INTRODUCTION

This paper explores contemporary American laws on paternity as of the time of the live birth of a child conceived through sexual intercourse. In doing so it necessarily examines the roles of biological ties in all determinations of legal parenthood. It does not speak directly to legal paternity arising from the use of reproductive technology; to legal fatherhood arising long after birth for reasons unrelated to biology; or, to actual fatherhood, which remains unrecognized under law. It does assume that there can be no legal paternity of an unborn child, though there

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\[ \text{\footnotemark[1]} \]

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1. Cf. 750 ILL. COMP. STAT. ANN. 45/7 (West 2002) ("An action to determine the existence of the father and child relationship... may be brought by... a pregnant woman... or a man presumed or alleging himself to be the father of the... expected child." Yet proceedings in an action brought before birth are usually "stayed until after the birth."); A.H.W. v. G.H.B., 772 A.2d 948, 949 (N.J. Super. Ct. Ch. Div. 2000) (Biological}
certainly may be prospective legal paternity that prompts parental-like status for pregnant dads.\(^2\) And, it does recognize there can be both retroactive legal paternity and presumptive legal paternity.\(^3\) In the former, paternity based upon biology is established long after birth, but relates back in time to the date of birth. In the latter, there is a presumption of paternity at the time of birth that usually assumes, but need not actually involve (as with marriage), biological ties.

For men, legal paternity designations may result in parental rights or responsibilities.\(^4\) These rights can involve such matters as childrearing, monetary recovery under tort or probate laws, or child visitation. These responsibilities can involve such matters as child support or special duties under tort or criminal laws. For children, legal paternity designations usually provide rights, if not responsibilities. Children’s rights can include child support as well as special protections under tort, probate, or criminal laws.\(^5\)

In exploring legal paternity, the paper necessarily examines differences in assigning parental rights and parental responsibilities, though
recognizing that the two often go hand-in-hand. As well, it explores differences guiding legal maternity and legal paternity determinations. The major thesis of the paper is that old-fashioned pregnancies require newly-fashioned paternity laws. Consideration of new laws is facilitated by advances in scientific testing. Law reform is necessary because existing laws too often mistreat dads by unfairly eliminating paternal rights or unfairly assigning paternal responsibilities. The chief concerns here are with the procedures, not with the substantive norms, employed by American governments, usually states, for designating legal paternity. The chief goal is to promote legal paternity designations "consistent with orderly procedure without unnecessary involvement in procedural quirks, complications and limitations." 

I. FOUNDATIONS OF AMERICAN PATERNITY LAWS

Lawyers and non-lawyers alike frequently misunderstand contemporary American paternity laws and their relationships with laws on maternity. A brief review of a few undeniable premises seems necessary before exploring legal paternity procedures and possible paternity law reforms.

A. Legal Paternity

Public policy supports early, accurate, informed, and conclusive legal designations of paternity as of the time of birth. A 1992 federal study, entitled "Supporting Our Children," said this:

Parentage determination does more than provide genealogical clues to a child's background; it establishes fundamental emotional, social, legal and economic ties between parent and child. It is a prerequisite to securing financial support for the child and to developing the heightened emotional support the child derives from enforceable

6. See infra Part I.B.
7. See infra Part I.
8. But see Scales v. I.N.S., 232 F.3d 1159, 1166 (9th Cir. 2000) (reviewing procedures for establishing parentage for U.S. citizenship purposes and finding there is no need to establish blood relationship with the U.S. citizen said to be the father).
9. This paper draws significantly from and expands upon an earlier work. Jeffrey A. Parness, Designating Male Parents At Birth, 26 U. MICH. J.L. REFORM 573, 591-92 (1993) (concluding that current designations of a child's male parentage as of the time of birth often are made inconsistently, fortuitously, inconclusively, and without involving all interested parties).
custody and visitation rights. Parentage determination also unlocks the door to government provided dependent’s benefits, inheritance, and an accurate medical history for the child.11

Legal paternity differs from legal fatherhood and actual fatherhood. Paternity under law involves a man with legally-recognized rights, responsibilities, or both, as the father of a newborn. Legal paternity can arise from varying acts including, paternity registrations, birth acknowledgments, and child support payments. On occasion, presumptions prompt designations of legal paternity, as with husbands12 or former husbands13 or former boyfriends14 of women who bear children.15 Every so often, more than one presumption may arise for a single child, often requiring courts to weigh competing presumptions.16 By contrast, legal fatherhood involves a man with comparable, if not the same,17 rights and

11. U.S. COMM’N ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM 120 (1992). See also James A. Gaudino Jr., et al., No Fathers’ Names: A Risk Factor for Infant Mortality in the State of Georgia, USA, 48 SOC. SCI. & MED. 253, 263 (1999) (concluding that “Missing fathers’ names on birth certificates, a measure of paternity, was a more important risk factor for infant mortality in Georgia than unmarried status. This finding suggests that fathers, in some way, may influence infant health.”).

12. See, e.g., TENN. CODE ANN. § 36-2-304(a) (2001) (“A man is rebuttably presumed to be the father of a child if: (1) . . . [He] and the child’s mother are married . . . and the child is born during the marriage.”).

13. See, e.g., id. (“A man is rebuttably presumed to be the father of a child if: (1) . . . [He] and the child’s mother . . . have been married to each other and the child is born . . . within three hundred (300) days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce . . . .”).

14. See, e.g., IN re Nicholas H., 46 P.3d 932, 933, 941 (Cal. 2002) (Mother’s former boyfriend who received child into his home and openly held the child out as his natural child is presumed to be natural father; this presumption is not necessarily rebutted when the man admits he is not the biological dad).

15. See also 750 ILL. COMP. STAT. ANN. 45/5(a)(3) (West 2002) (“A man is presumed to be the natural father of a child if . . . he and the child’s natural mother have signed an acknowledgment of paternity.”); 750 ILL. COMP. STAT. ANN. 45/5(b)(1) (West 2002) (The presumption is “conclusive” unless rescinded within sixty days); 750 ILL. COMP. STAT. ANN. 45/6(d) (West 2002) (“A signed acknowledgment of paternity . . . may be challenged in court only on the basis of fraud, duress, or material mistake of fact.”).

16. See, e.g., IN re Kiana A., 113 Cal. Rptr. 2d 669, 675-680 (Cal. Ct. App. 2001) (A rebuttable presumption founded on marriage after birth and inclusion on birth certificate competes with rebuttable presumption based upon receipt of child into the home and acknowledgment of biological ties; in weighing, biological ties are not determinative).

responsibilities who is recognized under law some time after a child is born for reasons unrelated to biological ties. For example, equitable estoppel forecloses denials of legal fatherhood by men who have actually fathered, though there is some good chance that the biological father can be pursued in paternity for child support. Beyond any laws, of course, many men actually assume rights and undertake responsibilities for children without any recognition under law. Such actual fatherhood occasionally helps to establish legal fatherhood or to establish legal paternity retroactively. Yet many actual fathers can never gain legal recognition; some, in fact, may be removed from their children due to a later-recognized legal paternity or legal fatherhood of another. Thus, a legal paternity designation for one man can override the actual fatherhood of a second man in some settings. Yet elsewhere, a later legal paternity designation for one man can be foreclosed by the actual fatherhood of another man. Many children have two or more different men recognized in legal paternity, or as legal fathers, or as actual fathers.

Legal paternity usually differs both in procedure and in substance from legal maternity. Thus, American birth certificate laws usually treat

18. Legal fatherhood conceivably may be designated for a biological father where the opportunity for childrearing rights based on biology was earlier lost so that legal paternity as of the time of birth is precluded, (as with a failure to step up to parenthood), but where there is 'revived' legal paternity that translates into legal fatherhood, as with adoption.

19. See, e.g., W. v. W., 779 A.2d 716, 720 (Conn. 2001) (From the child's perspective there is representation (positive act by man), reliance (by child), and detriment (to child)). Incidentally, estoppel may not be available to a biological father fighting a paternity suit (seeking recovery of governmental financial aid) even when earlier the biological mother and another man actually parented the child for at least six to eight years and where the child still believes the other man is the dad. Hjame v. Martin, No. FA000631333, 2002 WL 1163023, at *6 (Conn. Super. Ct. May 7, 2002).


21. See, e.g., Clark v. Wade, 544 S.E.2d 99, 101 (Ga. 2001) (describing how a recent statute, GA. CODE ANN. § 19-7-1(b.1) (2002), altered the guidelines for determining conflicts between biological parents and a limited number of third parties who may be actual, but are not legal, parents, including grandparents, aunts, uncles, siblings and prospective adoptive parents; the statute replaced a parental unfitness standard with a best-interest-of-the-child standard, making it somewhat easier for third parties to prevail).

22. See infra Part I.B.
differently a biological mom and a biological dad.23 A biological mom is nearly always noted on a birth certificate while a biological dad frequently is not.24 Further, federal constitutional rights involving childrearing arise quite differently for a biological mom and dad.25 For a mom, these rights arise from childbirth alone;26 for a dad, these rights only arise after he "grasps" the opportunity to develop a relationship with his offspring and "accepts some measure of responsibility for his child's future."27

Legal paternity is important in many different settings. Within a single American state and between different American states, there may be varying approaches to legal paternity for child support duties;28 child custody and visitation rights;29 tort law duties;30 rights under probate

23. See infra Part III.B.
25. See infra pp. 67-68.
26. A biological mom herein is a woman who is both the genetic and the gestational mother, as the paper concerns only old-fashioned pregnancies. Where reproductive technology produces a pregnancy with both a gestational mom and a genetic mom, there is usually different legal treatment of the moms. Thus, childbirth alone, in the absence of genetic ties, has been said to prompt no federal constitutional protections. See, e.g., Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (App. Div. 2000) (Gestational mother unconnected genetically [mistakenly implanted embryos] had no entitlement to court-ordered visitation).
27. Lehr v. Robertson, 463 U.S. 248, 262 (1983). Lehr is illustrated in In re Adoption of J.L.G., 808 So.2d 491, 498-99 (La. Ct. App. 2001) (Unwed father failed to manifest substantial commitment to child as required by statute, so his consent to adoption was unnecessary).

The nature (the types of decisions embodied in childrearing) and the breadth (the reach of childrearing authority, as where there are conflicting interests of grandparents) of federal constitutional childrearing rights were examined in Troxel, 530 U.S. at 65-66 (employing a case-by-case analysis in determining whether parental decisions involving "care, custody, and control" of children can override state interests in allowing paternal grandparent visitations found to be in the best interests of children, but contrary to parental wishes). See also Blakely v. Blakely, No. SC83307, 2002 WL 1364019, at *1 (Mo. June 25, 2002) (Notwithstanding Troxel, limited grandparent visitation order was not unconstitutional).
28. For example, American state laws vary on the types of harm (emotional or financial) to children of divorcing parents, which will bar husbands from escaping future child support responsibilities though they prove lack of biological ties. See, e.g., B.E.B. v. R.L.B., 979 P.2d 514, 515-16 (Alaska 1999) (reviewing state precedents on paternity by estoppel). And they may vary on whether during a divorce a couple can consent to the voluntary termination of the husband's parental rights, allowing him to be relieved of child support payments. See, e.g., DiPaolo v. Cugini, 2002 WL 31565822 at *1 n.2 (Pa. Super. 2002) (finding Pennsylvania laws, but not New Jersey laws, deem such consent a nullity).
29. For example, American state laws vary on whether biological fathers can have visitation (and support duties) for children born into intact marriages where the married couple objects. Compare Callender v. Skiles, 591 N.W.2d 182, 186-92 (Iowa 1999) (state constitution recognizes standing of such biological fathers) with Ex parte C.A.P., 683 So.2d 1010, 1011-12 (Ala. 1996) (the state does not recognize such standing).
30. For example, American state laws vary on whether there can be legal paternity of a
laws;\textsuperscript{31} and, criminal law duties.\textsuperscript{32} For legal paternity, both substantive and procedural laws often vary depending upon context. Thus, substantive legal paternity norms often differ for civil child support and for criminal child support.\textsuperscript{33} As well, the procedures for establishing legal paternity often differ for child custody, tort, and probate purposes.\textsuperscript{34} Within American states, there are varying approaches, both substantively and procedurally, to the rebuttal of presumptions of legal paternity founded on marriage.\textsuperscript{35}


32. For example, American state laws vary on whether there can be legal paternity of a fetus so as to prompt possible application of criminal child support laws applicable to parents. Usually, criminal statutes are read quite narrowly, thus precluding doctrines used in civil claim settings such as the "born alive rule." \textit{See, e.g.}, Commonwealth v. Booth, 766 A.2d 843, 848 n.7 (Pa. 2001). Some states have explicitly included the unborn as victims of child support crimes. \textit{See, e.g.}, CAL. PENAL CODE § 270 (1999) (child conceived but not yet born is to be deemed an existing person).

33. \textit{See, e.g.}, State v. Burg, 648 N.W.2d 673, 677-678 (Minn. 2002) (Criminal offense of nonsupport of child required prosecutors to prove beyond reasonable doubt all elements including knowing omissions and absence of lawful excuse). Thus, only under the criminal laws may the non-supporting legal fathers need to know of their children's existence and of their responsibilities to support them under law.

34. In the child custody setting only the potential legal fathers, the biological mothers, the children, and the state (especially if it is providing child support) may have standing to litigate legal paternity, while in the inheritance setting, more actual and alleged family members may have standing and in the tort setting, strangers (as those sued for damages involving injured family relations) may have standing. \textit{See, e.g.}, Estate of Griswold, 24 P.3d 1191, 1194 (Cal. 2001) (Half siblings may recover from intestate estate of a man born out of wedlock and biologically linked to their father because the father "acknowledged the child" and "contributed to the support or care of the child" as required by the Probate Code, even though the father never met the man and the siblings did not learn of the man until after he died). \textit{See also} Jackson v. Newsome, 758 N.E.2d 342, 346 (Ill. App. Ct. 2001) (recognizing that parentage acknowledgment procedures differ under Vital Records Act and Uniform Parentage Act) and Taylor v. Hoffman, 544 S.E.2d 387, 394 (W.Va. 2001) (limitations period for child support action by child based on paternity differs from limitations period for inheritance action by child seeking "heirship" rights).

35. States differ on whether certain legal paternity presumptions may be rebutted by certain people; they also differ on the weight and nature of evidence that may be used to rebut a legal paternity presumption. \textit{See, e.g.}, Theresa Glennon, \textit{Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity}, 102 W. VA. L. REV. 547 (2000); Diana S. Kaplan, \textit{Why Truth is Not a Defense in Paternity Actions}, 10 TEX. J.
Finally, a frequently misunderstood premise is that legal paternity can be designated in order to assign parental responsibilities to a man who is not then entitled (and may never truly be entitled) to exercise parental rights.36 Thus, a man who failed to establish a parent-child relationship that would have triggered childrearing rights, can nevertheless be pursued later for child support under laws based solely upon biological ties.37 An award and the payment of child support by such a man may, but need not, revive the chance for securing parental rights based on legal paternity.38

B. Differentiating Maternity and Paternity Laws

As noted, the legal standards guiding maternity and paternity differ in both procedure and substance. Some differences have been sustained by the United States Supreme Court. For federal constitutional childrearing rights, the Court has recognized differences between biological moms and biological dads of children conceived through sexual intercourse.39 In a dissent in 1979, which has since been widely used,40 Justice Stewart wrote:

Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships

\[\text{WOMEN & L. 69 (2000).}\]

36. The false linkage of parental rights and parental responsibilities may arise, in part, because laws often join the two as if they were interdependent. See, e.g., N.Y. SOC. SERV. LAW § 384-b(1)(ii) (McKinney 2002) ("[I]t is generally desirable for the child to remain or be returned to the birth parent because the child's need for a normal family life will usually best be met in the home of its birth parent, and that parents are entitled to bring up their own children unless the best interests of the child would be endangered.").

37. See, e.g., Klak v. Skellion, 741 N.E.2d 288, 289 (Ill. App. Ct. 2000) While a seventeen year old woman cannot sue by herself to establish parent-child relationship based on male biological ties, suit could be brought by her mother or legal guardian until she is eighteen and suit could be brought by woman herself when she is eighteen to twenty years of age. Id. at 291.

38. To date, there has been little talk of revived parental rights for men first assigned child support duties on behalf of older children. Yet in certain parental adoption settings involving older children, participation rights are afforded unwed biological fathers only because they developed actual parent-child relationships some time after birth, though at the time of birth their parental rights had not accrued and early-age adoptions could have proceeded without their participation. See, e.g., TENN. CODE ANN. § 36-1-102(1)(A)(i) and (iii) (2002) (abandoned children may prompt parental rights terminations and adoption availability; abandonment includes a biological father's failure to provide pre-birth financial support for 4 months before birth, but may only be proven more than 30 days after birth, suggesting that provision of some child support during the first 30 days after birth disallows a finding of abandonment at birth).


40. See, e.g., Lehr v. Robertson, 463 U.S. 248, 260 (J. Stevens, speaking for himself and five other justices, deems J. Stewart's observations correct).
more enduring. The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father’s parental claims must be gauged by other measures. By tradition, the primary measure has been the legitimate familial relationship he creates with the child by marriage with the mother. . . . In some circumstances the actual relationship between father and child may suffice to create in the . . . father parental interests . . . .

The differing legal treatment at birth of biological moms and biological dads extends beyond the types of “enduring” relationships necessary for federal constitutional rights. In June 2001, when exploring the different procedures for women and men seeking parental rights by proving biological ties to children, Justice Kennedy explained:

The first governmental interest to be served is the importance of assuring that a biological parent-child relationship exists. In the case of the mother, the relation is verifiable from the birth itself. The mother’s status is documented in most instances by the birth certificate or hospital records and the witnesses who attest to her having given birth.

In the case of the father, the uncontestable fact is that he need not be present at the birth. If he is present, furthermore, that circumstance is not incontrovertible proof of fatherhood. . . . Fathers and mothers are not similarly situated with regard to the proof of biological parenthood. The imposition of a different set of rules for making that legal determination with respect to fathers and mothers is neither surprising nor troublesome from a constitutional perspective.

41. Caban, 441 U.S. at 397 (J. Stewart, dissenting).
42. See generally Tuan Anh Nguyen v. I.N.S., 533 U.S. 53 (2001). Occasionally, both a biological dad and a biological mom are similarly treated at birth, as when they are foreclosed from stepping up to parenthood, because their unfitness is shown at birth. See, e.g., In re R.B.S., 36 P.3d 300, 305 (Kan. Ct. App. 2001) (Violent and abusive conduct and neglect of older son prior to his death allowed court to find a newborn to be a child in need of governmental care). At times, however, biological dads are foreclosed from stepping up to parenthood, because of certain acts, though biological moms who committed similar acts are not precluded. See, e.g., In re Termination of Parental Rights to Quianna M.M., 2001 WL 1046974, at *1 (Wis. Ct. App. Sept. 13, 2001) (Statute barring parenthood for those committing sexual assaults leading to births applied only to biological fathers and thus not to biological moms whose pregnancies resulted from their criminal sexual assaults of young boys).
43. Nguyen, 533 U.S. at 62-63 (citations omitted).
Justice Stewart recognizes certain substantive law differences between biological moms and biological dads. While he declares that parental rights require more than “biological connection,” he finds the necessary “enduring” relationship for a mom can arise from biology alone, in that she “carries and bears the child.” For a man, an “enduring” relationship often means an “actual relationship between father and child.” Justice Stewart hints that such an actual relationship, developed as soon as humanly possible, may still be insufficient for certain biological dads seeking legal paternity. For example, it may be insufficient where a biological mom is married to another man at the time of conception, pregnancy or birth. In 1989, though there was no majority opinion, Justice Scalia spoke for himself and three others on the U.S. Supreme Court when he found that California could allow an extant marital relationship to trump the biological ties of a man who had, in fact, established a parent-child relationship. Justice Scalia reasoned that where a “natural father’s unique opportunity [to grasp parenthood] conflicts with the similarly unique opportunity of the husband of a marriage ... it is not unconstitutional for the State to give categorical preference to the latter.” Otherwise, “to provide protection to

44. *Caban*, 441 U.S. at 397.

45. *Id.* As he spoke of biological ties in settings where sexual intercourse prompted later births, and thus where all biological connections involved but one woman, seemingly Justice Stewart left open the legal analyses for children born biologically connected to two women, as in surrogacy settings. *Id.* See, e.g., *Culliton*, 756 N.E.2d at 1138 (Mass. 2001) (The trial court may consider ordering a hospital to place the names of both genetic parents on the birth certificates of children delivered by gestational carriers, even before birth).

46. *Caban*, 441 U.S. at 397. While Justice Stewart spoke of an “enduring” relationship, in similar settings other Supreme Court Justices have employed such phrases as “a full commitment to the responsibilities of parenthood,” *Lehr*, 463 U.S. at 261 (J. Stevens) (citing *Caban*, 441 U.S. at 392); a manifestation of “a significant paternal interest in a child,” *Caban*, 441 U.S. at 394 (J. Powell); and a coming “forward to participate in the rearing” of the child, *Lehr*, 463 U.S. at 261 (J. Stevens) (citing *Caban*, 441 U.S. at 392).

47. *Caban*, 441 U.S. at 397.

48. *Id.*

49. Michael H. v. Gerald D., 491 U.S. 110, 115 (1989). The relevant California statute said “the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.” *Id.* (quoting CAL. EVID. CODE § 621(a) (West 1989)). Extant marriages can also trump important and established relationships between children and other blood relatives. See, e.g., Santi v. Santi, 633 N.W.2d 312, 314, 321 (Iowa 2001) (State constitutional childrearing rights of fit married couple, who object, overcome any attempts by grandparents to gain court-ordered visitations with grandchildren).

50. *Michael H.*, 491 U.S. at 129 (emphasis omitted). Cf. Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294, 296 (App. Dep't Super. Ct. 2000) (finding it unconstitutional to give categorical preference to husband where there was no marriage “in any meaningful sense” and where an unwed biological father had “developed a substantial parent-child
an adulterous natural father is to deny protection to a marital father."\textsuperscript{51} Not all American states today permit such absolute trumping.\textsuperscript{52}

Where an "enduring" parent-child relationship, as described by Justice

\begin{quote}
relationship"). While the federal constitution recognizes there may be differences between states in preferences and in other dimensions of state privacy rights involving childrearing, federal constitutional privacy rights are at times coextensive with state constitutional privacy rights. \textit{See, e.g., In re Custody of RRB}, 31 P.3d 1212, 1222 (Wash. Ct. App. 2001).

\textsuperscript{51} \textit{Michael H.}, 491 U.S. at 130. In California, this presumption was subject to rebuttal by blood tests prompted by a motion within two years of the child’s birth, pursued either by the husband or, if the alleged natural father has acknowledged paternity by affidavit, by the wife. \textit{Id.} at 115 (citing \textsc{Cal. Evid. Code} § 621(c) and (d) (West 1989)).

So, an adulterous natural father was protected in California, but only if the natural mother who is the wife of another man, or the other man, also acts in a way that would prompt protection for the adulterous natural father. \textit{Id.} at 146 (Brennan, J., dissenting). Today in California, the conclusive presumption accorded a husband where a child is born into a marriage may be rebutted by the husband, the mother, the child, or a man deemed a "presumed father" under statute. \textsc{Cal. Fam. Code} §§ 7540-41, 7611-12 (West 1994).

\textsuperscript{52} \textit{Cf.} \textit{Cihlar v. Crawford}, 39 S.W.3d 172, 175 (Tenn. Ct. App. 2000) (Tennessee parentage statutes are constitutional though they allow a putative unwed natural father to establish paternity of a child born to a married woman, even where she objects and where her husband is a presumed father under law, who himself seeks to establish legal paternity); \textit{C.C. v. A.B.}, 550 N.E.2d 354, 365, 373 (Mass. 1990) (eliminating conclusive presumption of legitimacy and allowing biological father to bring paternity action where there is strong evidence of a substantial parent-child relationship); \textit{N.A.H. v. S.L.S.}, 9 P.3d 354, 357 (Colo. 2000) (When there are competing presumptions in husband and biological dad, look to child’s best interests); \textit{Callender v. Skiles}, 591 N.W.2d 182, 192 (Iowa 1999) (Unconstitutional per state constitution to deny biological dad chance to establish paternity when child born to married woman whose husband accepted the child as his own). The demise of conclusive presumptions favoring husbands was perhaps explained by Nancy E. Dowd, in her book \textit{Redefining Fatherhood}, in which she said:

\begin{quote}
The strong link between social fathering and marriage connects nurturing by men to an institution in decline, given the declining rate of marriage and the high rate of divorce. Male parenting thereby parallels the episodic, serial character of men’s adult pairings. Ever since 1975, the first marriage rate has declined, the divorce rate has risen, and the remarriage rate rose but then declined to a rate similar to the first marriage rate. The change in family structures was profound. Most young women in the 1950s got married by the time they were twenty and quickly had two or three children. Almost eighty percent of all U.S. households were married couples in 1950 . . . . During the 1950s, the marriage rate went up, people began marrying earlier in their lives, and the divorce rate dropped sharply . . . . Women were full-time mothers, especially those with young children; men were breadwinner fathers largely absent from the daily lives of their children . . . . The decline in married households since the 1950s has been significant: by the year 2000, married couple households will constitute only about half of all U.S. households. Currently, many households are composed of single individuals, or single-parent families. Marriage occurs later in life and does not last as long. Half of all marriages end in divorce, although remarriage is also frequent. Children are born later in their parents’ lives, and families have fewer children . . . .
\end{quote}

\textsc{Nancy E. Dowd, Redefining Fatherhood} 28-29 (2000).
Stewart, is sufficient for a biological dad to secure legal paternity, the necessary procedures may operate in several different ways.\(^{53}\) As Justice Kennedy noted, the "uncontestable fact" is that any technique necessarily entails "a different set of rules" for moms and dads.\(^{54}\) At times no actual relationship is, in fact, necessary to establish the "enduring" relationship prompting legal paternity.\(^{55}\) Justice Stewart noted that the male connection may be proven by marriage to the biological mother or by an "actual relationship between father and child."\(^{56}\) Elsewhere, a biological dad may prove an "enduring" relationship under paternity laws by employing a state-established paternity register;\(^{57}\) by appearing on the birth certificate; by swearing under oath or otherwise acknowledging paternity;\(^{58}\) by procuring a court order adjudicating paternity;\(^{59}\) or by providing child support.\(^{60}\)

Whether or not substantive legal paternity norms require proof of biological ties, for many of the relevant procedures alleged biological dads will often depend upon the acts of biological moms to establish the "enduring" relationships needed for legal paternity.\(^{61}\) Moms by themselves can flee, fail to disclose a pregnancy, abandon a newborn or misrepresent their sexual encounters.\(^{62}\) Governmental procedures used by men to establish biological ties or otherwise "enduring" relationships should take account of the role of moms. For example, procedures in many settings should allow biological dads access to testing or other proof so that they may seize their "unique opportunity" to "grasp" legal paternity. Unfairness arises when procedures fail to account for the "unique opportunity" of

\(^{53}\) Caban, 441 U.S. at 397 (Stewart, J., dissenting).
\(^{54}\) Nguyen, 533 U.S. at 62-63.
\(^{55}\) Michael H., 491 U.S. at 133 (Stevens, J., concurring).
\(^{56}\) Caban, 441 U.S. at 397 (Stewart, J., dissenting).
\(^{57}\) See generally, e.g., Mary Beck, Toward a National Putative Father Registry Database, 25 HARV. J.L. & PUB. POL’Y 1031 (2002) (proposal for a national putative father registry database that will enhance and connect state and local registries).
\(^{58}\) See, e.g., In re Byrd, 552 S.E.2d 142, 147-48 (N.C. 2001). Acknowledgment alone may be insufficient in some settings, as under adoption laws that require the consent of the biological dad only where there has been an acknowledgment and the provision of "tangible support." Id. at 148.
\(^{59}\) UNIF. PARENTAGE ACT § 637(d), 9B U.L.A. 352 (2001). Not all court orders recognizing paternity are adjudications of paternity. See, e.g., id. (all divorce decrees are not accorded res judicata, the Act proposes divorce decrees are parentage adjudications where they expressly use such terms as "issue" or "child" of the marriage).
\(^{60}\) See OR. REV. STAT. § 109.230 (2001) ("Any contract between the mother and father of a child born out of wedlock is a legal contract, and the admission by the father of his fatherhood of the child is sufficient consideration to support the contract.").
\(^{61}\) See generally In re Baby Girl P., 802 A.2d 1192 (N.H. 2002).
\(^{62}\) See generally id. at 1194.
biological moms to thwart parental initiatives by biological dads. Only a biological mom is always present at birth; often only she controls the flow of information on her pregnancy and its aftermath. Unfortunately, many paternity laws today unfairly prompt paternal rights or assign paternal responsibilities for biological dads without taking proper account of maternal conduct. As well, paternity laws today at times also unfairly allow others, such as the husbands of biological mothers or men who mistakenly assert biological ties, to play too key a role in legal paternity proceedings involving true biological dads.

II. ILLUSTRATING UNFAIR LEGAL PATERNITY PROCEDURES

Varying forms of procedural unfairness in legal paternity designations are illustrated in recent West Virginia litigation involving a badly-acting mom, a deceived biological dad, and a man mistaken as to paternity who actually fathered for a while. While the records in the cases were incomplete, the following pertinent facts were judicially found.

Mr. K. filed for divorce from Ms. P. in July 1994, about a month before she gave birth to Robert. At the time of birth, no father's name was listed on Robert's birth certificate. Shortly after Robert's birth, on October 12, 1994, Mr. C. and Ms. P. completed a notarized paternity acknowledgment for Robert indicating that Mr. C. was the biological father. Later, Robert's birth certificate was amended to add Mr. C. and to give Mr. C.'s last name to Robert. Mr. K. and Ms. P. were divorced in

63. See, e.g., id. at 1193-94.
64. See supra notes 61-62.
66. The unfairness to biological dads due to the improper account under law of maternal and third party conduct is occasionally recognized. See, e.g., In re Jerry P., 116 Cal. Rptr. 2d 123, 138 (Ct. App. 2002), op. superseded, In re Jerry P., 46 P.3d 331 (Cal. 2002), and review dismissed & remanded, 53 P.3d 133 (Cal. 2002) (Unconstitutional for statute to deny a biological dad his constitutionally-protected opportunity to establish paternity at or shortly after birth by vesting in a biological mother "unilateral" control even where the dad promptly steps up and demonstrates a full commitment to his parental responsibilities). But cf Baby Girl P., 802 A.2d at 1197 (Mom's perjured affidavit and her failure to identify or notify unwed biological dad in adoption setting that caused dad to miss timely appearance in adoption case was irrelevant when statutory prerequisites to dad's participation were applied).
68. Id. at 671.
69. Id.
70. Id.
71. Id. at 671-72.
72. Id.
December 1994, through a court order stating there were no children born into the marriage.\textsuperscript{73} In March 1995, a state agency sued Mr. C. in Raleigh County to obtain child support for Robert.\textsuperscript{74} In the suit Mr. C. was tested at his request and was found not to be Robert’s biological father.\textsuperscript{75} In October 1996, this support case was voluntarily dismissed.\textsuperscript{76} In June 1997, a similar but separate support case was presented by the same state agency against Mr. K. in Fayette County.\textsuperscript{77} There, Mr. K. was shown by blood tests to be Robert’s biological father.\textsuperscript{78} The agency lawyer in the second case, perhaps because it was pending in a different West Virginia county, “may not have known the details of the earlier legal action” involving Mr. C.\textsuperscript{79} In June 1998, the second trial court declared Mr. K. to be the “legal father” and to owe child support.\textsuperscript{80} At the same time, it ordered Mr. K.’s name to be placed on Robert’s birth certificate.\textsuperscript{81} When Mr. K. learned in July 1998, that Mr. C. was already on the certificate, he moved to set aside the June 1998 orders.\textsuperscript{82} Though he prevailed in the trial court, the state agency appealed and won, with the West Virginia Supreme Court of Appeals finding that Mr. K. was the legal father of Robert.\textsuperscript{83}

While assuming the truth of Mr. K.’s assertion that Ms. P. “did everything she could” for several years to hide Robert’s biological parentage, the high court nevertheless ruled that such “concealment”, even if “inequitable” as to Mr. K., “ordinarily” can not “be attributed to an innocent child so as to weigh substantially on behalf of freeing a biological father from the responsibilities of supporting his offspring.”\textsuperscript{84} As well, it held “the implicit decree of non-paternity” within the divorce court order could not benefit Mr. K. “in an action brought \textit{on behalf of the child} to
obtain support."\(^{85}\) While noting that Mr. C. was not involved as a "party" in the child support action against Mr. K. (but in "hindsight" should have been), it did note that had Mr. K. won the second suit, then "further proceedings against Mr. C. would probably succeed in the long run," since one of the two men (barring "some unforeseen intervening event") is "likely going to be held responsible for child support" and since the suit against Mr. K. "is fairly seen as a conflict between the two paternities."\(^{86}\)

The high court did note that the legal issues raised on appeal by the state and against Mr. K. were not "adequately" presented in the trial court.\(^{87}\) Yet this "neglect" would not be attributed to Robert to his detriment.\(^{88}\) In part, the court said this neglect encompassed the failure of the state to insist on "the proper involvement . . . of a guardian" for Robert, deemed "essential when paternity is an issue before a court."\(^{89}\)

Were the legal paternity procedures unfair in the varying state-controlled mechanisms used to designate legal paternity for Robert? Consider first the initial birth certificate for Robert on which no father was named.\(^{90}\) A West Virginia statute, both at the time of Robert's birth and now, demands: "If the mother was married either at the time of conception or birth, the name of the husband shall be entered on the certificate as the father of the child unless paternity has been determined otherwise by a court of competent jurisdiction . . . ."\(^{91}\) Had Mr. K. been named on the certificate at the request of Ms. P., as required by the statute, perhaps he would have inquired and learned earlier that the lack of biological ties and the one-time maternal inclinations of wives do not necessarily foreclose all future paternal responsibilities for husbands.

Consider next the notarized paternity acknowledgment for Robert by Mr. C., which he had to include under West Virginia law writings by both Mr. C. and Ms. P. but not by Mr. K.,\(^{92}\) though Mr. K. had been married to

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\(^{85}\) Michael George K., 531 S.E.2d at 678.

\(^{86}\) Id. at 677. The court did not explain how a finding of non-paternity based upon biology in the suit against Mr. K. would likely mean the earlier lawsuit finding of non-paternity based upon biology was wrong as to Mr. C. Is it not more likely, given the accuracy of blood tests, that there was another man and additional "concealment" by Ms. P.? Id. at 678.

\(^{87}\) Id. at 675.

\(^{88}\) Id.

\(^{89}\) Id.

\(^{90}\) Id. at 671.

\(^{91}\) W. VA. CODE § 16-5-12(g) (2002).

\(^{92}\) Id. Under a 1989 West Virginia statute on paternity, acknowledgment by an alleged natural father, "consent" by the natural mother is also needed, together with findings that a state circuit court judge is "satisfied" the male "applicant is the natural father and that establishment of the relationship is for the best interest of the child. . . ." Upon such acts the
Ms. P. throughout the pregnancy and birth, in a setting where at least Ms. P. knew that Mr. K. could be the biological father. Seemingly, Mr. K. was unaware of these writings when made in 1994, and of the later alteration of Robert’s birth certificate naming Mr. C. as the father of Robert. Had he been notified, Mr. K. likely would have altered his thinking, and perhaps his conduct, as to his own potential parental responsibilities and any existing legal paternity presumption.

Next consider the 1995 state agency proceeding in Raleigh County against Mr. C. Here too Mr. K. was unaware. The West Virginia Supreme Court of Appeals did not expressly lament either Mr. K.’s absence or the lack of “proper involvement” of a guardian ad litem on behalf of Robert. Had Mr. K. and Robert been present, the “conflict between the two paternities” would have been resolved then, not later.

Finally, consider the 1997 state agency proceeding in Fayette County against Mr. K. Here, the lack of involvement by both Mr. C. and Robert concerned the Supreme Court. But, Ms. P. was also not present, leaving ensuing court order establishes the child as “the child of the applicant, as though born to him in lawful wedlock.” W. VA. CODE § 48 A-6-6 (1989). The statute was amended in 1995, calling for written paternity acknowledgments to be “filed with the state registrar of vital statistics” and mandating “new” birth certificates. W. VA. CODE § 48A-6-6 (1995). These acknowledgments establish the men as fathers “for all purposes.” Id. An acknowledgment became revocable if “a court of competent jurisdiction finds that such acknowledgment was obtained by fraud or duress.” Id. The statute was again amended in 1997, making a paternity acknowledgment subject to rescission within the earlier of sixty days from the date of its execution or of the date of an administrative or judicial proceeding relating to the child in which the signatory is a party. W. VA. CODE § 48 A-6-6(d) (1997). After sixty days, an acknowledgment may only be challenged “on the basis of fraud, duress or material mistake of fact, upon a finding of clear and convincing evidence by a court . . . .” Id. Today, the West Virginia law on “written, notarized” paternity acknowledgments still requires filing with the vital statistics registrar. W. VA. CODE § 16-5-12(i), (i)(3) (2002). Acknowledgments may still only be rescinded after sixty days for “fraud, duress, or material mistake of fact . . . upon a finding of clear and convincing evidence . . . .” W. VA. CODE § 16-5-12(i)(4)(C) (2002).

93. Michael George K., 531 S.E.2d at 672.
94. Id.
95. Id.
96. Id. at 675. As well, the West Virginia Supreme Court of Appeals did not discuss any inadequacy in the presentations in the earlier support action by the state agency against Mr. C., such as why estoppel did not operate to preclude Mr. C. from contesting paternity as the paternity acknowledgment and related order under the West Virginia statute established Robert as the child of Mr. C. “as though born to him in lawful wedlock.” W. VA. CODE § 48A-6-6 (1989). For discussions of paternity by estoppel, see, e.g., K. B. v. D. B., 639 N.E.2d 725, 727-31 (Mass. App. Ct. 1994); see generally B.E.B. v. R.L.B., 979 P.2d 514 (Alaska 1999).
97. Michael George K., 531 S.E.2d at 674.
98. Id. at 672.
99. Id at 677.
Mr. K.'s allegations as to her "concealment" unanswered. While deeming the 1997 suit "a conflict between the two paternities," the court did not describe the most appropriate means for resolving this conflict or what earlier procedures might have foreclosed the need for the 1997 litigation.

The West Virginia legal procedures for designating male parentage for Robert as of the time of his birth were employed in fundamentally unfair ways. They did not promote early, accurate, informed and conclusive legal paternity designations. While the West Virginia Supreme Court of Appeals acknowledged certain procedural deficiencies, neither it nor the state legislature has since taken corrective measures. How can legal paternity designations be better processed for Robert and for other children? How should legal paternity procedures treat biological dads like Mr. K., biological moms and wives like Ms. P., and alleged biological dads and one-time actual fathers like Mr. C.?

III. Creating Fairer Legal Paternity Procedures

A. Significant Time Periods

In exploring how legal paternity designations may be more fairly made, inquiries are needed into the conduct of biological dads, biological moms, children, social parents and others at three different times, namely, before the birth, at the time of the birth, and after the birth of the child. For a legal paternity designation based upon child support actually received from the biological dad, prebirth, at birth and/or postbirth acts may all be relevant, depending upon context. The ability of a biological dad to secure childrearing rights through child support payments, however, often depends not only on his own acts, but also upon the acts of the biological mother, which themselves might depend upon the acts of others like her

100. Id. at 678.
101. Id. at 677.
102. Id. at 671-72.
103. Id. at 675, 676 n.6, 677 n.10.
104. Not all procedural law problems associated with legal paternity determinations are considered herein. Elsewhere, difficulties have been found in statutes failing to provide much information on conduct that may cause the loss of parental opportunities. See, e.g., In re D.F., 748 N.E.2d 271, 280-82 (Ill. App. Ct. 2001), rev'd on other grounds, 755 N.E.2d 477 (Ill. 2001) (Adoption Act void for vagueness in that it fails to describe adequately how "neglect" or "misconduct" can lead to termination of parental rights).
105. Michael George K., 531 S.E.2d at 671.
parents or her husband (or guys like Mr. C.).\textsuperscript{106}

Paternity laws can cause some future biological dads to lose their opportunities for parental rights because of prebirth conduct.\textsuperscript{107} State laws guiding a “natural father’s unique opportunity”\textsuperscript{108} to grasp parenthood can operate primarily or exclusively before birth even where the dads were unaware of, or misled about, the pregnancies. Thus, biological dads may lose parental rights in adoption proceedings through their failures to provide prebirth support\textsuperscript{109} even though they did not know, and could not have reasonably known, of their impending offspring.\textsuperscript{110} Similarly, biological dads may lose parental rights in adoption cases through their failures to pursue prebirth paternity actions.\textsuperscript{111} While prebirth support or paternity action failures may end future parental rights, they do not necessarily eliminate future parental responsibilities for biological dads. For example, prebirth failures often only mean that biological dads have no rights to individualized notices of the possible adoptions of their offspring, though these same dads may be pursued later for child support in paternity actions brought on behalf of their offspring, at times after anticipated adoptions fizzle.\textsuperscript{112} The potential for unfair procedures seems great when the prebirth conduct of biological dads is legally relevant.

As well, paternity laws can cause some biological dads to lose

\textsuperscript{106} Id. at 672-73.
\textsuperscript{107} Id. at 673.
\textsuperscript{108} Michael H., 491 U.S. at 129.
\textsuperscript{109} See, e.g., In re Adoption of Doe, 543 So. 2d 741, 746 (Fla. 1989); In re Adoption of Baby E.A.W., 658 So.2d 961, 967 (Fla. 1995) (Prebirth child abandonment negating need for biological father to consent to adoption).
\textsuperscript{110} See, e.g., In re Paternity of Baby Doe, 734 N.E.2d 281, 285, 287 (Ind. Ct. App. 2000) (Stating in an adoption setting “[a]lthough we have found no Indiana cases addressing this issue, other courts from sister states considering cases similar to this one have placed the responsibility for promptly asserting parental rights on the putative father, even when the mother of the child has attempted to prevent the father’s knowledge of or contact with the child . . . . We further agree . . . that a child should not be made to suffer when a putative father is ignorant of his parenthood due to his fleeting relationship with the mother and her unwillingness to notify him about the pregnancy. The child should also not be made to suffer when a putative father makes no inquiry regarding the possibility of a pregnancy.”). Cf. Doe v. Queen, 552 S.E.2d 761, 764 (S.C. 2001) (Biological dad’s consent to adoption is needed as his “strict” compliance with prebirth support duty is excused, when caused by “the whim” of the biological mom, where the dad acted sufficiently and promptly upon learning of birth).
\textsuperscript{111} See, e.g, In re Paternity of M.G.S., 756 N.E.2d 990, 997-98 (Ind. Ct. App. 2001) (Where putative father fails to file a prebirth paternity action within thirty days of receiving notice of mother’s intent to place child for adoption, he gives his “irrevocable implied consent” to the adoption under statute even though he registered with the putative father registry twenty-three days after his child was born, which occurred before any adoption petition was filed).
\textsuperscript{112} Id. at 1001-03.
parental rights because of conduct at or near the time of birth. Some laws terminate at or shortly after birth the unique change to grasp parenthood in settings where the biological dad was unaware of or deceived about the newborn child. And again, at birth conduct may end future paternal rights but not future paternal responsibilities. For example, a married woman whose newborn she knows is biologically tied to a man who is not her husband, may conceal such ties and name her husband as the father on the birth certificate, prompting only for the husband parental rights and responsibilities. Yet, usually upon divorce, often she can rebut the presumption and pursue the biological father in court for child support based upon scientific tests which she prompts, though the biological father long ago may have lost any real chance to grasp his unique opportunity to establish an “enduring” parent-child relationship. Unfair procedures, thus, can arise during legal paternity designations founded on conduct at the time of birth.

Finally, paternity laws can prompt some biological dads to lose parental rights because of their postbirth failures to step up to parenthood. They too can operate where these dads were unaware or deceived and again, the loss of rights does not always trigger immunity from responsibilities. For example, limitation periods, such as two years from the time of birth, may bar paternity actions by biological dads

114. See, e.g., In re Baby Boy K., 546 N.W.2d 86, 101 (S.D. 1996). See also discussion infra note 122.
116. See, e.g., Baby Girl P., 802 A.2d at 1195-96.
117. Id.
118. Consider, as well, adoption laws foreclosing unwed biological dads from even receiving notice of adoption proceedings because they failed to initiate paternity actions or to hold themselves out as fathers shortly after birth, even though such actions were practically impossible given the moms’ deceit or failures to identify the dads. Id. at 1198 (Dads, even those out-of-state and deceived, must act before moms consent to adoption in order to be entitled to notice; here, consent by mom to adoption occurred ten days after birth).
119. See, e.g., Paternity of M.G.S., 756 N.E.2d at 997-98.
120. See infra note 122.
121. But see In re Adoption of Baby Girl H., 635 N.W.2d 256, 259 (Neb. 2001) (upholding thirty-five day time period within which putative father must act to challenge a proposed adoption, in a setting where a lawsuit was required and where one was actually filed by the father in a timely manner, but where the filing occurred in the wrong court); Heidbreder v. Carton, 645 N.W.2d 355, 366-68 (Minn. 2002) (Registration on Fathers’ Adoption Registry on thirty-first day after birth failed to meet thirty day rule that would have prompted for the putative father the right to notice of future adoption proceedings; substantial compliance was insufficient and unwed mother had no fiduciary duty to notify the putative father of her whereabouts).
desiring parental rights, even when they seek legal paternity as soon as they learn of their children's births in settings where their earlier ignorance was beyond their control. Yet, paternity actions against these same men on behalf of children seeking child support are not similarly barred. Support claims may even be pursued by teenaged girls who, until then, believed that other men were their biological dads. In paternity designation settings where postbirth conduct is relevant, unfair procedures abound.

B. New Birth Certificate Laws

Without altering the substantive law guidelines, though they too may be fairly criticized, American legal paternity procedures founded on inquiries into prebirth, at birth and postbirth acts can most easily be improved by reforming birth certificate laws. If birth certificates entered at or shortly after the time of birth, and if later birth certificates and birth certificate amendments, more accurately and comprehensively addressed

122. See, e.g., Baby Boy K., 546 N.W.2d at 101 (Unwed mother's failure to tell biological father of pregnancy and her misrepresentation to the trial court about the father's identity did not warrant exception to sixty day statutory time period, within which biological father had to assert paternity or lose any right to notice of a parental rights termination case involving his child); Paternity of Baby Doe, 734 N.E.2d at 285-287 (similar cases reviewed).

123. See, e.g., 750 ILL. COMP. STAT. ANN. 45/7 (West 2002). Yet actions by biological mothers to disestablish one man's earlier legal paternity designation, so as to establish legal paternity or legal fatherhood for another man, may be barred after a certain time, at least where the mother knew during the relevant time that the first man was not the biological father. See, e.g., Donath v. Buckley, 744 N.E.2d 385, 388-389 (Ill. App. Ct. 2001) (Two year statute bars mother in setting where earlier designated father has no desire to sever parent-child ties).

124. See, e.g., N.Y. FAM. CT. ACT § 517 (McKinney 1998) ("Proceedings to establish the paternity of a child may be instituted during the pregnancy... or after the birth..., but shall not be brought after the child reaches the age of twenty-one years, unless paternity has been acknowledged by the father in writing or by furnishing support.").

125. Any reforms of unfair procedures in other legal paternity settings, as with paternity acknowledgments and paternity cases, are not addressed herein. Nor does the paper look to legal procedures which may be unfair to biological dads in settings not directly involving legal paternity designations, as in the recent statutes permitting safe havens for abandoned babies. See, e.g., 325 ILL. COMP. STAT. ANN. 2/30 (West 2002) ("[R]elinquishing [parent]," usually a biological mom, has a "right to remain anonymous and to leave... and not be followed or pursued," when abandoning a child who was not abused or neglected, though the biological dad is unknown to state officials.). Commentaries include Tanya Anset, Note, South Carolina's Safe Haven for Abandoned Infants Act: A "Band-Aid" Remedy for the Baby-Dumping "Epidemic", 53 S.C. L. Rev. 151 (2001); Michael S. Raum & Jeffrey L. Skaare, Encouraging Abandonment: The Trend Towards Allowing Parents to Drop Off Unwanted Newborns, 76 N.D. L. Rev. 511 (2000) (reviewing safe haven laws).
the parental status of all involved men, including husbands, biological dads, and adopting dads, societal and individual interests in early, accurate, and conclusive legal paternity designations would be promoted. Any later inquiries into legal paternity could more frequently employ these certificates, thereby avoiding duplication, excessive expense, and the undermining of settled expectations. How might birth certificates be entered more fairly?126

A birth certificate typically is entered under state law shortly after the birth of a child.127 It normally contains either the names or the signatures of the man and woman said to be the child’s parents.128 Frequently, designations of male parentage are neither corroborated nor supported by admissible evidence, as when they are based solely on the written statements of an unmarried mother and an alleged father.129 Where affidavits are required, often when moms are unmarried, there is often little done to insure their accuracy.130 Often, designations of male parentage are

126. The following suggestions address possible changes in American state laws, as neither federal laws nor local laws historically have addressed birth certificate procedures or such related matters as paternity acknowledgments or trial court adjudications of paternity. Should Congress become interested, it is unclear how far it may go in reforming birth certificate laws given recent Commerce Clause and Tenth Amendment developments. But see Harding v. Harding, 121 Cal. Rptr. 2d 450, 457 (Ct. App. 2002) (Federal Full Faith and Credit for Child Support Orders Act is constitutional). State law reforms would be greatly facilitated if uniform standards were newly debated and proposed by such groups as the National Conference on Commissioners on Uniform State Laws, whose earlier related works include the UNIF. ILLEGITIMACY ACT (1922), the BLOOD TESTS TO DETERMINE PATERNITY ACT (1952), the UNIF. PATERNITY ACT (1960), the UNIF. PUTATIVE AND UNKNOWN FATHERS ACT (1988), the UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988), and the UNIF. PARENTAGE ACT (2000). The latter work is especially helpful, as it deals with legal paternity designations for both marital and nonmarital children. See generally, e.g., Paula Roberts, Biology and Beyond: The Case for the Passage of the New Uniform Parentage Act, 35 FAM. L.Q. 41 (2001). The Uniform Parentage Act contains provisions on nonmarital children necessary for states seeking federal funding for their child support and Temporary Assistance to Needy Families programs. See, e.g., Title IV-D (national child support enforcement program) and Title IV-A (welfare funding program), including 42 U.S.C. § 666(a)(5)(C)(i), (D)(ii)(I) (2002) (voluntary paternity acknowledgments must be available; once filed, usually they will ripen into legal paternity determinations without any court orders and they can only be rescinded within sixty days of parental signings).

127. See, e.g., 410 ILL. COMP. STAT. ANN. 535/12(1) (West 2002).

128. See, e.g., id. 535/12(2).

129. See, e.g., id. 535/12(4), (5) (witnessed signatures of mother and father where mother is unwed); cf. 410 ILL. COMP. STAT. ANN. 535/12(2), (4) (only “personal signatures” of husband and wife received when wife delivers child and there is no indication that the husband is not the biological father).

grounded only on a legal presumption, as when the mothers are married,\textsuperscript{131} where the presumption may be rebutted by biological dads, but where there is no effort to identify or notify these dads.\textsuperscript{132} The public usually cannot access birth certificates;\textsuperscript{133} thus, errors cannot be revealed and parental rights and duties may not be known in the community.

Birth certificates can also be incomplete, often with information on male parentage missing. Male parents most frequently go unnamed where the female parents are unmarried at the time of birth.\textsuperscript{134} The number of incomplete birth certificates surely increased in the last forty years due to the rise in the number of births to unmarried mothers. In 1960, in the United States, five out of every one hundred children were born to unmarried mothers; by 1994, about one third of all children were born to unmarried mothers.\textsuperscript{135} Notwithstanding the increase in unmarried moms and the likely increase in incomplete birth certificates, state laws continue to do little to encourage the full, accurate, informed, and timely completion of birth records where moms are unmarried.\textsuperscript{136} Where birth certificates for conception or birth, the name of the father is not to be entered on the child's birth certificate unless the mother and the putative father sign an affidavit of paternity. Prior to signing . . . the mother and natural father are given written information explaining the implications of signing the affidavit and their resulting parental rights and responsibilities. Once the mother and putative father execute an acknowledgment . . . the man executing . . . is the father . . . for all intents and purposes and the acknowledgments . . . constitute a conclusive finding of paternity.

\textit{Id.} (citations omitted).

131. \textit{See} 750 ILL. COMP. STAT. ANN. 45/5 (West 2002) (presumption of paternity); \textit{see also} 410 ILL. COMP. STAT. ANN. 535/12(4).

132. \textit{See} 750 ILL. COMP. STAT. ANN. 45/7 (who may bring action to determine the father child relationship); \textit{see also} 410 ILL. COMP. STAT. ANN. 535/12(7).

133. \textit{See}, e.g., KY REV. STAT. ANN. § 213.131 (Banks-Baldwin 2001) (no access to vital records except as authorized by statute, regulation or court order); ILL. ADMIN. CODE tit. 77 § 500.20(c) (2002) (information collected for birth certificate shall be "maintained in a confidential manner").

134. The data is hard to locate. \textit{But see} Parness, \textit{supra} note 9, at 577 n.20 (October 1991 survey of all Illinois medical facilities believed to provide obstetrical services); Ann Nichols-Casebolt, \textit{Paternity Adjudication: In the Best Interests of the Out-of-Wedlock-Child}, 67 \textit{CHILD WELFARE} 245, 245 (1988) (The majority of out-of-wedlock kids never have paternity adjudicated).


136. Inaction may be traced to legislative concerns with cohabitation rather than with such births, but legislative failures nevertheless remain unjustified. \textit{See}, e.g., Ann Laquer
children of unmarried moms are incomplete, usually for the moms there is no legal "duty to notify" the biological dads of "the birth of the child"137 as well as no legal duty to secure for the child a designation of legal paternity where one is available.138 While birth certificates may be completed (or amended) later, changes to reflect the actual biological dads usually are not mandated and later governmental inquiries into missing information are not very searching139 or are not made at all.140

Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1408 (2001) which concludes:

Those who believe that law is a useful tool for shaping family behavior sometimes argue for maintaining a strong distinction between cohabitation and marriage in order to channel couples into marriage. The experience of the past quarter century, however, is not encouraging on this front. With more than four million cohabiting couples in the United States today, the law’s failure to address cohabitation is increasingly difficult to justify. One result of the fear that cohabitation will encroach further on marriage is that the courts have largely taken themselves out of the process of creating broader social norms to govern nonmarital relationships.

Cohabitation has become well established as a demographic reality and an emerging social practice. In the law, however, cohabitation is still regarded as anomalous, and its consequences remain highly indeterminate.... [C]ohabitants are still left to their own devising, in a space set off between legal rules.  

Id. (citation omitted).

137. See, e.g., *In re TMK*, 617 N.W.2d 925, 926-27 (Mich. Ct. App. 2000) (Biological dad, who knew of the pregnancy in 1994 and whose relationship with the biological mother ended before birth, could not complain in 1999 when the mom’s husband sought to adopt). There the court rejected the ground that the biological dad had been afforded no real chance to provide postbirth child support (which would have prompted for him a parental fitness hearing under *In re Dawson*, 591 N.W.2d 433, 435 (Mich. Ct. App. 1998)) since the mom did not advise the biological dad of the child’s birth until 1999 and she never sought child support from him. *In re TMK*, 617 N.W.2d at 926-27.

138. See, e.g., Heidbreder v. Carton, 645 N.W.2d 355, 368 (Minn. 2002) (No fiduciary duty on unwed biological mom to disclose her location at the time of birth “to the putative father even if she knows he wants to... establish a relationship with his child,” where she opts not to parent and for an adoption). Yet, to promote the best interests of children not only do moms owe their born alive children many legal duties in varying contexts, but at least some expectant moms also owe their unborn children certain comparable duties. See, e.g., Nat’l Cas. Co. v. N. Trust Bank of Fla., N.A., 807 So.2d 86, 87 (Fla. Dist. Ct. App. 2001) (child has claim against mom based on her prenatal negligence causing an auto accident, at least to the extent of her insurance coverage). On other prebirth maternal duties, see Jeffrey A. Parness, *Arming the Pregnancy Police: More Outlandish Concoctions*, 53 L.A. L. REV. 427, 430-435 (1992).

139. Thus, when an unwed biological mother places her child for adoption shortly after birth, usually she is not required to identify the biological father (or the suspects) by name and her account of the biological dad’s disinterest, abandonment, failure of support and the like, though usually in an affidavit, is taken at face value. See, e.g., Evans v. S.C. Dep’t. of Soc. Ser., 399 S.E.2d 156, 157 (S.C. 1990) (determining mother’s affidavit is sufficient even where the biological father’s identity and whereabouts might be gleaned through governmental pressure on the mother [reveal his name or your name will be used in the adoption proceedings]). At times, it is later learned that the account of a biological mom and the account of the biological dad vary dramatically. See, e.g., Brown v. Malloy, 546 S.E.2d
While the birth certificate typically is the first, it often is not the last legal designation of paternity. Multiple and inconsistent legal designations of male parentage often are made for a single child. For example, although a birth certificate may designate the husband of a new mother as the "presumed" father, the mother, the husband, the biological father, or the child may have some standing in a later court proceeding to challenge this presumption. Further, although an order in a marriage dissolution proceeding, as well as an earlier birth certificate, may designate a married couple as the legal parents, this designation may be challenged in a later paternity action brought by the child or perhaps by an alleged biological father, as neither was party to the earlier designations. Recall the West Virginia litigation involving Robert, where an incomplete birth certificate was followed by inconsistent legal paternity designations accomplished through a notarized paternity acknowledgment; an amended birth certificate; a child support case finding; and, another child support case finding.

One way to encourage better legal designations of paternity is to promote more complete, informed, and accurate birth records shortly after birth with laws providing that expectant mothers, new mothers, and others who are specially interested (including husbands and boyfriends) receive better information about the legal consequences of birth. For example,

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140. Thus, when an unwed biological mother maintains sole custody of a child with no designation of legal paternity, usually she will not be prodded by government to complete the birth certificate or otherwise to identify the father unless she seeks certain forms of financial assistance from the government on behalf of her child. See, e.g., Paternity of Cheryl, 746 N.E.2d 488, 491 (Mass. 2001) (reviewing federal and Massachusetts laws on cooperation and "good faith" efforts). So, actress Jodie Foster's secrets on the reproductive circumstances relevant to her two children likely will not receive governmental scrutiny. Governmental efforts to obtain missing information as to legal paternity where the mother is unmarried are lacking even in states where statutes seemingly require that both parents usually be designated on birth certificates. See, e.g., 410 Ill. Comp. Stat. Ann. 535/12(2) (For births in hospitals, hospital agents "shall obtain and record all the personal and statistical particulars relative to the parents of the child that are required to properly complete the live birth certificate," including the "required personal signatures."); Ill. Admin. Code tit. 77 § 500.20(d) (2002) ("The father's signature shall be affixed to the original birth certificate. . . .").
141. See, e.g., Michael George K., 531 S.E.2d at 672.
142. Id.
143. See, e.g., 750 Ill. Comp. Stat. Ann. 45/7 (determination of father and child relationship; who may bring action).
144. Id.
145. See Michael George K., 531 S.E.2d at 672.
146. Information conveyed per state law as to the legal consequences of impending births to men like Mr. K. may at times awaken the men to the pregnancies in which they
those providing childbirth services could be required to pass on information
to all women and others about the laws on parental duties, including laws
on prebirth parental responsibilities; on presumed fatherhood; on the
support obligations of unmarried men; and on the duties of biological
fathers married to other women. Some information should be distributed
long before birth. Social services, such as counseling, legal services and no
cost scientific testing, should be provided at times to those in need.

Laws promoting better legal paternity designations need not operate
exclusively prior to or immediately after birth. For example, those
specially interested in children without legally designated male parents at
the time of birth often need time to ponder the consequences of birth. Ms.
P. in the West Virginia litigation comes to mind. Additionally, DNA and
other paternity tests may not be immediately available for many
newborns. Consideration therefore should be given to promoting more
conclusive legal paternity designations that occur shortly after birth, but
perhaps as long as a year or two later. Here, a man specially connected to a
child biologically, by marriage, or otherwise has more time, and likely a
legally sufficient amount, to establish an “enduring” parent-child
relationship. The state could usually require periodic inquiry (by state
agents such as recordkeepers, by hospital personnel, or perhaps by others)
into the male parentage of a child whose birth record, without explanation,
lacks a male parent. These inquiries at least could involve the
dissemination of additional information on legal paternity and on available
governmental services. Consider how the legal paternity of Robert might
have been processed differently in West Virginia if Ms. P., and perhaps Mr.
K. who was then her husband, had received information about the relevant
laws shortly after Robert’s incomplete birth certificate was filed. Legal
paternity designations should not be encouraged, however, in certain
postbirth settings as where a birth seemingly resulted from a criminal act or

have particular interests. Did Mr. K. even know Ms. P. was pregnant when he sued for
divorce?

147. See, e.g., Michael D. Resnick et al., The Fate of the Non-Marital Child: A
Human Services agencies to initiate such requirements). But see 410 ILL. COMP. STAT. ANN.
535/12(5) (hospitals only required to pass such information on when birth is to “an
unmarried woman” or to a married woman who the hospitals know, or have reason to know,
delivered a child not biologically tied to her husband).

148. Health concerns may be significant for some newborns, while certain potential
biological fathers may be unavailable for testing at the time of birth.

149. See generally Jessica Pearson & Nancy Thoennes, Settings, 54 PUB. WELFARE 44
(1996) (a review of reasons why voluntary paternity acknowledgments often are not secured
at hospitals at the time of birth).
where a mother reasonably fears abuse. 150

Finally, lawmakers should also consider more seriously the circumstances appropriate for 'revived’ legal paternity. Here, biological ties would be employed to permit certain men a second chance to develop “enduring” parent-child relationships and to prompt paternal rights. Unlike retroactive legal paternity, where paternity based on biology is established long after birth but relates back in time to the date of birth, revived rights would be based, at least in part, on biology but would not relate back.151

Revived rights should be considered for children having no legal or actual fathers where the children would benefit from actual “enduring” relationships with their biological fathers, though other prospective fathers (such as adopters) might also be available.152 For example, revived legal paternity might be available for an unwed biological dad who wishes to step up to fatherhood after his child’s unwed mother seeks child support or dies in a setting where the child is young and there are no extended family members related to the mother who themselves look to step up. Revived legal paternity may even be made available to a wed biological dad, as Mr.
K. who seemingly failed to grasp parenthood earlier on, but whose biological child later became fatherless when the support suit against Mr. C. was voluntarily dismissed.\textsuperscript{153}

These suggested initiatives and others promoting better legal paternity designations are not without drawbacks. Requirements prompting new or additional governmental investigations of procreational activities would undercut the actual freedoms enjoyed today by many women regarding male involvement in their children's lives, perhaps implicating at times the federal constitutional informational privacy, procreational, and childrearing rights of these women.\textsuperscript{154} Further, the reality that many biological dads are not involved in their children's lives also might be diminished. Contemporary freedoms and constitutional interests of adults will need to be balanced carefully with the children's and the government's interests in better legal paternity designations. Undoubtedly, the balancing will be difficult on occasion.

Concerns about promoting only traditional, two-parent designations also arise. New laws promoting better legal paternity designations should not mean that all or most children should have at least one male parent under law. A child born as a result of a rape or artificial insemination by an anonymous donor may never have a male parent recognized under law.\textsuperscript{155}

\begin{quote}
153. Even if "revived" legal paternity did become available to Mr. K. when the June, 1997 support suit against him was commenced, revival should not always depend upon the fortuity of Ms. P.'s poverty and on the government's attempt to aid her.

154. \textit{See, e.g.}, Livsey v. Salt Lake County, 275 F.3d 952, 955-956 (10th Cir. 2001) (Federal constitutional privacy right, encompassing individual interests in avoiding governmental disclosure of personal matters, can require a compelling governmental interest in the disclosure of intimate marital matters even where there is a legitimate governmental need to investigate); Johnson v. Superior Court, 95 Cal. Rptr. 2d 864, 873-875 (App. 2000) (Parents and child could compel a semen donor's deposition and the production of relevant documents from a sperm bank because the agreement between the sperm bank and the sperm buyers precluding disclosure of the donor's identity and related information was unenforceable due to its conflict with the state's compelling interests in the health and welfare of its children); Planned Parenthood v. Iowa Dist. Ct., No. 02-1191 (Iowa continuance filed Aug. 12, 2002) (Issues concern a prosecutor's ability to obtain pregnancy records from a private clinic relevant to its search for parent(s) who left an infant's body at a recycling center).

155. \textit{See, e.g.}, State \textit{ex rel.} D.R.M. 34 P.3d 887, 892 (Wash. App. 2001). The State suggests the child must have two parents and both must be accountable to support the child. Does a child have to have two parents? ... No. ... [consider ... instances where a child may have only one parent. The law allows relinquishment of parental rights by one parent. A parent may have ... parental rights terminated. The State may block a paternity action based on the child's best interests, resulting in a single parent for the child. The adoption statute does not limit adoption to married couples; single people are eligible to adopt. The law does not prohibit artificial insemination of a single woman that could result in only one parent for the child. The surrogacy statute does not limit surrogacy to
Similarly, a two-parent setting need not inevitably involve at least one man. A child born to an unmarried woman who has been artificially inseminated by an anonymous donor could, practically speaking, have two female parents and no male parent in certain settings, as perhaps with the children of singer Melissa Etheridge and Julie Cypher, where singer David Crosby (at the apparent urging of his wife) became a genetic dad but not a parent, at least not yet,\textsuperscript{156} by doing what he called the "perfectly natural thing."\textsuperscript{157}

In considering reforms to birth certificate laws, lawmakers should also ask whether our laws should continue to limit a child to only one or two parents. Some children may benefit if they were designated under law as having three or more parents as of the time of birth. In Louisiana, the concept of dual paternity provides that a mother, a mother’s husband at the time of birth, and a biological father may all have legal duties to a child, although they all may not share the same rights of parentage.\textsuperscript{158} In a society where divorce and remarriage are commonplace, many children today have four actual parents, although they all are not always recognized fully under law. Thus, there are parental-like legal duties imposed on many stepparents, as when children live in their homes, though some of these, and other, stepparents have no significant legal rights in parenting.\textsuperscript{159}

\textsuperscript{156} In Sweden recently a known sperm donor who helped a lesbian couple have three children was deemed by a court liable to pay child support after the two women separated. Karl Ritter, \textit{Swedish Court Rules Sperm Donor is Legal Father of Three}, \textit{Chi. Daily L. Bull.}, Feb. 1, 2002, at 1 (reporting that the man’s girlfriend persuaded him to donate sperm and that the lesbian couple had earlier agreed to handle all parental responsibilities).

\textsuperscript{157} Chuck Arnold, \textit{Chatter: Father’s Say}, \textit{People Mag.}, Mar. 6, 2000, at 168. If there was but one biological mother, only she may have parental rights recognized under law. \textit{See, e.g.}, Sharon S. v. Superior Court of San Diego County, 113 Cal. Rptr. 2d 107, 109 (App. 2001) (Second parent adoptions used by same-sex female couples disallowed under general state adoption statutes, though a new law does allow a registered domestic partner to adopt the other partner’s child), \textit{review granted}, 39 P.3d 512 (Cal. 2002); \textit{In re Adoption of Luke}, 640 N.W.2d 374, 378 (Neb. 2002) (biological mom's companion could not adopt under state statute on adoption); \textit{V.C. v. M.J.B.}, 748 A.2d 539, 555 (N.J. 2000) (One-time partner in same-sex female couple may have become "psychological parent" to the child of her fit and involved partner, thereby acquiring the power to seek visitation; the necessary elements include an established relationship which was consented to and fostered by the legal parent); \textit{State ex rel. D.R.M.}, 34 P.3d at 888 (Wash. App. 2001) (same-sex partner who encouraged artificial insemination and birth for her partner may not later be held liable for child support when partnership ends); \textit{see In re Adoption of R.B.F.}, 803 A.2d 1195, 1202 (Pa. 2002) (second parent adoptions by same-sex couples allowed).

\textsuperscript{158} \textit{See, e.g.}, T.D. v. M.M.M., 730 So.2d 873, 875 (La. 1999) (recognizing both legal and biological paternity); \textit{Bolden v. Rogers}, 746 So.2d 88, 92 (La. App. 1999) (Biological father’s rights are not absolute; actual relationship with the child, established in a timely manner, is "determinative").

\textsuperscript{159} \textit{See, e.g.}, Bodwell v. Brooks, 686 A.2d 1179, 1181 (N.H. 1996).
Promoting earlier, more complete, more conclusive, more informed, and more accurate legal paternity designations may mean that some men who are biologically linked to children will lose forever the opportunity to parent through no fault of their own. But this is already happening to many men.\footnote{See, e.g., Baby Boy K., 546 N.W.2d at 101.} It may also mean that some men would bear forever the legal designation of paternity because of their earlier assumptions or their past reliance on false representations about their biological ties.\footnote{See, e.g., People ex rel. J.A.U. v. R.L.C., 47 P.3d 327, 333 (Colo. 2002) (Children’s best interests foreclose paternity disestablishments by men who earlier acknowledged paternity without genetic testing, though such results may seem to some “harsh or unfair”; typically such foreclosures are said to promote “a policy in favor of protecting children from belated resort to scientific proof as part of efforts to escape parental responsibility.”). While false representations about biological ties may not allow disestablishment of legal paternity, they may also not prompt tort claims against biological moms by biological dads. See, e.g., Day v. Heller, 653 N.W.2d 475, 478-82 (Neb. 2002) (Ex-husband may not sue his ex-wife though there are conflicting rulings in other states).} This too is already happening.\footnote{See, e.g., People ex. Rel. J.A.U., 47 P.3d at 333.} And, it may mean that some women will be less able to conceal the identities of biological dads.\footnote{See, e.g., Jones v. Murphy, 772 A.2d 502, 507 (Vt. 2001) (Dooley, J., concurring) (In all cases, biological fathers should have the obligation to support their children unless all parties involved knowingly and intentionally agree to a different financial arrangement. Creating a choice in the mother to seek support either from her ex-husband or from the biological father is neither fair to the ex-husband nor in the best interest of the child).} These are not insignificant costs. Nevertheless, our present procedures for designating legal paternity seem more costly. American governments and most Americans have significant interests in better assuring that a correct and lasting legal designation of paternity is made for every child around the time of birth.

CONCLUSION

The substantive guidelines for legal designations of paternity as of the time of birth vary significantly from state to state and often are quite varied even in a single state depending upon context. These guidelines are usually implemented through a variety of state-controlled procedures, including mechanisms for birth certificates; paternity cases; marriage dissolution cases involving child support, custody and visitation issues; and, paternity registrations. Not infrequently these procedures do not adequately promote the legitimate governmental interests in early, accurate, informed, and conclusive legal paternity designations. Too often, undesirable conduct by mothers or others leads to successive legal paternity designations, which are inconsistent, fortuitous, and inconclusive, as well as to unfair losses of
paternal rights or unfair assignments of paternal responsibilities. American paternity law reform is long overdue.