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## Fighting the Establishment: The Need for Procedural Reform of Our Paternity Laws

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FIGHTING THE ESTABLISHMENT:  
THE NEED FOR PROCEDURAL REFORM  
OF OUR PATERNITY LAWS

*Caroline Rogus\**

ABSTRACT

*Every state and the District of Columbia use voluntary acknowledgments of paternity. Created pursuant to federal law, the acknowledgment is signed by the purported biological parents and establishes paternity without requiring court involvement. Intended to be a “simple civil process” to establish paternity where the parents are unmarried, the acknowledgment is used by state governments to expedite child support litigation. But federal policy and state laws governing the acknowledgments do not sufficiently protect the interests of those men who have signed acknowledgments and who subsequently discover that they lack genetic ties to the children in question. A signatory who learns that he is not the child’s biological father and who wishes to challenge the validity of the acknowledgment must navigate a difficult process for relief. The very act of signing an acknowledgment may subsequently prevent him from offering any scientific evidence of the absence of a biological connection to the child. As a result, he may be obligated to pay child support for years on the basis of that erroneous paternity acknowledgment, and a parent-child relationship may be imposed even if it is not in the child’s best interests.*

*Using the District of Columbia as a model to highlight the need for procedural reform, this Article examines the federal and D.C. legislation that created voluntary acknowledgments of paternity as well as the process for either rescinding or challenging their validity. The Article then analyzes the practical implications of these processes and discusses why the presumptive weight of the acknowledgment, a conclusive presumption of paternity, is problematic. In particular, the Article questions the need for a conclusive presumption of paternity, a difficult evidentiary burden for a challenger to overcome, and whether the conclusive presumption of paternity runs afoul of constitutional protections. Finally, the Article offers possible solutions to improve the establishment process.*

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## INTRODUCTION

A man meets a woman. They date. The woman informs the man that she is pregnant. Almost immediately after the child's birth, the man is given a document to sign by the hospital staff. The document states that the signatories swear that they are the biological parents of the child. Believing that this is an accurate statement, the man signs the document. Although the man and woman separate, the man stays involved in the child's life. Then

he discovers that the child's mother has told other family members that he is not the child's biological father. Unsettled by the news, he and the child submit to genetic testing. The test results exclude the man as the child's biological father.

Some years later, the man is served with notice that the government has brought suit for paternity and child support to recover public benefits spent on the child's behalf. Through this lawsuit the man finally learns that the document he had signed years ago at the hospital, a document known as an acknowledgment of paternity, is the basis for the government's contention that he is responsible for the child's welfare. Referencing the local paternity laws, the government argues that the existence of the acknowledgment is sufficient to establish the man's paternity and that the subsequent genetic test results are inadmissible.<sup>1</sup>

Every state and the District of Columbia use a voluntary acknowledgment of paternity. Created pursuant to federal law, the acknowledgment may be a single piece of paper used to establish paternity without the need for court intervention.<sup>2</sup> These acknowledgments are made available to unmarried individuals at public hospitals and government agencies.<sup>3</sup> By signing the acknowledgment, the signatories swear that they are the biological parents of the minor child.

The acknowledgment establishes parentage in situations where there is no other definitive evidence of the father's identity. Where the father and mother were married at the time of the child's conception or birth, there is a marital presumption that they are the parents of that child.<sup>4</sup> However,

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1. In order to both protect the privacy of the individuals in specific paternity cases and highlight some of the pitfalls of establishing paternity by an acknowledgment of paternity, this story is a composite of the facts in several cases before the Superior Court of the District of Columbia. As discussed in this Article, the D.C. government has argued that a signed acknowledgment of paternity is sufficient to establish paternity pursuant to D.C. law, regardless of the acknowledgment's biological accuracy. See *infra* Parts I.B, II.B.
  2. See generally Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 70–88 (2010) (surveying various states' paternity acknowledgments).
  3. See 42 U.S.C.A. § 666(a)(5)(C)(ii) (Westlaw through P.L. 113–65 (excluding P.L. 113–54 and 113–59) approved Dec. 20, 2013) (hospital-based program for the voluntary acknowledgment of paternity); D.C. CODE § 16-909.03 (Westlaw through Oct. 16, 2013) (voluntary paternity acknowledgment program for birthing hospitals); § 16-909.04 (Westlaw) (voluntary paternity acknowledgment program for birth records agency); see also § 16-909.05 (Westlaw) (authorizing mayor to designate other sites for paternity acknowledgment program).
  4. D.C. CODE § 16-909(a)(1) (Westlaw) (providing, in relevant part, that there is a “presumption that a man is the father of a child . . . if he and the child's mother are or have been married . . . at the time of either conception or birth, or between conception and birth, and the child is born during the marriage . . . or within 300

where the parents are unmarried, there is an identity crisis: “Without the law of marriage, we do not know who the parents are.”<sup>5</sup> Because the woman who bears and delivers the child is virtually always the child’s biological mother,<sup>6</sup> the dilemma becomes determining the identity of the child’s father when the parents are not married. Where, as in D.C., there are thousands of children born to unmarried women every year,<sup>7</sup> there are potentially thousands of unidentified fathers.

Intended to be a “simple civil process” to establish paternity where the parents are unmarried,<sup>8</sup> the acknowledgment is wielded as an evidentiary tool to expedite child support and paternity litigation. But when that process breaks down, the result is neither simple nor civil. Federal policy incentivizes state governments to maintain high rates of paternity establishment.<sup>9</sup> In D.C., the Office of the Attorney General—the entity that prosecutes paternity and support cases—opposes genetic testing. When such testing has already been performed and excludes the male signatory as the father, they argue that those test results are irrelevant and inadmissible.<sup>10</sup>

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days after the termination of marital cohabitation by reason of death, annulment, divorce, or separation ordered by a court”).

5. Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 651 (2008).
6. “The mother carries and bears the child, and in this sense her parental relationship is clear.” *Nguyen v. INS*, 533 U.S. 53, 62 (2001) (citing *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983)).
7. In 2010, 5,019 children were born to unmarried women in the District of Columbia. JOYCE A. MARTIN ET AL., NAT’L CTR. FOR HEALTH STAT., BIRTHS: FINAL DATA FOR 2010, NATIONAL VITAL STATISTICS REPORTS Vol. 61, No. 1 tbl.I-4 (2012), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61\\_01\\_tables.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01_tables.pdf).
8. 42 U.S.C.A. § 666(a)(5)(C)(i) (Westlaw through P.L. 113–65 (excluding P.L. 113–54 and 113–59) approved Dec. 20, 2013).
9. See *infra* Part I.
10. See, e.g., *District of Columbia ex rel. D.H. v. D.H.*, 140 DAILY WASH. L. REP. 2117, 2118 (D.C. Super. Ct. Sept. 6, 2012) (government argued that the lower court’s use of paternity test results to dismiss a petition for paternity and support was erroneous because “paternity test results are irrelevant” where a signed acknowledgment exists); *District of Columbia ex rel. J.I.W. v. J.W.*, 141 DAILY WASH. L. REP. 933, 933 (D.C. Super. Ct. Apr. 23, 2012) (ordering genetic testing “over the objection of the District of Columbia”); *G. v. H.*, No. 2006-SUP-4318, slip op. at 2 (D.C. Super. Ct. Dec. 20, 2010) (government opposed putative father’s request for genetic testing, taking the position that “[b]ecause Respondent signed an Acknowledgment of Paternity at the hospital . . . paternity has been established and Respondent is now prohibited from seeking a review of the issue of paternity.”); *District of Columbia ex rel. F. v. F.*, No. 2006-SUP-3783, slip op. at 2 (D.C. Super. Ct. Jan. 15, 2008) (ordering paternity test “[n]otwithstanding the District of Columbia’s objection” in a case where signatory to an acknowledgment challenged paternity); see also *M.M. v. T-M.M.*, 995 A.2d 164, 164–66 (D.C. 2010) (affirming denial of motion for relief from an order of paternity and permanent child support where putative father signed

According to the D.C. government, the existence of a voluntary acknowledgment establishes conclusively a father-child relationship in these cases; any further fact-finding about the man's biological relationship with the child is inappropriate. Therefore, a signatory who is not the child's biological father and who wishes to challenge the validity of the acknowledgment faces a procedural nightmare. He must navigate increasingly difficult burdens to have his challenge heard and may be formally barred altogether from introducing genetic test results as a justification for his challenge to his prior erroneous acknowledgment.

Because federal policy essentially mandates the use of these acknowledgments, the states have similar—if not identical—laws on using and challenging paternity acknowledgments.<sup>11</sup> This Article will focus on the laws

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paternity acknowledgment, notwithstanding that court-ordered paternity testing excluded him as biological father); *Bradford v. Rice*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*6 (D.C. Super. Ct., Fam. Ct. May 14, 2008) (government argued that paternity challenge filed by putative father who had obtained genetic test results on his own was time-barred from seeking relief); *W.F. v. K.J.*, 128 DAILY WASH. L. REP. 1045, 1045 (D.C. Super. Ct. Dec. 29, 1999) (responding to putative father's obtainment of DNA test results on his own, the Government argued that "the competing jurisdictions of *res judicata* and the 'final judgment rule' preclude such a tardy request to vacate a long-standing judgment of paternity, biology (or anything else) notwithstanding." (emphasis in original)).

11. See, e.g., CONN. GEN. STAT. § 46b-172(a)(2) (Westlaw through Pub. Acts of the 2013 Jan. Reg. Sess. of Conn. Gen. Assemb.); DEL. CODE ANN. tit. 13, §§ 8-308-8-309 (Westlaw through 79 Laws 2013, chs. 1-185); GA. CODE ANN. § 19-7-46.1 (Westlaw through End of the 2013 Reg. Sess.); HAW. REV. STAT. § 584-3.5 (Westlaw through Act 4 [end] of the 2013 2d Spec. Sess.); IDAHO CODE ANN. § 7-1106 (Westlaw through End of the 2013 1st Reg. Sess. of the 62d Leg.); ME. REV. STAT. ANN. tit. 19-A, § 1616 (Westlaw through 2013 1st Reg. Sess. and 1st Spec. Sess. of the 62d Leg.); MD. CODE ANN, FAM. LAW § 5-1028 (Westlaw through all chs. of the 2013 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 209C, § 11 (Westlaw through Ch. 195 of the 1st Ann. Sess. 2013); MISS. CODE ANN. § 93-9-9 (Westlaw through End of 2013 Reg. Sess. and 1st & 2d Ex. Sess.); NEB. REV. STAT. ANN. § 43-1409 (Westlaw through End of 2013 Reg. Sess.); N.M. STAT. ANN. § 40-11A-308 (Westlaw through Ch. 228 [end] of the 2013 1st Reg. Sess. of the 51st Leg.); N.Y. FAM. CT. ACT § 516-a (McKinney 2009); N.D. CENT. CODE ANN. § 14-20-18 (Westlaw through the 2013 Reg. Sess. of the 63d Legis. Assemb.); OKLA. STAT. ANN. tit. 10 § 7700-308 (Westlaw through Ch. 23 [end] of the 1st Extraordinary Sess. of the 54th Leg. 2013); OR. REV. STAT. ANN. § 109.070 (Westlaw through End of the 2013 Reg. Sess. and Spec. Sess.); 23 PA. CONS. STAT. § 5103 (Westlaw through Reg. Sess. Act 2013-88, 91, 93-97, 99-103, except 20 PA. CONS. STAT. § 7101 to end 2013-14); R.I. GEN. LAWS ANN. § 15-8-3 (Westlaw through Ch. 534 of the 2013 Reg. Sess.); S.C. CODE ANN. § 63-17-50 (Westlaw through End of 2013 Reg. Sess.); TEX. FAM. CODE ANN. § 160.308 (Westlaw through end of the 2013 3d Called Sess. of the 83d Leg.); VT. STAT. ANN. tit. 15, § 307 (Westlaw through 1st Sess. of the 2013-14 Vt. Gen. Assemb.); VA. CODE ANN. § 20-49.1 (Westlaw through End of the 2013 Reg. Sess. and the End of

and procedures in the District of Columbia to provide a framework for examining the federal policies on paternity establishment and their local impact on the process for challenging paternity acknowledgments.

The District's laws and procedures are fairly typical of state statutes on challenging acknowledgments, but some key differences in states' approaches will be noted throughout the Article. By providing a close-up examination of how one jurisdiction attempts to balance the interests involved in paternity establishment, this Article will underscore the procedural shortcomings for the disestablishment of paternity. In particular, the Article addresses the ways in which the interests of unmarried men may be marginalized in the government's rush to establish paternity and secure permanent child support orders as quickly as possible.

In Part I, this Article examines the federal and D.C. legislation that creates acknowledgments of paternity. Part II analyzes the process for either rescinding or challenging the validity of those acknowledgments. Part III discusses why a conclusive presumption of paternity is of particular importance for those wishing to invalidate an acknowledgment. Part IV proposes some solutions to improve the establishment of paternity process, such as eliminating the conclusive presumption and replacing it with a rebuttable presumption of paternity. While biology should not be considered the only basis for a parent-child relationship, it is an important element of parentage in our society and should be included in a court's analysis of whether a parent-child relationship exists in these paternity cases. A paternity acknowledgment should not nullify the relevance of biology.

## I. THE CREATION OF THE ACKNOWLEDGMENT OF PATERNITY

Fatherlessness poses a problem for state governments.<sup>12</sup> The federal government has identified the absence of fathers from family units as a "growing crisis" for young people across the country.<sup>13</sup> In D.C., fatherless-

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the 2013 Spec. Sess. I.); WASH. REV. CODE ANN. § 26.26.330 (Westlaw through 2013 Legis.); WYO. STAT. ANN. § 14-2-608 (Westlaw through 2013 Gen. Sess.). Many of these state laws are based on the relevant provisions of the Uniform Parentage Act (2000). See UNIF. PARENTAGE ACT §§ 307-309 (amended 2002).

12. For the sake of simplicity, the term "state governments" is used throughout the Article to refer to state governments as well as the government of the District of Columbia.

13. U.S. DEP'T OF HEALTH & HUMAN SERVS., *The President's Fatherhood Pledge*, NAT'L RESPONSIBLE FATHERHOOD CLEARINGHOUSE, <https://www.fatherhood.gov/pledge> (last visited Apr. 14, 2014); see also Proclamation No. 8839, 77 Fed. Reg. 37,259, 37,259 (June 15, 2012) ("Every father bears a fundamental obligation to do right by their children. Yet, today, too many young Americans grow up without the love and support of their fathers. When the responsibilities of fathers go unmet, our communities suffer.").

ness is a fact of life in communities struggling with poverty. Based on a recent survey, more than three-quarters of the households with children in D.C.'s poorest neighborhoods identify as families headed by women.<sup>14</sup> Children of such single-parent families are more likely to do poorly in school, have emotional problems, become teenage parents, and have poverty-level incomes as adults as compared to their cohorts in dual-parent families.<sup>15</sup>

Research indicates that a father's economic contributions, such as child support "play an important role in helping children avoid poverty."<sup>16</sup> Unsurprisingly, the federal government has established programs to incentivize fathers to become or stay involved in their children's lives. Recently, the Obama administration appropriated \$75 million to award funds for activities promoting responsible fatherhood.<sup>17</sup> The D.C. government created some progressive initiatives to support and integrate fathers into family life. In 2007, the D.C. Superior Court's Family Court launched the Family Fathering Court Initiative to help fathers released from incarceration re-enter their communities and families.<sup>18</sup> The 2011 Annual Interdisciplinary Conference sponsored by D.C. Superior Court's Family Court addressed con-

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14. URBAN INST. & D.C. LOCAL INITIATIVES SUPPORT, *DC Ward Profiles*, NEIGHBORHOODINFO DC (Nov. 26 2013), <http://www.neighborhoodinfodc.org/wards/wards.html>. These two wards, Wards 7 and 8, also have the highest rates of poverty and unemployment in the District. URBAN INST. & D.C. LOCAL INITIATIVES SUPPORT, *2012 Ward Comparison Table*, NEIGHBORHOODINFO DC (Feb. 18, 2014), <http://www.neighborhoodinfodc.org/comparisontables/comparisontables.html>.
  15. CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., RL31025, FATHERHOOD INITIATIVES: CONNECTING FATHERS TO THEIR CHILDREN 1 (2014). A D.C. magistrate judge went so far as to blame households in which children did not know their fathers for "the almost inexorable appearance of too many such children in the New Referrals, Misdemeanor, and Felony Branches." *W.F.*, 128 DAILY WASH. L. REP. at 1070.
  16. Maria Cancian et al., *Child Support: Responsible Fatherhood and the Quid Pro Quo*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 143 (2011).
  17. CARMEN SOLOMON-FEARS ET AL., CONG. RESEARCH SERV., RL41431, CHILD WELL-BEING AND NONCUSTODIAL FATHERS 39 (2013). The Responsible Fatherhood grant program's funding was extended at that same funding level from Fiscal Year 2011 through March 2013. *Id.*
  18. *Fathering Court Initiatives (Fathering Reentry Court)*, D.C. CTS., [http://www.dccourts.gov/internet/superior/org\\_family/fatheringcourt.jsf](http://www.dccourts.gov/internet/superior/org_family/fatheringcourt.jsf) (last visited Apr. 14, 2014); see also Petula Dvorak, *D.C. Court Program Teaches Absent Fathers How to Be Good Dads*, WASH. POST, Feb. 7, 2011, at B1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/07/AR2011020705927.html>.



cerns of fathers in the District and was entitled, “Empowering Fathers: One Size Does Not Fit All.”<sup>19</sup>

The proactive stance of the D.C. government on issues of fatherhood has its limits, however. Unlike most areas of family law that are governed exclusively by state law, a patchwork of federal statutes lays the groundwork for establishment of paternity. D.C. and state laws then implement federal policy on paternity and support in their respective jurisdictions. D.C. and other jurisdictions often take an aggressive approach in prosecuting non-custodial fathers in paternity and support cases because, as discussed below, federal law incentivizes jurisdictions to expedite the paternity establishment process.

#### *A. Federal Policy on Paternity Establishment*

The parents of a minor child share legal responsibility for the support of their child.<sup>20</sup> The custodial parent is presumed to financially support the child by providing the child with shelter, food, and other aspects of caregiving.<sup>21</sup> Although a custodial parent is entitled to sue the other parent for support owed to the minor child, where the custodial parent receives public benefits such as Temporary Assistance to Needy Families (TANF) or Medicaid on behalf of the child, she *must* assign to the state government the right to sue for child support.<sup>22</sup> If the state government has distributed public benefits on behalf of a child, federal law permits the state government to retain as reimbursement for those benefits a portion of the child support money paid by a non-custodial parent.<sup>23</sup> The possibility of recovering these funds incentivizes the state government to seek and secure as many support orders as possible against non-custodial parents of children receiving public benefits. Before the state government can secure a permanent child support order, it must first establish the identity of the child’s parents to determine who, if anyone, owes child support to the custodial parent and the govern-

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19. *Welcome to the 2011 Family Court Interdisciplinary Conference*, FAM. CT. D.C. SUPERIOR CT., [http://www.dccourts.gov/internet/system/headlines/2011\\_family\\_court\\_conference/index.html](http://www.dccourts.gov/internet/system/headlines/2011_family_court_conference/index.html) (last visited Apr. 14, 2014).

20. D.C. CODE § 16-916.01(c)(1) (Westlaw through Oct. 16, 2013).

21. Where one parent has primary physical custody of the child, he or she is presumed to spend their share of the child support directly on the child. § 16-916.01(f)(1)(D) (Westlaw).

22. *See* 42 U.S.C.A. § 608(a)(3) (Westlaw through P.L. 113–65 (excluding 113–54 and 113–59) approved Dec. 20, 2013). In D.C., this assignment of the right to sue does not apply to the first \$150 of child support received by the custodial parent every month. D.C. CODE § 4-905.19(c)(5) (Westlaw). Accordingly, that initial \$150 is not acquired by the government but instead is “passed through” from the non-custodial parent to the custodial parent.

23. *See* 42 U.S.C.A. §§ 654(5), 657 (Westlaw).

ment. It is in this way that the state government becomes involved in the business of establishing paternity.

D.C. and the states could lose significant federal funding if they fail to comply with federal laws on paternity establishment. D.C. and other jurisdictions must have a process for establishing paternity if they wish to receive federal funding for their public assistance programs.<sup>24</sup> Such funding is referred to as IV-D funding after the section of the Social Security Act outlining state requirements for child support and paternity establishment.<sup>25</sup> The Family Support Act of 1988 penalized states that did not establish paternity for a certain number of public benefits cases.<sup>26</sup> However, the 1988 Act did not mandate the use of an acknowledgement of paternity. Instead, the Act “encouraged”—but did not require—the states “to establish and implement a simple civil process for voluntarily acknowledging paternity and a civil procedure for establishing paternity in contested cases.”<sup>27</sup>

The Omnibus Budget Reconciliation Act of 1993 (OBRA) amended the federal statute on paternity establishment in critical ways. Most germane to this Article, OBRA required any states receiving IV-D funding to establish procedures “for a simple civil process for voluntarily acknowledging paternity under which the State must provide that the rights and responsibilities of acknowledging paternity are explained and ensure that due process safeguards are afforded.”<sup>28</sup> The legislation further instructed the states to create voluntary acknowledgement procedures that create a rebuttable or, “at the option of the State, conclusive presumption of paternity.”<sup>29</sup> Finally, the Act required procedures “under which the voluntary acknowledgment of paternity must be recognized as a basis for seeking a support order without requiring any further proceedings to establish paternity.”<sup>30</sup>

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24. See §§ 652(g), 654(4)(A) (Westlaw). Note that federal law requires states and the District of Columbia to offer any individual the service of establishing paternity and obtaining a permanent support order, regardless of whether he or she receives public benefits. See § 654(4)(A)(ii), (B) (Westlaw).

25. See 42 U.S.C.A. § 651 (Westlaw through P.L. 113–72 (excluding P.L. 113–66 and 113–67) approved Dec. 26, 2013).

26. See Family Support Act of 1988, Pub. L. No. 100-485, § 111, 102 Stat. 2343, 2348–50 (codified as amended in scattered sections of 42 U.S.C.A.).

27. § 111(c), 102 Stat. at 2350 (codified as amended at 42 U.S.C.A. § 668).

28. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13721(b)(2)(C), 107 Stat. 312, 659 (codified as amended at 42 U.S.C.A. § 666).

29. § 13721(b)(2)(D), 107 Stat. at 659. The states were given the same options with respect to genetic test results: they could either establish a conclusive or rebuttable presumption of paternity. See § 13721(b)(2)(G), 107 Stat. at 659.

30. § 13721(b)(2)(E), 107 Stat. at 659.

Thus, the 1993 Act made acknowledgments of paternity obligatory, rather than merely encouraged as under the Family Act of 1988.<sup>31</sup>

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) overhauled the entire welfare system. One of the goals of the 1996 legislation was to “greatly increase paternity establishment.”<sup>32</sup> PRWORA mandated that a state’s paternity establishment percentage must increase at a predetermined rate lest the state be found in non-compliance with the law and, consequently, at risk for losing federal funding for its IV-D programs.<sup>33</sup> Conversely, PRWORA rewarded those states that increased their rates of paternity establishment.<sup>34</sup> PRWORA also re-

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31. See 42 U.S.C.A. § 668 (Westlaw through P.L. 113–65 (excluding 113–54 and 113–59) approved Dec. 20, 2013) (encouraging states to adopt a civil procedure for establishing paternity).

32. *Oversight of the Child Support Enforcement Program: Hearing Before the Subcomm. on Human Res. of the H.R. Comm. on Ways & Means*, 106th Cong. 3 (1999) [hereinafter *Child Support Enforcement Program Hearing*] (statement of Rep. Johnson, Chairman, Subcomm. on Human Res.).

33. See 42 U.S.C.A. § 652(g) (Westlaw). The statute provides in relevant part:

(1) A State’s program under this part shall be found, for purposes of section 609(a)(8) of this title, not to have complied substantially with the requirements of this part unless, for any fiscal year beginning on or after October 1, 1994, its paternity establishment percentage for such fiscal year is based on reliable data and (rounded to the nearest whole percentage point) equals or exceeds—

(A) 90 percent;

(B) for a State with a paternity establishment percentage of not less than 75 percent but less than 90 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 2 percentage points;

(C) for a State with a paternity establishment percentage of not less than 50 percent but less than 75 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 3 percentage points;

(D) for a State with a paternity establishment percentage of not less than 45 percent but less than 50 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 4 percentage points;

(E) for a State with a paternity establishment percentage of not less than 40 percent but less than 45 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 5 percentage points; or

(F) for a State with a paternity establishment percentage of less than 40 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 6 percentage points.

*Id.*

34. Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, § 341, 110 Stat. 2105, 2231 (codified as amended at 42

quired that states have a hospital-based program for the voluntary acknowledgment of paternity “immediately before or after the birth of a child.”<sup>35</sup> With these provisions, the federal government’s message to state governments was loud and clear: prioritize the easy establishment of paternity or risk losing federal financial assistance.

OBRA’s provision that participating states must give the voluntary acknowledgments of paternity either a rebuttable or conclusive presumption of paternity was not included in the legislative revisions of PRWORA. Consequently, the current version of the relevant federal law, 42 U.S.C. § 666(a)(5), does not mention a presumption of paternity based on an acknowledgment. Nonetheless, the laws of D.C. and the states do attach a presumption to the acknowledgment.<sup>36</sup> PRWORA requires only that D.C. and the states have procedures to ensure that an executed acknowledgment constitutes a “legal finding of paternity.”<sup>37</sup>

The impact of this language may be no different than the effect of a conclusive presumption. At least one federal entity’s interpretation of PRWORA is that a paternity acknowledgment establishes a conclusive presumption of paternity. In a report regarding the use of voluntary acknowledgments, the Office of the Inspector General of the Department of Health and Human Services (OIG) stated, “[f]ederal law dictates that a voluntary paternity acknowledgment creates a conclusive finding of paternity.”<sup>38</sup> Elsewhere in the report, the OIG noted that some state agencies and courts were reluctant to attach a conclusive finding of paternity to the acknowledg-

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U.S.C. § 668); *see also* 42 U.S.C.A. § 658(a) (Westlaw through P.L. 113–72 (excluding P.L. 113–66 and 113–67) approved Dec. 26, 2013) (providing incentive payments to states based on, *inter alia*, the state’s “paternity establishment performance level”).

35. PRWORA § 331(a)(5)(C)(ii), 110 Stat. 2105, 2228 (codified as amended at 42 U.S.C.A. § 666).

36. 42 U.S.C.A. § 666(a)(5) (Westlaw through P.L. 113–65 (excluding P.L. 113–54 and 113–59) approved Dec. 20, 2013); *see infra* Part II.B.

37. § 666(a)(5) (Westlaw).

38. OFFICE OF THE INSPECTOR GEN., DEP’T OF HEALTH & HUMAN SERVS., PATERNITY ESTABLISHMENT: USE OF VOLUNTARY PATERNITY ACKNOWLEDGEMENTS, OEI-06-98-00053 1 (2000) [hereinafter OFFICE OF THE INSPECTOR GEN., USE OF VOLUNTARY PATERNITY ACKNOWLEDGEMENTS]. The report cites to the aforementioned provision on acknowledgments of the Social Security Act, as amended by PRWORA and other laws. *See id.* at 1,16 n.2; *see also* OFFICE OF THE INSPECTOR GEN., DEP’T OF HEALTH & HUMAN SERVS., PATERNITY ESTABLISHMENT: ADMINISTRATIVE AND JUDICIAL METHODS, OEI-06-98-00050 15 (2000) [hereinafter OFFICE OF THE INSPECTOR GEN., ADMINISTRATIVE AND JUDICIAL METHODS] (stating that a signed voluntary paternity acknowledgment is “[f]ederally mandated to stand on its own as a conclusive finding of paternity.”).

ment.<sup>39</sup> The OIG recommended that the Office of Child Support Enforcement encourage state child support agencies “to inform State and local courts regarding the legality of acknowledgments as conclusive findings of paternity and work more closely with State legal entities to ensure adherence to Federal law.”<sup>40</sup>

### B. *Effectuating Federal Policy Through Local Laws*

In D.C., written paternity acknowledgments have existed since the 1970s,<sup>41</sup> but over twenty years passed before the District of Columbia Paternity Establishment Act of 1991<sup>42</sup> codified what a written acknowledgment was. That law provided that paternity could be established by “a written statement of the father and mother made under oath that acknowledges paternity.”<sup>43</sup> Perhaps reflecting the District’s desire to locate as many fathers as possible, the legislation changed the burden of proof for *disproving* paternity, ratcheting the burden up from a preponderance of the evidence to clear and convincing evidence.<sup>44</sup> The burden of proof for *establishing* pater-

39. See OFFICE OF THE INSPECTOR GEN., USE OF VOLUNTARY PATERNITY ACKNOWLEDGEMENTS, *supra* note 38, at 12.

40. *Id.* at 14.

41. The District of Columbia Marriage and Divorce Act of 1976 provided that a child’s relationship to her father was established “by proving by a preponderance of evidence that he is the father,” and stated that such a presumption of fatherhood existed where the putative father has acknowledged paternity in writing. District of Columbia Marriage and Divorce Act, tit. I, § 106, 23 D.C. Reg. 5869, 5874 (Feb. 11, 1977) (amended 1989). This provision has since been revised to provide that the father-child relationship is established either by adjudication or by an “unrebutted presumption,” including the presumption created where paternity is acknowledged in writing. D.C. CODE § 16-909(a)(4) (Westlaw through Oct. 16, 2013). It is not clear from the language of the D.C. Code whether the “writing” referred to in this provision includes an acknowledgement of paternity that is provided for in a different statutory provision, section 16-909(b-1) of the D.C. Code, or whether the writing referenced in section 16-909(a)(4) is something else altogether: a written document in which a man attests to his paternity, but which does not have the requisite elements of a voluntary acknowledgment of paternity as set forth in section 16-909.01(a)(1). See § 16-909.01(a)(1) (Westlaw); see *infra* Part III.C (further discussion of § 16-909).

42. District of Columbia Paternity Establishment Act of 1991, § 2, 38 D.C. Reg. 4970 (July 24, 1991) (codified as amended in scattered sections in titles 13, 16, and 30 of the D.C. Code).

43. § 2(d) (codified as amended at D.C. CODE § 16-909.01, formerly cited as § 16-909.1). The statute also provided that a written agreement between the father and mother made under oath that “binds the putative father and mother to the results of a genetic test” will establish paternity. *Id.*

44. § 2(c).

nity, however, remained at the less burdensome preponderance of the evidence standard.<sup>45</sup> These burdens of proof remain in effect today.<sup>46</sup>

The legislative history accompanying the 1991 Paternity Establishment Act sheds light on the financial burdens that the District was facing with respect to its paternity caseload. The law was intended to “simplify and streamline the District’s paternity determination process,” according to the D.C. Council’s Committee on the Judiciary.<sup>47</sup> The Committee Report stated that the District’s Office of Paternity and Child Support Enforcement had a backlog of cases, including “approximately 20,000 such cases where paternity ha[d] not been established.”<sup>48</sup> In order to meet federal standards for processing child support cases, and thereby avoid the withholding of federal funds as a penalty, the Committee advised that establishing paternity by voluntary acknowledgement would help process child support cases in a timely fashion.<sup>49</sup> Voluntary acknowledgments would replace “time-consuming and expensive procedures” used to adjudicate paternity, which included service of process, discovery, pretrial hearings, and trials.<sup>50</sup>

The Committee noted that establishing paternity “is the first step towards obtaining child support in the District,” and therefore, the proposed legislation would help children receive financial support.<sup>51</sup> However, it also acknowledged that the government had a monetary interest in clearing its logjam of support cases: the possibility of not only avoiding a penalty but also receiving additional federal funds as incentive payments.<sup>52</sup> The Committee Report underscores the legislature’s competing goals. Although the Council demonstrated concern for the well-being of minor children, it was also aware of the risk of losing federal funding for its public benefits programs. Calculations of this financial risk—and of the methods needed to secure a high rate of paternity establishment—were reflected in the resulting legislation.

## II. CHALLENGING THE ACKNOWLEDGMENT

There are three methods to challenge a signed acknowledgment of paternity in D.C.: rescind the acknowledgment within sixty days of signing,

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45. WILHELMINA J. ROLARK, COMM. ON THE JUDICIARY, REPORT TO COUNCILMEMBERS ON BILL 9-2, THE DISTRICT OF COLUMBIA PATERNITY ESTABLISHMENT ACT 3 (1991).

46. D.C. CODE § 16-909(b)(1) (Westlaw through Oct. 16, 2013).

47. ROLARK, *supra* note 45.

48. *Id.* at 2.

49. *See id.* at 3.

50. *Id.* at 4.

51. *Id.* at 3.

52. *Id.*

challenge the validity of the acknowledgment's execution, or challenge the acknowledgment "on the basis of fraud, duress, or material mistake of fact."<sup>53</sup> Where a man seeks to invalidate an acknowledgment based on non-paternity, he will face obstacles no matter which method he chooses.

#### A. Rescission of the Acknowledgment

Pursuant to PRWORA,<sup>54</sup> the D.C. Code provides that a signatory to an acknowledgment may rescind the acknowledgment "within the earlier of 60 days or the date of an administrative or judicial proceeding relating to the child in which the signatory is a party."<sup>55</sup> This rescission period offers signatories the chance to undo an acknowledgment with relative ease, in contrast to the procedures for a post-rescission challenge.<sup>56</sup> Rescission has its origins in contract law; it annuls the contract from the beginning.<sup>57</sup> A party to a contract can rescind within a reasonable time after discovering facts justifying rescission.<sup>58</sup>

Consequently, rescission seems to be an ill-fitting form of relief for parties to an acknowledgment. In stark contrast to a contract for goods or services, a paternity acknowledgment creates not only parental obligations but also parental rights—rights that are considered among our society's

53. District of Columbia *ex rel.* D.H. v. D.H., 140 DAILY WASH. L. REP. 2117, 2119 (D.C. Super. Ct. Sept. 6, 2012).

54. 42 U.S.C.A. § 666(5)(D)(ii) (Westlaw through P.L. 113–65 (excluding P.L. 113–54 and 113–59) approved Dec. 20, 2013).

55. D.C. CODE § 16-909.01(a) (Westlaw through Oct. 16, 2013); *see also* Child Support and Welfare Reform Compliance Amendment Act of 2000, 48 D.C. Reg. 1270 (Apr. 20, 2001) (codified as amended in scattered sections in titles 16 and 46 of the D.C. Code) (permitting rescission of voluntary acknowledgments of paternity). Although PRWORA mandates a 60-day rescission period, Mississippi law extends that time period. The relevant Mississippi statute provides that a paternity acknowledgment is subject to the right of any signatory to rescind within the earlier of "[o]ne (1) year; or [t]he date of a judicial proceeding relating to the child, including a proceeding to establish a support order, in which the signatory is a party." MISS. CODE ANN. § 93-9-9(4)(a) (Westlaw through End of 2013 Reg. Sess. and 1st & 2d Ex. Sess.).

56. *See infra* Part II.C; *see also* D.C. CODE § 16-909(c-1) (Westlaw).

57. Friedman v. Kennedy, 40 A.2d 72, 74 (D.C. 1944) (quoting 1 HENRY CAMPBELL BLACK, A TREATISE ON THE RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS § 1 (1916) ("To rescind a contract is not merely to terminate it but to abrogate and undo it from the beginning; that is, not merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had ever been made.")).

58. *See, e.g.,* Cummings v. Jack Hurwitz, Inc., 204 A.2d 332, 333 (D.C. 1964).

most sacred.<sup>59</sup> Neither D.C. statutes nor case law offers much guidance as to what grounds justify rescission of a paternity acknowledgment, or whether a signatory must plead justification for rescission in the first place. For instance, can a signatory seek rescission simply because he changed his mind about signing the acknowledgment? The answer is unclear. The steps to rescind—where and how to make a request for rescission—are similarly unclear. If there is an upcoming administrative or judicial proceeding relating to the minor child such as a support hearing on the court’s calendar, could a signatory make an oral motion to rescind at the hearing? If there is no upcoming administrative or judicial proceeding scheduled at which the signatory could raise the issue, must the signatory initiate the rescission process by filing a complaint within sixty days of signing the acknowledgment? Would a signatory in such a case be required to serve the D.C. government and the other signatory with notice of the complaint to rescind? The statute’s silence on the particulars of rescission likely contributes to litigants’ procedural woes, particularly those without legal representation.<sup>60</sup>

Other states fare better in clarifying the proper use of the rescission option. Some jurisdictions require an allegation or proof that the putative father is not the biological father.<sup>61</sup> Certain jurisdictions, such as West Virginia and Louisiana, make clear that a court can void the acknowledgment without evidence of fraud, duress, or material mistake of fact when a signatory seeks such relief within sixty days of execution of the acknowledgment.<sup>62</sup> Some states elaborate on the process of requesting a rescission:

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59. Although “domestic relations are preeminently matters of state law,” *Mansell v. Mansell*, 490 U.S. 581, 587 (1989), on the few occasions where the Supreme Court has taken up the issue of parenthood, it has consistently recognized the “fundamental liberty interest of natural parents in the care, custody and management of their child.” *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Described as “[p]erhaps the oldest of the fundamental liberty interests” recognized by the Supreme Court, parents’ decision-making power concerning their children’s welfare is protected by the Due Process Clause of the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000).

60. For example, a report by the District of Columbia Access to Justice Commission stated that in 2005, 98% of respondents in child support and paternity matters before D.C. Superior Court were unrepresented. D.C. ACCESS TO JUSTICE COMM’N, JUSTICE FOR ALL? AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA’S LOW-INCOME COMMUNITY 7, 63 (2008).

61. See, e.g., IOWA CODE ANN. § 252A.3A(12)(a) (Westlaw through legis. from the 2013 Reg. Sess.) (requiring signatory to attest that putative father is not the biological father on rescission form); MASS. GEN. LAWS ANN. ch. 209C § 11(a) (Westlaw through Ch. 195 of the 1st Ann. Sess. 2013) (requiring court to order genetic testing and proceed to adjudicate paternity or non-paternity if either party rescinds in a timely fashion).

62. See e.g., W. VA. CODE ANN. § 16-5-10(h)(5)(D) (Westlaw through the 2013 1st Extraordinary Sess.); LA. REV. STAT. ANN. § 9:406(A) (Westlaw through the 2013



California requires that the appropriate state agency develop a form for rescission of the acknowledgment with instructions on how to complete the form and file for rescission.<sup>63</sup>

Perhaps the biggest drawback to the rescission process in D.C. is that, although the rights and obligations that flow from the acknowledgment are significant, the time to rescind—sixty days or less—is very brief. In order to effectuate rescission in D.C., one or both of the acknowledgment's signatories must have doubts about the document's veracity immediately after signing it. Once the allotted time has run, the conclusive presumption of paternity will be triggered and the male signatory is presumed to be the child's legal father.

The truth of the child's paternity may not be discovered in that initial sixty days. Where there is no reason for a signatory to question the truthfulness of the acknowledgment's statements—if, for instance, he has no reason to question the mother's representations that he is the father of the child—then it is likely that the sixty-day rescission period will pass with no action by either signatory. For example, in *G. v. H.*,<sup>64</sup> the putative father had no

Reg. Sess.). In West Virginia, a signatory may rescind by filing a complaint within sixty days of execution and by including in the complaint the name of the child, the name of the other parent, the date of the birth of the child, the date of signing the acknowledgment, and “a statement that he or she wishes to rescind the acknowledgment of the paternity.” W. VA. CODE ANN. § 16-5-10(h)(5)(A) (Westlaw). The law goes on to provide, “If the complaint was filed within sixty days of the date the affidavit of paternity was executed, the court shall order the acknowledgment to be rescinded without any requirement of a showing of fraud, duress, or material mistake of fact.” § 16-5-10(h)(5)(D) (Westlaw). If such a complaint is filed more than sixty days from the date of execution of the affidavit of paternity or the date of an administrative or judicial proceeding relating to the child in which the signatory of the affidavit of paternity is a party, then the complaint must include “specific allegations concerning the elements of fraud, duress or material mistake of fact.” § 16-5-10(h)(5)(A) (Westlaw).

Louisiana law provides that an acknowledgment may be revoked “without cause” within sixty days of its execution during a judicial hearing. LA. REV. STAT. ANN. § 9:406(A)(1)(b) (Westlaw). After the initial sixty days has passed, a signatory may petition a court for revocation of the acknowledgment upon proof by clear and convincing evidence that the acknowledgment “was induced by fraud, duress, material mistake of fact or error, or that the person is not the biological parent of the child.” § 9:406(B)(1) (Westlaw). Louisiana law also mandates that the appropriate state agency develop a form and process for the revocation of an acknowledgment. § 9:406(A)(1)(a) (Westlaw).

63. CAL. FAM. CODE § 7575(a) (Westlaw through 2013 Reg. Sess. laws, all 2013–14 1st Ex. Sess. laws, and Res. c. 123 (S.C.A.3)); *see also* N.H. REV. STAT. ANN. § 5-C:27 (Westlaw through Ch. 279 (End) of the 2013 Reg. Sess.) (detailing what information must be included in a request for rescission of paternity acknowledgment).

64. There are few published decisions addressing the validity of paternity acknowledgments in D.C., and therefore, in some instances this Article refers to unpublished

reason to question paternity either before or after he signed the acknowledgment until the child's mother disclosed to him, several months after he signed the acknowledgment, that their relationship had been non-exclusive.<sup>65</sup>

A child support prosecution of the putative father by the D.C. government may be filed months, and sometimes years, after the initial sixty-day period has passed.<sup>66</sup> The government may initiate a proceeding to determine parentage and obtain a support order anytime until the child's twenty-first birthday.<sup>67</sup> For example, the government might not become involved in a support case until the custodial parent begins receiving public benefits on behalf of the child, which could occur months or years after the child's birth and, consequently, months or years after the acknowledgment was executed.

Nevertheless, the timing of the government's suit against the putative father could impact whether he utilizes the rescission process. If there are no immediate consequences for the putative father following the signing of an acknowledgment, it is unlikely that he will take advantage of the rescission period because he has no reason to scrutinize the accuracy of the representations regarding his paternity. Legal action serves to put the signatory on actual notice of the acknowledgment's repercussions: an obligation to appear in court and a determination of how much, if any, child support he owes to the custodial parent. That may be, in part, why the D.C. statute shortens the rescission period where there is an administrative or judicial proceeding related to the child and involving the signatory.<sup>68</sup>

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court orders. For unpublished court decisions, citations will refer to the parties by the first initial of their last name only in order to protect their privacy.

65. *G. v. H.*, No. 2006-SUP-4318, slip op. at 11 (D.C. Super. Ct. Dec. 20, 2010); *see also* *Bradford v. Rice*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*23–24 (D.C. Super. Ct., Fam. Ct. May 14, 2008) (“[I]t may only be [the child’s mother], but is certainly not [the putative father], who was in possession of full information as to the potential parentage of this child. She, and not the Respondent, had access to the most pertinent details underlying the adjudication of paternity in this case.”).
66. *See, e.g.*, *District of Columbia ex rel. D.H. v. D.H.*, 140 DAILY WASH. L. REP. 2117, 2117 (D.C. Super. Ct. Sept. 6, 2012) (noting that acknowledgment was signed in July 2008, while the government petition for support was filed in January 2009); *District of Columbia ex rel. J.I.W. v. J.W.*, 141 DAILY WASH. L. REP. 933, 934 (D.C. Super. Ct. Apr. 23, 2012) (noting that acknowledgment was purportedly signed in February 2008, while the government petition was filed in November 2008); *G. v. H.*, No. 2006-SUP-4318, slip op. at 10 (noting that acknowledgment was signed in March 2006 while the government petition was filed in December 2006); *Robertson v. Anderson*, 136 DAILY WASH. L. REP. 2357, 2359 (D.C. Super. Ct. Oct. 7, 2008) (noting that acknowledgment was signed in July 2005, while the government petition was filed in February 2006).
67. D.C. CODE § 16-2342(b) (Westlaw through Oct. 16, 2013).
68. § 16-909.01(a-1) (Westlaw) (“A signatory to a voluntary acknowledgment of paternity pursuant to subsection (a)(1) of this section may rescind the acknowledgment

A litigant's failure to affirmatively seek rescission or challenge an acknowledgment prior to the government's litigation could be an absolute bar to obtaining a court order for genetic testing to determine the biological connections of the signatories and the child. Where there is no successful rescission of an acknowledgment, a D.C. court is not obligated to order genetic testing in a paternity case.<sup>69</sup>

In fact, it would be reasonable to interpret the relevant statute, D.C. Code Section 16-2343(a)(3), as barring testing altogether.<sup>70</sup> In *F. v. F.*,<sup>71</sup> an associate judge vacated a magistrate judge's order for paternity testing. The putative father in *F. v. F.* had signed an acknowledgment of paternity soon after the child's birth. Nearly six years after the child's birth, the D.C. government filed a petition for child support on behalf of the minor child. At a hearing on the petition, the magistrate judge ordered a paternity test; the test excluded the signatory as the biological father of the child and the judge subsequently dismissed the support case.<sup>72</sup> On the government's motion for review, however, the associate judge noted that the putative father had never attempted to rescind the acknowledgment in the intervening six years.<sup>73</sup> Absent such an attempt to rescind, the *F. v. F.* court concluded, "a subsequent paternity test is legally irrelevant and inappropriate."<sup>74</sup> More recently, in *D.H. v. D.H.*, a judge concluded that if a validly executed acknowledgment exists, pursuant to Section 16-2343(a)(3) of the D.C. Code, "a court may not order genetic testing."<sup>75</sup> The *F. v. F.* and *D.H. v. D.H.* cases illustrate the significant impact that the federally mandated sixty-day rescission period can have: where the parties take no action to rescind, a court can

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within the earlier of 60 days or the date of an administrative or judicial proceeding relating to the child in which the signatory is a party.").

69. § 16-2343(a)(3) (Westlaw).

70. D.C. Code Section 16-2343(a) provides in relevant part:

[T]he court, on its own motion, may require, or, on the motion of a party, shall require, the child and all other parties to submit to medical or genetic tests, unless . . . [t]he parties have signed a voluntary acknowledgment of paternity pursuant to section 16-909.01(a) . . . and have not made a legally-effective rescission of the acknowledgment.

§ 16-2343(a) (Westlaw).

71. District of Columbia *ex rel.* *F. v. F.*, No. 2006-SUP-3783, slip op. at 4 (D.C. Super. Ct. Jan. 15, 2008).

72. *F. v. F.*, No. 2006-SUP-3783, slip op. at 2.

73. *F. v. F.*, No. 2006-SUP-3783, slip op. at 3–4.

74. *F. v. F.*, No. 2006-SUP-3783, slip op. at 4.

75. District of Columbia *ex rel.* *D.H. v. D.H.*, 140 DAILY WASH. L. REP. 2117, 2119 (D.C. Super. Ct. Sept. 6, 2012).

interpret this as a failure to preserve their rights, which in turn justifies a bar on any future challenges to the acknowledgment.<sup>76</sup>

*B. The Conclusive Presumption of Paternity*

D.C. law provides that a “conclusive presumption” of paternity is created either by a genetic test result or by the father’s acknowledgement of paternity in writing.<sup>77</sup> The D.C. Council contemplated—and ultimately approved—the creation of that conclusive presumption during legislative hearings for the D.C. Paternity Establishment Act of 1994.<sup>78</sup> The legal counsel for the District—then known as the Office of Corporation Counsel—and a representative from the District’s Office of Paternity and Child Support Enforcement participated in those legislative hearings and both strongly endorsed the proposed amendment.<sup>79</sup> In a letter to the D.C. Council’s Committee on the Judiciary, the Office of Corporation Counsel expressed its support for the conclusive presumption for both the genetic test and the written acknowledgment, stating, “the interests of the child in receiving support and achieving finality in the determination of basic family relationships outweigh the minimal possibility of an erroneous result.”<sup>80</sup>

This is a curious description to apply to both a genetic test and to an acknowledgment, since only the former can yield a “99% or greater probability of paternity” based on scientific fact.<sup>81</sup> The acknowledgment, of course, is not based on any test but on the representations and beliefs of the two parties signing the document.<sup>82</sup> Notwithstanding this crucial distinction, in its letter to the D.C. Council, the Office of Corporation Counsel

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76. *See also* M.M. v. T-M.M., 995 A.2d 164, 166 (D.C. 2010) (denying subsequent challenge to paternity where litigant “created his own obstacle to equitable relief when he delayed any attempt to overturn the paternity and support order for twelve years”).

77. D.C. CODE § 16-909(b-1) (Westlaw through Oct. 16, 2013).

78. D.C. COMM. ON THE JUDICIARY, REPORT TO COUNCILMEMBERS ON D.C. BILL 10-777, “PATERNITY ESTABLISHMENT ACT OF 1994” 2 (D.C. Oct. 12, 1994).

79. Letter from Laurie A. Ensworth, Asst. Chief, Child Support Section of Office of Corp. Counsel, to Hon. James Nathanson, Chairman, Comm. on the Judiciary 1–2 (D.C. Oct. 11, 1994).

80. *Id.*

81. *Id.* at 2. Courts in D.C. have long stated that the results of genetic tests or blood tests can be conclusive proof of non-paternity. *See* S.A. v. M.A., 531 A.2d 1246, 1250 (D.C. 1987); *Retzer v. Retzer*, 161 A.2d 469, 472 (D.C. 1960). The D.C. Code provides that the results of genetic testing, if they meet certain scientific standards, “shall be conclusive evidence of nonpaternity, unless contrary test results are received.” D.C. CODE § 16-2343.01(c)(3) (Westlaw).

82. As discussed below, reliance on the beliefs and representations of the other parent has led to situations where a man discovers he is not the biological father after he has signed the acknowledgment of paternity. *See infra* Part II.C.

stated that a conclusive presumption “is even *more* suitable in the case of a voluntary acknowledgment executed by the putative father under oath.”<sup>83</sup> According to the Office of Corporation Counsel, the voluntary acknowledgment “allows a putative father to consider the implications of his acknowledgment and to investigate any questionable circumstances surrounding the child’s conception before assuming the responsibilities of parenthood.”<sup>84</sup> In contrast to the “reluctant father” who is forced to undergo genetic testing by court order, the Office of Corporation Counsel described the would-be signatory as executing the acknowledgment “at his leisure” and “on his own initiative,” thereby making it “entirely reasonable” to give “binding legal effect” to his actions.<sup>85</sup>

Policymakers attributed a significant amount of agency and opportunity to the would-be signatory. Elsewhere in the legislative history to the 1994 amendments, the representative for the Office of Corporation Counsel stated that a conclusive presumption should be used as a matter of public policy because, among other reasons, it “places a burden on the putative father to obtain a genetic test prior to signing a voluntary acknowledgment.”<sup>86</sup> However, at that time there was no language in the existing statute or the proposed legislation requiring that the putative father be advised of his right to genetic testing. Even today there is no statutory requirement that the parties to an acknowledgment be advised about genetic testing.

The Office of Corporation Counsel noted that in most adjudications of paternity in D.C. Superior Court, voluntary written acknowledgments are executed in open court, and it reasoned that creating a conclusive presumption for all written voluntary acknowledgments “simply extends the same measure of legal protection to children whose fathers acknowledge paternity without being sued for support.”<sup>87</sup> Other jurisdictions have similarly concluded that the significance of the act of voluntarily signing such an acknowledgment justifies the conclusive presumption.<sup>88</sup>

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83. Ensworth, *supra* note 79, at 2 (emphasis added).

84. *Id.*

85. *Id.*

86. JAMES E. NATHANSON, COMM. ON THE JUDICIARY, REPORT TO COUNCILMEMBERS ON D.C. BILL 10-777, “PATERNITY ESTABLISHMENT ACT OF 1994” 2 (1994).

87. *Id.*

88. *See, e.g., In re Paternity of an Unknown Minor*, 951 N.E.2d 1220, 1222 (Ill. App. Ct. 1st Dist. 2011) (quoting *People ex rel. Dep’t of Pub. Aid v. Smith*, 818 N.E.2d 1204, 1214 (Ill. 2004)) (noting the disparate treatment of men presumed to be fathers by the marital presumption and by a signed acknowledgment by commenting that “it would be unreasonable to allow a man . . . to undo his voluntary acknowledgment years later on the basis of DNA test results, when his paternity was based not on a mere marital presumption that he was the child’s father but on his conscious decision to accept the legal responsibility of being the child’s father.”); Cesar

This logic overlooks the vast difference between adjudication, with due process protections administered by an impartial judge, and an acknowledgment, which is usually presented and executed in a hospital room or government agency office with no judicial officer or even a notary present.<sup>89</sup> The latter is simply not a comparable setting to adjudication for thoughtful deliberation.<sup>90</sup> Either the Office of Corporation Counsel assumed that a signatory to the acknowledgment would be fully informed about the child's parentage prior to signing the acknowledgment or, more troubling, did not find cause for alarm if the signatory was uninformed about those facts and signed the document anyway. Later legislation affirmatively foreclosed the possibility of additional procedural protections for signatories by explicitly disallowing judicial or administrative proceedings to ratify a voluntary acknowledgment.<sup>91</sup>

Applying a conclusive presumption to an acknowledgment has serious evidentiary implications. Though not defined in the D.C. or federal statutes regarding paternity establishment, a conclusive presumption is not an unfamiliar term in our jurisprudence. As the language in OBRA implies,<sup>92</sup> it is an alternative to a rebuttable presumption. A fact-finder may conclude that a presumptively rebuttable fact is incorrect or untrue based on other factual evidence. By contrast, conclusive presumptions—sometimes referred to by the more apt term “irrebuttable presumptions”—are described as “fictions in which a rule of substantive law comes disguised as a presumption.”<sup>93</sup> Con-

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C. v. Alicia L., 800 N.W.2d 249, 257 (Neb. 2011); Burden v. Burden, 945 A.2d 656, 669 (Md. Ct. Spec. App. 2008).

89. Regulations promulgated by the Department of Health and Human Services require the presence of a witness or a notary to authenticate the parents' signatures on the voluntary acknowledgment. 45 C.F.R. § 303.5(g)(4) (Westlaw through Jan. 30, 2014; 79 FR 5222). In one of several ambiguities plaguing the D.C. statutes, the description of a voluntary acknowledgment states that the written oath of the parents “may include [a] signature in the presence of a notary.” D.C. CODE § 16-909.01(a) (Westlaw through Oct. 16, 2013) (emphasis added). However, elsewhere the D.C. Code requires birthing hospitals and the Vital Records Registrar to provide written notice to unmarried individuals that a voluntary acknowledgment “is not effectuated unless the mother and putative father each signs the form under oath and a notary authenticates the signatures.” §§ 16-909.03(b)(1)(D), 16-909.04(a)(4) (Westlaw).

90. See *infra* Part II.C.

91. § 16-2342.01(b) (Westlaw). Federal law mandated this provision. 42 U.S.C.A. § 666(a)(5)(C)(iii) (Westlaw through P.L. 113–65 (excluding P.L. 113–54 and 113–59) approved Dec. 20, 2013).

92. See Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 13721(b)(2)(C), 107 Stat. 312, 659 (codified as amended at 42 U.S.C.A. § 666).

93. 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, FEDERAL RULES OF EVIDENCE § 5124, at 494-95 (2d ed., 2005); see also 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2492, at 307–08 (James H. Chadbourne rev., 1981) (citing *State v. Platt*, 2 S.C. 150, 154

tradictory facts cannot challenge a conclusive presumption; in effect, the presumption short-circuits the fact-finding responsibilities of the court.<sup>94</sup>

The conclusive presumption of paternity in D.C. that flows from a voluntary acknowledgment establishes that the signatories are the legal parents of the child; no additional testimony or evidence is required. Once the signatories are found to be the child's legal parents, all rights and responsibilities of parenthood, including the obligation to support the child, are invoked. The D.C. statute provides that where there is no presumed parent and where there has been no rescission, the acknowledgment "shall legally establish the parent-child relationship between the father and the child for all rights, privileges, duties, and obligations under the laws of the District of Columbia."<sup>95</sup>

The legislative history accompanying these amendments to D.C.'s paternity statutes underscores the importance of federal funding to localities. The Paternity Establishment Act of 1994, enacted in response to OBRA,<sup>96</sup> was passed in part due to the D.C. Council's concern that the District could lose as much as \$13 million in federal funding for its IV-D program if it did not comply with federal law.<sup>97</sup> While OBRA gave states the option of attaching either a rebuttable or conclusive presumption of paternity to written acknowledgments of paternity, the D.C. Council opted to apply a conclusive presumption.<sup>98</sup> Even though PRWORA subsequently omitted mention of the option for a rebuttable or a conclusive presumption of paternity and federal law is currently silent on the issue, D.C. continues to attach a conclusive presumption to paternity acknowledgments.<sup>99</sup>

Other states have also promulgated paternity laws that attach a conclusive presumption to acknowledgments. In Rhode Island, "[t]he sworn acknowledgment of paternity becomes a conclusive presumption if there is

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(1879)) ("In strictness there cannot be such a thing as a 'conclusive presumption.' Wherever from one fact another is said to be conclusively presumed, in the sense the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence.").

94. *See Neder v. United States*, 527 U.S. 1, 10 (1999) (addressing conclusive presumptions in the context of criminal jury trials).

95. D.C. CODE § 16-909.01(b) (Westlaw).

96. JAMES E. NATHANSON, COMM. ON THE JUDICIARY, REPORT TO COUNCILMEMBERS ON D.C. BILL 10-777, "PATERNITY ESTABLISHMENT ACT OF 1994" 2 (1994).

97. *Id.*

98. *See* Paternity Establishment Act of 1994, 41 D.C. Reg. 8051 (Mar. 16, 1995) (codified as amended in scattered sections in title 16 of the D.C. Code).

99. D.C. CODE § 16-909(b-1)(2) (Westlaw).

no court challenge to this acknowledgment within sixty (60) days of the signing of this acknowledgment.” Rhode Island’s paternity statute further provides that “[t]he only defenses which may be raised to the signing of this acknowledgment after the sixty (60) day period are fraud, duress or mistake of fact.”<sup>100</sup> Some states, such as Virginia, Pennsylvania, and Wisconsin, make clear that an unrescinded written acknowledgment has the same conclusive effect as a judgment.<sup>101</sup> Even a rebuttable presumption of parentage can become conclusive if there is no challenge to the presumption within the time provided in a state’s statute. In D.C., for instance, a rebuttable presumption of paternity arises when the parents are married at the time of the child’s birth. A challenge to that presumption must be brought within two years of the child’s birth after which the presumption becomes conclusive.<sup>102</sup>

The Office of Corporation Counsel stated in no uncertain terms that the legislative body should not consider enacting a law with a rebuttable presumption for either the DNA test or the voluntary acknowledgment of paternity. Although the Counsel acknowledged that a rebuttable presumption “would provide a putative father with an opportunity to challenge a paternity finding he believed to be erroneous,” it argued that the rebuttable presumption would also provide putative fathers seeking to avoid support obligations with further opportunities to prolong litigation and to challenge existing support orders.<sup>103</sup> The Counsel referred to the purported ease with which fathers challenged written paternity acknowledgments where a rebuttable presumption applied, stating that in its experience, the rebuttable presumption of paternity “is so easily rebuttable as to have little legal effect.”<sup>104</sup> In such cases, according to the Counsel, courts responded to paternity challenges by ordering genetic tests, which often caused “significant disruption to the child’s emotional life and ability to obtain support.”<sup>105</sup>

While the impact of later genetic testing on a child’s life and the stability of the family is of serious import in any paternity case, it is a mistake

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100. R.I. GEN. LAWS § 15-8-3(a)(5) (Westlaw through ch. 534 of the 2013 Reg. Sess.).

101. See 23 PA. CONS. STAT. ANN. § 5103(d) (Westlaw through Reg. Sess. Act 2013-88, 91, 93-97, 99-103, except 20 PA. CONS. STAT. § 7101 to end 2013-14); VA. CODE ANN. § 20-49.1(B)(2) (Westlaw through End of the 2013 Reg. Sess. and the End of the 2013 Spec. Sess. I.); WIS. STAT. ANN. § 767.805 (Westlaw through 2013 Wis. Act 116, published Dec. 21, 2013).

102. D.C. CODE § 16-2342(c) (Westlaw). In Minnesota, by contrast, a presumption of paternity becomes conclusive if no challenge is brought within three years of a declaration of paternity. See *DeGrande v. Demby*, 529 N.W.2d 340 (Minn. Ct. App. 1995) (interpreting MINN. STAT. § 257.57).

103. Ensworth, *supra* note 79, at 2-3.

104. *Id.* at 3.

105. *Id.*



to assume that a conclusive presumption is the best approach to support the health and stability of a family unit. As I discuss in Part III, a paternity acknowledgment and a desire for genetic testing need not be at odds with one another. Instead, the existence of an acknowledgment should not make irrelevant or immaterial evidence of a lack of biological connection between the putative father and the child.

### *C. Post-Rescission Challenges*

Can a signatory overcome the conclusiveness of a conclusive presumption? If a signatory does not request rescission within sixty days of signing, it will be exceedingly difficult for him to succeed in having his challenge heard, let alone decided in his favor. If an acknowledgment is not rescinded, it constitutes a legal finding of the parent-child relationship and creates the aforementioned conclusive presumption of paternity.<sup>106</sup> At that point, it is difficult for a signatory to challenge the finding of parenthood based on a paternity acknowledgment:

A conclusive presumption thus established may be challenged in the Superior Court after the rescission period . . . through the same procedures as are applicable to a final judgment of the Superior Court, but only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenging party.<sup>107</sup>

Although PRWORA requires jurisdictions to establish procedures under which a written acknowledgment of paternity can be challenged on the basis of fraud, duress, or material mistake of fact,<sup>108</sup> it makes no mention of time limitations on such challenges. Neither does PRWORA require incorporation of a final judgment rule, which seeks to preserve the finality of a judgment deliberately rendered through adjudication.<sup>109</sup> The final judgment rule circumscribes post-judgment challenges such that a litigant may

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106. D.C. CODE §§ 16-909.01(b), 16-2342.01(a)(1) (Westlaw).

107. *Matthews v. District of Columbia*, 875 A.2d 650, 656 (D.C. 2005) (citing D.C. CODE § 16-909(c-1)).

108. 42 U.S.C.A. § 666(a)(5)(D)(iii) (Westlaw through P.L. 113-65 (excluding P.L. 113-54 and 113-59) approved Dec. 20, 2013).

109. *See generally* *Johnson v. Capital City Mortg. Corp.*, 723 A.2d 852, 856 (D.C. 1999) (“A final judgment is defined as a prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.”) (internal quotations omitted). *See also* *Lynch v. Meridian Hill Studio Apts., Inc.*, 491 A.2d 515, 520 (D.C. 1985) (noting that post judgment relief is only permissible under exceptional circumstances).

argue only a narrowly tailored set of claims for relief.<sup>110</sup> In doing so, the rule balances a litigant's interest in fairness and justice against the need for predictability and enforceability of a court's ruling.<sup>111</sup>

Despite the lack of a federal requirement for inclusion of the final judgment rule, the D.C. Council chose, as other jurisdictions have, to incorporate the local judicial rule on final judgment.<sup>112</sup> Reference to the final judgment rule, however, has only compounded the confusion regarding challenges to paternity acknowledgments.

The final judgment rule in D.C.'s Domestic Relations Procedural Rules is Rule 60(b), the same final judgment rule in D.C. Superior Court's Rules of Civil Procedure and the Federal Rules of Civil Procedure. Domestic Relations Rule 60(b), entitled "Relief from Judgment or Order," allows for post-judgment challenges on the following grounds:

- mistake, inadvertence, surprise, or excusable neglect;
- newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under SCR-Dom. Rel. 59(b);
- fraud (whether previously denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- the judgment is void;
- the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- any other reason justifying relief from the operation of the judgment.<sup>113</sup>

The Restatement (Second) of Judgments explains the rationale of the final judgment rule:

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110. *See, e.g.*, D.C. SUPER. CT. DOM. REL. R. 60(b) (Westlaw through June 15, 2013).

111. *See, e.g.*, 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, FEDERAL RULES OF CIVIL PROCEDURE § 2851, at 286 (3d ed., 2012) (citing *Hutchins v. Zoll Medical Corp.*, 492 F.3d 1377, 1386 (Fed. Cir. 2007)) (noting that Rule 60 "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done").

112. *See* D.C. SUPER. CT. R. CIV. P. 60(b) (Westlaw through June 15, 2013); D.C. SUPER. CT. DOM. REL. R. 60(b) (Westlaw).

113. D.C. SUPER. CT. DOM. REL. R. 60(b) (Westlaw).

This Section makes the general common-sense point that such conclusive carry-over effect should not be accorded a judgment which is considered merely tentative in the very action in which it was rendered. On the contrary, the judgment must ordinarily be a firm and stable one, the “last word” of the rendering court—a “final” judgment.<sup>114</sup>

### 1. Time Limitations

D.C.’s procedural rule on final judgments includes a time limitation. For most post-judgment challenges the motion for relief must be brought “within a reasonable time,” but for a motion based on “mistake” or “fraud,” *inter alia*, the motion must be made “not more than one year after the judgment, order, or proceeding was entered or taken.”<sup>115</sup> The D.C. statute on disestablishment of paternity does not explicitly reference Rule 60(b)’s time restrictions on post-judgment challenges; instead, it provides that post-rescission challenges must be made “through the same procedures as are applicable to a final judgment of the Superior Court.”<sup>116</sup> Notwithstanding the fact that there is no explicit time restriction in the relevant D.C. paternity statute, the government has contended that a signatory is foreclosed from challenging an acknowledgement’s validity because he did so more than one year from the date he signed the document.<sup>117</sup>

The D.C. Court of Appeals has not explicitly ruled on the application of Rule 60(b)’s time limitations to post-rescission challenges to paternity acknowledgments, however, it has suggested that such challenges may be brought after one year in some circumstances. In *Matthews v. District of Columbia*, the D.C. Court of Appeals considered the substance of a post-rescission challenge to paternity that occurred at least two years after the signing of an acknowledgment, thereby allowing a post-rescission challenge to be brought outside the one-year limitation purportedly proscribed by Rule 60(b).<sup>118</sup> Although lower courts have interpreted the decision as al-

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114. RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. a (1982).

115. D.C. SUPER. CT. DOM. REL. R. 60(b) (Westlaw).

116. D.C. CODE § 16-909(c-1) (Westlaw through Oct. 16, 2013).

117. *See Bradford v. Rice*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*6 (D.C. Super. Ct., Fam. Ct. May 14, 2008) (“The government’s position is that Rule 60(b) motions premised on such grounds must be made within one year from the date of the judgment, and that the catchall provision of Rule 60(b)(6) cannot be used to avoid that time limitation.”); *Robertson v. Anderson*, 136 DAILY WASH. L. REP. 2358, 2359 (D.C. Super. Ct. Oct. 7, 2008) (“When the rescission period has passed, the government asserts that Rule 60(b)(3) of the Rules Governing Domestic Relations Proceedings applies and any challenges to an acknowledgment of paternity must be made within a year after the acknowledgment become[s] final.”).

118. *Matthews v. District of Columbia*, 875 A.2d 650, 654 (D.C. 2005).

lowing for liberal construction of the time limitation,<sup>119</sup> the *Matthews* court did not address the timing issue directly.<sup>120</sup>

More recently, in *M.M. v. T-M.M.*, the D.C. Court of Appeals indicated that a motion challenging paternity pursuant to Rule 60(b)(6) must be made “within a reasonable time” and that the challenge in the case at bar was unreasonable when filed twelve years after the putative father had acknowledged paternity.<sup>121</sup> Although the challenger had subsequently obtained genetic proof that he was not the biological father of the child, the *M.M.* appellate court agreed with the lower court that the man “created his own obstacle to equitable relief when he delayed any attempt to overturn the paternity and support order for twelve years.”<sup>122</sup> The *M.M.* court made clear that there was a strict one-year time limitation for all other Rule 60(b) requests for relief. It emphasized that the putative father’s genetic test results could not provide the basis for relief under Rule 60(b)(1), (2), or (3) because such a claim would be barred by the one-year time limitation.<sup>123</sup>

There is one crucial distinction between the *M.M.* case and many other paternity cases: in *M.M.*, the putative father had acknowledged that he was the father at a court hearing, and thus his paternity was established by adjudication, not by written acknowledgment.<sup>124</sup> Although the litigant contended that he acknowledged paternity primarily because he believed the mother’s statement that he was the father<sup>125</sup>—a justification that is not uncommon in such cases—the father in *M.M.* had at least some procedural protections available to him that are lacking in the out-of-court settings in which acknowledgments are signed. Thus, to the *M.M.* court, the challenger’s twelve-year delay may have seemed particularly unreasonable in light of the fact that he had acknowledged paternity in open court.

Of course, adjudications of paternity do not always deliver appropriate procedural protections. In *Bradford v. Rice*, the court outlined the failure of the government to provide adequate notice to a *pro se* litigant in a paternity

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119. See, e.g., *Robertson*, 136 DAILY WASH. L. REP. at 2360 (finding that the *Matthews* court “indirectly rejects the idea that the Rule 60(b)(3) one year time limit for challenging final judgments necessarily applies to acknowledgments of paternity”).

120. *Robertson*, 136 DAILY WASH. L. REP. at 2360.

121. *M.M. v. T-M.M.*, 995 A.2d 164, 166 (D.C. 2010).

122. *M.M.*, 995 A.2d at 167.

123. *M.M.*, 995 A.2d at 166 n.1.

124. *M.M.*, 995 A.2d at 165 (stating that the putative father “acknowledged that he was [the child’s] father” at an April 1993 hearing on the petition to establish paternity and child support). Note, though, that in *M.M.* the appellate court cites to the D.C. Code section 16-909(c) language about challenging a written acknowledgment of paternity despite the fact that it appears to have been an adjudication of paternity. *Id.* at 166.

125. *M.M.*, 995 A.2d at 165.

adjudication.<sup>126</sup> Professor Jane C. Murphy has noted that courts can and do enter default judgments against putative fathers when no actual notice of the proceedings has been provided.<sup>127</sup> A party's confusion about the implications of acknowledging or consenting to paternity can still occur in the courtroom setting. As Professor Murphy points out, the absence of legal representation for most putative fathers, the sheer volume of paternity cases, and the "routine treatment" of such cases by the child support agency "leave many fathers misinformed about the significance of the proceedings."<sup>128</sup>

When courts have allowed challenges to acknowledgments to go forward despite a delay in bringing the challenge, they have addressed the impact of Rule 60(b). In *Robertson v. Anderson*, for example, after finding the government's timeliness argument to be "essentially moot" because the acknowledgment was not properly executed,<sup>129</sup> the court concluded that even if the acknowledgment was properly executed, the government's timeliness argument was "flawed."<sup>130</sup> The court affirmatively stated that acknowledgments are "not final judgments issued by a court of law,"<sup>131</sup> thereby recognizing the problem of relying on a final judgment rule in limiting a litigant's ability to challenge an acknowledgment's validity. Consequently, stated the court, the one year deadline "is not necessarily applicable" to post-rescission challenges to acknowledgments.<sup>132</sup> Courts in other cases have similarly disregarded the one-year time limitation where they found that extraordinary circumstances justified re-examining the acknowledgment under Rule 60(b)(6).<sup>133</sup>

These cases illustrate the problem with incorporating reference to the final judgment rule into laws governing the paternity acknowledgments: there is no actual final judgment of an acknowledgment of paternity. Ironically, the absence of a judgment in most paternity cases was exactly what lawmakers had intended. As discussed in Part II, the federal legislation that

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126. See *Bradford v. Rice*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*40 (D.C. Super. Ct., Fam. Ct. May 14, 2008) (noting that litigant did not have attorney present at adjudication).

127. Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 357 (2005).

128. *Id.*

129. *Robertson v. Anderson*, 136 DAILY WASH. L. REP. 2358, 2359–60 (D.C. Super. Ct. Oct. 7, 2008).

130. *Robertson*, 136 DAILY WASH. L. REP. at 2360.

131. *Robertson*, 136 DAILY WASH. L. REP. at 2360.

132. *Robertson*, 136 DAILY WASH. L. REP. at 2360.

133. See *Bradford v. Rice*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*25–26 (D.C. Super. Ct., Fam. Ct. May 14, 2008); *G. v. H.*, No. 2006-SUP-4318, slip op. at 12–13 (D.C. Super. Ct. Dec. 20, 2010).

mandated the widespread use of paternity acknowledgments intended them to be a substitute for a lengthy and expensive adjudicative process.

Until the Court of Appeals for the District of Columbia rules definitively on the issue of the applicability of Rule 60(b)'s time limits, an unmarried father's post-rescission challenge may be attacked—and consequently denied—on timeliness grounds, even where the government itself has delayed initiating an action for child support.<sup>134</sup> It is not unheard of for the government to bring a paternity and support case after considerable time has passed since the birth of the child or the signing of an acknowledgment. In the *Robertson* case, the government initiated the paternity and support action eight months after the acknowledgment was signed, and nearly thirteen years after the child was born.<sup>135</sup> In *G. v. H.*, the petition for child support was filed approximately nine months after the acknowledgment was signed, and the putative father was served approximately seventeen months after the acknowledgment was signed.<sup>136</sup> Surely one must question the fairness of a judicial system that appears to give the government *carte blanche* to seek support whenever it deems it appropriate to do so but penalizes an individual for not seeking relief in a timely manner when he has no reason to believe he must seek such relief.

## 2. Voluntariness

The final judgment rule is appropriate in situations where a court has rendered an actual judgment. A court's ruling is the product of a judicial process that requires ongoing protections for litigants' due process rights and obligates the judicial officer to deliberate prior to making a ruling.<sup>137</sup> Importantly, these protections are absent from the process of signing an acknowledgment of paternity. Although federal regulations promulgated by the Department of Health and Human Services call for due process safeguards for voluntary acknowledgments,<sup>138</sup> they provide no further guidance as to what these safeguards should be. Any agent administering the acknowledgment is required to provide the parents—prior to signing—with both oral and written notice “of the alternatives to, legal consequences of, and the rights and responsibilities that arise from signing the acknowledg-

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134. District of Columbia *ex rel.* F. v. F., No. 2006-SUP-3783, slip op. at 3 (D.C. Super. Ct. Jan. 15, 2008).

135. *Robertson*, 136 DAILY WASH. L. REP. at 2359.

136. *G. v. H.*, No. 2006-SUP-4318, slip op. at 2–3.

137. See U.S. CONST. amends. V, XIV (due process clauses); see also D.C. SUPER. CT. R. CIV. P. 52 (Westlaw through June 15, 2013) (requiring court to state all findings of fact and conclusions of law); D.C. SUPER. CT. DOM. REL. R. 52 (Westlaw through June 15, 2013) (same).

138. 45 C.F.R. § 303.5(g)(2)(iii) (Westlaw through Jan. 30, 2014; 79 FR 5222).

ment.”<sup>139</sup> But there is no requirement for deliberation—if anything, the putative parents are encouraged to sign as soon as possible, often immediately following the birth of the child, so that the child’s birth certificate may include the identity of both parents.<sup>140</sup>

The hospital setting is conducive to capturing men who might otherwise disappear without determining their identities as fathers, but it is not necessarily conducive to careful consideration and open communication about the facts of paternity. There is no disinterested third-party official present to ensure that the parties understand the legal implications of what is happening. An agent of the District may be trained to present the requisite information to the parties, but there is no incentive for that agent to provide sufficient notice; to the contrary, the District has an interest in procuring as many signatures on acknowledgments as possible in order to be eligible for future federal funds for social service programs.<sup>141</sup> Indeed, the hospital-based paternity establishment process has been cited as a “major factor” for the high rates of voluntary paternity establishment across the country.<sup>142</sup>

There are no apparent checks to ensure that proper notice and information are given to the signatories. Moreover, neither federal nor D.C. law requires that the signatories be advised about the availability of genetic testing, although a court has noted that the hospital’s failure to inform the father about the right to genetic testing “would surely undercut the validity” of the acknowledgment.<sup>143</sup> There is no statutory requirement to inform the signatories about the processes for either rescinding or later challenging the validity of the acknowledgment. No law requires that the government’s agents at a hospital or in an agency explain to putative fathers the potential for human error when signing the acknowledgment based on the representations of the child’s mother. Sometimes the mother does not “disclose critical information regarding paternity”<sup>144</sup> to the putative father when he signs the acknowledgment.

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139. D.C. CODE § 16-909.01(a) (Westlaw through Oct. 16, 2013).

140. For instance, all hospitals, whether public or private, are required to offer an acknowledgment and the opportunity to sign the acknowledgment to each unmarried woman who gives birth at the hospital and the alleged putative father, if present in the hospital, immediately before and after the birth of the child. *See* § 16-909.03(b) (Westlaw).

141. *See supra* Part I.

142. *Child Support Enforcement Program Hearing, supra* note 32, at 9 (statement of Hon. Olivia A. Golden, Assistant Secretary for Children and Families, U.S. Dep’t of Health and Human Servs.).

143. *G. v. H.*, No. 2006-SUP-4318, slip op. at 4 (D.C. Super. Ct. Dec. 20, 2010).

144. *G. v. H.*, No. 2006-SUP-4318, slip op. at 11.

The parents themselves may not be prepared to deliberate on the implications of signing the acknowledgment while at the hospital.<sup>145</sup> The moments immediately following the birth of a child can be emotionally stressful<sup>146</sup> and may be an inappropriate time to make important decisions. The parents may not want to ask or answer sensitive questions about a child's paternity. Individuals may feel pressured to sign by extended family members who are present at the birth. Indeed, the aforementioned 2000 Department of Health and Human Services report on the use of voluntary acknowledgments evidenced concern among workers in the child support system that, in the hospital setting where emotions run high and multiple family members may be present, a signatory might feel coerced into signing the acknowledgment and may not have the opportunity to ask or obtain accurate information about his genetic ties to the newborn baby.<sup>147</sup> In short, one of the easiest procedures for identifying a child's father is also easily susceptible to manipulation and confusion.

In some of the cases where the putative father has initiated a post-rescission challenge to paternity, the court did not analyze whether the putative father successfully proved one of the three exceptions to the final judgment rule—fraud, duress, or material mistake of fact.<sup>148</sup> Instead, the court scrutinized the circumstances under which the document was signed, evaluating whether the voluntary acknowledgement was, in fact, signed voluntarily and voiding it where the evidence suggested otherwise.<sup>149</sup> In *Bradford v. Rice*, the putative father was served with a copy of the government's paternity and support petition the very morning that the initial hearing in the matter was scheduled to take place, even though the notice itself stated that it was to be served at least six days prior.<sup>150</sup> Concerned with the "per-

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145. NANCY DUFF CAMPBELL ET AL., NAT'L WOMEN'S LAW CTR. & CTR. ON FATHERS, FAMILIES, & PUB. POLICY, COMMON GROUND PROJECT, FAMILY TIES: IMPROVING PATERNITY ESTABLISHMENT PRACTICES AND PROCEDURES FOR LOW-INCOME MOTHERS, FATHERS AND CHILDREN 17 (2000) [hereinafter COMMON GROUND PROJECT].

146. *Id.*

147. In the report, child support officials characterized the situation at hospitals as coercive because, at the time of birth, "relatives of the newborn may make threats or otherwise coerce one or both parties into signing an acknowledgment." OFFICE OF THE INSPECTOR GEN., USE OF VOLUNTARY PATERNITY ACKNOWLEDGEMENTS, *supra* note 38, at 11.

148. *See infra* Part III.A. (discussing the statutory exceptions to the conclusive presumption of paternity).

149. *See, e.g.,* *Bradford v. Rice*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*1 (D.C. Super. Ct., Fam. Ct. May 14, 2008); *G. v. H.*, No. 2006-SUP-4318, slip op. at 4; *District of Columbia ex. rel. J.I.W. v. J.W.*, 141 DAILY WASH. L. REP. 933, 936 (D.C. Super. Ct. Apr. 23, 2012).

150. *Bradford*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*2.



functory nature” of notice to the putative father—the man had not been informed about the rights and responsibilities attendant to an acknowledgment either—the *Bradford* court concluded that the putative father had not made a “deliberate, voluntary and informed choice” regarding his acknowledgment of paternity.<sup>151</sup> More surprisingly, the putative father in that case had the supposed benefit of an adjudication before a judicial officer.<sup>152</sup>

Similarly, in *J.I.W. v. J.W.*, a D.C. court held that the conclusive presumption did not apply because the litigant was not provided with the required notice before signing the acknowledgment.<sup>153</sup> The court found that the signatory did not take any action even after he learned he might not be the child’s biological father because “he was not aware he could do so and was not aware of [the acknowledgment’s] legal significance.”<sup>154</sup> In another case where the court concluded there was insufficient deliberation at the time of signing—and thus the acknowledgment was not knowingly signed<sup>155</sup>—the court highlighted an important distinction between challenges to paternity and the typical post-judgment challenge: an imbalance of knowable information between the two signatories, “[the mother] was in possession of greater information on the issue of paternity than [the putative father].”<sup>156</sup> Similarly, the *Bradford* court recognized that in paternity cases, the biological mother—and not the putative father—may be the only one “in possession of full information as to the potential parentage of th[e] child. . . . She, and not [the putative father], had access to the most pertinent details underlying the adjudication of paternity in this case.”<sup>157</sup> The putative father, consequently, might reasonably rely on the mother’s representations as to who the father is.<sup>158</sup>

The analysis in *Bradford* underscores one of the drawbacks of government officials and courts using an acknowledgment’s supposed voluntari-

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151. *Bradford*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*44. The paternity acknowledgment occurred prior to subsequent amendments to the D.C. laws which codified such notice requirements; nevertheless the *Bradford* court concluded that there was insufficient notice in that case. *Id.*

152. *Bradford*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*40.

153. *J.I.W.*, 141 DAILY WASH. L. REP. at 936. The D.C. government has been admonished for its lack of proper notice in other areas of paternity litigation. In *District of Columbia v. Burt*, a judge upheld a magistrate judge’s determination that the government’s paternity and support petitions had failed to comply with the pleading requirements set forth in the court’s rules, noting that the government had deprived some litigants of notice because of improper pleading. *Burt*, No. 2010-PCS-1823, 2011 D.C. Super. LEXIS 5, at \*16 (D.C. Super. Ct., Fam. Ct. Aug. 18, 2011).

154. *J.I.W.*, 141 DAILY WASH. L. REP. at 934.

155. *G. v. H.*, No. 2006-SUP-4318, slip op. at 4 (D.C. Super. Ct. Dec. 20, 2010).

156. *G. v. H.*, No. 2006-SUP-4318, slip op. at 11.

157. *Bradford*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*23–24.

158. *Bradford*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*40.

ness to justify its evidentiary weight as a conclusive presumption of paternity. If a litigant is unable to demonstrate that an acknowledgment is invalid because of a lack of voluntariness at the time of signing, his last option for challenging paternity where he is not the biological father is to demonstrate “fraud, duress, or material mistake of fact,”<sup>159</sup> the only post-rescission grounds for such a challenge that are permitted by federal law.

### III. WHY THE CONCLUSIVE PRESUMPTION MATTERS

The effect of signing an acknowledgment in D.C. is significant and potentially long-lasting. A valid acknowledgment is a legal finding of a parent-child relationship. That parent-child relationship includes “all rights, privileges, duties, and obligations under the laws of the District of Columbia.”<sup>160</sup> Not only does a man deemed to be a child’s legal father have an obligation to support that child until she is twenty-one,<sup>161</sup> he also has a constitutional right of access to the child through custody and visitation.<sup>162</sup> A signatory who is not the biological father of a child but who is barred from raising the issue of non-paternity before the court will not only have an ongoing child support obligation for years to come, he will likely have a right to care for and make decisions about the child’s upbringing.<sup>163</sup>

Consequently, the conclusive presumption of paternity is momentous in the lives of not only the putative father but also the child and her mother. It effectively creates a family unit in the eyes of the law. The presumption’s impact on a putative father’s challenge to the accuracy and validity of an acknowledgment is therefore worthy of further analysis.

#### *A. Narrow Exceptions to the Presumption*

The law permits but three avenues to refute the conclusive presumption: fraud, duress, or material mistake of fact.<sup>164</sup> Although these relatively narrow grounds are mandated by federal law and have been used to grant relief from final judgments in civil litigation, in the context of paternity acknowledgments, there is no further elaboration as to their definition in

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159. D.C. CODE § 16-909(c-1) (Westlaw through Oct. 16, 2013).

160. § 16-909.01(b) (Westlaw).

161. *Butler v. Butler*, 496 A.2d 621, 622 (D.C. 1985).

162. *See Quilloin v. Walcott*, 434 U.S. 246, 254–55 (1978) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”).

163. § 16-914(a)(2) (Westlaw) (creating a rebuttable presumption of joint physical and legal custody of a minor child).

164. § 16-909(c-1) (Westlaw); *see also* *Matthews v. District of Columbia*, 875 A.2d 650, 656 (D.C. 2005) (interpreting section 16-909(c-1) to refute conclusive presumption only on basis of fraud, duress, or mistake of fact).

the federal statute. Both the federal and D.C. governments are aware of the discrepancies in the law and the confusion over post-rescission challenges. Over a decade ago, the Department of Health and Human Services recommended that the federal government clarify the circumstances that constitute fraud, duress, or material mistake of fact in the context of paternity acknowledgments.<sup>165</sup>

Does fraud, for instance, include misrepresentations—intentional or not—by the child’s mother regarding the child’s paternity?<sup>166</sup> Do such misrepresentations constitute a material mistake of fact?<sup>167</sup> Does the discoverability of the fraud or mistake toll the statute of limitations? No such clarifications have yet been issued, leaving litigants to wonder whether a court will invalidate the acknowledgment in situations where the signatory believed—incorrectly—that he was the biological father of the child.

Somewhat absurdly, the process for challenging an acknowledgment’s validity is *more* difficult than a challenge to genetic test results. In D.C., a man whose paternity is established conclusively by genetic testing may avail himself of any of the bases in Rule 60(b) to challenge the test results.<sup>168</sup> By contrast, after the sixty-day rescission period ends, a man who voluntarily acknowledged paternity may challenge the acknowledgment’s validity *only* on the basis of fraud, duress, or material mistake of fact.<sup>169</sup>

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165. OFFICE OF THE INSPECTOR GEN., USE OF VOLUNTARY PATERNITY ACKNOWLEDGEMENTS, *supra* note 38, at 14.

166. Some states’ laws make explicit that the fraud, duress, or material mistake of fact must exist at the time the acknowledgment is executed. *See, e.g.*, N.Y. FAM. CT. ACT § 516-a (McKinney 2009) (requiring that petitioner “prove[ ] to the court that the acknowledgment of paternity was signed under fraud, duress, or due to a material mistake of fact”); LA. REV. STAT. ANN. § 9:406(C)(2) (Westlaw through the 2013 Reg. Sess.) (“If the court finds based upon the evidence presented at the hearing that there is substantial likelihood that fraud, duress, material mistake of fact or error existed in the execution of the act or that the person who executed the authentic act of acknowledgment is not the biological father, then, and only then, the court shall order genetic tests . . . .”); IND. CODE ANN. § 16-37-2-2.1 (Westlaw through 2013 1st Reg. Sess. and 1st Reg. Tech. Sess.) (requiring a court to determine that “fraud, duress, or material mistake of fact existed in the execution of the paternity affidavit” before granting a rescission after the initial sixty day period).

167. For example, Texas law provides that evidence, based on genetic testing, that the man who is the signatory of an acknowledgment is not the child’s father constitutes a material mistake of fact. TEX. FAM. CODE ANN. § 160.308(d) (Westlaw through end of the 2013 3d Called Sess. of the 83d Leg.).

168. *Bradford v. Rice*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*15 (D.C. Super. Ct., Fam. Ct. May 14, 2008).

169. D.C. CODE § 16-909(c-1) (Westlaw through Oct. 16, 2013); *Bradford*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*15. Arguably, the Rule 60(b) grounds are ill-fitted for challenging either a genetic test result or a paternity acknowledgment. For instance, it stretches the imagination that a genetic test result could be contested

This disparity in procedure is troublesome. If anything, a voluntary acknowledgment—which is dependent upon the parties’ ability to communicate as well as the government’s ability to fulfill its statutory obligation to sufficiently inform the parties of the consequences of signing—is more at risk of being compromised by human error than a genetic test. One can challenge a genetic test result using the “catch-all” provision of the final judgment rule, Rule 60(b)(6), which allows a post-judgment challenge “for any other reason justifying relief” from the judgment.<sup>170</sup> Yet, per the language of the relevant statute, one cannot challenge a paternity acknowledgment under this “catch-all” provision; the law permits challenges to acknowledgments “only on the basis of fraud, duress, or material mistake of fact.”<sup>171</sup> By omitting any reference to Rule 60(b)(6)’s grounds for relief, the paternity statute leaves open the possibility that legitimate but extraordinary circumstances for seeking invalidation of the acknowledgment will not be permitted.

A man can choose to submit to genetic testing instead of signing an acknowledgment to establish his paternity. But if he chooses to sign an acknowledgment—and forego testing at the outset—then he may be subsequently barred from submitting genetic test results as proof of non-paternity, or even from successfully petitioning for such testing to be performed. Because the acknowledgment is recognized as a “legal finding of paternity,”<sup>172</sup> which does not require any further proceeding to establish paternity,<sup>173</sup> the D.C. government can seek a court order for child support from the signatory of the document on behalf of a child receiving TANF or Medicaid. The D.C. Code states that a court “on its own motion, may require, or, on the motion of a party, shall require, the child and all other parties to submit to medical or genetic tests, *unless* . . . [t]he parties have signed a voluntary acknowledgment of paternity . . . and have not made a legally-effective rescission of the acknowledgment.”<sup>174</sup> The government has

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on the grounds that it is void per Rule 60(b)(4), or has somehow been satisfied, released, or discharged per Rule 60(b)(5).

170. D.C. SUPER. CT. DOM. REL. R. 60(b)(6) (Westlaw through June 15, 2013). The D.C. Court of Appeals has noted 60(b)(6) “allows relief only in unusual and extraordinary situations justifying an exception to the overriding policy of finality, or where the judgment may work an extreme or undue hardship.” *Cox v. Cox*, 707 A.2d 1297, 1299 (D.C. 1998) (citing *Ohio Valley Constr. Co. v. Dew*, 354 A.2d 518, 521 (D.C. 1976); *Starling v. Jephunneh Lawrence & Assocs.*, 495 A.2d 1157, 1161 (D.C.1985)).

171. D.C. CODE § 16-909(c-1) (Westlaw).

172. 42 U.S.C.A. § 666(a)(5)(D)(ii)(Westlaw through P.L. 113–65 (excluding P.L. 113–54 and 113–59) approved Dec. 20, 2013).

173. D.C. CODE § 16-2342.01(a) (Westlaw).

174. § 16-2343(a)(3).

argued that, where an acknowledgment has been executed, genetic testing should not be performed, or if it has already been performed, should not be admitted as evidence in a paternity case.<sup>175</sup>

In *J.I.W. v. J.W.*, the D.C. government contended that genetic test results that excluded the litigant as the father of the child did not overcome the conclusive presumption created by the acknowledgment.<sup>176</sup> Although this argument was ultimately rejected by the court because the court found that the signatory had not been provided the requisite notice prior to signing,<sup>177</sup> other courts have reached the opposite result. In *F. v. F.*, the court stated that where the litigant failed to properly rescind the acknowledgment, subsequent paternity testing was both “legally irrelevant” and “inappropriate.”<sup>178</sup>

Exclusion of the results of a genetic test is unusual in the judicial system. As the *Bradford* court noted:

Genetic tests are widely available and well-known to the general public. . . . [W]ere the public to learn that the same court system which makes DNA testing available as a matter of right in other civil paternity cases and to criminal defendants charged with certain crimes because of its ability to exclude persons as the source of biological material, ignored the results of such testing in a paternity case, public confidence in the court system may well be undermined to some extent.<sup>179</sup>

Given the additional expense of a genetic test, the disparity in the presumptive weight of a test compared to that of an acknowledgment is further skewed along socio-economic lines. Signing an acknowledgment costs nothing for the signatories, but paternity established by acknowledgment is not always biologically accurate. The accuracy of a genetic test is

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175. See, e.g., *G. v. H.*, No. 2006-SUP-4318, slip op. at 2 (D.C. Super. Ct. Dec. 20, 2010) (“The Government has taken the position that because Respondent signed an Acknowledgment of Paternity at the hospital . . . paternity has been established and Respondent is now prohibited from seeking a review of the issue of paternity.”). In *Bradford*, a magistrate judge went so far as to conclude that the putative father was barred from being able to receive equitable relief from the court because he took the child for a genetic test without the mother’s consent. *Bradford v. Rice*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*27 (D.C. Super. Ct., Fam. Ct. May 14, 2008).

176. District of Columbia *ex rel. J.I.W. v. J.W.*, 141 DAILY WASH. L. REP. 933, 935 n.14 (D.C. Super. Ct. Apr. 23, 2012).

177. *J.I.W.*, 141 DAILY WASH. L. REP. at 935 n.14.

178. District of Columbia *ex rel. F. v. F.*, No. 2006-SUP-3783, slip op. at 4 (D.C. Super. Ct. Jan. 15, 2008).

179. *Bradford*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*47.

virtually unassailable but it costs money to administer that test, anywhere from one hundred to several hundred dollars.<sup>180</sup> The men and women involved in child support cases initiated by the government may not have the means to pay for genetic testing at the time of the child's birth and may instead opt to sign an acknowledgment.<sup>181</sup> Those who can afford to determine paternity by genetic testing not only have the advantage of knowing with certainty the child's paternity, but they can also avail themselves of more ways to challenge, if necessary, those test results under any of the provisions of the final judgment rule. Those who have signed a voluntary acknowledgment instead and forego genetic testing will have both a greater likelihood of an erroneous paternity and fewer ways to challenge its establishment.

### *B. Realities of Child Support Obligations*

While the government cannot force a parent to forge a relationship with his or her child<sup>182</sup> or guarantee that an individual will be a good parent,<sup>183</sup> it can require that the parent provide financial support for the child.<sup>184</sup> Assessing men's non-financial contribution to the family unit is both more complicated and less quantifiable than determining a monetary figure for child support. Perhaps unsurprisingly, the financial responsibilities of the father are often highlighted in our culture while his emotional ties to his family have received much less attention by policymakers and courts. Professor Nancy Dowd has stated that our society's acknowledgment of men's ability to nurture and parent "has remained far secondary to defin-

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180. Fairfax Identity Laboratories, one of the laboratories that handles genetic testing requests for parties appearing before D.C. Superior Court, charges private individuals (as opposed to government entities) \$330 to administer a genetic test to a mother, putative father, and child and submit those test results to the court. E-mail from Lonna Durrence, Senior Marketing Associate, Fairfax Identity Labs, to Caroline Rogus (Feb. 21, 2014, 09:48 A.M.) (on file with author). Even an unofficial, at-home paternity test can cost \$145. *Absolute Match Online confidential paternity testing*, FAIRFAX IDENTITY LABS., available at <http://www.fairfaxidlab.com/sites/fairfax/files/files/Absolute-Match-Online-3-15-11-enabled.pdf>.

181. See *infra* Part III.B.

182. See, e.g., *W.F. v. K.J.*, 128 DAILY WASH. L. REP. 1045, 1089 (D.C. Super. Ct. Dec. 29, 1999) ("It is plain, of course, that a court cannot compel a man to love a child or to maintain a paternal relationship with a child.").

183. See *Bradford*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*29–30 (citing *Butler v. Butler*, 496 A.2d 621, 622 (D.C. 1985)) ("An adjudication of paternity in the District of Columbia confers a legal obligation to provide material support for one's child. It is silent on whether a person must also be a good parent to their child.").

184. See *Butler*, 496 A.2d at 622 ("Child support is a common law right which arises by virtue of the existence of the family relationship.").

ing men's role as purely economic, within the classic paradigm of the breadwinner."<sup>185</sup>

Not only is the relevance of a man's non-financial support often ignored in child support cases, but also the process to determine the amount of financial support can put significant burdens on the obligor. Despite the law's intention to provide a speedy and efficient process by which to resolve paternity issues, cases challenging paternity acknowledgments have lingered in D.C. Superior Court for years.<sup>186</sup> While his challenge to an acknowledgment winds its way through the court system, the man's support obligations are not suspended unless "good cause" can be shown for doing so.<sup>187</sup>

Failing to adhere to a formal support order can have severe repercussions, including the revocation of the defendant's driver's license, which can make it almost impossible for the defendant to obtain or retain employment.<sup>188</sup> An obligor could even face criminal sanctions for failure to pay.<sup>189</sup> Some states, including D.C.,<sup>190</sup> use contempt orders to ensure that support orders are honored.<sup>191</sup> These drastic measures for failure to pay are more likely to become a reality given the high levels of unemployment for

185. Nancy E. Dowd, *From Genes, Marriage, and Money to Nurture: Redefining Fatherhood*, in GENETIC TIES AND THE FAMILY: THE IMPACT OF PATERNITY TESTING ON PARENTS AND CHILDREN 81 (Mark A. Rothstein et al. eds., 2005). Interestingly, some have suggested that women's principal responsibility for children "is coterminous" with their own second-class status in the workplace. Darren Rosenbaum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57, 66-67 (2012).

186. See, e.g., *District of Columbia ex. rel. J.I.W. v. J.W.*, 141 DAILY WASH. L. REP. 933, 933 (D.C. Super. Ct. Apr. 23, 2012) (entering an order on March 27, 2012 when paternity was challenged on December 17, 2008); *G. v. H.*, No. 2006-SUP-4318, slip op. at 2,15 (D.C. Super. Ct. Dec. 20, 2010) (entering order on December 20, 2010, when motion to vacate acknowledgment was filed January 23, 2008); *Bradford*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*4 (reversing, on May 14, 2008, a March 14, 2005 court order denying a motion to challenge paternity filed August 20, 2003).

187. 42 U.S.C.A. § 666(a)(5)(D)(iii) (Westlaw through P.L. 113-65 (excluding P.L. 113-54 and 113-59) approved Dec. 20, 2013); D.C. CODE § 16-909(c-1) (Westlaw through Oct. 16, 2013).

188. Cancian et al., *supra* note 16, at 149.

189. All states have criminal sanctions that could be imposed if an obligor fails to pay child support. CARMEN SOLOMON-FEARS ET AL., CONG. RESEARCH SERV., R42389, CHILD SUPPORT ENFORCEMENT: INCARCERATION AS THE LAST RESORT PENALTY FOR NONPAYMENT OF SUPPORT 17 (2012).

190. See D.C. CODE § 46-225.02(a) (Westlaw through Oct. 16, 2013) ("The Mayor or a party who has a legal claim to child support may initiate a criminal contempt action for failure to pay the support by filing a motion in the civil action in which the support order was established.")

191. *Turner v. Rogers*, 131 S. Ct. 2507, 2517 (2011).

men,<sup>192</sup> especially in male-centric fields such as construction.<sup>193</sup> A man may feel trapped by the endless cycle of demands for which there is no resolution: he must get a job to fulfill his financial obligations, but there are no jobs available.<sup>194</sup> Feelings of frustration or resentment may be compounded by the fact that the man is unable to be heard regarding his belief that he is not the child's father and that the acknowledgment is invalid. He may even direct that frustration or resentment towards the child or the child's mother to whom he is now inextricably tied.<sup>195</sup>

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192. As of October 2013, the national jobless rate for adult men was 7 percent; for women it was 6.4 percent; for African-American adult men it was 13 percent. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-13-2120, THE EMPLOYMENT SITUATION — OCTOBER 2013 at 13 tbl.A-2 (2013) [hereinafter THE EMPLOYMENT SITUATION - OCTOBER 2013], available at [http://www.bls.gov/news.release/archives/empisit\\_11082013.pdf](http://www.bls.gov/news.release/archives/empisit_11082013.pdf); see also U.S. DEP'T OF LABOR, THE AFRICAN-AMERICAN LABOR FORCE IN THE RECOVERY 4–5 (2012), available at [http://www.dol.gov/\\_sec/media/reports/BlackLaborForce/BlackLaborForce.pdf](http://www.dol.gov/_sec/media/reports/BlackLaborForce/BlackLaborForce.pdf) (addressing the connection between higher rates of unemployment for African-Americans and lower educational attainment, as compared to whites).
193. See THE EMPLOYMENT SITUATION - OCTOBER 2013, *supra* note 192, at 25 tbl.A-13 (examining employed and unemployed persons by occupation as of October 2013). In the District, employment rates for manufacturing and construction jobs remain low, especially when compared to employment rates for professional and business services, education and health services, and government. *Economy at a Glance: District of Columbia*, BUREAU OF LABOR STATISTICS, [http://stats.bls.gov/eag/eag.dc.htm#eag\\_dc.f.P](http://stats.bls.gov/eag/eag.dc.htm#eag_dc.f.P) (last visited Apr. 14, 2014) (summarizing employment statistics from May 2013 to October 2013). Although the employment rates in manufacturing and construction are more stable in the greater D.C. metropolitan area—which includes northern Virginia and Maryland—these vocations have not had the same growth as seen in other fields. See *Economy at a Glance: DC-VA-MD-WV*, BUREAU OF LABOR STATISTICS, [http://www.bls.gov/eag/eag.dc\\_washington\\_msa.htm](http://www.bls.gov/eag/eag.dc_washington_msa.htm) (last visited Apr. 14, 2014); *Economy at a Glance: Washington-Arlington-Alexandria, DC-VA-MD-WV (Metropolitan Division)*, BUREAU OF LABOR STATISTICS, [http://www.bls.gov/eag/eag.dc\\_washington\\_md.htm](http://www.bls.gov/eag/eag.dc_washington_md.htm) (last visited Apr. 14, 2014) (noting change in employment for last twelve months in various occupations).
194. See Daniel L. Hatcher, *Don't Forget Dad: Addressing Women's Poverty by Rethinking Forced and Outdated Child Support Policies*, 20 AM. U. J. GENDER SOC. POL'Y & L. 775, 775–76 (2012) (noting that although women have gained some ground in having poverty laws respond to the particular issues facing unmarried, low-income mothers, fathers have often been perceived “as an enemy to be pursued rather than a fellow victim of poverty's wrath, and potential partner towards the cure”).
195. See COMMON GROUND PROJECT, *supra* note 145, at 14 (“Because neither parent can prevail against the power of government actions [i.e., paternity establishment, TANF/Medicaid driven support actions], they vent their frustrations and feelings of powerlessness against each other.”) Professors Carbone and Cahn have noted the child support dispute process can cause both the putative father's grievances against the custodial parent and the child's interest in the quality of the relationship between the two to “disappear from view.” June Carbone & Naomi Cahn, *Which Ties Bind?*



Lastly, federal law does not permit any retroactive modification of a child support order.<sup>196</sup> Consequently, even if a man is successful in invalidating an acknowledgment based on non-paternity, if he has already paid support on the child's behalf—whether court-ordered or otherwise—he may not be able to recover what he has already paid. Notwithstanding the federal prohibition of retroactive modification of a support obligation, in Maryland, the Court of Appeals held that where genetic testing excludes a man as the biological father of a minor child, he cannot be legally obligated to pay accrued arrears under a vacated paternity judgment.<sup>197</sup> But the D.C. Court of Appeals has not reached that same conclusion, instead ruling that Rule 60(b), the rule on post-judgment relief, does not provide a basis for ordering a refund for child support paid by a man who was subsequently found to have no biological connection to the child. The court left open the possibility that a litigant might use a “new and independent” lawsuit against the D.C. government to recoup the child support he had already paid.<sup>198</sup>

### C. *Disparate Impact of Time Delay*

As time passes, a signatory sees his chances for successfully challenging an acknowledgment wither. Inevitably, events are forgotten, witnesses disappear, and papers are lost in the interim period between the signing of the acknowledgment and the prosecution for support. Even waiting for the official genetic test results can cause delay. Although the testing is a relatively simple procedure, it can take considerable time for the results to be made available to the court and for the court to subsequently schedule the next hearing to address the results. In the *J.L.W.* case, the test results were filed nearly seven months after the court ordered the test be performed.<sup>199</sup> The evidentiary hearing on the issue of the signatory's paternity in *J.L.W.* was not held for another year and a half.<sup>200</sup>

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*Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1013 (2003).

196. See 42 U.S.C.A. § 666(a)(9)(D)(ii) (Westlaw through P.L. 113–65 (excluding P.L. 113–54 and 113–59) approved Dec. 20, 2013).

197. *Walter v. Gunter*, 788 A.2d 609, 619 (Md. 2002) (holding that “the putative father cannot be legally obligated for arrearages emanating from child support orders resulting from the now-vacated paternity declaration”).

198. *V.P. v. L.S.*, 656 A.2d 1157, 1159 (D.C. 1995) (quoting *United States v. One (1) Douglas A-26B Aircraft*, 662 F.2d 1372, 1377 (11th Cir. 1981)). It is not clear whether the litigant was able to initiate a new action to recoup the approximately \$11,000 he had paid in child support, or if he was in fact reimbursed. *Id.*

199. *District of Columbia ex. rel. J.I.W. v. J.W.*, 141 DAILY WASH. L. REP. 933, 933 (D.C. Super. Ct. Apr. 23, 2012).

200. *J.I.W.*, 141 DAILY WASH. L. REP. at 933.

If there is no corroborating evidence or testimony, only the challenger to the paternity acknowledgment is affected. Because an acknowledgment is given a conclusive presumption of paternity, so long as the acknowledgment exists then arguably the government has all the evidence it needs to successfully establish paternity and secure a permanent support order. Furthermore, if the government cannot prove that the signed document is a valid acknowledgment, D.C. law offers the government a second bite at the proverbial apple. If a signatory demonstrates that he was not provided the requisite notice and information,<sup>201</sup> and thus the *conclusive* presumption of paternity does not apply in his case,<sup>202</sup> the government may rely on another section of the D.C. Code to argue that a *rebuttable* presumption of paternity was created because, although not an official acknowledgment of paternity, the signed acknowledgment constitutes a “writing acknowledging paternity” pursuant to Section 16-909(a)(4) of the Code.<sup>203</sup> The signatory will have to try to overcome that presumption. In all likelihood his support obligations will continue.<sup>204</sup>

#### D. Constitutional Implications

The conclusive presumption may run afoul of constitutional protections. In other statutory contexts, the procedural shortcomings of a conclusive presumption have prompted constitutional challenges. Litigants have argued that conclusive and irrebuttable presumptions violate individuals’ due process and equal protection rights.<sup>205</sup> Courts have scrutinized the necessity of a conclusive presumption. For instance, in deciding whether a conclusive presumption passed constitutional muster, the Supreme Court of Connecticut questioned whether the presumption—that a family of a certain size

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201. See D.C. CODE § 16-909.01(a) (Westlaw through Oct. 16, 2013).

202. A magistrate judge concluded that an improperly signed acknowledgment—without proper notice to the signatories—could not trigger the conclusive presumption of paternity in section 16-2342.01(a)(1). See *J.I.W.*, 141 DAILY WASH. L. REP. at 936 n.14.

203. That provision reads in relevant part: “A father-child relationship is established by . . . an unrebutted presumption under this subsection. There shall be a presumption that a man is the father of a child . . . if the putative father has acknowledged paternity in writing.” § 16-909.01(a)(4) (Westlaw).

204. See 42 U.S.C.A. § 666(a)(5)(D)(iii) (Westlaw through P.L. 113–65 (excluding P.L. 113–54 and 113–59) approved Dec. 20, 2013) (stating that support obligations arising from challenged acknowledgment may not be suspended during the challenge except for good cause shown); see also D.C. CODE § 16-909(c-1) (Westlaw) (stating the same proposition).

205. See, e.g., *Kentucky Harlan Coal Co. v. Holmes*, 872 S.W.2d 446, 454 (Ky. 1994); *Mullen v. Braatz*, 508 N.W.2d 446, 448 (Wis. Ct. App. 1993); *Klarfeld v. Dubose*, 706 S.W.2d 62, 65 (Mo. Ct. App. 1986); *Elliott v. Ehrlich*, 280 N.W.2d 637, 640–41 (Neb. 1979).

could live on a fixed living allowance without regard to a particular family's needs—was “necessarily or universally true in fact” and whether the state “ha[d] reasonable alternative means of making the crucial determination.”<sup>206</sup> The court found the presumption impermissible and a violation of due process.<sup>207</sup> Similarly, a Florida appeals court struck down a statute's provision that created a conclusive presumption because of “the high potential for inaccuracy of the conclusive presumption” and “the feasibility of individualized determinations.”<sup>208</sup>

A conclusive presumption of paternity is not necessarily violative of constitutional rights, especially if a court decides that the presumption does not foreclose relief altogether. In Illinois, a statute provides that a presumption of paternity arising from a voluntary acknowledgment becomes conclusive if the acknowledgment is not rescinded,<sup>209</sup> similar to the law in D.C. A man who had signed an acknowledgment later discovered through DNA testing that he was not the child's biological father and subsequently filed a complaint alleging the nonexistence of a parent-child relationship.<sup>210</sup> Noting that the language in the various state paternity statutes appeared to be in conflict,<sup>211</sup> the Illinois Supreme Court nevertheless concluded that the law did not permit a subsequent challenge to an acknowledgment based on genetic test results.<sup>212</sup> According to the court, it made “no sense . . . to allow those men who sign voluntary acknowledgments to challenge the presumption of their paternity with DNA evidence because the presumption with respect to them is conclusive.”<sup>213</sup> Although the Illinois Supreme Court did not address the constitutionality of the statute's conclusive presumption, it did note that, although signatories could not challenge the conclusive pre-

206. *Salemma v. White*, 392 A.2d 969, 971 (Conn. 1978) (quoting *Vlandis v. Kline*, 412 U.S. 441, 452 (1973)); see also *Mullen*, 508 N.W.2d at 448–49 (interpreting the statutory language “service is complete upon mailing” to raise a rebuttable, and not a conclusive presumption, since the latter violates the due process clause).

207. *Salemma*, 392 A.2d at 971.

208. *Hall v. Recchi America Inc.*, 671 So. 2d 197, 201 (Fla. Dist. Ct. App. 1996). In that case, a workers' compensation statute created an irrebuttable presumption that a workplace injury was caused by intoxication where the worker tested positive for drugs. *Id.* at 200. The court held that the statute was unconstitutional in part, stating that “[a] positive confirmation of a drug at the time of the industrial injury does not conclusively establish that the industrial accident was causally related to the intoxication of, or the influence of the drug upon, the employee.” *Id.* at 201–02.

209. 750 ILL. COMP. STAT. 45/5(b)(1), (b)(2) (Westlaw through P.A. 98–616 of the 2013 Reg. Sess.); 410 ILL. COMP. STAT. 535/12(5)(a) (Westlaw through P.A. 98–616 of the 2013 Reg. Sess.); see also *People ex rel. Dep't of Pub. Aid v. Smith*, 818 N.E.2d 1204, 1213 (Ill. 2004).

210. *Smith*, 818 N.E.2d at 1206–07.

211. *Smith*, 818 N.E.2d at 1210.

212. *Smith*, 818 N.E.2d at 1213.

213. *Smith*, 818 N.E.2d at 1213.

sumption of paternity using contrary genetic test results, they were still able to challenge the “voluntariness of the acknowledgment” on the grounds of fraud, duress, or material mistake of fact.<sup>214</sup>

But are those grounds—fraud, duress, or material mistake of fact—sufficient to protect the interests of the signatories? While the United States Supreme Court has backed away from its earlier condemnation of conclusive presumptions,<sup>215</sup> the fact that such constitutional challenges continue to be brought suggests that the propriety of conclusive presumptions in the paternity context ought to be carefully scrutinized. A conclusive presumption of paternity created by an acknowledgment could cut off a litigant’s only avenue of relief from a burdensome and erroneous support obligation. In *Bradford*, the D.C. court was “troubled by the absence of any alternative means by which the Respondent might be able to obtain relief were he not allowed to proceed” with his motion to invalidate the determination of paternity.<sup>216</sup>

#### IV. PROPOSED SOLUTIONS: LET THERE BE PROCESS

##### A. Recognize the Importance of Fairness

Whether or not there are constitutional concerns about due process, ensuring that the signatories to acknowledgments have a genuine opportunity to be heard ought to be a higher priority for D.C. and other jurisdictions. Professor Deborah Epstein has examined the role of procedural fairness in predicting whether domestic violence offenders comply with court orders.<sup>217</sup> Her research indicates that “the likelihood of a person’s compliance with . . . court orders issued in civil or criminal cases, is at least

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214. *Smith*, 818 N.E.2d at 1213 (emphasis in original).

215. *Michael H. v. Gerald D.*, 491 U.S. 110, 120–21 (1989).

A conclusive presumption does, of course, foreclose the person against whom it is invoked from demonstrating, in a particularized proceeding, that applying the presumption to him will in fact not further the lawful governmental policy the presumption is designed to effectuate. But the same can be said of any legal rule that establishes general classifications, whether framed in terms of a presumption or not.

*Id.* (upholding marital presumption of paternity).

216. *Bradford v. Rice*, No. 1991-PS-2474, 2008 D.C. Super. LEXIS 8, at \*40 (D.C. Super. Ct., Fam. Ct. May 14, 2008). The *Bradford* court analyzed an adjudication of paternity, but the challenge to paternity, based on subsequent evidence of an absence of a biological connection to the child, is similar to the analysis for a challenge to an acknowledgment especially in light of the issues with notice and procedural fairness that were at issue in that case. *Id.*

217. Deborah Epstein, *Procedural Justice: Tempering The State’s Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1881–83 (2002).

as firmly rooted in his perception of fair process as in his satisfaction with the ultimate result.”<sup>218</sup> Epstein further notes: “Allowing a person to state their views [before the court and] ensuring that their perspective is taken seriously . . . enhances a person’s sense that authorities are moral and legitimate.”<sup>219</sup> A sense of fairness may even provide the individual with justification for honoring the resulting court order.<sup>220</sup>

Procedural fairness in child support litigation has caught the United States Supreme Court’s attention. In *Turner v. Rogers*, the Court addressed whether an indigent, non-custodial parent has a constitutional right to counsel in civil contempt proceedings for failure to pay child support.<sup>221</sup> Ultimately the Court ruled that there was no such right, but its ruling was based in large part on the fact that there were “alternative procedural safeguards” in place to protect the litigant’s rights.<sup>222</sup> One of the procedural safeguards identified by the *Turner* Court was a fair opportunity to present and dispute relevant information which, not coincidentally, is also one of the “building blocks of procedural justice” that Professor Epstein suggests can contribute to a litigant’s sense of fairness.<sup>223</sup> This safeguard is potentially absent where a court decides that the conclusive presumption precludes any opportunity to present such information.

A genuine opportunity to be heard—so critical in domestic violence cases<sup>224</sup> and fundamental to the Supreme Court’s analysis of fairness in the child support contempt context—is crucial to effectuating productive outcomes in challenges to paternity acknowledgments as well. If a putative father is precluded from pleading his concerns about non-paternity, from obtaining a genetic test to verify his biological connection to the child, or from introducing such test results as evidence of non-paternity, then he might conclude that his interests are irrelevant to the court. He has lost before the first hearing has begun. It would behoove government agencies to recognize the short-sightedness of their current prosecution policy and its potential adverse impact on long-term goals. If the D.C. government con-

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218. *Id.* at 1846.

219. *Id.*

220. *Id.* at 1875 (“If people feel unfairly treated by a government official or a court proceeding, they will perceive the source as less legitimate and, as a consequence, obey its orders less frequently.”).

221. *Turner v. Rogers*, 131 S. Ct. 2507, 2515–16 (2011).

222. *Turner*, 131 S. Ct. at 2520.

223. See Epstein, *supra* note 217, at 1876–77 (identifying a “genuine opportunity to state his case” as important to a respondent’s sense of fairness in domestic violence cases). Other such building blocks described by Professor Epstein include a defendant’s belief that the process functions “in the absence of bias or prejudice” and that the “authorities [are] engaging in respectful and ethical treatment [of the parties].” *Id.*

224. *Id.*

tinues to argue that the interests of finality outweigh the interests of justice such that post-rescission challenges should not be permitted,<sup>225</sup> the fallout may be an increasing distrust of the judicial system by the very individuals whose compliance the government seeks in these paternity and support cases.

### *B. Consider the Child's Interests*

It is clear that the D.C. government, like the state governments, has an interest in keeping its rates of paternity establishment high so that it maintains eligibility for federal funding of its public benefits programs.<sup>226</sup> It also has an interest in securing and enforcing support orders to ensure that the parents of a child are providing care owed to the child. Having an identifiable father on whom to serve notice of paternity and support cases is critical to achieving those goals.<sup>227</sup>

Where the marital presumption is inapplicable, the in-hospital acknowledgment of paternity program serves those interests. It enables government agents to identify both of a child's biological parents, provides the government with the parents' addresses and other information to locate and serve them with notice of any subsequent litigation related to child support, and establishes a process by which the unwed father affirmatively commits to supporting the child.<sup>228</sup> Moreover, all of this is accomplished at the very start of the child's life, potentially cementing the parental relationships and the familial unit in place for the duration of the child's life.

For more effective procedural protections, however, these governmental interests need to be weighed against the interests of not only the putative father, but also the minor child. This Article focuses on the shortcomings in process related to paternity acknowledgments, and thus addresses the impact of those shortcomings on the men who sign the acknowledgments. However, when a court is facing a challenge to an acknowledgment based on a man's non-paternity, the interests of the child or children impacted by the acknowledgment should be taken into consideration.

If a court determines that the signatory is a child's legal father despite the absence of a biological connection to the child, then presumably that man would be entitled to visitation and custody rights as well.<sup>229</sup> This could

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225. *See* G. v. H., No. 2006-SUP-4318, slip op. at 13 (D.C. Super. Ct. Dec. 20, 2010).

226. *See supra* Part I (discussing the financial incentives behind paternity establishment).

227. *See* OFFICE OF THE INSPECTOR GEN., ADMINISTRATIVE AND JUDICIAL METHODS, *supra* note 38, at 5–6 (finding that a survey of states indicated that states have had difficulties in notifying fathers of subsequent paternity and support cases).

228. *See supra* Part I.

229. D.C. CODE § 16-909.01(b) (Westlaw through Oct. 16, 2013).

have unsettling results: the very individual who sought to disestablish his paternity may end up with momentous decision-making power in that child's life, such as deciding whether the child should undergo surgery or attend a particular school.<sup>230</sup> It is not outside the realm of possibility that the signatory could become the sole custodian of the minor child. In *M.M.*, the D.C. Family Court determined that a man with no biological connections to the child was her legal father and, because the child's mother had passed away, her only living parent.<sup>231</sup> The putative father had acknowledged paternity in an adjudication, but later genetic testing confirmed that he was not biologically related to the child.<sup>232</sup> Although it is unclear whether the man was subsequently awarded custody of the child, his status as the child's legal father would provide him with the grounds to seek access to the child.<sup>233</sup>

In *Robertson*, the D.C. court described this kind of outcome as a "legal loophole" to the adoption process, which could permit a "biological stranger" to step into the role of father.<sup>234</sup> The signatory to an acknowledgment would be handed "power and control" over the child but without the safeguards of adoption to protect the child.<sup>235</sup> To enforce a so-called "fraudulent" acknowledgment would require the court to "recognize a legal parent-child relationship without first evaluating the individual's fitness and whether it is in the child's best interest to do so."<sup>236</sup> Displeased with this possibility, the *Robertson* court admonished the government for "essentially placing monetary concerns above the best interest of the child" by seeking to enforce a "fraudulent" paternity acknowledgment for child support purposes.<sup>237</sup> Given that the establishment of paternity has other weighty consequences beyond child support, the government's exclusive focus on financial support for a minor child in these paternity and support cases seems my-

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230. In D.C., there is a rebuttable presumption that the child's parents will share legal custody of the child. § 16-914(a)(2) (Westlaw). Legal custody includes the ability to make decisions regarding the child's health, education, and religious upbringing. § 16-914(a)(1)(B)(i) (Westlaw).

231. *M.M. v. T-M.M.*, 995 A.2d 164, 166-67 (D.C. 2010) (affirming lower court's finding that putative father was the child's legal father based on his voluntary acknowledgment of paternity).

232. *M.M.*, 995 A.2d at 165.

233. *M.M.*, 995 A.2d at 165-67. While it is not clear whether the putative father later sought custody rights as the child's legal father, the grandmother would have had the burden to overcome the presumption that the legal father should have custody of the child.

234. *Robertson v. Anderson*, 136 DAILY WASH. L. REP. 2357, 2360 (D.C. Super. Ct. Oct. 7, 2008)

235. *Robertson*, 136 DAILY WASH. L. REP. at 2360.

236. *Robertson*, 136 DAILY WASH. L. REP. at 2360.

237. *Robertson*, 136 DAILY WASH. L. REP. at 2360.

opic. Indeed, the possibility of perverse consequences demonstrates the need for paternity policies that better reflect the interests not only of the government but of all the affected family members.<sup>238</sup>

State laws differ on the issue of when, if ever, a court may consider the child's interests in a paternity case. Some states, like Maryland, do not permit a best interests of the child analysis in determining whether to order a genetic test in a challenge to a paternity acknowledgment.<sup>239</sup> By contrast, if a court in New York makes a written finding that a genetic test is not in the child's best interests "on the basis of *res judicata*, equitable estoppel, or the presumption of legitimacy of a child born to a married woman," then no such test may be ordered by the court even if the petitioner has proved that the acknowledgment was signed under fraud, duress, or due to material mistake of fact.<sup>240</sup>

California's statutes provide for a best interests analysis only after a genetic test indicates that the male signatory of a paternity acknowledgment is not the child's father. When that occurs, "the court may set aside the voluntary declaration of paternity unless the court determines that denial of the action to set aside the voluntary declaration of paternity is in the best interest of the child."<sup>241</sup> In order to make that determination, the court is required to consider several factors, such as: the age of the child, the length of time since the execution of the acknowledgment, the nature of the relationship between the putative father and the child, the putative father's request that the parental relationship continue, notice by the biological father that he does not oppose preservation of the putative father's parental relationship, the benefit or detriment to the child in establishing biological parentage, whether the putative father's conduct has impaired the court's ability to determine the identity of the biological father, and any additional factors deemed by the court to be relevant.<sup>242</sup> Similarly, the D.C. Code includes a provision that requires, in certain but not necessarily all paternity

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238. There are, of course, other children who could be affected by the outcome of a challenge to a paternity acknowledgment—the biological children of the putative father. Many low-income men have children with more than one partner and thus are at risk of owing child support to multiple households. See Cancian et al., *supra* note 16, at 152. Whether a court should have to consider these children's possible financial hardship if their father was obligated to pay support for a child who is not biologically related to him is an important issue worthy of further discourse by the courts and policymakers.

239. See *Langston v. Riffe*, 754 A.2d 389, 405–10 (Md. 2010).

240. N.Y. FAM. CT. ACT § 516-a (McKinney 2009).

241. CAL. FAM. CODE § 7575(b)(1) (Westlaw through 2013 Reg. Sess. laws, all 2013–14 1st Ex. Sess. laws, and Res. c. 123 (S.C.A.3)).

242. § 7575(b)(1)(A)-(H) (Westlaw through 2013 Reg. Sess. laws, all 2013–14 1st Ex. Sess. laws, and Res. c. 123 (S.C.A.3)).



cases, that the court when making a parentage determination give “due consideration” to, among other things, “the child’s interests” “notwithstanding evidence that the presumed parent is not the child’s genetic parent.”<sup>243</sup>

The best interests analysis may not necessarily weigh in favor of upholding an acknowledgment if the signatory is not the child’s biological father. While the child’s financial stability is critical, she may have also an interest in knowing her biological father. A child who does not know the identity of her biological parent could be harmed if she develops medical issues stemming from a genetic disorder. In *W.F. v. K.J.*, the court noted these potentially conflicting interests, on the one hand the “fundamental right of a child . . . to know with as much certainty as possible the true identity of his or her biological father” and on the other hand, the child’s right “to continue to rely on the ‘father’ who has provided support (of whatever nature) in his life thus far.”<sup>244</sup> Undoubtedly, the weight of these interests will vary from child to child and from case to case, further underscoring the need for a more nuanced approach to paternity disestablishment procedures that permit judicial outcomes to reflect the weight of these interests.

### *C. Create More Opportunities for Meaningful Deliberation*

To avoid these challenges to paternity and the tangled web of interests that accompany them, lawmakers should consider better ways to exclude

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243. The statute provides in full:

A presumption created by subsection (a)(1) through (4) of this section may be overcome upon proof by clear and convincing evidence, in a proceeding instituted within the time provided in § 16-2342(c) or (d), that the presumed parent is not the child’s genetic parent. The Court shall try the question of parentage, and may determine that the presumed parent is the child’s parent, notwithstanding evidence that the presumed parent is not the child’s genetic parent, after giving due consideration to:

- (A) Whether the conduct of the mother or the presumed parent should preclude that party from denying parentage;
- (B) The child’s interests; and
- (C) The duration and stability of the relationship between the child, the presumed parent, and the genetic parent.

D.C. CODE § 16-909(b)(1) (Westlaw through Oct. 16, 2013). The provision was added recently; it is unclear whether that statute is applicable to situations where an acknowledgment of paternity has been executed by the putative father and mother. It is also unclear whether a “child’s interests” is the same as the “best interest of the child,” the standard for determining custody of a minor child. *See* § 16-914 (Westlaw).

244. *See* *W.F. v. K.J.*, 128 DAILY WASH. L. REP. 1045, 1046 (D.C. Super. Ct. Dec. 29, 1999).

non-biological fathers from the population who sign the acknowledgments. Reducing the number of erroneous signatories to acknowledgments can only increase the likelihood that the acknowledgments will fulfill their purpose of identifying a child's biological parents. Short of requiring genetic testing of all potential fathers, there is no perfect method for excluding non-biological parents from the population of signatories. D.C. courts that have grappled with subsequent legal challenges to paternity have zeroed in on the quality of notice provided to the signatories as it relates to the "voluntariness" of the signing, evaluating whether there was meaningful deliberation by the signatories regarding the consequences of signing the document.<sup>245</sup> Ensuring that the signatories have understood the impact of a signed acknowledgment may encourage them to evaluate the accuracy of their beliefs regarding parentage. But in their analysis of voluntariness and notice, the D.C. courts do not necessarily examine whether the signatories were informed about the availability of genetic testing or the potential irrelevance of genetic test results subsequent to signing.<sup>246</sup> The federally mandated disclosures for paternity acknowledgments—notice of the alternatives to, the legal consequences of, and the rights and responsibilities that arise from, signing the acknowledgment<sup>247</sup>—do not offer much guidance as to what constitutes sufficient notice.

Another principle of voluntariness may provide needed guidance to courts and policymakers on this issue. Informed consent, as familiar in the hospital setting as a paternity acknowledgment, is a cornerstone of medical patients' rights.<sup>248</sup> It is based on the idea that an individual's right to determine what shall be done with her own body is so significant that she must be given sufficient information about a proposed treatment's possible consequences such that her decision to undergo or forego a medical procedure is an informed one.<sup>249</sup> The principle incorporates the fact that most people are

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245. See, e.g., *G. v. H.*, No. 2006-SUP-4318, slip op. at 3–5 (D.C. Super. Ct. Dec. 20, 2010); see also *supra* Part II.C.2.

246. In *G. v. H.*, the court was wary of applying too stringent a standard when evaluating the voluntariness to paternity acknowledgments, noting "it is doubtful that the same standard that applies to guilty pleas and the waiver of constitutionally guaranteed trial rights would apply to a paternity adjudication." *G. v. H.*, No. 2006-SUP-4318, slip op. at 3 n.1.

247. 42 U.S.C.A. § 666(5)(C)(i) (Westlaw through P.L. 113–65 (excluding P.L. 113–54 and 113–59) approved Dec. 20, 2013).

248. See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. 1972) (quoting *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, 93 (1914) ("The root premise is the concept, fundamental in American jurisprudence, that every human being of adult years and sound mind has a right to determine what shall be done with his own body." (internal citations omitted))).

249. *Crain v. Allison*, 443 A.2d 558, 561 (D.C. 1982).

not themselves knowledgeable about these possible consequences and thus rely on the knowledge and advice of their medical providers.<sup>250</sup>

Informed consent thus provides patients with the opportunity to reflect thoughtfully and carefully on weighty medical decisions, evaluating the information provided by their healthcare professionals.<sup>251</sup> In the context of deciding whether a patient has made an informed medical decision, D.C. courts examine whether a reasonable person in the individual's position would consider the information about the medical treatment material to his decision.<sup>252</sup> Information is material if a reasonable person "in what the physician knows or should know to be the patient's position would be likely to attach significance to the risks in deciding to accept or forego the proposed treatment."<sup>253</sup>

In the paternity acknowledgment setting, this informed consent standard suggests that policymakers ought to determine what information potential signatories would consider critical in their decision to sign the document.<sup>254</sup> To ensure the decision to sign the acknowledgment is an informed one, the requisite notice should include specific information about the cost and availability of genetic testing,<sup>255</sup> the process and deadline for rescinding an acknowledgment, and the process for a post-rescission challenge.

Of course, there are limits to the effectiveness of disclosure. When an individual is inundated with information to the point of oversaturation, information is no longer useful.<sup>256</sup> Too many disclosures about the risks and possible outcomes of signing an acknowledgment might make even those men who are confident of their biological connection to the child wary about signing. The balance should not swing so far in favor of disclosure

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250. *Crain*, 443 A.2d 558 at 561 (citing *Cobbs v. Grant*, 502 P.2d 1, 9 (Cal. 1972)).

251. *See Crain*, 443 A.2d 558 at 561 (citing *Cobbs v. Grant*, 104 Cal. Rptr. 505, 515 (1972)) ("In order to make an intelligent and informed choice, a patient must first obtain the facts necessary to make the decision from the physician.").

252. *Miller-McGee v. Wash. Hosp. Ctr.*, 920 A.2d 430, 440 (D.C. 2007) (quoting *Abbey v. Jackson*, 483 A.2d 330, 332 (D.C. 1984)).

253. *Crain*, 443 A.2d at 562.

254. *See Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. 1972) (listing topics "demanding a communication of information" in the informed consent context).

255. *See G. v. H.*, No. 2006-SUP-4318, slip op. at 4 (D.C. Super. Ct. Dec. 20, 2010) ("The failure to fully explain that a putative father had a right to genetic testing would surely undercut the validity of an acknowledgment. . . . The very purpose of advising the parties about the right to genetic testing is to provide an option for paternity determination for those parties with questions regarding that issue.").

256. *See Crain*, 443 A.2d 558 at 562 ("Not all risks need be disclosed; only material risks must be disclosed."); *see also Canterbury*, 464 F.2d at 786 (noting that the scope of the physician's communications to the patient "must be measured by the patient's need").

that the entire paternity establishment program disintegrates. It is possible that even if the proper amount of information and notice is given to individuals to ensure that their consent to sign is informed, the result may be that fewer individuals sign the acknowledgments, thereby frustrating one of the original goals of the paternity establishment process.<sup>257</sup> If that is the case, however, the establishment process itself deserves further scrutiny. No government program should succeed on account of uninformed and, in some cases, vulnerable participants.

#### *D. Eliminate the Conclusive Presumption*

Until a method is devised that will exclude all non-biological parents from signing paternity acknowledgments, there will continue to be challenges to a signed acknowledgment's validity. The disestablishment statutes of the District of Columbia and other jurisdictions can only benefit from further clarification about the procedures for such challenges. There are a number of ways to ensure that there are proper safeguards in place so that unmarried men with no biological ties to the child are able to present evidence of their non-paternity in the proper forum. For instance, the process for rescinding the acknowledgment should be made clear, including the proper forum for rescission.<sup>258</sup> The statutes should also include more information about any time limitations on a post-rescission challenge. In recognition of the uniqueness of paternity acknowledgments and the significance of the rights and obligations conveyed by them, a disestablishment statute should not incorporate by reference time restrictions or other aspects of a final judgment rule.

A state's disestablishment law should be clear that evidence of non-paternity may be submitted in a post-rescission challenge to an acknowledgment and permit the man an opportunity to request testing, if it has not yet

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257. *See supra* Part I.

258. Other states' statutes provide guidance on their rescission procedures. Delaware's law states that any proceedings to rescind or challenge an acknowledgement of paternity "must be conducted in the same manner as a proceeding to adjudicate parentage." DEL. CODE ANN. tit. 13, § 8-309 (Westlaw through 79 Laws 2013, chs. 1-185). Florida's law on challenges to paternity acknowledgment goes even further. FLA. STAT. ANN. § 742.18 (Westlaw through Ch. 272 (End) of the 2013 1st Reg. Sess. of the 23d Leg.). Among other provisions, the Florida statute addresses the proper forum for such a petition, who must be served with the petition to disestablish paternity, and what must be included in the petition. Notably, these include an affidavit executed by the petitioner stating that newly discovered evidence relating to the paternity of the child has come to the petitioner's knowledge since the initial paternity determination or establishment of a child support obligation and the results of scientific tests administered within 90 days of the filing of such petition excluding the petitioner as the child's father. § 742.18 (Westlaw).

been performed.<sup>259</sup> Determining the appropriate time in a disestablishment case for ordering genetic tests is an issue best addressed by the various stakeholders in a particular jurisdiction. States have taken different approaches. For example, in Louisiana, the court must first determine at a hearing that there is a “substantial likelihood” that fraud, duress, material mistake of fact or error existed in the execution of the acknowledgment or that the person who executed the authentic acknowledgment is not the biological father before it can order genetic tests.<sup>260</sup> In Michigan, a court must find that the affidavit for revocation of an acknowledgment is “sufficient” before ordering genetic testing.<sup>261</sup> The affiant seeking revocation must state facts that constitute mistake of fact, newly discovered evidence, fraud, misrepresentation, misconduct, or duress in signing the acknowledgment.<sup>262</sup> Alternatively, a state’s disestablishment law could ensure that all signatories have an opportunity to undergo genetic testing at some point in the child support case. In Arkansas, any man who is ordered to pay child support based on an acknowledgment but who did not receive the benefit of genetic testing is entitled to one paternity test.<sup>263</sup> Regardless of how D.C. or other jurisdictions handle the admission of genetic tests, the relevant court should not vacate an acknowledgment based solely on evidence of non-paternity. Instead, the court should determine paternity on a case-by-case basis.<sup>264</sup>

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259. Currently, in D.C. the court is obligated to order genetic testing where a party moves for such relief if a legal finding of paternity was made by a court or administrative entity of competent jurisdiction where the party:

[H]as made a showing pursuant to Superior Court Domestic Relations Rule 60(b) or section 16-909(c-1) (or the applicable rule of another jurisdiction, if the finding was made in another state) that supports setting aside the judgment, and genetic or medical testing would aid in resolving whether the judgment should be set aside.

D.C. CODE §16-2343(a)(2) (Westlaw through Oct. 16, 2013). I would suggest that a similar standard be employed for those whose paternity has been established by voluntary acknowledgment. The statute exempts from genetic testing those cases in which the parties have signed a voluntary acknowledgment and “have not made a legally-effective rescission of the acknowledgment.” § 16-2343(a)(3)(Westlaw).

260. LA. REV. STAT. ANN. § 9:406(C)(2) (Westlaw through the 2013 Reg. Sess.).

261. MICH. COMP. LAWS ANN. § 722.1437 (Westlaw through P.A.2013, No. 277 (End of the 2013 Reg. Sess., 97th Leg.).

262. § 722.1437 (Westlaw).

263. ARK. CODE ANN. § 9-10-115(e) (Westlaw through End of 2013 Reg. and 1st Ex. Sess., including changes made by Ark. Code Rev. Comm. received through Nov. 27, 2013).

264. *See supra* Part III.B. The D.C. Code does address certain situations where genetic testing reveals that the individual thought to be the biological father is not in fact the biological father. If there is a presumed parent but a genetic test identifies the “putative father” as the father of the child, the Code requires that the Court give “due consideration” to the child’s interests, as well as “the duration and stability of the

The application of statutes of limitations on post-rescission challenges and the admissibility of genetic tests in paternity cases underscore how troublesome the conclusive presumption of paternity is. The majority of the D.C. courts that have permitted challenges to acknowledgments by non-biological fathers have relied on the absence of voluntariness at the time of signing, leaving the implications of the conclusive presumption and the application of Rule 60(b) largely untouched.<sup>265</sup> This may signal a reluctance to enforce the presumption; it is likely easier for the courts to invalidate an acknowledgment for lack of sufficient notice than to apply the conclusive presumption in situations where enforcing the acknowledgment does not seem to benefit the parties or the child. Moreover, the conclusive presumption applies where men deny paternity, but not when they seek to claim parenting responsibilities. One court noted that the purpose of the conclusive presumption of parentage is “to establish paternity where the father is either *denying* parentage or is otherwise unavailable to confirm it.”<sup>266</sup> Unmarried men bear the brunt of the effects of the conclusive presumption, since even married men have a lesser burden should they decide to challenge their legal relationship to children born to their wives during a marriage: the D.C. Code attaches only a rebuttable presumption of paternity in those situations.<sup>267</sup>

This reliance on paternity acknowledgments with disregard for the signatories’ biological connections is emblematic of our society’s inconsistent notions of what it means to be a father. Professor Laura Oren has referred to this as the “paternity paradox.” If a man desires to participate in a child’s life as a caregiver, he may be required to provide proof of both a biological connection with the child and also his attempts to maintain an actual parent-child relationship.<sup>268</sup> But where the state seeks to secure support from a man, a biological connection alone will suffice as a basis for the support obligation.<sup>269</sup> And where a paternity acknowledgment exists, sometimes

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relationship between the child, the presumed parent, and the putative parent.” D.C. CODE § 16-2343.01 (Westlaw through Oct. 16, 2013).

265. But not all D.C. courts are willing to interpret the law so liberally; the court in *F. v. F.* did not demonstrate concern with voluntariness and, perhaps unsurprisingly, concluded that the lower court’s order for a genetic test was inappropriate in light of the conclusive presumption. *District of Columbia ex rel. F. v. F.*, No. 2006-SUP-3783, slip op. at 4 (D.C. Super. Ct. Jan. 15, 2008).

266. See *In re D.W.*, 27 A.3d 1164, 1168 n.6 (D.C. 2011) (emphasis in original).

267. D.C. CODE § 16-909(a)(1) (Westlaw through Oct. 16, 2013).

268. Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology ‘Plus’ Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 54–55 (2004) (citing *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983)).

269. *Id.* at 92–94.

neither biology nor caregiving is necessary to establish the support obligation. A man's signature on the acknowledgment can be sufficient to determine his support obligation.

The conclusive presumption should be eliminated in D.C. and in other jurisdictions that still employ it in their paternity statutes. Federal policy should be explicit: only a rebuttable presumption of paternity may arise from a properly executed paternity acknowledgment. A rebuttable presumption of parentage will still create binding legal relationships between minor children and those individuals who had sufficient information about both their parentage and the consequences of signing. But a rebuttable presumption—instead of a conclusive one—can help to ensure that an individual who has been cast as a child's parent is appropriate for that role by allowing a court to evaluate not just the putative father's biological connections to the child but also the signatory's emotional relationship to the child. A rebuttable presumption will permit court evaluation of challenges that may not fit squarely within the current permissible exceptions to the conclusive presumption: fraud, duress, or material mistake of fact. In this way, the presumption of paternity created by an acknowledgement may be rebutted. As a family court in New York stated, "to do otherwise would outrage common sense and reason."<sup>270</sup>

The presumptive weight given to such acknowledgments should reflect the potential for misinformation and confusion. Federal and local policy should require a lesser presumption for voluntary acknowledgments of paternity so that signatories can seek relief for mistakes made at the time of signing without circumscribing the availability of such relief based on a jurisdiction's definition of fraud, duress, or mistake of fact, or by placing burdensome time limitations on litigants. A rebuttable presumption would acknowledge the possibility that, through no fault of his own, a man may not be able to discover the truth of his paternity at the time that he attested to that very fact on the acknowledgment. After all, an acknowledgement is a far cry from a scientific test or even an adjudication of paternity; it is a document whose accuracy depends almost entirely upon the couple's communications.

The law should make clear that evidence that there is no biological connection between an unmarried man and a minor child is always relevant to the issue of paternity. Considerations of the interests of the minor child should be accounted for in determining the weight of a man's non-paternity

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270. *McCoy v. Briggs*, No. P-00253-08, 2009 WL 124433, at \*2 (N.Y. Fam. Ct. Jan. 20, 2009) (quoting *In re Estate of Fay v. Hunter*, 375 N.E.2d 735, 737 (N.Y. 1978)) ("[I]f the truth can be discovered, and equity does not demand otherwise, the presumption of paternity should not be utilized to perpetuate a falsehood.").

in these cases. While the government can and should have interests in identifying the fathers of children born to unmarried parents, these interests need to be carefully balanced given the importance of the interests of the signatories and of the children affected by the establishment of paternity.

It appears that the federal government is aware, on some level, of the shortcomings of the acknowledgment process. The Office of Child Support Enforcement has stated that one of their guiding principles is that both parents “are treated fairly and kept informed, and their concerns are recognized.”<sup>271</sup> That Office seeks to “[i]ncrease the use of expedited and administrative processes, including recourse to courts, ensuring that parents have access to procedural justice” and to “[p]rovide easy access to genetic testing for parents of children born outside of marriage.”<sup>272</sup> But at the same time, the Office uses the percentage of paternity established or acknowledged for children born to unmarried parents as a measure of its success.<sup>273</sup> If the Office is serious about maintaining fairness and providing procedures responsive to the concerns of all parents, then it should carefully consider whether relying on the “simple civil process” for establishing paternity in as many cases as possible is in fact an accurate measure of success. Professor Murphy noted, “easy paternity establishment has led to increased efforts to disestablish paternity several years later.”<sup>274</sup> What constitutes easy paternity establishment now could come back to haunt state governments when signatories attempt to undo those acknowledgments.

#### CONCLUSION

It is undeniable that there are benefits to establishing paternity by acknowledgment. Not only can children benefit from having their parents sign a paternity acknowledgment,<sup>275</sup> but also, parents can benefit from the stability and security of familial relationships that the acknowledgment rep-

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271. OFFICE OF CHILD SUPPORT ENFORCEMENT, ADMIN. FOR CHILDREN & FAMILIES, NATIONAL CHILD SUPPORT STRATEGIC PLAN: FY 2010-2014 5 (2013).

272. *Id.* at 11–12.

273. *Id.* at 8.

274. See Murphy, *supra* note 127, at 357.

275. See Leslie Jones Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 169 (2011) (noting that fathers who signed an acknowledgment are more likely to provide support, either in cash or as in-kind contributions, to the mother and child during and after the pregnancy); see also Marcia J. Carlson & Katherine A. Magnuson, *Low Income Fathers' Influence on Children*, 635 ANNALS AM. ACAD. POL. & SOC. SCI. 95, 103 (2011) (discussing how more involvement by fathers in children's lives may benefit children because it reinforces mothers' parenting and strengthens the cohesiveness of the family).



resents.<sup>276</sup> To paraphrase the Common Ground Project's report on paternity establishment practices, although the government should facilitate the use of the acknowledgment of paternity, it must not mandate its use.<sup>277</sup>

A putative father who is led to believe he is the child's biological father but subsequently discovers he is not genetically related to the child deserves an opportunity to be heard. Such an opportunity does not mean that a court must grant his request for an acknowledgment to be invalidated; indeed, the court might subsequently determine that under the circumstances the best resolution is to determine that the man is the legal father of the child.<sup>278</sup> What is important, however, is that a man is given a reasonable opportunity to raise his concerns of non-paternity before a court, so that the court can consider all of the relevant evidence before determining the man's legal relationship with the child.

A signed paternity acknowledgment should not override the biological truth of paternity. In turn, that biological truth should not override the existence of an acknowledgment or the existence of a stable, nurturing relationship between a putative father and a child. Instead, these different facets of the connections between a man and a child—a signed acknowledgment, biology, emotional bonds—should all be relevant to a court's consideration of paternity where the signatory is not the biological father.

Policymakers should review and revise their paternity laws to ensure both that an unmarried man is given a reasonable opportunity to challenge an erroneous acknowledgment and that the biological ties between a putative father and the child—or the lack thereof—are given due consideration in a paternity challenge. If the District of Columbia and other jurisdictions are willing to reconsider their paternity disestablishment laws in light of the importance of both biological and emotional ties between parents and children, the purpose of paternity acknowledgments can be preserved and the interests of the unmarried men who have agreed to sign those acknowledgments can be protected. ❀

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276. See Harris, *supra* note 275, at 171–72 (suggesting that acknowledgments “have become a way that unmarried parents mark their feelings of commitment and family membership”).

277. COMMON GROUND PROJECT, *supra* note 145, at 17.

278. See, e.g., *In re William K. v. Ronald F.*, 73 Cal. Rptr. 3d 737, 745 (Cal. Ct. App. 2008) (affirming court decision to uphold acknowledgment of paternity where signatory was not the biological father, noting that the lower court found that the best interests of the child would not be furthered by setting aside the acknowledgment).