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DESIGNATING MALE PARENTS AT BIRTH

Jeffrey A. Parness*

It is becoming increasingly difficult to determine the legal parentage of newborns and infants. Although it may be clear who bore a child, whose sperm was involved in conception, to whom a new mother was married at the time of conception, pregnancy, and birth, and which medical personnel helped to facilitate a pregnancy, it is unclear how these facts should affect the determination of a child's legal parentage. Recently, a great deal of national debate has centered around the parenting consequences of births involving surrogates and same-sex marriages.¹ This Essay addresses a topic less frequently discussed—the legal designation of male parentage as of the time of birth. Although much attention recently has been focused on the termination of male parental rights and designations of new male parents at some time after birth,² the laws on designating male parents at birth have remained stable and largely removed from public debate. This Essay, which examines laws concerning the designation of male parentage, is warranted not only because of the burgeoning new methods by which pregnancy and birth are accomplished, but also because of new technologies that

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¹ See, e.g., Johnson v. Calvert, 851 P.2d 776, 782 (Cal.) (concluding that under a surrogacy agreement involving the implantation of an embryo created by a married couple, the married couple are the resulting child's natural parents), cert. denied, 114 S. Ct. 206 (1993); Adoptions of B.L.V.B., 628 A.2d 1271, 1272, 1276 (Vt. 1993) (holding that a woman may adopt her lesbian partner's children born during their relationship).

² In particular, much attention has been directed toward the termination of male parental rights in anticipation of an adoption. Compare In re Clausen, 502 N.W.2d 649, 668 (Mich. 1993) (enforcing an Iowa court judgment placing custody of a two-year-old girl with her natural parents after the biological father contested the girl's adoption by a Michigan couple) with In re Petition of Doe, No. 1-92-1552, 1993 Ill. App. LEXIS 1271, at *9; 1993 WL 330638, at *4 (Ill. App. Ct. Aug. 18, 1993) (terminating a biological father's parental rights for failure to assume a reasonable degree of concern for the newborn within 30 days of birth).
permit more accurate assessments of biological paternity.

Public policy supports the view that a child's male parent-age as of the time of birth should be designated early in life. This policy should apply even to children born to women who are not married to the biological father at the time of conception or birth. A recent federal commission summarized the policy reasons supporting the early designation of male parents:

Parentage determination does more than provide genealogical clues to a child's background; it establishes fundamental emotional, social, legal and economic ties between parent and child. It is a prerequisite to securing financial support for the child and to developing the heightened emotional support the child derives from enforceable custody and visitation rights. Parentage determination also unlocks the door to government provided dependent's benefits, inheritance, and an accurate medical history for the child.

Thus, mothers, husbands, and biological fathers, as well as children, have significant interests in the early designation of male parentage.

3. DNA analysis is one example of these new technologies. Concerning the use of DNA analysis in paternity cases, see FLA. STAT. ANN. § 742.12 (West Supp. 1993) (allowing human leukocyte antigen (HLA) tests to be performed without consent in paternity cases); UTAH CODE ANN. § 78-45a-10 (Supp. 1992) (allowing "genetic tests" to be admitted in paternity cases); U.S. COMM'N ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM 126 (1992) [hereinafter SUPPORTING OUR CHILDREN] (stating that "DNA testers can virtually assure accurate parentage determination"). Concerning the use of DNA analysis in criminal cases, see FLA. STAT. ANN. § 760.40 (West Supp. 1993) (allowing DNA analysis to be performed without consent in criminal cases); U.S. v. Jakobetz, 955 F.2d 786, 791–800 (2d Cir.) (admitting DNA test results in a rape case), cert. denied, 113 S. Ct. 104 (1992); Commonwealth v. Lanigan, 596 N.E.2d 311, 317 (Mass. 1992) (finding DNA test results inadmissible where a father and his son both were accused of incest).

4. This essay is concerned with the designation of a child's male parentage as of the time of birth because, although some women may become mothers through surrogacy arrangements or via various means of artificial impregnation, the identities of the biological mothers generally are self-evident. Not only is the identity of biological fathers not self-evident, but also many men become legal fathers even though they are not biologically linked—as when married men are presumed to be the fathers of the children born to their wives. See infra note 11.

5. The policy thus should apply to unmarried women as well as to married women (who may bear children biologically unrelated to their husbands).

6. SUPPORTING OUR CHILDREN, supra note 3, at 120.

7. The government, too, usually has an interest in determining the male parentage of a child as of the time of birth, especially where it is paying welfare benefits which are subject to possible recoupment. See infra note 42.
Focusing on male parentage as of the time of birth is especially warranted today because many contemporary legal designations of paternity are not made uniformly, occur fortuitously, fail to involve all interested persons, and are inconclusive. Federal and state governments do little to assure that birth records include the names of male parents as of the time of birth. As a result, many children are without legal designation of paternity for extended periods of time, while other children never receive such a designation. Moreover, many new mothers are afforded unfettered discretion regarding the legal designation of male parentage. Even when legal designations do occur, all too frequently they are subject to later attack, often because they were made without involving all interested parties.

Legal designations of male parentage need not precede the assumption of parenting responsibilities. Many men presently raise children in the absence of any legal declaration of parental responsibility. Additionally, biological links are irrelevant to many legal designations of male parentage. For example, sterile men married to women who bear children may be presumed to be vested with the same legal rights and duties as biological fathers. In fact, many men (such as stepfathers) quite happily assume parental duties for

8. See infra Part I (reviewing contemporary designations of male parentage made through birth certificates, marriage dissolution proceedings, paternity actions, other civil cases, and laws on presumed parenthood).

9. See infra notes 43-50 and accompanying text.

10. The assumption of parenting responsibilities by those not legally recognized as parents, or otherwise obligated to assume such duties, often will not result in a parental designation under law or in legal responsibility for child support. Compare Bowie v. Arder, 490 N.W.2d 568, 576–80 (Mich. 1992) (finding that a couple who raised a child in their home through a casual arrangement with the child's legal parents had no substantive right to child custody) and Cox v. Williams, 502 N.W.2d 128, 131 (Wis. 1993) (holding that a former stepmother who helped parent a child for six years lacked standing to petition for visitation when child custody was granted to the biological mother) with OR. REV. STAT. § 109.119 (1990) (allowing any person "who has established emotional ties creating a child-parent relationship" to petition for custody, visitation, or other generally recognized parental rights).

11. See, e.g., 750 ILL. COMP. STAT. act 45, § 5 (1992) (presuming that the husband is the natural father of a child born or conceived during his marriage to the mother); MINN. STAT. ANN. § 257.55 (West 1992) (presuming a man to be the biological father if he and the mother were married when the child was born, or if the child was born within 280 days after the marriage was terminated); WASH. REV. CODE ANN. § 26.26.040 (West 1992) (presuming a man to be the natural father if he and the mother were married when the child was born, or if the child was born within 300 days after the marriage was terminated); see also Smith v. Smith, 845 P.2d 1090, 1092 (Alaska 1993) (recognizing a common-law presumption of a husband's paternity).
children to whom they have neither a biological link nor a legal presumption of parentage. This may occur even where another man is legally responsible for the children. Finally, legal designations of male parentage as of the time of birth need not inevitably lead to the assumption of parenting responsibilities for the men so designated. Occasionally, the designations may be sought with the expectation that the man's parental rights will be terminated shortly after the designation is made.

In focusing on legal designations of male parentage as of the time of birth, this Essay first reviews the methods by which such designations currently are made. The difficulties raised by contemporary methods then will be explored, together with suggested reforms involving laws that could promote earlier, more complete, and more accurate designations of male parentage as of the time of a child's birth.

I. CONTEMPORARY METHODS OF DESIGNATING MALE PARENTAGE

Currently, designations of a child's male parentage as of the time of birth often are made inconsistently, fortuitously, inconclusively, and without involving all interested parties. Although designations can be made in many ways, they occur most often when birth certificates are issued. A birth certificate typically issues under state law shortly after the birth of a child. It normally contains either the names or the

12. Consider, for example, the possibility of posthumous artificial insemination. See Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 291 (Ct. App. 1993) (preventing the destruction of a decedent's frozen sperm which he left to his girlfriend).
13. This often occurs where an adoption is anticipated, but cannot be accomplished without the termination of parental rights, which may not occur unless legal parentage has been established.
14. This Essay does not address the circumstances under which one who legally is designated a male parent as of the time of a child's birth may or should lose his parental rights (for example, due to child abuse), or the circumstances under which a man not capable of being designated a male parent as of the time of birth later can become a parent under law (for example, by marriage to the child's mother or by adoption).
15. This is not to suggest that the federal government has no interest in state birth certificate laws. For example, the Interstate Child Support Enforcement Act, S. 689 & H.R. 1600, 103rd Cong., 1st Sess. (1993), now pending in Congress, would require states to create hospital-based paternity establishment programs.
signatures of the man and woman designated as the child's parents. Frequently, the designations of male parentage are neither corroborated scientifically nor supported by admissible evidence, but are made solely on the basis of a legal presumption, as when the mother is married, or on the basis of written statements made by an unmarried mother and alleged father. Further, the public often does not have access to birth certificates, preventing errors from being revealed and parental rights and duties from becoming known in the community.

Birth certificates often are not completed fully and information on male parentage frequently is missing. Moreover,

16. See supra note 11.
17. See 410 ILL. COMP. STAT. act 535, § 12(4) (1992) (requiring that "[t]he names of the mother and father shall be entered on the birth certificate . . . . The mother and father shall sign the birth certificate . . . . If the mother was not married to the father of the child either at the time of conception or birth, the name and the signature of the father shall be entered thereon only with the written consent of the mother and the person to be named as the father."); WASH. REV. CODE ANN. § 70.58.080 (West 1992) (requiring that the birth certificate include the names of the mother and father if they are married at the time of the birth; and providing that if the mother is unmarried at the time of birth, she and the natural father must have the opportunity to complete an affidavit acknowledging paternity, which includes a "sworn statement by the mother consenting to the assertion of paternity and stating that this is the only possible father" and "[a] statement by the father that he is the natural father of the child").
18. See, e.g., KY. REV. STAT. ANN. § 213.131 (Michie/Bobbs-Merrill 1991) (prohibiting access to vital records except where authorized by statute, regulation, or court order); ILL. ADMIN. CODE tit. 77, § 500.20(c) (1991) (providing that the information necessary to complete a birth certificate shall be "collected, recorded and maintained in a confidential manner").
19. This may prevent some fathers from asserting their parental rights. See In re Petition of Doe, No. 1-92-1552, 1993 Ill. App. LEXIS 1271, at *9, 1993 WL 330638, at *4 (Ill. App. Ct. Aug. 18, 1993) (terminating a biological father's rights for failure to assume a reasonable degree of concern for the newborn within 30 days after birth, even though he and his friends searched through public records for information on his child, but found nothing).
20. In October 1991, I surveyed all Illinois medical facilities believed to provide obstetrical services. Although responses indicated that most recent birth certificates contained both the mother's and father's names, they also indicated that unmarried mothers were less likely to name the father and that the hospitals did little or nothing to obtain a father's name when it was not volunteered by the mother. In one hospital, 23 of the last 65 births to unmarried women produced certificates without a father's name. In another, the first 219 births in 1991 involved 21 unmarried women who refused to provide information about the father of the baby. One hospital reported that one married woman had named her husband as the father, but then stated that the baby was not her husband's offspring—at least not biologically. All responding hospitals reported little difficulty in obtaining the designation of the father where the mother was married. The survey and the data collected are on file with the author.
state laws do little to encourage the full, accurate, and timely completion of birth certificates. Likewise, birth certificates rarely contain information about other men or women who assume parenting duties. Occasionally, birth certificates may be completed or amended at a later date, although such completion or amendment may not be compelled.

21. Illinois law seemingly requires that hospital personnel exert some effort to obtain the father's name on a birth certificate. See 410 ILL. COMP. STAT. act 535, § 12(4) (1992) ("The person responsible for preparing and filing the birth certificate shall make a reasonable effort to obtain the signatures of both parents."). Little is done, however, if the name is not supplied voluntarily. See supra note 20. An Illinois law which became effective in 1993 requires the hospital, the attending physician, the midwife, or his or her agent to provide an opportunity for the consensual establishment of male parentage by an unmarried woman and the natural father. See 410 ILL. COMP. STAT. act 535, § 12(5) (West Supp. 1993). For a review of recent state initiatives to spur male parentage determinations at birth, see Paula Roberts, Paternity Establishment: An Issue for the 1990s, 26 CLEARINGHOUSE REV. 1019, 1024–26 (1993).

22. Consider, for example, the boyfriend who agrees in advance to raise the child conceived by his girlfriend through artificial insemination. Additionally, parental rights have been recognized where the biological father can prove that he donated sperm to an unmarried mother in reliance on an agreement that they would coparent any child born as a result of the artificial insemination. See In re R.C., 775 P.2d 27, 33–35 (Colo. 1989); McIntyre v. Crouch, 780 P.2d 239, 243–46 (Or. Ct. App. 1989), cert. denied, 495 U.S. 905 (1990).

23. For example, two women may agree to parent jointly any child born as a result of the artificial insemination of one of them. Compare Alison D. v. Virginia M., 572 N.E.2d 27, 29 (N.Y. 1991) (denying parenthood, and thus visitation rights, to a woman following the end of her relationship with the biological mother, who had agreed to share all child-rearing responsibilities for a child born as a result of artificial insemination during their relationship) with A.C. v. C.B., 829 P.2d 660, 664, 665 (N.M. Ct. App.), cert. denied, 827 P.2d 837 (N.M. 1992) (recognizing the possibility of joint custody between two women if there was a valid coparenting agreement and if it was in the child's best interests).

24. In Illinois, for example, where male parentage is unrecorded at birth, later judicial determinations of male parentage in adoption and paternity cases should result in the issuance of new birth certificates, or in the further completion of existing birth certificates. See 410 ILL. COMP. STAT. act 535, § 16 (1992) (requiring the State Registrar of Vital Records to be notified of adoptions and provided with information necessary to establish a new birth certificate); 750 ILL. COMP. STAT. act 45, § 14(d) (1993) (requiring the court to order a new birth certificate to be issued where a judgment is "at variance" with the birth certificate). In other cases, new birth certificates are issued only when a request supported by evidence is made. See 410 ILL. COMP. STAT. act 535, § 17(c) (1992) (requiring the State Registrar of Vital Records to establish a new birth certificate upon receipt of a request for a new certificate and such evidence as is required by regulation); cf. MASS. GEN. L. ch. 46, § 13 (1992) (allowing an incomplete or incorrect birth record to be altered if evidence establishing the facts beyond a reasonable doubt is presented by "credible persons having knowledge of the case").

25. MASS. GEN. L. ch. 209C, § 8 (1992) (providing that the court may order the issuance of a new birth certificate if its judgment is "at variance" with the birth certificate).
A child's male parentage as of the time of birth also may be designated during a marriage dissolution proceeding, whether or not there is a completed birth certificate. In these proceedings, the rules of evidence usually apply and resulting judgments are credited to the parties and those in privity or sufficiently identified with them. Often, however, all interested persons are not involved in these proceedings. Marriage dissolution proceedings might not necessarily include as parties the child of the divorcing couple; the child's biological father, if different from the husband; or the state, which may have supported the children through the female parent and which now may have claims against the male parent for reimbursement.

Paternity actions constitute a third way in which a child's male parentage as of the time of birth may be established.

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27. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 39-41 (1982) (eschewing the term privity and describing various nonparties sufficiently related to earlier litigants so as to be bound by judgments involving those litigants).
28. See 750 ILL. COMP. STAT. act 5, § 5061 (1992) (providing that in a marriage dissolution case, the court may appoint an attorney to represent the interests of a child regarding support, custody, and visitation, and also may appoint a guardian-ad-litem for the child); In re Custody of D.A., 558 N.E.2d 1355, 1361-62 (Ill. App. Ct. 1990) (recognizing that a court had both statutory and inherent power to appoint a guardian-ad-litem for a minor interested in litigation involving the identity of her father); cf. SUPPORTING OUR CHILDREN, supra note 3, at 125 (noting that "a child need not be joined in a parentage action for the action to proceed"). But see Michael K.T. v. Tina L.T., 387 S.E.2d 866, 872-73 (W. Va. 1989) (finding that the appointment of a guardian-ad-litem for a child is necessary when an attempt to disprove paternity is made in a divorce proceeding).
29. See 750 ILL. COMP. STAT. act 5, § 403(d) (1992) (providing that in a marriage dissolution case, a court may join "additional parties necessary and proper for the exercise of its authority"). But see People ex rel. L.J., 835 P.2d 1265, 1266 (Colo. Ct. App. 1992) (consolidating a marriage dissolution proceeding and a paternity action involving both the husband and the child's biological father); In re Marriage of Pierce, No. 91 D 16616 (Ill. Cir. Ct. 1991) (litigation papers on file with the University of Michigan Journal of Law Reform) (involving a marriage dissolution petition which included a claim for contribution by the husband of a pregnant woman against the man who allegedly caused the pregnancy).
30. See 42 U.S.C. § 602(a)(26)(A) (1988) (providing that state AFDC programs must require each applicant or recipient to assign to the state any rights of support that she may have in her own behalf or in behalf of any other family member for whom she is applying or receiving aid).
31. Paternity actions include cases where male parentage is sought to be established or disestablished. See 750 ILL. COMP. STAT. act 45, § 7(a)(1992) (providing that an "action to determine the existence of the father and child relationship . . . may be brought by the child; the mother; a pregnant woman; any person or public agency who has custody of, or is providing or has provided financial support to, the child; or a man presumed or alleging himself to be the father of the child or expected child"); 750 ILL. COMP. STAT. act 45, § 7(b) (1992) (providing that an "action
These actions typically are commenced by a mother, or by the government when it has supported the child. Cases may be initiated against a putative father even where another man is the presumed father or is named in the birth certificate. Occasionally, alleged biological fathers or children themselves commence paternity actions.

Other methods also exist under law to designate male parentage as of the time of birth. Parentage can be resolved in cases involving insurance beneficiaries, probate disputes, the termination of parental rights, adoptions, and workers' compensation claims.

The techniques for designating male parentage under law usually are subject to significant maternal control. New
mothers alone often decide what information is entered on birth forms, especially when they are unmarried at the time of the birth. Mothers in marriage dissolution proceedings often determine whether the issue of a third person's paternity will be raised regarding a child conceived or born during the marriage. Additionally, unmarried mothers often control whether paternity actions will ever be initiated, unless they receive governmental assistance and thus are subject to governmental compulsion to initiate suit.

The aforementioned methods of designating male parentage for a child are neither mutually exclusive nor necessarily interrelated. Multiple and inconsistent legal designations of male parentage therefore may be made for a single child. For example, although a birth certificate may deem the husband of a new mother to be the “presumed” father, the mother, the

39. See supra note 20 and accompanying text.

40. Often, it is only the mother who knows that a third person is, or may be, the father. But see In re Marriage of Pierce, No. 91 D 16616 (Ill. Cir. Ct. 1991) (litigation papers on file with the University of Michigan Journal of Law Reform) (involving a marriage dissolution petition which included a claim for contribution by the husband of a pregnant woman against the man who allegedly caused the pregnancy).

41. Mothers may be under no legal duty to establish the male parentage of their children, or even to inform known male parents of the birth of their children. See Robert O. v. Russell K., 604 N.E.2d 99, 100 (N.Y. 1992) (concluding, under applicable statutes, that the father was not entitled to have notice of his child's adoption and that the father's consent to the adoption was not required); id. at 108 (Titone, J., concurring) (commenting that it is an “understandable” decision by the mother to keep the pregnancy secret from the father and not to include him in the later adoption proceeding).

42. For example, unmarried mothers receiving AFDC must assign support rights to the state and must cooperate with the state in pursuing those, including the father, who are responsible for paying for the care and services provided by the state. 42 U.S.C. § 602(a)(26)(A)-(C) (1988). On the issue of cooperation, see Douglas v. Babcock, 990 F.2d 875, 876–79 (6th Cir.) (affirming a judgment that a woman who did not cooperate in establishing the paternity of one child was not entitled to receive pregnancy related benefits for another), cert. denied, 114 S. Ct. 86 (1993).

43. See supra note 11 (discussing different forms of statutory presumptions of paternity). The presumption of fatherhood for a man married to a woman at the time she bears a child may not arise, however, if the pregnancy was the result of artificial insemination using the sperm of an anonymous donor, undertaken without the husband's consent. See 750 ILL. COMP. STAT. act 40, § 3 (1992); Anonymous v. Anonymous, 17 Fam. L. Rep. (BNA) 1161 (N.Y. Sup. Ct. 1991); see also Lawsuit Gives New Twist to Paternity, CHI. TRIB., Jan. 4, 1993, § 1, at 10 (discussing a woman's suit against her physician for the support of a child rejected by her estranged husband, where the physician failed to obtain the husband's consent to the wife's artificial insemination).

44. See Denbow v. Harris, 583 A.2d 205, 207 (Me. 1990) (concluding that a
husband,\textsuperscript{45} the biological father,\textsuperscript{46} or the child\textsuperscript{47} may have standing in a later court proceeding to contest this presumption. Further, although an order in a marriage dissolution proceeding may designate a married couple as a child’s legal parents, this designation may be challenged in a later paternity action commenced by the child\textsuperscript{48} or the alleged biological father\textsuperscript{49} because neither was a party to the dissolution.

mother may bring a paternity action against the alleged biological father even though she was married at the time of conception and a presumption of legitimacy arose); Hulett v. Hulett, 544 N.E.2d 257, 259–60 (Ohio 1989) (holding that a wife may rebut the presumption of paternity by clear and convincing evidence). But see \textit{In re} Marriage of T, 842 P.2d 1010, 1013 (Wash. Ct. App. 1993) (stating that in divorce actions, some presumptive fathers may resist mothers’ efforts to disestablish paternity through blood testing); \textit{In re} Adoption of R.S.C., 837 P.2d 1089, 1094 (Wyo. 1992) (ruling that a woman was time barred from challenging her former husband’s paternity, where the child was born during the marriage, custody had been awarded to the husband, and the woman waited almost four years after their divorce to contest paternity).

45. \textit{See} A.R. v. C.R., 583 N.E.2d 840, 842 (Mass. 1992) (ruling that in a divorce proceeding, the husband may adjudicate the issue of paternity); Michael K.T. v Tina L.T., 387 S.E.2d 866, 870–72 (W. Va. 1989) (stating that in a divorce proceeding, a presumed father may disprove paternity and rebut the presumption through the use of blood test results where equities warrant the admission of such evidence). But see \textit{LA. CIV. CODE ANN.} arts. 188–189 (West Supp. 1993) (providing that in the absence of a mother’s fraud, a man may not disavow paternity if he knowingly marries a pregnant woman, and requiring that a husband file suit for the disavowal of paternity within 180 days after he learned, or should have learned, of the child’s birth); Slagle v. Slagle, 398 S.E.2d 346, 350 (Va. Ct. App. 1990) (ruling that in the absence of fraud, a husband was collaterally estopped from modifying the support provisions of a divorce decree).

46. \textit{See} C.C. v. A.B., 550 N.E.2d 365, 370–71 (Mass. 1990) (holding that in a paternity action, an alleged biological father is required to show that he and the child have a substantial parent-child relationship and to prove paternity by clear and convincing evidence, rather than to rebut the husband’s presumptive paternity by proof beyond a reasonable doubt). Whether an alleged biological father has standing to raise and rely upon the presumption of paternity has divided courts. \textit{See} Privette v. State, 585 So. 2d 364, 365 (Fla. Dist. Ct. App. 1991) (declining to follow Pitcairn v. Vowell, 580 So. 2d 219, 222 (Fla. Dist. Ct. App. 1991), which held that the putative father did not have standing to raise and rely upon the presumption of legitimacy).

47. \textit{See} \textit{In re} Marriage of Ross, 783 P.2d 331, 338–39 (Kan. 1989) (ruling that in a child’s paternity action against the alleged biological father, the court could consider a rebuttal of the presumed father’s status only if it was in the child’s best interests).


49. \textit{See} Mark Allan B. v. Paula V., 244 Cal. Rptr. 79, 80–82 (Ct. App. 1988) (permitting an alleged biological father’s paternity action to proceed, notwithstanding an earlier marriage dissolution decree, where he had not received notice and had no opportunity to participate in the prior case), withdrawn, 1988 Cal. LEXIS
proceeding. Occasionally, even a party to an earlier dissolution proceeding subsequently may challenge the parentage designation. The potential for successive legal designations and later challenges to paternity determinations warrants an examination of methods for promoting early and more comprehensive determinations of male parentage, as well as mechanisms for consolidating and updating all government-sponsored determinations of legal paternity.

II. IMPROVING METHODS FOR DESIGNATING MALE PARENTAGE

What can and should be done about the haphazard, fortuitous, and inconsistent ways in which male parents are now designated under law? Worthy of debate are proposals mandating, or at least promoting earlier, more complete, and more accurate designations of male parentage as of the time of a child's birth. The proposals that follow suggest improvements in the initial establishment and later amendment of birth records.

A. Establishing the Birth Record

One way to encourage earlier and more complete designations of male parentage is to promote the compilation of complete and accurate birth records shortly after birth by providing expectant and new mothers and others with better information concerning the legal consequences of birth.

182 (Cal. May 19, 1988) (denying review and ordering that the opinion not be published officially).

50. See Jensen v. Runft, 843 P.2d 191, 193–94 (Kan. 1992) (allowing a mother's paternity action to proceed based on a finding that it was in the child's best interests to have paternity established, where the issue of paternity was never considered in an earlier dissolution proceeding, even though the husband did not believe that the child was his biological offspring and disavowed paternity after the mother remarried); Masters v. Worsley, 777 P.2d 499, 500, 504 (Utah Ct. App. 1989) (upholding a former husband's action in fraud against his former wife to disestablish the paternity determination made in an earlier marriage dissolution proceeding).

51. For example, known spouses and men identified as possible biological fathers could be provided with this information.
For example, those providing childbirth services could inform women about the laws relating to parental duties, including statutes on presumed fatherhood, the support obligations of unmarried men, and the duties of biological fathers married to other women.

Laws mandating or encouraging earlier, more complete, and more accurate designations of male parentage as of the time of a child's birth need not operate exclusively prior to or immediately after birth. Those interested in a child born without a legally designated male parent often need time to consider, discuss, and settle on the consequences of birth. Additionally, unlike phenylketonuria (PKU) testing, DNA and other paternity tests may not be performed on a newborn. Consideration therefore should be given to laws promoting more conclusive designations that operate as long as one or two years after birth. Under such laws, it is important that a man with connections to a child (biologically, by marriage, or otherwise) has sufficient time to "come forward to participate" in child rearing or to establish a "custodial, personal or financial relationship."

To encourage complete and accurate legal designations of male parentage as of the time of birth, the state could require periodic inquiry (by state agents, hospital personnel, or doctors) into the male parentage of a child whose birth record, without explanation, lacks a male parentage designation. These inquiries at least should involve the

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52. The Pennsylvania statute challenged in Planned Parenthood v. Casey, 112 S. Ct. 2791, 2834 (1992), required women to be informed by physicians or others about the legal liability of prospective fathers, except rapists, for their unborn children. 18 PA. CONS. STAT. ANN. § 3203(a)(2)(iii) (1990); see also SUPPORTING OUR CHILDREN, supra note 3, at 121 (reviewing the success of Washington's parentage acknowledgment outreach program, where "almost four times as many paternity affidavits were filed in 1991 than were in 1988").

53. This information could be conveyed in a manner similar to that contemplated in Casey, 112 S. Ct. at 2822–23, where doctors would be required to notify pregnant women of the availability of materials relating to a father's child support duties, or in 20 ILL. COMP. STAT. act 2310, § 55.54 (1992), where a statewide education program on the negative consequences of drug use during pregnancy is conducted by the Department of Health.

54. Unlike many other blood tests, PKU testing requires only a small blood sample; samples for PKU testing of infants usually are taken from the heel. On required PKU testing of all infants, see 40 ILL. COMP. STAT. act 240, § 1 (1992) (requiring every newborn to be tested for phenylketonuria, hypothyroidism, and galactosemia).


dissemination of parentage law information which is more extensive than that provided to all mothers and which identifies additional government services to assist voluntary private initiatives in designating a male parent.\textsuperscript{57} The designation of male parentage should not be encouraged by the state, however, where the birth resulted from criminal sexual assault, or where the mother reasonably fears abuse by the father or otherwise has good cause to be left alone.\textsuperscript{58}

Laws also could encourage earlier, more complete, and more accurate designations of male parentage as of the time of a child's birth by requiring an inquiry of female parents\textsuperscript{59} within a certain time after a child's birth to confirm birth record data. These inquiries also might be used to inform mothers about the methods of amending any birth records that were inaccurate when made or that can be deemed inaccurate because of new medical tests or similar disclosures.

These suggested initiatives are not without drawbacks. Any inquiry into procreational activities, which inevitably would accompany state-encouraged or state-mandated designations of male parentage, raises a host of concerns. The present freedoms enjoyed by many women regarding male involvement in their children's lives might be curtailed. The present freedoms of many men to not be involved in their children's lives also might be diminished. The constitutional interests of adults in informational privacy,\textsuperscript{60} child rearing,\textsuperscript{61} and bodily autonomy\textsuperscript{62} must be balanced carefully with the

\textsuperscript{57} For example, governments could offer to pay for paternity tests where there is uncertainty about biological ties.

\textsuperscript{58} Criminal sexual assault involving consensual intercourse with a minor might not prevent the designation of male parentage. \textit{See infra} note 64. Consider also the exceptions provided in the Pennsylvania law on spousal notification of abortion which was recently invalidated by the U.S. Supreme Court in Planned Parenthood v. Casey, 112 S. Ct. 2791, 2826–33 (1992). The law provided that a woman need not notify her husband if her pregnancy was caused by another man or by spousal sexual assault, or if notice might lead to bodily injury.

\textsuperscript{59} State officers, medical facilities, or the medical personnel attending the birth could be designated to make these inquiries.

\textsuperscript{60} \textit{See} Whalen v. Roe, 429 U.S. 589, 598–604 (1977) (discussing the federal constitutional privacy interest "in avoiding disclosure of personal matters" in the context of health care).

\textsuperscript{61} \textit{See} Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925) (discussing the parental interests in directing "the upbringing and education of children under their control").

\textsuperscript{62} \textit{See In re} J.M., 590 So. 2d 565, 569–70 (La. 1991) (discussing the various constitutional concerns raised where compulsory blood testing is ordered to determine paternity); A.R. v. C.R., 583 N.E.2d 840, 844 (Mass. 1992) (finding that the
child's and the government's interests in earlier and more conclusive designations of male parentage. Undoubtedly, balancing these freedoms and interests will be difficult.\(^3\)

Concerns about promoting only traditional, two-parent designations also exist. Laws promoting earlier, more complete, and more accurate designations of male parentage as of the time of a child's birth should not necessarily require that all children have at least one male parent designated. A child born as a result of a rape\(^6\) or due to artificial insemination by an anonymous donor\(^5\) may never have a male parent under law. Similarly, a two-parent setting need not inevitably involve at least one man. For example, a child born to an unmarried woman who has been artificially inseminated by an anonymous donor could have two female parents and no male parent.\(^6\)

ordering of blood tests in paternity cases does not violate the Fourth Amendment prohibition against unreasonable searches and seizures where there is probable cause to believe that paternity exists).  

63. Consider, for example, the controversy over whether an adoption can proceed with only the mother's consent where the biological father is unknown to the state because the mother refuses to identify him. See In re Adoption of S.J.B., 745 S.W.2d 606, 607–08 (Ark. 1988) (permitting the adoption of a child born to an unmarried fifteen-year-old to proceed without notice to the biological father, who "was not interested enough in the outcome of his sexual encounter with this fifteen-year-old girl to even inquire concerning the possibility of her pregnancy," even though the father probably did not know of the child's existence and the mother did not reveal the father's name for reasons of "religion and privacy"); Robert O. v. Russell K., 578 N.Y.S.2d 594, 597 (App. Div.) (finding it "well settled" that a mother has no obligation to volunteer any information about the biological father during an adoption), aff'd, 604 N.E.2d 99 (N.Y. 1992). But see Lehr v. Robertson, 463 U.S. 248, 273 n.5 (1983) (White, J., dissenting) ("Absent special circumstances, there is no bar to requiring the mother of an illegitimate child to divulge the name of the father when the proceedings at issue involve the permanent termination of the father's rights."); In re Three Adoption Cases, 16 Fain. L. Rep. (BNA) 1099, 1100 (D.C. Super. Ct. 1989) (ruling that in an adoption case where the biological father is unknown, "[a]t a minimum an explanation of the birth mother's refusal to identify the birth father is warranted").

64. See In re SueAnn A.M., 500 N.W.2d 649, 656 (Wis. 1993) (denying standing to a father to contest the termination of his parental rights where his child was conceived during a sexual assault and where he had not established a significant relationship with the child). But cf. Jevning v. Cichos, 499 N.W.2d 515, 518 (Minn. Ct. App. 1993) (requiring a father who was under the age of consent at the time of conception to provide child support); Mercer County Dep't of Social Servs. v. Alf M., 589 N.Y.S.2d 288, 290 (Fam. Ct. 1992) (holding that a male victim of statutory rape was obligated to support the resulting child).

65. See 750 ILL. COMP. STAT. act 40, § 3(b) (1992) (providing that a semen donor is not considered the father of a child conceived with the donor's semen). A married woman who is artificially inseminated without her husband's consent or his semen also may bear a child who has no legal father. See 750 ILL. COMP. STAT. act 40, § 3(a) (1992) (requiring a husband's consent before he can be declared the father of a child conceived through artificial insemination).

66. See supra note 23 and accompanying text.
Laws also need not limit a child to having only one or two parents. Some children may benefit if they are designated legally as having three or more parents as of the time of birth. In Louisiana, the concept of dual paternity provides that a mother, a presumed father (a mother's husband at the time of birth), and a biological father all may have legal duties to a child, although they may not all have the same rights of parentage. Because divorce and remarriage are commonplace today, many children now have four de facto parents, although each of the parents may not carry such a designation under law.

B. Amending the Birth Record

The promotion of earlier and more complete designations of male parentage should diminish the number of subsequent inquiries into a child's male parentage as of the time of birth. Yet, not even a fully completed birth record should foreclose all later inquiries. For example, the rebuttal of a husband's presumed paternity should be allowed in some settings. If a

67. See Smith v. Cole, 553 So. 2d 847, 855 (La. 1989) (declining to address, in a filiation action by a mother against a biological father, whether or not child support may be required of a presumed father who has not disavowed paternity); State ex rel. Lawrence v. Harrell, 582 So. 2d 940, 941 n.1 (La. Ct. App. 1991) (allowing a state-initiated filiation action against a biological father to proceed even though the presumed father had not disavowed paternity); Smith v. Jones, 566 So. 2d 408, 414 (La. Ct. App.) (allowing a biological father to sue to establish paternity even though the presumed father had not disavowed paternity and therefore remained the child's legitimate father), cert. denied, 569 So. 2d 981 (La. 1990); see also Judith T. Younger, Light Thoughts and Night Thoughts on the American Family, 76 MINN. L. REV. 891, 913 (1992) ("The law should recognize the possibility that a child might have more than one mother and one father."). Consider, as well, the traditional rule that a stepfather has an obligation to support his stepchild to the same extent as a biological father as long as the stepfather's marriage to the mother continues. See, e.g., UTAH CODE ANN. § 78-45-4.1 (1992).

68. See Gnagie v. Department of Health & Human Resources, 603 So. 2d 206, 214 (La. Ct. App.) (denying a presumed father's wrongful death or survival action arising from a child's death where the presumed father was not a biological parent and had not developed a parental relationship with the child), cert. denied, 608 So. 2d 174 (La. 1992).

69. Of course, additional proceedings may not be precluded if differing evidentiary burdens attend paternity determinations in different settings. See R.L.J. v. Western Sprinklers, Inc., 844 P.2d 37, 40 (Kan. Ct. App. 1992) (noting that although paternity may be established by a preponderance of the evidence in a workers' compensation suit, a higher burden is required in other types of suits).
later inquiry into the child's male parentage as of the time of birth is necessary, efforts should be made to ensure that the determination is conclusive so that additional proceedings will be unnecessary. In order for a court determination of male parentage to be conclusive, it must accord procedural due process to all persons who have constitutional interests.70

Thus, if male parentage as of the time of a child's birth is to be designated conclusively during a marriage dissolution proceeding, the divorcing spouses cannot be the sole parties to the litigation, just as a petitioning couple and a child are not the only interested parties in an adoption proceeding. Adjudications involving a child's male parentage perhaps should proceed as personal status (or in rem) cases71 so that all interested parties can be joined without the usual constraints attending nonresident defendants.72

70. In particular, the liberty interests of unmarried men in their biological offspring are difficult to assess. See In re Adoption of B.G.S., 556 So. 2d 545, 549, 559 (La. 1990) (finding that "[t]he interest of a parent in having a relationship with his children is manifestly a liberty interest protected by the Fourteenth Amendment's due process guarantee" and declaring a Louisiana statute unconstitutional because it deprived unwed fathers of their parental rights without due process); Robert O. v. Russell K., 604 N.E.2d 99, 103 (N.Y. 1992) (finding that a liberty interest may be created if a father promptly attempts to establish his parental responsibilities). Of course, there are often other substantive due process interests involved in court hearings on parentage, such as informational privacy. See B.J.R.L. v. Utah, 655 F. Supp. 692, 697-99 (D. Utah 1987) (finding privacy interests in the public disclosure of information on the bearing of illegitimate children). But see CAL. CIV. CODE § 7017(c) (West Supp. 1992) (providing that in proceedings to terminate parental rights prior to an adoption, it is necessary to make an "effort to identify the natural father," including "inquiry to be made of the mother and any other appropriate person"); J.P. v. DeSanti, 653 F.2d 1080, 1090-91 (6th Cir. 1981) (finding that not all interests in the nondisclosure of private information are of a constitutional dimension); Scheetz v. Morning Call, Inc., 747 F. Supp. 1515, 1526-34 (E.D. Pa. 1990) (employing differing balancing tests when differing informational privacy interests are infringed, with strict scrutiny reserved for intrusions into especially intimate or personal areas), aff'd, 946 F.2d 202, 205-07 (3d Cir. 1991) (considering the reasonable expectation of privacy in information given to the government), cert. denied, 112 S. Ct. 1171 (1992).

71. See Shaffer v. Heitner, 433 U.S. 186, 208 n.30 (1977) (noting compliance with the standard of fairness in "status" cases); Pennoyer v. Neff, 95 U.S. 714, 734-36 (1878) (recognizing the authority of state proceedings to determine the "status" of one of its citizens towards residents and nonresidents alike); In re M.L.K., 768 P.2d 316, 319 (Kan. Ct. App. 1989) (holding that, like divorce and custody proceedings, proceedings to terminate parental rights involve "status" and fall within the exception to the minimum contacts rule).

72. See, e.g., 750 ILL. COMP. STAT. act 5, § 401(a) (1992) (allowing a marriage dissolution judgment to be entered where only one of the spouses was a state resident at the time that the action was filed).
The results of adjudicatory proceedings in which male parentage designations from earlier birth certificates are reexamined should be reflected in those birth records. Later paternity determinations in marriage dissolution, adoption, probate, or insurance proceedings should be noted on the relevant birth records so that all parentage designations are maintained centrally. Such centralization would reduce the chances of multiple proceedings because formal paternity determinations would be easy to locate.

Another way to improve the current system for designating male parentage is to facilitate the amendment of birth records. Judicial involvement in the amendment of incomplete or inaccurate records could be eliminated by deeming sworn affidavits to be sufficient to establish male parentage as of the time of a child's birth. Such affidavits, as well as unsworn assertions, currently are used in making many birth records at the time of birth.

Finally, the ability to challenge birth records that are made at the time of a child's birth or shortly thereafter should be limited. Although it may be wise to maintain lengthy limitations periods for challenges brought by or on behalf of children, certain conduct, or the passage of time, should foreclose others from seeking to alter earlier designations of male parentage. Some courts presently bar biological fathers from participating in adoption proceedings involving their children because of their failure to provide prebirth or early postbirth

73. Of course, the maintenance of initial and updated parentage records does not mean that the records would be open to the public. See supra note 18; cf. 21 U.S.C. § 844(b) (1988) (providing for a nonpublic record of drug possession findings made in administrative hearings).

74. A recent federal commission recommended to Congress that "[s]tates shall have and use laws providing that acknowledgment of parentage be incorporated in a witnessed, written statement . . . . In states where the acknowledgment must be ratified by a tribunal[,] . . . the tribunal shall have the power to determine parentage based on the acknowledgment without the necessity of a hearing." SUPPORTING OUR CHILDREN, supra note 3, at 123; see also Roberts, supra note 21, at 1027-28.

75. See supra note 17 and accompanying text.

76. See 42 U.S.C. § 666(a)(5)(A)(i) (1988) (providing that states participating in the AFDC program must have "[p]rocedures which permit the establishment of the paternity of any child at any time prior to such child's eighteenth birthday"); H.R. REP. NO. 527, 98th Cong., 1st Sess. 38 (1983) (indicating that advances in scientific paternity testing eliminate the need for short limitations periods "to prevent stale claims and to protect a man from having to defend himself against a paternity action brought years after the child's birth when witnesses may have disappeared and memories may have become faulty").
support, or because of their failure to become informed sooner about the pregnancy or birth. Some courts presently bar presumed fathers from disavowing their parental status in divorce proceedings because of their children's best interests, their own earlier assumption of parental duties, or the passage of time. Further, in the absence of fraud, a man who marries a pregnant woman with knowledge that he is not the biological father often may not later deny his male parentage as of the time of the child's birth. After a certain point in time, it may be best to bar everyone, except perhaps a child who is proceeding in her own best interests, from attempting to alter a birth record's designation of male parentage as of the time of birth.

This is not to say that biological ties should be considered irrelevant to legal designations or financial support orders involving the male parentage of older children. It suggests, however, that a child's interests typically should be paramount in deciding whether to allow a redetermination of that

77. See In re Adoption of Doe, 543 So. 2d 741, 749 (Fla.) (ruling that a natural father's consent to his child's adoption was not required because the father abandoned the child and made only marginal support efforts before and shortly after the child's birth), cert. denied, 493 U.S. 964 (1989).

78. See In re Petition of Doe, No. 1-92-1552, 1993 Ill. App. LEXIS 1271, at *9, 1993 WL 330638, at *4 (Ill. App. Ct. Aug. 18, 1993) (terminating a biological father's parental rights for failure to assume a reasonable degree of concern for the newborn within 30 days after birth, where the biological father did not follow what was happening during the pregnancy or after the birth); Robert O. v. Russell K., 604 N.E.2d 99, 100, 104 (N.Y. 1992) (ruling that a man who did not know that he had fathered an out-of-wedlock child until 10 months after the child's adoption became final could not seek to vacate the adoption because no one prevented him from finding out about his girlfriend's pregnancy and he failed to act promptly after the child's birth).

79. See Michael K.T. v. Tina L.T., 387 S.E.2d 866, 871–72 (W. Va. 1989) (finding that a child's best interests may bar a presumed father from challenging his parental status where he has held himself out as the father for a sufficient length of time).

80. See N.P.A. v. W.B.A., 380 S.E.2d 178, 181 (Va. Ct. App. 1989) (finding that a husband may be bound to support his wife's illegitimate child if he knowingly and intentionally entered into such a support agreement with his wife).

81. See LA. CIV. CODE ANN. art. 189 (West 1993) (requiring that in most cases, a husband file suit for disavowal of paternity within 180 days after he learned, or should have learned, of the child's birth).

82. See, e.g., LA. CIV. CODE ANN. art. 188 (West 1993) (providing that in the absence of fraud by the mother, a man may not disavow paternity if he knowingly marries a pregnant woman).

83. See, e.g., Wyo. STAT. § 14-2-104(c) (Supp. 1993) ("Any man alleging that he is the natural father of a child having a presumed father ... may, within six (6) months of the child's birth ... bring an action ... to declare his paternity of the child and ... rebut the presumption...").
child's male parentage as of the time of birth. Neither a parent's interests, which often surface only after the deterioration of a relationship with a person other than the child, \(^4\) nor the state's interests, which typically involve financial reimbursement, are so compelling that longstanding designations of paternity should be open to attack.

Undoubtedly, these suggestions raise some troubling questions. Promoting earlier, more complete, and more accurate designations of male parentage would mean that some men who are biologically linked to children will lose forever the opportunity to be parents under law through no fault or misconduct of their own. It also would mean that other men will bear forever the legal designation of parents because of their past reliance on false representations about their parental ties. \(^5\) Further, it would mean that some women will lose their ability to conceal the identities of their children's biological fathers. These are not insignificant costs. Nevertheless, our present system for designating male parentage as of the time of a child's birth seems more costly. Governments and most interested parties have a significant stake in better assuring that a lasting designation of male parentage is made for every child at or shortly after the child's birth.

**CONCLUSION**

The contemporary methods for legally designating male parentage as of the time of a child's birth require study, debate, and reform. Presently, too many designations lack uniformity and occur long after birth, resulting in unnecessary surprise and uncertainty for children and parents alike.

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84. Thus, in Cain v. Cain, 777 S.W.2d 238 (Ky. Ct. App. 1989), without a finding as to the child's best interests, the former husband should not have been permitted to question his parentage after having a normal parent-child relationship with the child for 10 years. This paternity challenge came twelve years after the child's birth and two years after the husband's divorce from the child's mother. The child's interests should have been paramount, notwithstanding the mother's fraud in concealing the child's biological roots during her marriage and for two years after her divorce.

85. See, e.g., Hartman v. Stassis, 504 N.W.2d 129, 130, 134 (Iowa Ct. App. 1993) (imposing a child support duty on a man who claimed that the mother had conceived children under deceptive circumstances while planning to raise the children with her lesbian partner).
Moreover, male parentage adjudications often proceed without involving all interested parties, leaving the resulting judgments open to later attacks.

Laws should promote earlier, more complete, and more accurate designations of male parentage as of the time of a child's birth. In particular, birth-record laws should be amended to encourage, if not compel, such designations. If a designation subsequently is reexamined in court during a marriage dissolution, adoption, probate, or other proceeding, the resulting designation, to the extent feasible, should be conclusive so that additional inquiries are foreclosed.