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Paternity Un(certainty): How the Law Surrounding Paternity Challenges Negatively Impacts Family Relationships and Women's Sexuality

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Abstract

It is popularly believed that false paternity rates are 10–30%, and that thousands of unsuspecting men are supporting children who are not theirs. These reported rates of false paternity have become urban legend, demonizing women as over-sexualized partners who shouldn't be trusted. This in turn has influenced laws regarding paternity, which have evolved to allow men to disestablish paternity years after a child's birth, even when there has been an adjudication or acknowledgment of paternity. This article argues that society should be cautious about elevating science as the highest consideration in truth claims about paternity. It examines the incoherent and inconsistent nature of family law concerning paternity challenges, and it illustrates ways modern cases elide the reasons a woman might keep paternity questions secret—for instance, when women have been subjected to domestic violence or sexual assault. Challenges to paternity involve complex factors which should not be reduced to the results of a DNA test.

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I. INTRODUCTION

The British television producer Chris Lewis, known for his work on the 2012 Olympics, sued his ex-wife for £300,000 when DNA tests suggested that she had deceived him about the paternity of their seventeen-year-old son.[1] In the United States, fears of false paternity have given rise to do-it-yourself paternity tests, and organizations such as U.S. Citizens Against Paternity Fraud and Women Against Paternity Fraud claim that "28–30% of fathers tested for paternity are not the real father."[2] Paternity fraud engages our attention during afternoon episodes of *The Maury Show*,[3] as well as in more high-brow entertainment, such as the film starring Meryl Streep and Julia Roberts, *August: Osage County*.[4] Even rappers like Kanye West fret about paternity fraud:

> 18 years, 18 years
> She got one of your kids, got you for 18 years
> I know somebody paying child support for one of his kids
> His baby mamma car and crib is bigger than his
> You will see him on TV any given Sunday
> Win the Superbowl and drive off in a Hyundai
> She was supposed to buy your shorty TYCO with your money
> She went to the doctor got lipo with your money
> She walking around looking like Michael with your money
> Should've got that insured got GEICO for your money,
> money, money
> If you ain't no punk holla we want prenup
> WE WANT PRENUP! Yeah
> It's something that you need to have
> 'Cause when she leave yo ass she gon' leave with half
> 18 years, 18 years
> And on her 18th birthday he found out it wasn't his.[5]

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[1] Rosemary Bennett, *TV Producer Sues Ex-Wife for £300,000 Over Child 'Lie,'* THE TIMES (Apr. 27, 2015, 12:01 AM), http://www.thetimes.co.uk/tto/law/article4423187.ece.

[2] *See* Grecia Aguilar, *Women Against Paternity Fraud Advocating for Men and Children*, 23 ABC NEWS BAKERSFIELD (June 19, 2015, 3:06 PM), http://www.turnto23.com/news/local-news/women-against-paternity-fraud-advocating-for-men-and-children-061815; *see About Us*, U.S. CITIZENS AGAINST PATERNITY FRAUD, http://www.paternityfraud.com/paternityfraud-aboutus.html.

[3] *See* MAURY, http://www.mauryshow.com/ (last visited Feb. 5, 2017).

[4] AUGUST: OSAGE COUNTY (Weinstein Co. 2013).

[5] Kanye West, *Gold Digger,* AZ LYRICS, http://www.azlyrics.com/lyrics/kanyewest/golddigger.html (last visited Feb. 5, 2017).

The hype surrounding paternity fraud is a relatively recent development, gathering steam in the late twentieth century as the field of human genetics blossomed with the Human Genome Project.[6]

In contrast, in the late nineteenth century, scientific testing could not accurately eliminate a man as the biological father of a child. Since a man could never be certain of his paternity, cuckoldry was a humiliating possibility, as even Goethe realized: "A man must take his children on trust."[7] The problem of paternity fraud or paternity uncertainty is a central issue in Karen Shepard's 2013 historical novel, *The Celestials*,[8] about Chinese strikebreakers who came to work in a shoe factory in North Adams, Massachusetts in the late 1800s. The factory owner's wife has an affair with the Chinese foreman, which results in the birth of an Asian-American daughter.[9] Calvin Sampson, the husband, at first rejects the baby, but agrees to raise her as his own.[10] Paternity fraud is also a central issue in August Strindberg's 1887 play, *The Father*,[11] about a husband's and wife's bitter struggle for control over their daughter. In Strindberg's play, the husband (called simply "The Captain"), has no reason to question his paternity. However, he is driven insane by his wife's implication that he might not be the father of his child,[12] in what is clearly a power-play on the wife's part to keep her teenage daughter from being sent away to boarding school.[13] Unlike Sampson, the Captain insists that if he isn't the father, he will immediately reject his daughter, because a man should not have to support a child that is not his.[14] Both fictional works are set in the late 1800s, before the availability of genetic testing for paternity, and both focus on the problem of false paternity or paternity uncertainty.

While neither Sampson nor the Captain could be certain of their paternity in the late 1800s, today both could obtain DNA testing to determine their paternity

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[6] *See* Mary R. Anderlik, *Disestablishment Suits: What Hath Science Wrought?*, 4 J. CTR. FOR FAMS., CHILD. & CTS. 3, 3–4 (2003).

[7] AUGUST STRINDBERG, THE FATHER, MISS JULIE, THE GHOST SONATA 54 (Michael Meyer trans., 2013) (quoting Goethe in *The Father*). *See also*, DiMichele v. Perrella, 2014 WL 2022243, * 2 (Conn. Super. Ct. Apr. 16, 2014) (quoting Shakespeare's *The Merry Wives of Windsor*, act 2, sc. 2, 1073–99, "See the hell of having a false woman! . . . Fie, fie, fie! cuckold, cuckold, cuckold!").

[8] *See* KAREN SHEPARD, THE CELESTIALS (2013). At the time the novel takes place, China was known as "The Celestial Empire." *Id.* at 19.

[9] *Id.* at 169–70.

[10] *Id.* at 180, 338. Sampson agrees to raise the child as his own after his wife, Julia, takes the infant and moves out of town.

[11] *See* STRINDBERG, *supra* note 7, at 15.

[12] The wife, Laura, taunts the Captain that "You can't be sure that you are Bertha's father," and when he asks her, "Are you trying to be funny?," she responds, "I'm only repeating what you've taught me." Laura learned this from a conversation opening the play, between the Captain and a soldier, who denied paternity of an unmarried pregnant woman he had promised to marry and then impregnated. *Id.* at 45, 27–29.

[13] *Id.* at 58.

[14] *Id.* at 57–58 (quoting the Captain: "Do you think I'd want to keep some other man's child if I knew you were guilty [of adultery?]").

with almost 100% certainty. In other words, today, science prevails. This article examines three points in arguing that society should be cautious about elevating science as the highest consideration in truth claims. Part one argues that society's moral panic about rates of false paternity demonizes women and influences paternity disestablishment legislation. Using Carol Smart's modified Foucaultian approach to family law discourse, part two considers the incoherent nature of family law concerning paternity challenges. Part three contends that modern cases elide the reasons a woman might keep paternity questions secret, and that it is important to bring these reasons to light in order to pave the way for change in legislation and judicial decision-making.

A. Moral Panics and Rates of False Paternity

Rates of false paternity are lower than commonly believed; however, with the availability of over-the-counter and on-line genetics tests, high rates of false paternity have become urban legend, which in turn has demonized women as defrauding scores of unsuspecting men.[15] It is popularly believed that false paternity rates are 10–30%.[16] For instance, the Florida case of *Parker v. Parker* asserts that the rate of false paternity (or, as the court states, children who "were the product of adultery") is at least 10%.[17] An even higher rate is quoted in the dissenting opinion of *Marriage/Children of Betty L.W. v. William E.W.*, which relies on the often-cited finding by the American Association of Blood Banks America: of 280,000 paternity cases, almost one-third excluded the tested individual.[18] In other words, "almost 100,000 men were falsely accused of being the father of a child [whom] they simply did not father."[19]

Despite the common belief that false paternity rates are 10–30%, studies by cultural anthropologists indicate that the overall rate of false paternity is lower than popularly believed, and that it is not static, but is tied to paternity

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[15] *See* Leslie Cannold, *Who's the Father? Rethinking the Moral "Crime" of "Paternity Fraud,"* 31 WOMEN'S STUD. INT'L F. 249, 250 (2008) (explaining that "Fathers' rights discourse articulates . . . ways in which paternity fraud cheats or defrauds men or children" and fathers' rights discourse labels "paternity fraud" as widespread); Lyn Turney, *Paternity Secrets: Why Women Don't Tell*, 11 J. OF FAM. STUD. 227, 227–29 (2005) (citing the popular figure of "between 10 and 30%" and arguing that society tends to demonize women as "predatory, deceptive, and instrumental" in perpetuating paternity fraud. Turney also blames "media and its audiences" for an increased interest in paternity testing.).

[16] Turney, *supra* note 15, at 228.

[17] *Parker v. Parker*, 916 So. 2d 926, 928 (Fla. Dist. Ct. App. 2005), *aff'd*, 950 So.2d 388 (Fla. 2007).

[18] *Compare In re Marriage/Child. of Betty L.W. v. William E.W.*, 569 S.E.2d 77, 88 (W. Va. 2002) (Maynard, Elliot E., dissenting) (basing its data upon testing in 1999), *with Women Against Paternity Fraud advocating for men and children* (describing that a non-profit organization cites 28-30% of false paternity according to American Association of Blood Banks), http://www.turnto23.com/news/local-news/women-against-paternity-fraud-advocating-for-men-and-children-061815 (June 19, 2015), *and* Kristen Jacobs, *If the Genes Don't Fit: an Overview of Paternity Disestablishment Statutes,* 24 J. AM. ACAD. MATRIM. LAWS., 249, 256 (2011).

[19] *William E.W.*, 569 S.E.2d at 88.

confidence.[20] Researchers Kermyt Anderson and Peter Gray found that in men with low paternity confidence, the rate of false paternity was 30%; but in men with high paternity confidence, the rate of false paternity was 2–3%.[21] Paternity confidence depends on men's "perceptions of the sexual fidelity of their mates and on the degree of trust and commitment within the relationship."[22] Anderson and Gray explain that men may have low paternity confidence when the couple is not married or when the pregnancy is a surprise.[23] Moreover, a man may also reevaluate his paternity confidence after the baby is born, based on whether the baby resembles him.[24] So, although the overall rate of false paternity differs for various cultures, in their study of Albuquerque, New Mexico, Anderson and Gray derived a rate of 3.7%, and noted that there is probably a higher rate in populations that are unstable—for instance, in populations that have a high rate of men in prison, in the military, or in migratory labor.[25] This first point is important to what follows because urban legend regarding high rates of false paternity has been used to demonize women as overly-sexualized adulteresses who should not be trusted, which in turn has influenced both legislation and case law.

B. Incoherent Family Laws on Paternity Fraud

Laws regarding paternity are incoherent not only amongst jurisdictions, but also within individual jurisdictions. As this part demonstrates, changes in the Uniform Parentage Act were shaped by both federal child support legislation and by scientific advances in paternity testing. States adopted versions of the Uniform Parentage Act or enacted statutes to comply with federal legislation in a patchwork fashion, resulting in vast inconsistencies across and within jurisdictions. These inconsistencies may be analyzed through a modified-Foucaultian approach, which explores the tensions between kinship claims and best interests of the child on one hand, and scientific claims to the truth of DNA tests on the other. Moreover, these laws may be critiqued as regulating women's sexuality because they deny a mother's right to choose who should be the father of her child, and also because they reinstitute heart balm remedies, such as various tort claims for paternity fraud.

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[20] PETER B. GRAY & KERMYT G. ANDERSON, FATHERHOOD: EVOLUTION AND HUMAN PATERNAL BEHAVIOR, 103–05 (2010). Gray and Anderson refer to "nonpaternity," rather than "false paternity." *Id.;* Turney, *supra* note 15, at 228.

[21] GRAY & ANDERSON, *supra* note 20, at 104–05.

[22] *Id.* at 111.

[23] *Id.*

[24] *Id.* at 111–12. Anderson and Gray note that studies "in the United States, Canada, and Mexico have found that the mother's relatives are more likely than the father's relatives to say that the new baby looks like the father—presumably hoping to reinforce his paternity confidence and downplay any doubts he may have."; Turney, *supra* note 15, at 228 (citing sources indicating that the rate of false paternity is between 1–4%). *Id.* at 112.

[25] GRAY & ANDERSON, *supra* note 20, at 106.

II. OVERVIEW

Before the 1973 Uniform Parentage Act (UPA), common law distinguished legitimate and illegitimate children.[26] Children were presumed legitimate if "born in lawful wedlock or within a competent time afterwards."[27] This presumption of legitimacy could be rebutted with proof of the husband's impotence or his absence "beyond the four seas."[28] An illegitimate child could not inherit from his mother or father, and when he died without heirs or a spouse, his property escheated to the state.[29]

The common-law distinction between legitimate and illegitimate children was abolished by the 1973 UPA, a model act which provided that all children were legitimate, despite the parents' marital status. [30] Under the UPA, presumptions of paternity included the common law marital presumption,[31] along with presumptions of paternity for an unmarried man who filed a claim of paternity, one who "received a child into his home and held the child out as his," one who was named (with his consent) on the child's birth certificate, or one who was ordered to pay child support.[32] In order to challenge paternity, a party with standing could file a paternity suit and attempt to prove a biological relationship by clear and convincing evidence; however, genetic testing based on blood tests were not highly accurate—they "excluded a man inaccurately identified as the biological father only 55% of the time."[33]

After Congress mandated child-support enforcement programs because of the increasing number of children born outside of marriage,[34] the 2002 UPA was drafted to comply with federal requirements.[35] The 2002 UPA extended the statute of limitations to establish paternity up until the child's eighteenth

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[26] HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 149–50 (2d ed. 1988).

[27] *Id.* at 151 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *446, *454).

[28] *Id.* at 152.

[29] *Id.* at 149–50.

[30] *Id.* at 150 (explaining in the 1960s, before the UPA, the United States Supreme Court began issuing decisions that struck down many disabilities of illegitimate children).

[31] Leslie Joan Harris, *Reforming Paternity Law to Eliminate Gender, Status, and Class Inequality*, 2013 MICH. ST. L. REV. 1295, 1301–02 (2013). The marital presumption also included children born within 300 days of the marriage's termination, or children born after the marriage when the husband filed an acknowledgement. *Id.*

[32] *Id.* at 1301–02.

[33] *Id.* at 1302–03.

[34] *See* Leslie Joan Harris, *A New Paternity Law For The Twenty-First Century: Of Biology, Social Function, Children's Interests, and Betrayal*, 44 WILLAMETTE L. REV. 297, 297, 300 (2007). [hereinafter *A New Paternity Law*] (noting that "In the 1970s, about 90 percent of all children were born to married women," whereas by the early twenty-first century, "about one-third of all children are born to unmarried women").

[35] *See id.* at 311.

birthday.[36] However, if there was a presumption of paternity, it could be challenged only within two years of a child's birth, and even then a court retained discretion to refuse to order a genetic test based on principles of estoppel and best interest of the child.[37]

The 2002 UPA also complied with federal law by providing that a mother and alleged father could sign a Voluntary Acknowledgment of Paternity (VAP), which would have the effect of an adjudication of paternity.[38] Federal law provided that a VAP could be rescinded within sixty days of birth or any order regarding the child, and after that, could be challenged based on "fraud, duress, or material mistake of fact."[39] However, federal law did not provide a time limit for VAP challenges, and did not define what constituted "fraud, duress, or material mistake of fact."[40] Under the UPA, the time limit for VAP challenges was two years after the VAP was filed, but a court could reject challenges on the basis of estoppel and best interest of the child.[41]

As discussed more fully below, states that adopted the 2002 UPA or enacted other statutes to comply with federal child-support enforcement provisions, did so in unique ways, resulting in vast inconsistencies across jurisdictions. For example, in Oregon, the UPA Working Group struggled to decide whether biology or the father-child relationship should determine the outcome of paternity challenges.[42] The majority view and the ultimate conclusion of the Working Group was that a court should retain discretion not to sever a father-child relationship because:

> [S]ociety has a legitimate interest in protecting children from harm, especially in situations where the legal father has also had a social relationship with the child. Although we cannot legislate that fathers have continuing social relationships with their children, social policy does not and law should not condone severing these relationships.[43]

Similarly, legal counsel in the District of Columbia explained that the goal of the District's conclusive presumption regarding a VAP was both finality of judgment and the need for child support.[44] The District's statute allows judges to

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[36] *Id.* at 312.

[37] *Id.* at 315–16.

[38] *Id.* at 313.

[39] *Id.; see also* Caroline Rogus, *Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws*, 21 MICH. J. GENDER & L. 67, 80, 90 (2014).

[40] *A New Paternity Law, supra* note 34, at 313–14.

[41] *Id.* at 316–17.

[42] *Id.* at 318.

[43] *Id.* at 319 (quoting OREGON LAW COMMISSION UNIFORM PARENTAGE ACT WORK GROUP. ESTABLISHING, DISESTABLISHING, AND CHALLENGING LEGAL PATERNITY 12 (2007)).

[44] *See* Rogus, *supra* note 39, at 85–86 (pointing out problems with the statute in terms of protecting men who sign VAPs).

deny court-ordered genetic testing for men who do not get their own genetic tests before they sign a VAP, and also allows a one-year statute of limitations to challenge a VAP after the rescission period.[45]

A. A Modified-Foucaultian Approach to Today's Laws

Today, laws concerning paternity challenges are incoherent and inconsistent. The rebuttable common law presumption that a husband is the father has given way to a web of inconsistent laws allowing both paternity challenges and civil tort actions for paternity fraud. Today, there are myriad presumptions for paternity, and paternity may be established through adjudication (which may include a divorce decree reciting children born of the marriage), or paternity may be established when the mother and father sign an acknowledgment of paternity.

In analyzing these inconsistent paternity laws, I use Carol Smart's modified-Foucaultian approach.[46] Smart describes modern family law as having "two parallel mechanisms of power, each with its own discourse, the discourse of rights and the discourse of normalization."[47] I will refer to these two parallel powers as the "old view" (Smart's rights discourse in which truth is associated with kinship and best interests of the child), and the "modern view" (Smart's normalization discourse in which truth is associated with biology).[48] Smart modifies Foucault's description of discourses of power because she observes that family law continues to exercise some of the ancient regime power that Foucault no longer finds in modern power regimes (the old view).[49] But Smart notes that family law also exercises a discourse of normalization that Foucault describes, in which it defers to the truth of science (the modern view).[50]

So under the old view (discourse of rights), law's power is not diminishing as Foucault describes, but rather, law incorporates other social discourses, such as psychology, yet law ultimately exercises a higher claim to truth, which might be based on what Smart describes as "an undeniably non-legal criterion" of the best interest of the child.[51] When law operates under the old power, it incorporates the new technologies to extend rights over one parent or another.[52] However, when law operates under the modern power (the discourse of normalization), it does not

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[45] *Id.* at 84, 86–87, 90–94 (noting that it is unclear whether the District even has a statute of limitations, and also arguing that the process is unfair to the many men who have no reason to challenge a VAP until after the government seeks child support, which is often after a year).

[46] CAROL SMART, FEMINISM AND THE POWER OF LAW 8 (Maureen Cain & Carol Smart eds., 1989) [hereinafter FEMINISM AND THE POWER OF LAW].

[47] *Id.*

[48] *Id.* at 8.

[49] *Id.*

[50] *Id.* at 11.

[51] *Id.* at 16.

[52] FEMINISM AND THE POWER OF LAW, *supra* note 46, at 16–17 (giving a surrogacy-adoption example).

exercise power to extend rights, but defers to new technologies, such as science and medicine, as having a higher claim to truth.[53]

One question is how law weighs various truth claims in determining paternity. This is informed by competing interests, which include at least these eight: the stability of the family (especially a marital family);[54] the right of the child to know his/her biological father;[55] the right of a child to keep a relationship with the father he/she has known;[56] the duty of the biological father to support a child and the unfairness that a non-biological father should support a child that is not his;[57] the right of a non-biological father to continue to raise a child he has always believed and held out as his own; the finality of judgments; [58] the prohibition against de-legitimizing a child or leaving a child fatherless;[59] and the lesser rights afforded to non-marital fathers, who lose their paternity rights if they fail to "develop a relationship" with their offspring.[60]

B. Absence of the Mother's Say in Paternity and Regulation of Women's Sexuality

What is missing from this list of competing interests is any mention of the mother's rights or interests in paternity. For instance, cases do not mention the mother's right to choose who will be the functional "father" of her child. A woman does not explicitly have this right in law, even if that is the effect of her actions, such as when Julia, in *The Celestials*, chooses her husband to be the functional (or psychological) father of her daughter.[61]

Even though women lack this legal right, some theorists, such as Gary Spitko and June Carbone, have argued that a woman should have the right to choose the

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[53] *Id.* at 18 (giving an abortion example).

[54] *See* Michael H. v. Gerald D., 491 U.S. 110, 120, 124 (1989) (describing how inquiries into paternity would harm "family integrity and privacy" and noting that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition").

[55] This interest in knowing genetic truth applies to both the children and to alleged fathers. *See* Godin v. Godin, 725 A.2d 904, 910 (Vt. 1998) (recognizing the interest of a biological father "in ascertaining the true genetic makeup of the child").

[56] *Id.* at 911 n.3 ("A finding of nonpaternity in this case would essentially leave the child without the benefit of a father-child relationship, and the economic and emotional well-being that accompanies it.").

[57] *See* Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less When Nature Prevails in Paternity Actions*, 65 U. PITT. L. REV. 811, 848 (2004) ("[I]t would be unfair to hold the father liable for years of child support for a child with whom he has no biological relationship.").

[58] *See Godin,* 725 A.2d at 909 ("[T]he fundamental policy concerns that require finality of paternity adjudications.").

[59] *See Michael H.,* 491 U.S. at 161 (detailing the protection of a child "from the stigma of illegitimacy").

[60] *See* Lehr v. Robertson, 463 U.S. 248, 262 (1983).

[61] SHEPARD, *supra* note 8, at 246–49.

father of her children.[62] Spitko bases his argument on what he describes as a "labor-with-consent theory."[63] Spitko urges that the father should be the man who receives a mother's consent to be a father and when he puts in labor by acting as a father in supporting the child and developing emotional bonds to the child.[64] Under Spitko's theory, a father's biological status alone is not sufficient labor; rather, a man must have "performed sufficient paternal labor" in order to have a "right to develop or maintain a relationship with his child."[65] Carbone generally agrees with Spitko, but notes that courts should be careful to define "consent."[66]

Thus, Spitko and Carbone convincingly argue that the mother's consent regarding who should be the child's other parent ought to carry great weight in court decisions. Their argument can be extended to view paternity disestablishment statutes and tort claims for false paternity as attempts to regulate women's sexuality.

C. Paternity Fraud Torts

Although about ten states have case law allowing tort claims for paternity fraud,[67] another eight do not allow such claims for the reasons given in a 2000 Maryland case, *Doe v. Doe*, in which a wife had an affair with her art professor.[68] The Maryland Supreme Court held in *Doe* that the ex-husband could not sue the ex-wife for tort claims (fraud and intentional infliction of mental distress) because

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[62] E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97 (2006); June Carbone, *From Partners to Parents Revisited: How Will Ideas of Partnership Influence the Emerging Definition of California Parenthood?*, 7 WHITTIER J. CHILD & FAM. ADVOC. 3 (2007).

[63] Spitko, *supra* note 62, at 121.

[64] *Id.* at 104 (Spitko argues that the gestational labor of the mother "give[s] . . . her status as the child's initial constitutional parent . . . [who] enjoys the right to determine who shall be allowed to become the child's second constitutional parent."). The labor-with-consent theory is "consistent with and helps explain the Supreme Court's unwed father cases." *Id.* at 113.

[65] *Id.* at 109 (noting that "[t]he biological father's role in conceiving the child is constitutionally insignificant as labor").

[66] Carbone, *supra* note 62, at 45–48, 54–55 (arguing that "consent should involve two components . . . holding out to the public. . . [and] implied consent to the assumption of parental status.").

[67] *See* DiMichele v. Perrella, 51 Conn. L. Rptr. 750 (Conn. Super. Ct. 2011); Koelle v. Zwiren, 672 N.E.2d 868 (Ill. App. Ct.. 1996); Dier v. Peters, 815 N.W.2d 1 (Iowa 2012); Denzik v. Denzik, 197 S.W.3d 108 (Ky. 2006); Mansfield v. Neff, 31 Mass. L. Rptr. 616 (Mass. Super. Ct. 2014); G.A.W., III v. D.M.W., 596 N.W.2d 284 (Minn. Ct. App. 1999); R.A.C. v. P.J.S., Jr., 927 A.2d 97 (N.J. 2007); Miller v. Miller, 956 P.2d 887 (Ok. 1998); Hodge v. Craig, 382 S.W.3d 325 (Tenn. 2012); Masters v. Worsley, 777 P.2d 499 (Utah Ct. App. 1989).

[68] Doe v. Doe, 747 A.2d 617 (Md. 2000). *See also*, Coulson v. Steiner, 2015 WL 10013667 (D. Alaska 2015); Nagy v. Nagy, 210 Cal.App.3d 1262 (Cal. Ct. App. 1989); Steve H. v. Wendy S., 960 P.2d 510, 67 Cal.Rptr.2d 90 (Cal. Ct. App. 1998); Grand v. Hope, 617 S.E.2d 593 (Ga. Ct. App. 2005); Renel v. Fortuna, 2014 WL 4628811 (Mich. Ct. App. 2014); Day v. Heller, 653 N.W.2d 475 (Neb. 2002); Hevey v. Hundley, 2013 WL 5782924 (Tex. App. 2013); Koestler v. Pollard, 471 N.W.2d 7 (Wis. 1991); St. Hilaire v. DeBlois, 721 A.2d 133 (Vt. 1998).

the damages were for conduct formerly actionable under heart balm statutes, which the state had abolished by the 1970s.[69]

The underlying basis for heart balm statutes such as criminal conversation was a man's right to bear his own children, which goes back to Anglo-Saxon law: "inheritance, as well as social standing, was largely dependent upon the 'lawful issue of pure blood.'"[70] Thus, only a husband (and not a wife) could recover damages for criminal conversation and adultery.[71] In *Doe*, the court rejected the ex-husband's tort claim as it attempted to revive this cause of action that had been abolished because "today's sense of the increasing personal and sexual freedom of women is incompatible with the rationale underlying this action."[72] The *Doe* court rejected the ex-husband's tort claim for the same reason; tort claims for false paternity have the indirect effect of regulating women's sexuality.[73]

D. Inconsistencies Across Jurisdictions

What is especially intriguing about paternity law is not only that different jurisdictions have different laws, but there can be inconsistency within a single jurisdiction. When paternity law operates under the old view that truth is based on kinship and best interests of the child, statutes provide that after a relatively short time—two to four years—paternity of a husband should be conclusive.[74] For instance, in Texas, where there is a presumed father (such as a husband) paternity challenges can be brought only within the first several years of a child's life.[75] Similarly, where there has been a voluntary acknowledgment of paternity ("VAP"), a man can rescind it within sixty days of signing it, but after that he can challenge it only on the basis of fraud, mistake, or duress—generally, states impose a short time period for these challenges, as well.[76] It should be noted that while the laws for rescission and challenge of VAPs are federally mandated, federal statutes do not define "fraud, duress, or mistake of fact," nor do federal

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[69] Doe v. Doe, 747 A.2d 617, 623 (Md. 2000).

[70] *Id.* at 623 (quoting Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 655 (1930)).

[71] *Id.*

[72] *Id.* at 623 (quoting Kline v. Ansell, 414 A.2d 929, 931 (Md. 1980)).

[73] *See id.* at 621, 623. *See also* Fernanda G. Nicola, *Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts*, 19 WM. & MARY J. WOMEN & L. 445, 467–69 (2013) (explaining state abolishment of amatory torts in response to sexual freedom). *But see* G.A.W., III v. D.M.W., 596 N.W.2d 284, 289 (Minn. Ct. App. 1999) (allowing tort claim for paternity fraud on basis that although the legislature had abolished heart balm suits, if it had wanted to do so, it could also have abolished all torts arising out of the marriage, but did not).

[74] *See* Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 569–70 (2000) (noting a two-year statute of limitations under the Uniform Parentage Act of 2000).

[75] TEX. FAM. CODE §160.607 (2015) (providing for a four-year statute of limitations under its enactment of the UPA).

[76] *See* Jacobs, *supra* note 18, at 254–55.

statutes include a limitations period, so these elements vary by state, as well.[77] Finally, under the old view, where there has been an adjudication (including a divorce judgment), that adjudication is typically considered a final judgment. If a final judgment is not appealed, it is nearly impossible to successfully challenge on a bill of review (because the fraud is generally considered intrinsic, and only extrinsic fraud may be challenged on a bill of review). In some jurisdictions, moreover, future challenges to paternity are barred by estoppel or res judicata.[78]

However, under the modern view that associates truth with science, paternity laws have substantially expanded men's ability to challenge paternity. Now, men may challenge paternity adjudications and VAPs for almost unlimited time frames under disestablishment statutes that allow a father to vacate paternity based on the results of a DNA test, without consideration of the best interests of the child or estoppel.[79] Additionally, some jurisdictions provide that a man is not responsible for past due child support if he vacates paternity.[80] Moreover, in a handful of jurisdictions that do not allow fathers to disestablish paternity, men may bring tort actions for fraud and intentional infliction of mental distress (and possibly negligent infliction of mental distress) against the mother, her lover, and her parents if they were complicit in hiding paternity.[81] Included in the tort judgments may be child support the man had paid.[82]

E. Jurisdictions Contain Internal Inconsistencies

Paternity laws vary wildly amongst the American states, but they also can vary wildly within a single state. For instance, in Arkansas, a man who signs a Voluntary Acknowledgment of Paternity ("VAP") can disestablish paternity based on a genetic test, and can even be relieved of past-due child support, but a man who is divorced cannot disestablish paternity because Arkansas considers the divorce decree to bar future litigation under res judicata and public policy reasons.[83] Georgia's and Florida's laws are just the reverse: a man can disestablish paternity after an adjudication, but if he signs a VAP, he can disestablish paternity

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[77] *Id.* at 255, 259.

[78] Glennon, *supra* note 74, at 571–72, 576–77.

[79] Jacobs, *supra* note 18, at 259–60.

[80] *Id.* at 264–65.

[81] *See* Doe v. Doe, 747 A.2d 617 (Md. 2000). *See also*, Coulson v. Steiner, 2015 WL 10013667 (D. Alaska. 2015); Nagy v. Nagy, 210 Cal.App.3d 1262 (Cal. Ct. App. 1989); Steve H. v. Wendy S., 960 P.2d 510, 67 Cal.Rptr.2d 90 (Cal. Ct. App. 1998); Grand v. Hope, 617 S.E.2d 593 (Ga. Ct. App. 2005); Renel v. Fortuna, 2014 WL 4628811 (Mich. Ct. App. 2014); Day v. Heller, 653 N.W.2d 475 (Neb. 2002); Hevey v. Hundley, 2013 WL 5782924 (Tex. App. 2013); Koestler v. Pollard, 471 N.W.2d 7 (Wis. 1991); St. Hilaire v. DeBlois, 721 A.2d 133 (Vt. 1998).

[82] *See, e.g.*, Dier v. Peters, 815 N.W.2d 1, 14 (Iowa 2012) (noting that according to Iowa code, a putative father may be relieved of future but not past child support obligations); Denzik v. Denzik, 197 S.W.3d 108, 113 (Ky. 2006) (reinstating the jury verdict, award the putative father all child support payments he made for the past five years.

[83] Martin v. Pierce, 257 S.W.3d 82, 89-90 (Ark. 2007) (interpreting Ark. Code Ann. § 9-10-115 (2016) and referencing Godin v. Godin, 725 A.2d 904 (Vt. 1998)).

only by showing fraud, mistake, or duress within a certain time frame.[84] Furthermore, in Texas, a man who is adjudicated the father or who signs a VAP without a genetic test can now petition to terminate parental rights within two years of discovering he has been defrauded and is not the biological father.[85] This statutory provision is outside the Texas Uniform Parentage Act statutes, which might bar a challenge in other states.[86] What is especially illuminating is to look at the discursive shifts in jurisdictions that move from the old view of rights discourse to the new view of normalization discourse—and, as the discussion below indicates, sometimes retain both in statutory schemes allowing disestablishment under some circumstances.

1. The Old View

The 2005 Florida case of *Parker v. Parker* illustrates the old view and may be contrasted with Florida's disestablishment statute enacted the year after *Parker* was decided.[87] In *Parker*, a married couple had a child, and the wife repeatedly assured her husband that he was the father.[88] When the child was three-and-a-half, the couple divorced, and in the divorce proceedings, the wife again represented that the husband was the father, so the divorce judgment stated that there was a child of the marriage.[89] This was a legal adjudication of paternity.[90] Two years later, when the child was about five, the ex-husband obtained DNA testing that showed that he was not the father.[91] About two months after that, the ex-husband filed a petition to disestablish paternity.[92] He alleged that the mother knew he was not the father "due to sexual relations she had with another man" and that she concealed that information in order to collect child support from him.[93]

The trial court dismissed his petition, which the appeals court affirmed because the ex-husband did not challenge the divorce judgment within the one year rule to set aside the judgment on the basis of extrinsic fraud, and moreover, the wife's fraud would be considered intrinsic fraud, so he could not have challenged it successfully even within a year.[94] The *Parker* appellate court opinion discussed the policy reasons for not allowing a father to challenge

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[84] GA. CODE ANN. §19-7-46.1(c) (2016); FLA. STAT. ANN. § 742.10(4) (2015).

[85] TEX. FAM. CODE § 161.005 (c)–(e) (West 2015).

[86] The Texas Family Code contains the Uniform Parentage Act provisions in Chapter 160 and the Termination of the Parent-Child Relationship provisions in Chapter 161.

[87] Parker v. Parker, 916 So. 2d 926 (Fla. Dist. Ct. App. 2005).

[88] *Id.* at 927.

[89] *Id.*

[90] *Id.* at 929.

[91] *Id.* at 927.

[92] *Id.*

[93] *Parker*, 916 So. 2d at 927.

[94] *Id.* at 934.

paternity after a short period—the concern with finality and the overriding concern with the "psychological devastation that the child will undoubtedly experience from losing the only father he or she has ever known."[95]

Moreover, the court quoted a Vermont decision describing the father as having a "belated and self-serving concern over a child's biological origins."[96] The Vermont decision quoted in the court's opinion had even stronger condemnation for a father who wants to disestablish parentage:

> The fact that plaintiff chose for self-serving purposes to jeopardize his relationship with [the child] is beyond our control. We need not, however, award plaintiff a financial windfall for his conduct, or deprive [the child] of not only a father's affection, but also the legal rights and financial benefits of the parental relationship.[97]

The solution for fathers, according to the Florida court in *Parker*, was to ask for genetic testing before final adjudication as the legal father.[98] The opinion recited, "there may be some merit in telling divorcing fathers who are in doubt to 'test now, or forever hold your peace.'"[99]

Thus, under the old view, if a father allows a judgment to be entered, or if he signs an acknowledgment without a genetic test, he is considered selfish when he later seeks to disestablish paternity. This view of the selfish father shows up in other court decisions. For instance, Indiana has a strong public policy against disestablishing paternity, and its court decisions contain strong metaphors. Some Indiana decisions view requests for genetic tests as "fishing expedition[s]" and allow paternity challenges only "in extreme and rare instances" because the state has "no intention of creating 'a new tactical nuclear weapon for divorce combatants.'"[100] Thus, a father in Indiana has to discover non-paternity almost inadvertently (like the father who learned only when he underwent genetic testing because a child from his prior relationship was being treated for sickle cell anemia).[101]

Under the old view of rights discourse, a court may declare a non-biological father to be the legal father on the public policy of estoppel, of support for the child, and of not delegitimizing the child. For instance, New York law deploys the old view of rights discourse. In order to vacate an acknowledgment of paternity, the court first holds a hearing to determine if there has been fraud,

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[95] *Id.* at 933.

[96] *Id.* (quoting Godin v. Godin, 725 A.2d 904, 910 (Vt. 1998)).

[97] *Id.* at 934 (quoting *Godin*, 725 A.2d at 911).

[98] *Id.* at 932–33.

[99] *Parker*, 916 So. 2d at 932.

[100] F.G. v. B.G., No. 49A05-1210-DR-506, 2013 Ind. App. Unpub. LEXIS 364, at *5–6 (Ind. Ct. App. Mar. 22, 2013).

[101] Fairrow v. Fairrow, 559 N.E.2d 597, 598 (Ind. 1990).

mistake, or duress.[102] If so, then the court holds a hearing to determine if it is in the best interest of the child to order a genetic test.[103] If the named father has established a relationship with the child, he will be estopped to deny paternity and the court will refuse to order genetic testing.[104] This was the case for the paternity suit against rapper Black Rob (Robert Ross).[105] The court of appeals reversed an order for genetic testing on the grounds of estoppel: "the child, nearly five years of age . . . recognized the respondent as her father and . . . enjoyed a relationship with him and members of his family."[106]

Under the old view of rights discourse, a man may nonetheless use a genetic test showing non-paternity for reasons other than to vacate paternity. This occurred in Alabama, when a husband who "persist[ed] in his status as the legal father," used the DNA test as evidence of his wife's adultery in their divorce suit.[107] Because the husband "persist[ed] in his status as the legal father," the biological father was prevented from challenging paternity.[108] The court indicated that a husband might use DNA evidence for other reasons than to disprove paternity, such as to confirm a biological relationship, to determine an accurate medical history, or to show a wife's adultery—which would impact a property division.[109]

2. The Modern View

The modern discourse of normalization that gives science a higher claim to truth is expressed in legislation. An example is Florida's 2006 enactment issued the year after the *Parker* case discussed above.[110] Under the modern view, father's rights prevail; or seen another way, science prevails. Florida's statute allows a father to disestablish paternity even after a time he would have had no legal remedy under the previous law. The statute provides that an adjudicated father may disestablish paternity or terminate child support based on "newly discovered evidence," i.e., a DNA test, without consideration of best interest of the child or

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[102] *See In re* Westchester Cty. Dep't of Soc. Servs. v. Robert W.R., 25 A.D.3d 62, 63 (N.Y. App. Div. 2005).

[103] *Id.*

[104] *Id.* at 71.

[105] Westchester Cty. Dep't of Soc. Servs. v. Robert W.R., 25 A.D.3d 62, 63 (N.Y. App. Div. 2005).

[106] *Robert W.R.*, 25 A.D.3d at 71.

[107] D.F.H. v. J.D.G., 125 So. 3d 146, 148 (Ala. Civ. App. 2013) (under the Alabama statute, "[i]f the presumed father persists in his status as the legal father of a child, neither the mother nor any other individual may maintain an action to disprove paternity" (quoting ALA. CODE § 26-17-607(a) (2009)).

[108] *Id.*

[109] *Id.* at 151–52.

[110] FLA. STAT. § 742.18 (2006); Parker v. Parker, 916 So. 2d 926, 926 (Fla. Dist. Ct. App. 2005).

estoppel.[111] The biggest issue Florida courts have decided is whether a man has to pay arrearages for child support after paternity is vacated.[112]

An example of the modern view under Florida's disestablishment law is the case of *Hickman v. Milsap*, in which a child was born out of wedlock, and the mother brought a paternity action against the father when the child was four, resulting in a paternity judgment and child support order.[113] Six years later, when the child was ten, the father disestablished paternity after DNA tests showed he was not the father.[114] The appellate decision does not discuss whether the father and child had any relationship; in fact, it does not discuss any interests, but is cut and dry. Law yields to biological truth. Recent Florida cases allow disestablishment even when the child is fifteen and living with his father.[115] Florida's statute is not unique; in all, there are about eleven states with disestablishment statutes.[116]

Other jurisdictions reach the same result for challenges based on fraud—either as a challenge to a VAP, adjudication, or as a tort claim. For instance, in a 2002 Minnesota case, a man brought a challenge to an adjudication based on fraud under the state's Rule 60, which allows a court to vacate the adjudication when there is evidence of fraud.[117] In the 2002 case of *In re Turner*, the man (Turner) accepted responsibility for a non-marital child after the mother (Suggs) told him it was his child. Turner helped take care of the child and treated him as his son.[118] When the child was two, the parents signed a paternity affidavit; when the child was five, the parents separated, and the county brought a paternity suit.[119] The father again relied on the mother's "unequivocal representations regarding the child's paternity," when he waived rights to a genetic test and was subsequently adjudicated the father.[120] Later (the opinion does not say when), genetic tests

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[111] FLA. STAT. § 742.18(1)(a) (2006); P.G. v. E.W., 75 So. 3d 777, 782–83 (Fla. Dist. Ct. App. 2011).

[112] FLA. STAT. § 742.18(5) (stating only that "relief shall be limited to the issues of child support payments").

[113] Hickman v. Milsap, 106 So. 3d, 513, 513 (Fla. Dist. Ct. App. 2013).

[114] *Id.* at 513–14.

[115] *P.G.*, 75 So. 3d at 777.

[116] ALA. CODE § 26-17A-1(a) (2015) (Reopening a Paternity Case Based on Scientific Evidence); ARIZ. REV. STAT. ANN. § 25-503(F) (2015) (Order for Support); FLA. STAT. § 742.18 (2015) (Disestablishment of Paternity or Termination of Child Support Obligation); GA. CODE ANN. § 19-7-54 (2016) (Motion to Set Aside Determination of Paternity); IDAHO CODE § 32-1009 (2016) (Paternity Fraud—Child Support Restitution); 750 ILL. COMP. STAT. 45/7 (b-5) (2015); MD. CODE ANN. FAM. LAW CODE § 5-1038 (LexisNexis 2015); MICH. COMP. LAWS § 722.1438 (2016); MISS. CODE ANN. § 93-9-10 (2015) (Disestablishment of Paternity); N.J. STAT. ANN. § 9:17-48(b) & § 9:17-48(d) (West 2015); TEX. FAM. CODE ANN. § 161.005 (West 2015) (Termination When Parent Is Petitioner).

[117] Turner v. Suggs, 653 N.W.2d 458, 465 (Minn. App. 2002).

[118] *Id.* at 462.

[119] *Id.*

[120] *Id.*

showed that Turner was not the father and he brought a motion to vacate a paternity judgment, which the trial court dismissed.[121]

On appeal, the court reversed and remanded, holding that there was not a statute of limitations to vacate paternity on the basis of fraud, and moreover that the best interests of the child were "irrelevant" because "[t]he objective of paternity proceedings is to correctly identify the biological father of a child," and "biological paternity is an objective fact."[122] The court took the opposite view from the Florida court in *Parker*, which placed the burden of ascertaining paternity on the father at the time of the adjudication. Rather, in the Minnesota case of *In re Turner,* the court reasoned that a father should not be "penalized for not seeking genetic tests before stipulating to paternity" because he should be entitled to believe "the sworn statements" of a woman with whom he had been sexually intimate, resulting in a child.[123] The court further reasoned that expecting men to disbelieve their sexual intimates "would result . . . in a judicially mandated atmosphere of distrust and acrimony that is contrary to public policy strongly favoring stipulations in family cases."[124]

Cases such as *Parker* and *In re Turner* demonstrate how legal discourse has shifted away from the more complex rights discourse and best interests of the child analysis to a discourse placing highest value on scientific truth. Thus, modern law shifts from Strindberg's truth in *The Father* that no man knows he is a child's father, and the old view (expressed in some cases) that fathers who want to disestablish paternity are selfish, to the modern view that biology should prevail against women who have defrauded them—fraud being shown solely on the basis of DNA tests. This modern view sometimes stigmatizes a woman's sexuality and destroys her power to choose the father of her child. For example in *J.R. v D.P.*, a California court was asked to resolve paternity when there were two presumed fathers.[125] The court resolved the issue on the basis of biology, against the husband who had held out as the father and raised the child.[126] The court rejected the mother's choice of a father, basing its decision on the "weightier considerations of policy and logic."[127]

This shift to the modern view can be seen in Texas as well. The legislature in 2011 enacted a statute that allows for termination of parental rights based on misrepresentations about paternity.[128] The statute, which is outside the UPA

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[121] *Id.*

[122] *Id.* at 468.

[123] *Turner*, 653 N.W.2d at 466.

[124] *Id.* at 467.

[125] J.R. v. D.P., 212 Cal. App. 4th 374, 378 (2012).

[126] *Id.* at 389.

[127] *Id.*

[128] Tex. Fam. Code § 161.005 (West 2015) (describing that the section is entitled "Termination When Parent is Petitioner.").

provisions of the Texas Family Code, allows a man to petition to terminate parental rights when there has been an adjudication or when he has signed a VAP based on misrepresentations, and when genetic tests exclude the man as the father.[129] There is no best interests of the child analysis.[130] Rather, a man may petition to terminate parental rights within two years of discovering the misrepresentation.[131] He may also request access to the child, though he will be relieved from child support obligations.[132]

Before the enactment, Texas followed a rights discourse, as an earlier case indicates: "Being a parent has always meant more than simply proving [that] the DNA necessary to create human life originated from a particular individual . . . The judgment at issue in this case should not be set aside because one of the individuals involved has become unhappy with the continued existence of it."[133] After enactment, a judgment or VAP can now be set aside based on a man's unhappiness with the continuation of a parent-child relationship on the basis that it lacks a biological tie. Thus, in Texas, like other jurisdictions, discourse has shifted to place the highest value on scientific truth. As discussed next, this results in a blind spot in legal analysis.

III. FAMILY SECRETS

Legal cases typically elide reasons a woman might have for not disclosing her knowledge or uncertainty about paternity. For example, *In re Turner,* the Minnesota case discussed above, the mother asserted from the child's birth that Suggs was the only possible father.[134] The couple was not married, but based on her statements Suggs supported the child.[135] When the child was two, the mother signed an affidavit of paternity, and when the child was five, she testified in an adjudication hearing that Suggs was the father.[136] Even when Suggs claimed that genetic tests excluded him as the father and sought to vacate the paternity adjudication, the mother "continue[d] to maintain that [Suggs was] the only possible father of the child" and made sworn statements under oath.[137] The appellate decision remanding the case gives no indication why the mother might have kept paternity (or paternity uncertainty) a secret. In fact, like *In re Turner,* most cases shed little insight into why a woman might not reveal the truth about

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[129] Tex. Fam. Code § 161.005(c) (West 2015).

[130] *See In re* J.K.B., 439 S.W.3d 442, 450–51 (Tex. App. 2014) (holding that "termination under subsection (c) does not include a best-interest determination").

[131] Tex. Fam. Code § 161.005(e) (West 2015).

[132] *See* Tex. Fam. Code § 161.005(i), (l) (West 2015).

[133] Ince v. Ince, 58 S.W.3d 187, 191 (Tex. App. 2001).

[134] Turner v. Suggs, 653 N.W.2d 458, 462 (Minn. Ct. App. 2002).

[135] *Id.*

[136] *Id.*

[137] *Id.* at 465–66.

paternity or paternity uncertainty; instead, law elides the reasons a woman might keep these secrets, as the following discussion shows.

In an Australian study of paternity stories, Lyn Turney discovered that while society generally demonizes women accused of paternity fraud, there are multiple reasons women keep paternity issues secret—both when they have knowledge about false paternity, and also when they have questions about paternity certainty.[138] Turney found several reasons for secrets, which can be broadly categorized as secrets resulting from domestic violence or sexual assault; secrets based on uncertainty about who the father was; and secrets resulting from the passage of time and family ties.[139] Rather than finding that women kept secrets merely to defraud men, Turney found "that paternity secrets are deeply held, complex, and difficult to disclose."[140] Likewise, in her research on family secrets, Carol Smart argues that oftentimes, women keep paternity secrets to protect children and families.[141] Because kinship is a complex relationship of ties to "both relatives and others defined as close or as elective kin,"[142] Smart argues for a sociological understanding of paternity secrets.[143] In other words, we should take into account "the local morality of [the] family," the culture, and the importance of kinship networks likely to be destroyed by genetic truth.[144]

In contrast to Turney's broad categories, which are illustrated below with case law, Smart found a "rough chronology of reproductive secrets" based on societal shifts in what is considered taboo.[145] Thus, in the late nineteenth century, family reproductive secrets concerned highly stigmatized illegitimacy (as in *The Father* and *The Celestials*); in the twentieth century, illegitimacy was no longer as shameful, but now family secrets involved "pre-marital conceptions [which] were a matter of great shame."[146] Then in the 1950s and 1960s, family secrets shifted to adoptions, especially instances in which adults learned late in life that

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[138] Turney, *supra* note 15, at 234–43 (her study consisted of interviews of fifty "men and women who volunteered to tell about their experience of paternity testing and paternity uncertainty"). *See also* Carol Smart, *Families, Secrets and Memories,* 45 SOC. 539, 541 (2011) (studying "an archive [going back to the 1930s] based at the University of Sussex which collects written narratives from a panel of regular writers who are invited to respond three times a year to a set of questions").

[139] *See* Turney, *supra* note 15, at 234–43.

[140] *Id.* at 243.

[141] Carol Smart, *Law and the Regulation of Family Secrets*, 24 INT'L J.L. POL'Y, & FAM. 397, 400 (2010) [hereinafter *Law & Regulation*].

[142] Carol Smart, *Family Secrets: Law and Understandings of Openness in Everyday Relationships*, 38 J. SOC. POL. 551, 555 (2009) [hereinafter *Family Secrets*] (noting that "[t]he clichés 'Blood is thicker than water' and 'You can choose your friends but not your family' seem to be equally prevalent and now, in addition, more people refer to families of choice . . .").

[143] *Id.* at 555.

[144] *Law & Regulation*, *supra* note 141, at 410. *See also*, Susan Ayres, *The Hand That Rocks the Cradle: How Children's Literature Reflects Motherhood, Identity, and International Adoption*, 10 TEX. WESLEYAN L. REV. 315, 319–321 (2004) (examining the kinship narrative in adoption stories).

[145] *Family Secrets*, *supra* note 142, at 558.

[146] *Id.*; *see* STRINDBERG, *supra* note 7; SHEPARD, *supra* note 8.

they had been adopted.[147] Finally, Smart found that modern secrets concern assisted reproduction (not telling the child or family members) and paternity uncertainty.[148]

As mentioned above, case law discussing paternity adjudications typically ignores reasons a mother might have for keeping paternity secret—that is simply not part of the judicial equation. For each category discussed below, there is scant case law illustrating the reasons Turney found in her study. However, considering these reasons is important to counterbalance the negative views of women as acting intentionally to defraud men.[149]

A. Secrets Resulting from Domestic Violence or Sexual Assault

In her study, Turney found that some women were victims of domestic violence, and they did not want to suffer more battering by revealing paternity uncertainty.[150] Of the over one hundred paternity cases reviewed for this Article, only one openly discusses domestic violence. In the New York case of *Jeannette GG v. Lamont HH*, a mother sought to overturn a father's (Lamont's) acknowledgment of paternity and to name another man the father on the basis of duress in signing the acknowledgment.[151] Genetic tests showed that the other man was indeed the biological father.[152] However, Lamont battered the mother for years.[153] She testified that he had burned her with cigarettes, raped her, taken her earnings, and after she left him, "broke into her house."[154] When she went to the hospital to have the child, Lamont and his family went with her, and Lamont yelled at the nurse when he learned that the birth certificate did not list his name as the father; he "insisted" that Jeannette go to the nurse's station and sign the acknowledgment listing him as the father, which she did.[155] The appellate court remanded to allow Jeannette to produce expert testimony on domestic violence in order to show she signed the acknowledgement under duress, based on "her fear of his anger and future violence."[156]

Turney's study showed that a similar reason women keep paternity issues a secret is that they have been raped and did not want to disclose the biological

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[147] *Id.* at 559.

[148] *Id.* at 560.

[149] *See* Turney, *supra* note 15, at 234; However, Turney admits that her study does not "claim that no woman has ever cheated, lied, or deceived." *Id.*

[150] *Id.* at 240.

[151] Jeannette GG. v. Lamont HH., 77 A.D.3d 1076, 1076–77 (App. Div. 2010).

[152] *Id.* at 1076.

[153] *Id.* at 1077.

[154] *Id.*

[155] *Id.* at 1078.

[156] *Id.*

father.[157] Again, this is very rare in case law, appearing in the 2013 case of *Ralda-Sanden v. Sanden*.[158] Before she became pregnant, the mother's employer repeatedly raped her when she was working for his family as a nanny from Guatemala.[159] She then became pregnant as a result of rape, and refused to have an abortion.[160] During one of her employer's attacks, she ran away, filed charges against him, and eventually gave birth to a daughter.[161] She never had contact with the father, and although she did tell the Attorney General's office his name, it "declined to recoup child support payments . . . to protect [the daughter] from the gruesome truth about her conception."[162]

The mother later told her daughter that her father had been killed in an automobile accident because she did not want her daughter to know about the rape and his threats to hurt her family.[163] Her daughter repeatedly asked who her father was, and after her daughter turned twenty, during "a heated argument," the mother finally told her the truth, so the daughter was able to track down the father and file a paternity suit against him.[164] The issue before the court of appeals was whether the statute of limitations (two years after child reaches majority) should have been equitably tolled.[165] The court of appeals held that the limitations period indeed should have been tolled, from which one could infer that the father's violence was an understandable reason for the mother to withhold the truth about paternity.[166]

B. Secrets Resulting from Paternity Uncertainty

According to Turney, another reason why women kept secrets about paternity is because they were uncertain themselves who the father was.[167] Turney refers to this situation not as paternity fraud, but paternity uncertainty.[168] For instance, if a woman had overlapping relationships or a one-night stand during an otherwise monogamous relationship, she might find herself uncertain about paternity and typically "assume . . . . the father to be the man of the most enduring and regular sexual relationship."[169] This appears to be the situation in several cases and courts

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[157] Turney, *supra* note 15, at 242.

[158] Ralda-Sanden v. Sanden, 989 N.E.2d 1143 (Ill. App. Ct. 2013).

[159] *Id.* at 1145.

[160] *Id.*

[161] *Id.* at 1145–46.

[162] *Id.* at 1156.

[163] *Id.* at 1178.

[164] *Ralda-Sanden*, 989 N.E.2d at 1148–49.

[165] *Id.* at 1146–48.

[166] *Id.* at 1149.

[167] Turney, *supra* note 15, at 235–36.

[168] *Id.* at 236.

[169] *Id.*

can be obtuse about paternity uncertainty. For example, a Kentucky court held there was a reasonable inference of paternity fraud when a woman had sex more often with her lover than her husband, and the court stated that the woman "should have known that it was more likely that [her husband] was not the father."[170] Paternity uncertainty also occurs when pregnant teenagers are ashamed to reveal to their parents or boyfriends that they have had multiple partners, and as a result, did not know who the father of their child was.[171] A final situation in which paternity uncertainty occurs is when a woman is pressured to name a father in order to execute a VAP or to receive Title IV-D benefits.[172]

C. Secrets Resulting from the Passage of Time and Family Ties

Additionally, Turney determined that one of the primary obstacles to revealing paternity secrets was the passage of time: "Women reported that, while the imperative to confess their secret was strong, the pragmatics of doing so seemed to be destructive of family and interpersonal relationships."[173] This was certainly the case for Julia in *The Celestials*.[174] When Julia learned she was pregnant and passed the common time for miscarriage (she had already had thirteen miscarriages in her twenty-four years of marriage), she and her husband went to Florida for a vacation.[175] It was "a lovely time," and Julia imagined Sampson "would greet her news with joy" because they had both been waiting a long time for a child.[176] However, she did not tell him she was uncertain about paternity because: "She knew her time of remaining silent was slipping away, but it was in many ways a lovely silence, and betrayal and secrets lead to more of the same."[177]

Related to the passage of time, Turney discovered that "children were often the main reason women gave for keeping their paternity secret. [Women's] appreciation of the importance of the social bond that had developed between the

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[170] Denzik v. Denzik, 197 S.W.3d 108 (Ky. 2006).

[171] *See* Hodge v. Craig, 382 S.W.3d 325 (Tenn. 2012). Hodge v. Craig does not explicitly describe the teenaged mother as being ashamed, but describes a scenario of a teenaged girl having multiple sexual partners. *Id. See also* Turney, *supra* note 15, at 239.

[172] *See* Rogus, *supra* note 39, at 75–77 ("Federal policy incentivizes state governments to maintain high rates of paternity establishment); 96–97 (noting that VAPs signed in hospitals after childbirth account for the majority of paternity establishments, however, childbirth is a stressful time and parties "bay feel pressured to sign by extended family members who are present at the birth"); *See also* Weaver v. Solone, 2006 WL 2730425 at *1–2 (Conn. Super. Ct. 2006) (noting that "welfare recipients are required to cooperate in the identification of the non-custodial parent" and that mothers who do not "cooperate in identifying the father of her child" will receive reduced benefits. Moreover, most paternity adjudications are determined by default).

[173] Turney, *supra* note 15, at 238.

[174] *See* SHEPARD, *supra* note 8.

[175] *Id.* at 17–18, 178–79.

[176] *Id.* at 178.

[177] *Id.*

father and child prevented exposure of their secret."[178] This is not discussed in case law except under the old view as a justification for estoppel, which can be seen in jurisdictions that refuse to order genetic testing because the child has formed a relationship with the man believed to be the father.[179]

D. Legal Discourse Should Take These Reasons into Account

The reasons Turney discovered for paternity secrets sometime peep out of the facts of legal cases, but more often than not, judges and society assume that mothers hold knowledge about paternity and keep it to themselves for selfish reasons. A West Virginia decision states: "[F]raudulent conduct exists in every case where a wife gives birth to a child cognizant of the fact that paternity is uncertain, yet remains silent while her husband innocently assumes the care of the child."[180] Contrary to this damning view, Turney concludes "paternity secrets are deeply held, complex, and difficult to disclose."[181] Yet, legal cases rarely offer reasons a woman might keep paternity secrets; instead, it is much more common for the facts of multiple partners to be stated objectively or for incongruent genetic tests to be proof of a mother's fraud.

Legal decision-making and legislation could benefit from the point of Turney's research, which is not "[T]hat women are always blameless . . . ," but to provide a balance to the moral panic and demonization of women surrounding paternity fraud. [182] Turney wisely suggests that society should view these "intensely private matters" not in a "moralistic, judgmental, and politicised. . . ." fashion, but instead should "consider them to be unintended outcomes of the human condition; that is, human mistakes made by the actions of women and men in the context of intimate relationships."[183] The tendency of the law to elevate science as the highest consideration in truth claims is a flawed approach. It is important to halt the tendency to oversimplify. Rather, courts and laws should sort out reproductive secrets about paternity in the "[s]ocial, legal and cultural context."[184] Perhaps courts and laws should even allow for multiple fathers, as did the trial court in *DiMichele v. Perrella*, discussed below.

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[178] Turney, *supra* note 15, at 235.

[179] *See, e.g.*, *In re* Westchester Cty. Dep't of Soc. Services ex. Rel Melissa B. v. Robert W.R., 803 N.Y.S.2d 672 (N.Y. App. Div. 2005) (noting that in a paternity challenge where the challenging party seeks a genetic test, the court must first conduct a hearing regarding the best interests of the child before allowing the genetic test, on the basis of equitable estoppel).

[180] Betty L.W. v. William E.W., 569 S.E.2d 77, 87–88 (W. Va. 2002) (citing William L. v. Cindy E.L., 495 S.E. 2d. 836, 842 (1997)).

[181] Turney, *supra* note 15, at 243.

[182] *Id.* at 243–44.

[183] *Id.* at 245.

[184] *Family Secrets, supra* note 142, at 557.

IV. CONCLUSION

The trial court in the case of *DiMichele v. Perrella* did take into account these complex, intimate relationships, and it came up with a solution that is both creative and troubling.[185] The trial court's tort judgment (reversed on appeal), is disturbing.[186] However, the trial court's solution of allowing two fathers—a biological father and a psychological father—is creative.[187]

In *DiMichele v. Perrella*, the mother immigrated to the United States from Brazil when she was nine.[188] Later, when she began working, she had an affair with her supervisor, who was sixteen years older than she.[189] She continued this affair without her husband's knowledge after they married in 1994.[190] She then had two children, one in 1996 and another in 1998.[191] When the first child was born, the mother determined through genetic testing that her lover was the father.[192] She did not tell her husband, and after she had the second child, she assumed her lover was the father;[193] a later DNA test confirmed this.[194] She took the children to see her lover until the children became suspicious about why they had to keep the visits secret from the man they called their father.[195] They first voiced their suspicions when the oldest child was about nine.[196]

When she stopped taking her children to see her lover, he filed a petition for visitation and custody, which is how her husband learned there was a question about his paternity.[197] Complicated legal proceedings ensued. In 2008, a court ordered that the husband and wife would have legal custody, and the lover (who was the biological father of both children) would have visitation rights and would pay child support.[198] Two years after that, in 2010, the husband brought a tort suit against the lover, and eventually the wife was joined as a codefendant after the

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[185] DiMichele v. Perrella, No. CV1060045365, 2014 WL 2022243, at *1 (Conn. Super. Ct. 2014).

[186] DiMichele v. Perrella, 120 A.3d 551, 554–55 (Conn. App. 2015) (the appeals court reversing the tort judgment on the basis that the biological father owed no duty to disclose his paternity to the psychological father because there was not a special relationship between them).

[187] DiMichele v. Perrella, No. CV106004536, 2011 WL 1026184, at *1, *6 (Super. Ct. Conn. Feb. 23, 2011).

[188] *DiMichele,* 2014 WL 2022243, at *9.

[189] *Id.* at *1.

[190] *Id.* at. *1, n.1.

[191] *Id.* at *1.

[192] *Id.*

[193] *Id.*

[194] *DiMichele,* 2014 WL 2022243, at *1.

[195] DiMichele v. Perrella, No. CV106004536, 2011 WL 1026184, at *1 (Super. Ct. Conn. Feb. 23, 2011).

[196] *See* DiMichele v. Perrella, 120 A.3d 551, 552 (Conn. App. Ct. 2015).

[197] *See DiMichele*, 2011 WL 1026184, at *1..

[198] *Id.* at *1 n.1.

husband prevailed on the lover's motion to dismiss.[199] The husband and wife continued to live together until 2013, and a bench trial was held in 2014.[200]

Ultimately, the husband prevailed on his fraud claim, and the court entered a judgment in the amount of $15,000 each against the lover and the wife.[201] The fraud claim was based on the lover's and wife's duty to disclose paternity.[202] The trial court found that the lover had a duty to disclose that the husband was not the biological father based in part on the children's fundamental interest in knowing their paternity and, in part, because both men were considered fathers under Connecticut law—the lover as the biological parent, and the husband as the psychological parent.[203] Further, the trial court held the lover owed a duty to the husband and children to reveal his paternity. The lover defrauded the husband by allowing him to psychologically and physically support the children, so the court concluded that the lover "not only violated the 'plain rules of common honesty,' but acted contrary to any concept of common decency."[204]

The lover appealed. The appellate court reversed the tort judgment for fraud. It held that the biological father had *no* duty to reveal paternity to the psychological (or functional) father because a "'special relationship'" of "'trust and confidence'" did not exist between them.[205]

Connecticut is not alone in allowing tort claims for paternity fraud. As discussed above, about ten states allow such suits.[206] This trend of allowing paternity fraud tort suits is troubling for reasons that many feminist theorists have explored.[207] Specifically, such torts regulate women's sexuality, promoting "the honor of the family and . . . traditional sexual behaviors in marriage."[208] These

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[199] *DiMichele*, 120 A.3d at 553 (noting that the husband also brought suit for intentional and negligent infliction of emotional distress and for unjust enrichment, but only his fraud claim and intentional infliction of emotional distress claim survived pretrial motions). *DiMichele*, 2011 WL 1026184, at *2–5 (dismissing unjust enrichment claim). *DiMichele*, 2014 WL 2022243, at *4 (striking the negligent infliction of emotional distress claim as barred by the statute of limitations). The trial court found against the husband for intentional infliction of emotional distress because he was not visibly outraged. *DiMichele*, 2014 WL 2022243, at *10.

[200] *DiMichele*, 2014 WL 2022243, at *1.

[201] *Id.* at *11.

[202] *DiMichele*, 2011 WL 1026184, at *4–6; *DiMichele*, 2014 WL 2022243, at *4, 8.

[203] *DiMichele*, 2014 WL 2022243, at *6.

[204] *DiMichele*, 2011 WL 1026184, at *6.

[205] *DiMichele*, 120 A.3d 551, 554–55, 727.

[206] *See* DiMichele v. Perrella, 2011 WL 1026184 (Conn. Super. Ct. 2011); Koelle v. Zwiren, 672 N.E.2d 868 (Ill. App. Ct. 1996); Dier v. Peters, 815 N.W.2d 1 (Iowa 2012); Denzik v. Denzik, 197 S.W.3d 108 (Ky. 2006); Mansfield v. Neff, 31 Mass. L. Rptr. 616 (Mass. Super. Ct. 2014); GAW, III v. DMW, 596 N.W.2d 284 (Minn. Ct. App. 1999); RAC v. PJS, Jr., 927 A.2d 97 (N.J. 2007); Miller v. Miller, 956 P.2d 887 (Ok. 1998); Hodge v. Craig, 382 S.W.3d 325 (Tenn. 2012); Master v. Worsley, 777 P.2d 499 (Utah Ct. App. 1989).

[207] *See* Nicola, *supra* note 73, at 470.

[208] *Id.*

torts also hark back to amatory torts, which most jurisdictions have abolished, and have the effect of punishing "[t]he cheating wife" and of rewarding "the cuckolded husband."[209]

However, the solution in *DiMichelle* of allowing two legal fathers—a biological and psychological father—is both creative and empowering to women and children.[210] While the husband in that case would have been estopped under Connecticut law from denying paternity, by his actions, it appeared he wanted to assert his paternity instead. He continued to live with his wife and was given legal custody as the children's psychological father.[211] He appears to be a husband like Sampson in *The Celestials*, who came around to his wife's adultery and accepted the child as his own. The concept of allowing biological and psychological fathers might be utopian hopefulness, but perhaps not, with California legislation scheduled to allow multiple parents, and English legislation to allow three parents in surrogacy procedures. However, the law should probably also accommodate fathers who, like the Captain in Strindberg's play, reject children not biologically theirs. These are not simple cases, but complex ones both legally and socially.

While this Article does not provide a normative framework or easy solution, it urges caution in elevating science as the highest consideration in truth claims about paternity, and urges legal discourse to include a vocabulary of reasons a mother may have for keeping paternity secrets. The arguments of Lyn Turney and Carol Smart for a sociological understanding of family secrets would inform and possibly cool the judicial and legislative trend to supplant "complex kinship ties" with genetic truth.[212] Instead of demonizing women, society might recognize that many women keep paternity secrets not to defraud men, but as "a desire to care for and protect their children."[213]

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[209] *Id.* at 473; *see also id.* at 493–94.

[210] *See, e.g.*, Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231 (2007) (explaining the benefits of a two-parent model).

[211] *DiMichele v. Perrella,* 2011 WL 1026184 (Super. Ct. Conn. Feb. 23, 2011), at *6 (defining a "psychological parent" as "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs.").

[212] *Law & Regulation, supra* note 141, at 411.

[213] *Id.*