus, in determining whether their obligations should remain, it would seem logical that since they had exclusive rights to the benefits during that time, they should remain liable for the obligations to the child that amassed during that time as well.

**C. The States’ Flawed Analysis of the Best Interests of the Child: Paternity Estoppel**

Children are not miniature adults. The law presumes children to be “incomplete beings during the whole period of their development” dependent upon adults for “survival,” “physical and mental growth,” and “adaptation to community standards.” The states have duties in their role as parens patria in ensuring that a child is supported and nurtured in these basic aspects; these duties are tempered, in part, by the parents’ right to autonomy in raising their child as they deem acceptable. The state is empowered to step in when there are breakdowns in the parents’ execution of their duties, such as physical abuse or neglect of the child, or in certain situations in order to resolve disputes between the parents, such as custody disputes incident to divorce. It is from custody battles that the best interests of the child standard developed. Joseph Lieberman characterized the standard as a “neutral standard,” because in respect to child custody disputes, the law purported to enter the situation with no preconceived presumptions as to whom the child should be awarded custody. Thus, the best interests of the child standard was an affirmative step in remedying the gender stereotyping frequent in the courts—that mothers due to their gender were the proper custodians of the children whereas fathers due to their gender were the proper financial supporters for the children. Lieberman notes that the best interests of the child standard was first incorporated in a child support setting in 1974 in Pennsylvania, where the father successfully argued that in determining support it was in the child’s best interests to consider the assets of both parents and not simply presume support should come from the male.
Lieberman’s “neutral standard” description depicts the best interests standard from the perspective of the parents, but the standard is also about bringing a child’s viewpoint into the judicial proceedings. The states have been attempting to do this in the context of paternity challenges via a form of equitable estoppel called paternity estoppel. Paternity estoppel is triggered where a man has represented himself to be the father, knowing or having reason to know that he is not the biological father, and the child or the mother suffer financial and/or emotional harm as a result of reasonable reliance on his representation. If triggered, all parties, the mother, the legally adjudicated father, the biological father, the child, and the state are estopped from challenging paternity. Thus, if the legally adjudicated father asserts some reason for reopening a paternity order, paternity estoppel might be raised by another interested party, such as the mother, as a bar to that motion.

Paternity estoppel originated, in part, with the desire to honor the sanctity of marriage and to protect the benefits conferred to children of a marriage, namely legitimacy. In *Clevenger v. Clevenger*, the court determined that a father could not challenge paternity because of the doctrine of paternity estoppel if the emotional injury likely to be suffered by the child would be devastating such as in the present case where the son would likely be publicly stripped of his “cloak of legitimacy.” The court stated that “[t]o be designated as an illegitimate child in preadolescence is an emotional trauma of lasting consequence.”

Despite *Clevenger’s* seemingly antiquated language regarding societal views on nonmarital children, the notion has survived, at least in theory, that it is the child’s harm that should be the primary inquiry in deciding whether to estop the legally adjudicated father from challenging paternity. The Supreme Court of New York stated, “the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the child or children who are the subject of the controversy.” While some states will evaluate the emotional relationships between the child and the legally adjudicated father in assessing the harm to the child, other states focus solely on the financial harm. These states do not want to punish stepfathers and putative fathers for acting like fathers. Financial harm is evidenced when the
legally adjudicated father has taken drastic steps to say that the biological father cannot have a financial relationship with the child. [149] If the legally adjudicated father were allowed to deny paternity, the child would be left with no ready source of financial support.

The majority of states have not been adamant that the child’s harm should be the focal point in determining whether paternity estoppel is triggered, but have instead fallen into the view that paternity estoppel is a tool in which courts can dole out equity between the parents. For instance, using the language that the legally adjudicated father must have knowingly misrepresented that he was the father, courts are quick to use a mother’s misrepresentation that the couple’s relationship was monogamous to defeat estoppel and allow the paternity challenge. Maryland denied an estoppel claim in a case where the child had believed that the man who acted as his father was his father for twelve years, and where the man had received a vasectomy, so certainly had reason to know that his representation of fatherhoods was false. [150] The court found that if anyone was to blame it was the mother for telling the child his father was not his biological father during a family argument. The court determined that instead of continuing the putative father’s paternity obligations it would be better to seek support from the biological father, a man who “believed that his alcoholism rendered him sterile in some way or [] was unable to recall engaging in sexual relations with the [mother].” [151] Clearly, the decision to forgo estoppel in this case was based on normative judgments regarding the adults involved rather than upon the parens patria obligations owed by the state the child involved. [152]

Therefore in the situations of the two fathers, Nicholas will almost definitely be allowed to challenge paternity, because the child’s mother indicated that he was the child’s father, without revealing the possibility that her sexual history may implicate another man as the biological father. The mother of Cheryl asked John Doe if he would like to take a paternity test, but did reveal that this may have been to assuage her doubts rather than his. In both situations, the conduct of the mothers may deny the triggering of estoppel, in a procedure that is supposed to be geared at getting at the best interests of the child.
III. IN THE BEST INTERESTS OF THE CHILD: A NEW BURDEN FOR PUTATIVE FATHERS IN CHALLENGING PATERNITY

Because of the frequency in which judges find themselves in situations in which they must decide whether to reward or punish the behaviors of adults, it is often difficult for them to set aside such notions in order “to make a child’s interests determinative.”[153] The critical flaw embodied in all the first two theoretical modes of analysis and in all the accompanying case law is the ease in which they allow judges to administer an “adult-centered sense of justice”[154] in paternity challenge cases. Thus, a child can lose a relationship to her believed father because her mother misrepresented whom she slept with and when. A child can lose that relationship when her parents have a falling out and the father wishes to punish the mother or be disconnected from the mother. A child can lose that relationship because a judge decides to place genetics in the foremost position.[155] By judges prioritizing adult values in an adult centered arena of justice and by becoming entrenched in which parent should be the victor, it is the child who ultimately ends up losing in too many of these situations.

States need to set out a new standard of proof in paternity cases that will force judges out of the adult centered arena and into the mindset of the best interests of the child. A party seeking to terminate paternity should be forced to pass a high hurdle at the first instance. Thus, this Article proposes that a new standard should apply when seeking to meet the equitable factors in rule 60(b), the first stop in attacking a paternity order once the statute of limitations has passed. Adhering to the clear and convincing standard that is required for an outside party, such as the state, to strip a legally adjudicated father of paternity,[156] states should determine that in order to reopen a final paternity order, the challenger must prove by clear and convincing evidence that the disestablishment of paternity would be in the child’s best interests. Thus, the challenger has the burden of showing with clear and convincing evidence that the legally adjudicated father has not been providing emotional and/or financial support to such an extent that extinguishing the relationship between the putative father and the child would be in the child’s best interests. This section details that the clear and convincing standard is appropriate in
this context, that the new standard will promote stability in regards to the well-being of children, and that the standard provides the best hope for continued relations between the child and the father.

A. The Clear and Convincing Standard is Consistent with Prior Uses of the Standard

The Supreme Court decided in *Santosky v. Kramer*, that when a natural parent’s rights toward a child were to be terminated, the state must prove its case with clear and convincing evidence.\(^{[157]}\) Although in this situation the right is being voluntarily given up by the father, this section shows that the clear and convincing standard is still the proper standard to be applied when viewed from a child’s perspective.

The Court identified several factors from *Mathews v. Eldridge* for why a higher standard of proof was necessary in termination cases. First, the private interest affected must be identified.\(^{[158]}\) Like *Santosky*, the right here is the right to be a parent, however in this situation it is the father, and not the state that wishes to terminate that right. The termination, however, is “final and irrevocable;” “[f]ew forms of state action are both so severe and so irreversible.”\(^{[159]}\) The Court depicts the parent’s interests in bringing parents as one that is “far more precious than any property.”\(^{[160]}\) All of this is certainly true from the child’s perspective—their right to have these parents with which they have formed a relationship with is more sacred than material items and is a very important decision because of its finality and gravity. The Court in *Santosky* noted that

For a child, the consequences of termination of his natural parents’ rights may well be far-reaching. In Colorado, for example, it has been noted: “The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for [a limited] period . . . , but forever.” In re K.S., 515 P.2d 130, 133 (1973).

Some losses cannot be measured.\(^{[161]}\)
The Court said that the rights that are at stake here are immeasurable. They are ones that should not be taken from the child lightly.

Next, one should consider the “risk of erroneous deprivation of private interests resulting from use of a [lower standard] and the likelihood that a higher standard would reduce that risk.”[162] Using some of the very same examples that the Santosky Court did, there is a high risk, especially where children’s interests may be unrepresented or only represented by the mother, who may be poor or uneducated. The standards in paternity estoppel case for determining when a person is estopped from challenging paternity may be uncertain. While this is not a situation of the “State” with its enormous resources for putting a case together against a single person, it is the situation of an adult putting a case together for the possible detriment of a child, one that needs protection, in this case from the State in its role as parens patria.

Certainly these are the types of situations where heightened standards are appropriate, the succeeding sections demonstrate that the new standard is necessary to best protect children.

**B. Promoting a Child’s Well-Being**

Under the new standard, if the putative father wants to terminate paternity, he may do so by showing that there is someone else, the biological father or a putative father that could likely be adjudicated with paternity who stands in a better position to provide emotional and financial support. The legally adjudicated father could also show that he fulfilled his duties so poorly to the child that even without another source of emotional or financial support to turn to, it would be in the child's best interests to terminate the relationship.

This new burden of proof for fathers will achieve in an area where other standards for challenging paternity have failed—protecting the concerns of the child. While the standard may seem to have the effect of punishing men who took care of children financially and emotionally and rewarding those who did not, that is solely because these concerns are all from an adult-centered sense of justice. From the child’s point a view, she wins when a “good” father cannot
be taken away from her, and an “undesirable” father can, hopefully providing the opportunity for someone else to serve as the “good” father.

The new burden would help to realize stability and continuity for the child in her relationships. Judges, caught up in the contours of adult litigation requiring rulings such as when a mother’s misrepresentation may be viewed as fraud and influenced by societal pressures urging the importance of DNA and genetics, forget that “[c]ontinuity of relationships is essential for a child’s healthy development. Since continuity may not play as significant a role in later life, its importance may be underrated by adult decision-makers.”[163] By raising the hurdle that one must pass in order to challenge paternity, continuity and stability is brought to the forefront. The harm in not considering stability and continuity is apparent. A significant change in a parental figure can have affects on a child at all stages of development; for youngsters this could be evidenced by “breakdowns in toilet training,” and “deterioration of ability to communicate effectively.”[164] Such a change at a school-age level may affect “cognitive and social achievements,” and may cause distrust of adults and bothersome behavior at school, and may put the child “at an educational and social disadvantage.”[165] Adolescents may not be able to overcome developmental behaviors typical of their age that other children mature out of, such as “revolt against parental authority.”[166]

The raised burden in challenging paternity will promote the goals necessary to a child’s well-being and provide a meaningful analysis of the best interests of the child. This standard will also provide the best chance for continued relations between the child and the man challenging his paternity.

C. Hope for Continued Relations

One might question how forcing a putative father to remain in a relationship he is affirmatively seeking to end could be in the child’s best interest. The child’s interests could be served by such a standard for several reasons. First, if the putative father is challenging because he has had a falling out with the mother, such a rule will not easily allow fleeting and changing
romantic situations between the parents to come in the way of meaningful parent-child relationships. While initially the father may be interested in using his paternity as a means to punish the mother, a firm statement from the law indicating that paternity is not to be employed as a vindication tool, but rather viewed as a lasting obligation which imparts rights as well as duties may induce the father to continue the benefit he received from his relationship with the mother—his relationship with the child. Further, if the father is not allowed to challenge paternity and persists his support payments, the child is not only benefited financially but emotionally because “[p]arents who pay child support are more likely to visit children than those who do not pay support.”

Second, this Article recognizes that this is contrary, but not entirely contrary to the generally accepted sociological view by Goldstein, Freud, and Solnit that it is healthier for children to be exposed to parents who are on good terms, rather than those that are on bad terms. Yet, one should consider that this new standard will stave off much litigation before the rigors of litigation increases the parties’ hostilities to one another, thus perhaps providing a chance for reconciliation between the parties. Thus, the new burden may spare all parties from some of the downsides of prolonged litigation, which often has the effect of escalating ill feeling between the parties rather than settling adverse beliefs and restoring amicable feelings. In stark contrast to a situation in which the relationship between the father and the child is pulled further apart and possibly severed by continuing litigation, the pressure on their bond is halted before the situation has a chance to escalate.

Third, even if the putative father believes that genetics is all that matters, in many cases he won’t be able to prove he is not genetically related, and may ethically and legally continue to provide support for the child. The putative father may not have the requisite unsupervised access to the child to conduct a DNA test, may not be able to afford it because of the costs, or may not be able to trust a DNA test if not conducted under state authorized procedures. This reasoning should not be seen as punishing the man for lack of access to the child or for not being able to afford DNA testing, but simply as another reason in which continuing paternity is not adverse to
the child’s interests. Joseph Goldstein, *et al.*, in writing *THE BEST INTERESTS OF THE CHILD*, recognized, in the context of child custody and placement, that “[w]hatever the court decides, inevitably there will be hardship.”[169] Their insight carries over to the framing of standards for challenging paternity, “[i]t may be the parents, already victimized by poverty, poor education, ill health, prejudice or other circumstances”, who are exposed to the hardship.[170] But all these considerations must be secondary to the “paramount” task, the well-being of the child.[171]

**D. Retrospective Obligations**

Consistent with this theory, if the putative father meets the burden and is successful in disestablishing paternity, he should neither be allowed to regain money he has paid in support nor be off the hook for any arrears he has amassed. From the perspective of an “adult centered sense of justice” the putative father excluded all others from the benefits of being the child’s father during the period of time in which he paid support, and thus he should be held responsible for the duties of being a father during that time period. From this same perspective, the putative father might be “punished” under some sort of laches theory for waiting so long to challenge the order, and not be entitled to receive reimbursement or forgiveness for arrears. Most importantly, however, from a child centered sense of justice, the ex-father should not be entitled to reimbursement because that would involve taking money from the child, either directly or figuratively from the state agency acting on the child’s behalf. Similarly, he should not be off the hook for arrears because it would deprive the child of funding in which the child is entitled. From a broader perspective, denying these motions from the now acquitted father also gives worth to what the child has given or what the acquitted father may have acquired from the child if he had engaged in right to have a relationship with the child. Thus, the best interests of the child are preserved.

**CONCLUSION**
REVISITING THE TWO FATHERS AND ANALYZING THEIR CHILDREN’S BEST INTERESTS

For the two fathers, John Doe and Nicholas, the result may be much the same under the new analysis as it was when the cases were decided. John Doe, having forged a strong emotional and financial relationship with Cheryl, would unlikely be able to prove with clear and convincing evidence that it would be in Cheryl’s best interests for him to be allowed to terminate such a relationship. For Nicholas and his child, the case would turn on the details. Although Nicolas was only provided sporadic financial and emotional support, he may be the best that this child realistically has for a father figure. Nicholas’s challenge would turn on whether there was someone else who could provide for the child better than he had. This would raise many issues that he would have to prove: that another putative father was locatable, that this man had means to support the child, that the man would likely provide an emotional relationship to the child. The answers to these questions are unknown. But what is known is that if states adopt this standard of analyzing the child’s best interests when making paternity determinations, children’s lives and their well-being will not be based on the fortuity of which state they live in, on whether their mothers were forthcoming about their sexual histories, or simply based on DNA. Instead, the focus will be on the children, where it should be.

[5] See, e.g., Atcherian v. Dep’t of Revenue, Child Support Enforcement Div., 14 P.3d 970, 972 (Ala. 2000) (allowing man who waited five years to challenge a paternity order to do so with DNA evidence and to be reimbursed the money he paid in support from the date he filed his challenge); Ex Parte State Dep’t of Human Resources v. Rorer, 674 So.2d 1274, 1275 (Ala. Civ. App. 1995) (allowing a man who waited seven years to challenge a paternity order to do so with DNA evidence); Walter v. Gunter, 788 A.2d 609 (Ct. App. Md. 2002) (deciding that a man who waited seven years to challenge a paternity order with DNA evidence may also be relieved of any arrears in child support he amassed).
See www.jennyjones.com (describing that day’s show), site visited, May 7, 2003.  


See infra section III (B) of this Article.

Weitzman, supra note 8, at A1.


See BLACKSTONE, infra, part B. The idea that the duty to support stems from biology is still prevalent in the law. See Walter v. Grunter, 788 A.2d 609, 615-16 (Md. 2002) (quoting Blackstone and finding where there is no biological connection, there can be no obligation for support).

“(C)hild support often constitutes more of a penalty for the violation of societal norms than a direct expression of parental responsibility for children.” Carbone, supra note 11, at 4.

“The goals of our public welfare program must be positive and constructive . . . [The welfare program] must stress the integrity and preservation of the family unit. It must contribute to the attack on dependency, juvenile delinquency, family breakdown, illegitimacy, ill health, and disability.” Carole M. Hirsch, When the War on Poverty Became the War on the Poor, Pregnant Women: Political Rhetoric, The Unconstitutional Conditions Doctrine, and the Family Cap Restriction, 8 WM. & MARY J. WOMEN & L. 335, 344 (2002) (quoting President Kennedy’s 1962 welfare message to Congress) (internal citation omitted).

Id. For the notion that the basis for older laws were punitive, see Carbone, supra note 11, at 5 (“Society brought considerable pressure to bear on young women to name the fathers of their children and on young men to marry the mothers of their children . . . . Marriage was the preferred solution, and support orders were designed more to offset public expenditures than to provide adequately for children.”). For the change from punitive to protective, see Hirsch, supra note 14, at 344 (quoting President Kennedy’s 1962 welfare message to Congress) (internal citation omitted); Id. (quoting King v. Smith, 392 U.S. 309, 324-35 (1968)) (“Congress has determined that immorality and illegitimacy should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of the AFDC.”).


Id.

Id.

Id. at 2.

Id. at 2. The punishment for non-support by either parent was jail, fine, or seizure of assets to be liquidated for child support. Id. Lieberman notes that children, in theory, could receive support by purchasing necessities from merchants on credit. The merchant could then sue for recovery from the children’s parents, however, most merchants would not extend necessities to children unaccompanied by parents with ready money. Id.

Carbone, supra note 11, at 5.

Id. at 2-3.

Id. at 3; MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES xii (1994) (attributing the increasing status of women, such as the accumulation of more property rights, as spurring along the change). See e.g., Langston v. v. Horton, 317 S.W.2d. 821, 822 (Ark. 1958) (affirming a decision where in the proceedings below “it was the chancellor’s opinion that the children should be placed in their mother’s care rather than remaining in a home where there is no woman to look after their needs.”) Krause has characterized the courts’ perspective of the obligations that parents owe children as the “father’s obligation is fulfilled by paying dollars and the mother’s by rendering personal care.” HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 5 (1981).

LIEBERMAN, supra note 11, at 5.

Id.

Id. at 6.

Hirsch, supra note 14, at 340-43 (describing the various stereotypes of welfare recipients that fueled the public sentiment).

LIEBERMAN, supra note 11, at 6. Leiberman quotes Senator Russell Long, whose rhetorical sentiments echoed those of the nation’s: “Should our welfare system be made to support the children whose fathers cavalierly abandons
them—or chooses not to marry the mother in the first place?”  Id. States were not diligent about prosecuting fathers who were delinquent in their child support payments.  Id.  

[29] Id.  
[34] See e.g., Editorial, War on the Poor, ST. LOUIS POST DISPATCH, May 23, 2003, at B2 (quoting House Representative Pete Stark regarding the stricter work requirements for welfare assistance, “In 1964, Lyndon Johnson declared war on poverty. Today, my Republican colleagues and the president have declared war against the poor.”).  
[36] Paternity is presumed to the husband if the child was born to the wife during a legal marriage. In Miscovich v. Miscovich, the putative father attempted to rebut the marital presumption of paternity with blood tests that positively excluded him from being the father. 688 A.2d 726, 727-28 (Pa. Super. Ct. 1997) aff’d per curiam, 720 A.2d 764 (Pa. 1998). The Superior Court of Pennsylvania and the Supreme Court of Pennsylvania affirmed the trial court’s decision that Mr. Miscovich, having waited four years after the birth of the child, could only enter DNA evidence once he had rebutted the presumption with clear and convincing evidence, such as evidence of lack of access to the wife during conception period or husband’s impotency or sterility. Id. at 729-30. Since Miscovich could present no such evidence here, his child support order was affirmed. The affirmation of this case and the refusal of the U.S. Supreme Court to grant certiorari and reverse the decision generated substantial public attention and fired the fuel for various men’s rights organizations. See e.g. Adam Pertman, DNA Tests Emerging as Legal Weapon in Child Support Cases, BOSTON GLOBE, July 23, 2000, at A1, available at LEXIS, News Library, Bglobe file; Richard Willing, DNA and Daddy Explosion of Technology is Straining Family Ties, USA TODAY, July 29, 1999, at 1A, available at LEXIS, News Library, Usatoday file.  
[37] 42 U.S.C. § 608 (a) (2) (2003) (state may reduce or eliminate TANF support to a parent that does not cooperate in establishing paternity).  
[38] See e.g., CALIF. DEP’T. OF CHILD SUPPORT SERV., 160 THE CHILD SUPPORT HANDBOOK 11 (May 2002).  
[39] The Supreme Court has held that in regards to such benefits, parties may not discriminate against legitimate and illegitimate children. Levy v. Louisiana, 391 U.S. 68 (1968). This represented a significant change in legal policy regarding nonmarital children. See 1 W. Blackstone, Commentaries 459 (discussing the common law regarding support for nonmarital children) (“[A] child born out of wedlock, referred to as a bastard, was considered a non-person and was not entitled to support from the father or inheritance from either parent.”).  
[42] 42 U.S.C. § 666 (a). The 1984 amendments effectively resolved the issue of how long the statute of limitations for the establishment of paternity must be so as not to offend equal protection. For Supreme Court discussion of this now essentially moot dilemma, see Clark v. Jeter, 486 U.S. 456 (1988) (holding that a Pennsylvania law granting illegitimate children only six years to establish paternity in order to receive child support where legitimate children may seek support at any time violated equal protection); Pickett v. Brown, 462 U.S. 1 (1983) (striking down Tennessee’s similar two year statute of limitations); Mills v. Habluetzel, 456 U.S. 91 (1982) (holding same for Texas’s one year statute of limitations). Justice O’Connor, in her concurrence in Mills, emphasized that a short statute of limitations for paternity establishment is likely to deprive an illegitimate child of support, because:  

[t]he unwillingness of the mother to file a paternity action on behalf of her child, which could stem from her relationship with the natural father or . . . from the emotional strain of having an illegitimate child, or even from the desire to avoid community and family disapproval, may continue years after the child is born. The problem may be exacerbated if, as often happens, the mother herself is a minor.

See e.g., CALIF. DEP’T OF CHILD SUPPORT SERV., 160 THE CHILD SUPPORT HANDBOOK 4 (May 2002).

Id. [47]

Id. [48]

MARIANNE TAKAS, CHILD SUPPORT: A COMPLETE, UP-TO-DATE, AUTHORITATIVE GUIDE TO COLLECTING CHILD SUPPORT 55-56 (1985).


483 U.S. 574, 577-78 (1987) (finding that preponderance of the evidence “is the . . . standard that is applied in paternity litigation in the majority of American jurisdictions that regard such proceedings as civil in nature.”).

See generally ABA CHILD SUPPORT PROJECT, CENTER ON CHILDREN AND THE LAW, CHILD SUPPORT REFERENCE MANUAL FOR LAW STUDENTS V-29 (1989).

See generally id. at V-30. The Supreme Court has noted the importance of this last provision—acting as a father and stated that when looking to strip a man of paternity, he has greater constitutional protection from this by acting as a father rather than by his biological link of being a father. Rivera v. Minnich, 483 U.S. 574, 580 n.7 (1987).

Anderlik & Rothstein, supra note 31, at 220 (citing Richard Willing, DNA and Daddy Explosion of Technology Is Straining Family Ties, USA Today, July 29, 1999, at 1A).


Anderlik & Rothstein, supra note 31, at 221 (internal citations omitted).

Id. at 221-22 (2002) (internal citation omitted).


Anderlik & Rothstein, supra note 31, at 220.

David M. Cotter, Will You Still Need Me, Will You Still Feed Me, After 60(b)? Direct Attacks Upon Final Paternity Judgments, 14 NO. 1 DIVORCE LITIG. 1.


See State ex rel. Dep’t of Family Serv. V. PAJ, 934 P.2d 1257 (Wyo. 1997). PAJ is discussed in detail in David M. Cotter, Will You Still Need Me, Will You Still Feed Me, After 60(b)? Direct Attacks Upon Final Paternity Judgments, 14 NO. 1 DIVORCE LITIG. 1 (2002).

Id. supra note 73. See id. (calling Alabama a “breeding ground” for relief in situations like the aforementioned and depicting numerous Alabama, as well as Kentucky cases).

For a detailed overview of how the states have been using 60(b) in the context of paternity challenges, see id.

Id. See e.g., Pacifico v. Jackson, 562 So. 2d 174, 178 (Ala. 1990) (“An order granting or denying a motion for new trial on the basis of newly discovered evidence will not be disturbed on appeal unless it appears that the trial court abused its discretion.”); Varley v. Varley, 428 A.2d 317, 318 (Conn. 1980) (“To have a judgment set aside on the basis of fraud which occurred during the course of the trial upon a subject on which both parties presented evidence is especially difficult.”); In re Missouri-Kansas Pipe Line Co., 2 A.2d 273, 77 (Del. Ch. 1938) (stating that new trials should be disfavored because “[f]requently the disappointment over the result spurs the applicant to that diligence which he should have exercised before trial”).

To challenge a paternity order, the Supreme Court has mandated that a constitutionally accepted standard is a higher standard of proof than preponderance—clear and convincing is acceptable. Santosky v. Kramer, 455 U.S. 749-50 (1982).

See e.g., Citizens Against Paternity Fraud, www.paternityfraud.com (“Join the fight for victim's freedom. [Citizens Against Paternity Fraud] believes in paying child support on our biological kids and for any kids that we legally adopt. But pay for mom's sleeping around, NO WAY! She must not be rewarded and be held responsible for her own actions.”) last visited May 17, 2003.

In re Cheryl, 746 N.E.2d 488, 491-92 (Mass. 2001) (The opinion does not identify the identity of the putative father or the mother, referring to them simply as “father” and “mother” of child, Cheryl. For ease of reading, this Article will refer to the putative father of Cheryl as John Doe or John.).

John’s support obligation was $56.50 a week. Id. at 492.

Id. at 492 n.4.

Id. at 492 (emphasis added).

Id. John’s motion requesting genetic testing was supplemented with reasons justifying his doubt that he was the biological father of Cheryl. He said that when Cheryl was two, several of the mother’s friends told him he was not the genetic father. He also noted that Cheryl did not resemble him. He also included a doctor’s letter showing that he had a low sperm count resulting in problems with fertility. Id. at 492-93.

Id. at 493-96.

Id. at 496.

Id. at 497-98. John did not qualify because he was required to make a showing that his claim did not fall in one of the other 60(b) provisions. Yet, his claim centered upon “newly discovered evidence,” “deceit,” and “mistake,” all issues covered by other 60(b) provisions for which the statute of limitations had run. Id.

Id. at 498.

Id.


788 A.2d 609, 611 (Ct. App. Md. 2002). Nicholas did not request genetic testing before consenting to paternity.

Id.

Id. at 611-12.

Id. at 611. His request for genetic testing stemmed in part from statements from family stating that the child did not resemble him. Id.

“A declaration of paternity may be modified or set aside: if a blood or genetic test . . . establishes the exclusion of the individual named as the father in the order.” Maryland Code § 5-1038 (1984) (a)(2)(i); (a)(2)(i)(2).

Walter, 788 A.2d at 611.
Today genetic testing can establish or exclude the possibility of paternity to the extent of leaving a degree of doubt of less than one percent, and state legislatures have reflected these changes in paternity statutes. See e.g., MINN. STAT. § 257.55 (f) (2002) (paternity is presumed if genetic tests establishes the likelihood that the putative father is the biological father by a probability of ninety-nine percent or greater).

See also Mary Ann Mason, From Father’s Property to Children’s Rights: The History of Child Custody in the United States 1-4 (1994) (recounting our nation’s history of child labor and emphasizing that in Colonial America, family units were not so much biological units but labor units in which the “father” was often a master and his “child,” was often an apprentice).

Natural law may be a peculiar term to depict this mode of analysis, because it has also been used to encompass the marital presumption, arguing that marriage is a part of natural law, and thus any offspring during the marriage should be viewed as children of the parents. See id. at 222 (“Marriage, the union of one man and one woman, was also considered part of the natural order, as the proper context for procreation.”).

Whether good policy or bad, the fact is that the accomplishment of [the court’s interpretation of the statute] objective necessarily leaves children legally fatherless, sometimes emotionally fatherless, without an existing order of paternal support, and without an ability to inherit from a man previously adjudicated to be the child’s father. It abrogates, as well, the support flowing to the mother or other custodian of the child. The hope that, some day, the “true” father may be discovered and substituted—the likelihood of which, I suspect, is largely remote—does not diminish the immediate substantive effect of setting aside an established paternity declaration.

See Cotter, supra note 116.
Gregory, whom genetic tests proved to be the child’s biological father. *Id.* at 543-44. Gregory then filed a third party claim against Tedford, Nina’s ex-husband who had been supporting Jeanne since the marriage. *Id.* at 543. Tedford counter-claimed against Gregory for reimbursement of child support payments and sought reimbursement from Jeanne if Jeanne were successful in her suit against Gregory. *Id.* The court of appeals held that the marital presumption estopped Tedford from seeking reimbursement, against both the natural father and the child. *Id.* at 550-51.

See also Arkansas Office of Child Support Enforcement v. Mitchell, 964 S.W. 2d 218, 220-21 (Ct. App. Ark. 1998) (vacating order setting aside putative father’s obligations for child support arrears on the basis of the mother’s fraud in stating that she had not been sexually involved with other men at the time of conception).

977 P.2d 95, 101 (Alaska 1999) (“The distinction Ferguson proposes would give child support obligors incentive not to pay child support, in hopes that paternity might someday be established.”).


*Id.*

LIEBERMAN, *supra* note 11, at 3.

*Id.* at 3-4 (1986). Lieberman notes that the best interests of the child standard did little to actually change this stereotype in the court system, other than in theoretical policy. *Id.*


*Id.* The mother, the biological father, the child, and the state (acting on behalf of the child) are imputed to assenting in allowing the putative father to act as the father, thus paternity estoppel also bars their challenges to paternity. *Id.*

Alabama, Florida and Michigan still require a valid marriage as a prerequisite to triggering paternity estoppel. Cotter, *supra* note 143.


Charles v. Charles, 296 A.2d 547, 549-50 (N.Y. App. Div. 2002) (remanding upon finding that no determination of the child’s best interests had been made, and speculating that it might be possible to allow the legally adjudicated father to challenge paternity based on the fact that the child had a relationship with her biological father).

Cotter, *supra* note 143.


Cotter, *supra* note 143.

David M. Cotter, *Limitations and Novel Applications of the Doctrine of Paternity Estoppel, supra* note 143, depicts numerous cases in which the conduct between the adult parties determined whether or not the man would be estopped from challenging paternity, for example, In re Marriage of Adams, 701 N.E. 2d 1131) (Ill. App. Ct. 1998) (holding that equitable estoppel did not bar a man from challenging paternity regarding a child the mother told him was a result of artificial insemination, but really originated from an affair); Tiffany M.H. v. Greg G., 709 N.Y.S. 2d 315 (N.Y. Civ. Ct.) (finding that the mother’s claim that the man was the biological father resulting a default paternity judgment militated against estopping the father from challenging paternity five years later).


*Id.*

Judge Saufley recognized this inequity:

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 a father and child. When a man has been newly determined to be the biological father of the child, the courts have a responsibility to assure that the child does not, without cause, lose the relationship with the person who has previously been acknowledged to be the father both in the law, through marriage, and in fact, through the development of the parental relationship over time. In this developing area of law, and in the absence of legislative action, many questions remain unanswered.


Id. at 758.

Id. at 759.

Id.

Id. at 758.

Id. at 759.

Id. at 760 n. 11.

Id. at 761.

GOLDSTEIN, ET AL., supra note 138, at 19.

Id.

Id. at 20.

Id.


GOLDSTEIN, ET AL., supra note 138, at 38.

Id. at 82.

Id.

Id.