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Predatory Paternity Establishment: A Critical Analysis of the Acknowledgment of Paternity Process in Texas.

Anne Greenwood

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COMMENTS

PREDATORY PATERNITY ESTABLISHMENT: A CRITICAL ANALYSIS OF THE ACKNOWLEDGMENT OF PATERNITY PROCESS IN TEXAS

ANNE GREENWOOD

I. Introduction.....	421
II. Background	428
A. Birth of the Acknowledgment of Paternity Process in Texas.....	428
B. Resulting Impact on Child Support Collections in Texas.....	434
III. Analysis.....	435
A. Winning the Federal Incentives.....	435
B. Defining the Issue for Texas.....	437
C. Statutory Attempts to Protect the Integrity of the Process.....	437
D. The Office of the Attorney General Attempts to Protect the Integrity of the Process.....	438
E. Fully Informing the Alleged Father	445
F. Actions in Other Jurisdictions	445
G. Bringing Integrity Back into the Process Through Genetic Testing	450
H. Bringing Integrity Back into the Process Through Alternative Means	453
IV. Conclusion	455

I. INTRODUCTION

Child support programs across the nation are struggling to achieve even meager recovery of the financial support children need from their

parents.¹ These efforts will likely increase dramatically now that federal monetary incentives have become entirely dependent upon a state's ability to meet federally mandated percentages in target areas.² One such area is in the number of paternities, or father-child relationships, a state must establish for children born to unwed parents.³ To comply, Texas has broadened the scope of its paternity establishment campaign by increasing the effect of its Acknowledgment of Paternity (AOP) process.⁴ An

1. See TIMOTHY GRALL, U.S. DEP'T OF COMMERCE, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT 6 (1999), available at <http://www.census.gov/prod/2002pubs/p60-217.pdf> (reporting that of the \$32.3 billion in child support payments owed in 1999, about \$19.0 billion was actually paid). In 2000, approximately "13.5 million parents had custody of 21.7 million children under 21 years of age whose other parent lived somewhere else." *Id.* at 1. Child support had been agreed upon or awarded to over sixty percent of custodial mothers and thirty-nine percent of fathers. *Id.* at 4. Custodial mothers actually received approximately sixty percent of the support owed to them in 1999, while custodial fathers collected approximately forty-eight percent. *Id.* at 6. In 1999, sixty-four percent of the 1.5 million custodial parents who were living below poverty and due child support received "some payments." *Id.* at 5.

2. See CHILD SUPPORT DIV., OFFICE OF THE ATT'Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 21 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (explaining that, beginning in 2000, state programs could earn incentives based upon meeting performance standards in the areas of paternity establishment, percentages of cases with court orders, percentages of current support collected, percentages of cases in which arrearages are collected, and cost effectiveness). Any federal incentives are based upon Texas's performance relative to other states and, in 2002, became entirely dependent upon meeting standards of performance in these categories. *Id.* at 23; see also 42 U.S.C. § 666(a) (2003) (conditioning federal child support enforcement funds on individual states' enactment of laws that broaden a man's ability to voluntarily acknowledge paternity).

3. CTR. ON FATHERS, FAMILIES, AND PUBLIC POLICY & OFFICE OF THE ATT'Y GEN. OF TEX., HANDBOOK FOR NON-CUSTODIAL PARENTS 3 (2003), available at http://www.oag.state.tx.us/AG_Publications/pdfs/qa_ncp.pdf (asserting that the federal government has set a ninety percent goal for paternity establishment for children born out of wedlock); see also OFFICE OF THE ATT'Y GEN. OF TEX., CHILD SUPPORT SFY 2001 ANNUAL REPORT 10 (2001) (reporting that, every year, approximately 100,000 children are born to unwed parents); CHILD SUPPORT DIV., OFFICE OF THE ATT'Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 35 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (stating that the PRWORA mandates development of a new process for establishing paternity through acknowledgment); Admin. for Children & Families, U.S. Dep't of Health & Human Servs., DCL-99-12, *Voluntary Paternity Acknowledgment Staff Training Videotape Script* (Feb. 12, 1999), at <http://www.acf.hhs.gov/programs/cse/pol/DCL/dcl9912.htm> (mentioning that federal law requires a voluntary acknowledgment program in every state) (on file with the *St. Mary's Law Journal*).

4. See CHILD SUPPORT DIV., OFFICE OF THE ATT'Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 35 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (noting that an AOP process existed prior to the implementation of welfare reform, but a signed AOP served only as evidence of paternity). This changed in 1999 when the Texas Legislature, in an attempt to

AOP is a document that a man may sign when he wishes to assert that he is the father of a child born out of wedlock.⁵ In essence, it is a contract. An AOP entitles him to parental rights in exchange for his agreement to support the child.⁶ His signature legally binds him almost immediately to support the child for a minimum of eighteen years.⁷ This approach is proving enormously successful for the State of Texas.⁸

Pursuant to federal law, and in an effort to enlist fathers for as many children as possible, the Child Support Division of the Texas Office of the Attorney General (OAG) began a recruiting process whereby virtually anyone, of any educational level, working in any birthing center in the state, can become certified to approach a potential father and get his sig-

comply with the federal mandate that an expedited voluntary establishment of paternity be developed, deemed an AOP a conclusive legal finding. *Id.*

5. See TEX. FAM. CODE ANN. § 160.301 (Vernon Supp. 2004) (stating that “a man claiming to be the biological father of the child may sign an acknowledgment of paternity with the intent to establish the man’s paternity”); CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 35 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (explaining that a signed acknowledgment is a legal finding).

6. See TEX. FAM. CODE ANN. § 151.001 (Vernon Supp. 2004) (enumerating various rights belonging to a parent such as physical possession of the child, the right to direct the child’s upbringing, along with the duty to support the child); CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., ACKNOWLEDGMENT OF PATERNITY 1 (2001), available at <http://www.texasag.org/aop/pdf/aopback.pdf> (listing on the back of the AOP that “[t]his Acknowledgment has the same effect as a court order establishing paternity,” that “[b]oth parents have parental rights and duties as provided by state law,” that “[e]ither parent has the right to seek primary custody of the child,” that “[a] parent not living with the child may have the right to visit and maintain a relationship with the child,” and that “[b]y signing this Acknowledgment, you may be ordered to pay child support and medical support”).

7. See TEX. FAM. CODE ANN. § 151.001(a)(3) (Vernon Supp. 2004) (expressing that a parent has a “duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education”); *id.* § 151.001(b) (detailing that “[t]he duty of a parent to support his or her child exists while the child is an unemancipated minor and continues as long as the child is fully enrolled in an accredited secondary school in a program leading toward a high school diploma”); CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., ACKNOWLEDGMENT OF PATERNITY 1 (2001), available at <http://www.texasag.org/aop/pdf/aopback.pdf> (cautioning under the “Benefits, Rights, and Responsibilities of Paternity” section of the AOP that “[t]he biological father who signs this Acknowledgment becomes the legal father of the child when this document is filed with the Texas Department of Health Bureau of Vital Statistics” (emphasis removed)).

8. See CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 3 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (reporting that, in 2000, paternity establishments strongly rebounded from past years, and the OAG broke the “billion dollar barrier” in child support collections for the first time, which vaulted it “into an elite group of state child support programs”).

nature on an AOP.⁹ A formal adjudication by a court is no longer required.¹⁰ An attorney is not required either.¹¹ In situations where the man signing the AOP is actually the biological father of the child, this approach does not unjustly impact his rights.¹² However, the OAG reports that “if a man does not understand the meaning and possible conse-

9. See Office of the Att’y Gen. of Tex., *Child Support Outreach Volunteer Program*, at <http://www.oag.state.tx.us/child/outreach.shtml> (last visited Sept. 30, 2003) (acknowledging that “[t]he POP program currently has enlisted all birthing hospitals statewide, making it one of the largest hospital-based paternity programs in the country”) (on file with the *St. Mary’s Law Journal*); see also CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 35 (2000) (indicating that the OAG’s Paternity Opportunity Program and the Bureau of Vital Statistics began a state-wide training program in the summer before the effective date of Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA)). The program trains personnel to administer AOPs to unmarried fathers right in the hospital or birthing center just after children are born. *Id.*; see also Admin. for Children & Families, U.S. Dep’t of Health & Human Servs., DCL-99-12, *Voluntary Paternity Acknowledgment Staff Training Videotape Script* (Feb. 12, 1999), at <http://www.acf.hhs.gov/programs/cse/pol/DCL/dcl9912.htm> (explaining that unmarried parents can sign acknowledgments at hospitals, doctors’ offices, local health care clinics, WIC offices, and vital records agencies) (on file with the *St. Mary’s Law Journal*).

10. CTR. ON FATHERS, FAMILIES, AND PUBLIC POLICY & OFFICE OF THE ATT’Y GEN. OF TEX., HANDBOOK FOR NON-CUSTODIAL PARENTS 10 (2003), available at http://www.oag.state.tx.us/AG_Publications/pdfs/qa_ncp.pdf (stating that “[i]f both parents have signed an AOP, no court proceeding on the issue of paternity is needed”); see also CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 24 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (stating that the Child Support Division of the OAG has the authority to take expedited administrative measures to determine parentage, including ordering paternity testing without the need for a court hearing); Admin. for Children & Families, U.S. Dep’t of Health & Human Servs., DCL-99-12, *Voluntary Paternity Acknowledgment Staff Training Videotape Script* (Feb. 12, 1999), at <http://www.acf.hhs.gov/programs/cse/pol/DCL/dcl9912.htm> (indicating that the intention at the federal level is that the voluntary acknowledgment program is designed to facilitate the establishment of paternity for unmarried parents without having to go to court) (on file with the *St. Mary’s Law Journal*).

11. See CTR. ON FATHERS, FAMILIES AND PUB. POLICY & OFFICE OF THE ATT’Y GEN. OF TEX., HANDBOOK FOR NON-CUSTODIAL PARENTS 4 (2003), available at http://www.oag.state.tx.us/AG_Publications/pdfs/qa_ncp.pdf (advising that legal services should be sought by the alleged father, but many cannot afford such services); CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 35 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (asserting that the Paternity Opportunity Program is designed on its own to “ensure that these fathers understand their rights and responsibilities and because an acknowledgment is now a legal finding, hospital and birthing staff [are] trained in the proper method for obtaining acknowledgments”).

12. CTR. ON FATHERS, FAMILIES AND PUB. POLICY & OFFICE OF THE ATT’Y GEN. OF TEX., HANDBOOK FOR NON-CUSTODIAL PARENTS 4 (2003), available at http://www.oag.state.tx.us/AG_Publications/pdfs/qa_ncp.pdf.

quences of documents he signs. . . child support laws and policies could have an unintended result.”¹³ Ironically, however, under Texas law, a minor’s signature on an AOP is as equally binding as an adult’s.¹⁴

The danger is that a man who signs an AOP may be unknowingly, but legally, binding himself to supporting and parenting a child of whom he is not the biological father. He and the mother may both mistakenly believe the child is his, or he may have been actively duped into believing the child is his by the mother.¹⁵ The probability of this scenario is particularly disturbing considering that recent statistics from the American Blood Banks Association show that nearly thirty percent of men who are alleged to be fathers and who undergo genetic testing are determined not to be the biological fathers of the children involved.¹⁶

13. *Id.*

14. *Id.* at 11 (explaining that under Texas law, AOPs are equally binding on minors and adults); see also UNIFORM PARENTAGE ACT § 304(d) (2000) (rationalizing that a young man old enough to procreate is old enough to accept responsibility for the child). However, this provision does a tremendous disservice to, for instance, a fourteen-year-old male minor who is duped into believing he fathered a child that he actually did not by a creative teen-age mom. The minor may fearfully omit telling his parents and sign an AOP. When the male is underage, requiring a parent’s signature along with the minor’s would presumably aid in thwarting undue influence on the young and impressionable and allow a parent to seek legal advice and genetic testing on behalf of the minor before an AOP commitment is made.

15. See *Cortese v. Cortese*, 76 A.2d 717, 719 (N.J. Super. Ct. App. Div. 1950) (noting that “in the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity”). The majority opinion in *Cortese* was written by United States Supreme Court Justice William J. Brennan while he was a member of the Appellate Division of the Superior Court of New Jersey. *Id.* at 719; see also OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., PUB. NO. OEI-06-98-00053, PATERNITY ESTABLISHMENT, USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS 11 (2000), available at <http://oig.hhs.gov/oei/reports/oei-06-98-00053.pdf> (expressing the state agencies’ concerns that, “[a]t the time of signing, some of these men may genuinely plan to perform as father throughout the child’s life” and “[m]others may encourage this type of acknowledgment to help maintain their eligibility for public assistance benefits or to keep the real father away from the child”). Some state agencies and about a third of local office respondents voiced concern that people may be coerced into signing acknowledgments. *Id.* This coercion is potentially occurring in the hospitals “when relatives of the new-born may make threats or otherwise coerce one or both parties into signing an acknowledgment.” *Id.* “[C]oncerns voiced by both State and local staff are that . . . some men may sign the affidavit knowing they are not the father, as one local office manager describes ‘out of kindness, pity or foolishness.’” *Id.*

16. See AM. ASS’N. OF BLOOD BANKS, ANNUAL REPORT SUMMARY 4 (2000) (reporting that 300,626 parentage cases were evaluated by laboratories in 2000, and the overall exclusion rate was 27.9%); Martin Kasindorf, *Men Wage Battle on ‘Paternity Fraud,’* USA TODAY, Dec. 2, 2002, http://www.usatoday.com/news/nation/2002-12-02-paternity-usat_x.htm (reiterating that “[t]he American Association of Blood Banks says the 300,626 paternity tests it conducted on men in 2000 ruled out nearly 30% as the father”) (on file with the *St. Mary’s Law Journal*); *Who’s Your Daddy? DNA Testing Answers Questions of*

A man who has signed an AOP in error has sixty days to discover his mistake and bring suit to rescind the document.¹⁷ After that window expires, he has four years to file a lawsuit challenging the AOP's validity and bears the burden to show fraud, duress, or material mistake.¹⁸ Unfortunately, many men cannot afford to go to court.¹⁹ Furthermore, in cases where a man has signed an AOP but later discovers information suggesting he is not the child's biological father, the biological father is still out there, and he may be unaware that a child exists. The mother provides the only possible link because she is the only one who knows his identity.

Presently, there are no effective safeguards in place to compel a woman to ever tell the signatory on an AOP or her child the identity of the bio-

Betrayal, but Not Love, at <http://abcnews.com> (last visited Jan. 4, 2003) (“[a]ccording to DNA Diagnostics, a private lab in Fairfield, Ohio, one in three males who undergo [genetic testing] finds out he is not the biological father of a child”) (on file with the *St. Mary's Law Journal*); see also TEX. FAM. CODE ANN. § 160.503(a)(1) (Vernon 2002) (expressing that “[g]enetic testing must be of a type reasonably relied on by experts in the field of genetic testing” and “performed in a testing laboratory accredited by the American Association of Blood Banks”).

17. TEX. FAM. CODE ANN. § 160.307 (Vernon 2002) (detailing that an acknowledgment may be rescinded “by commencing a proceeding . . . before the earlier of . . . the 60th day after the effective date of the acknowledgment . . . or the date of the first hearing in a proceeding to which the signatory is a party . . . to adjudicate an issue relating to the child, including [one] that establishes child support”); see also CTR. ON FATHERS, FAMILIES AND PUB. POLICY & OFFICE OF THE ATT’Y GEN. OF TEX., HANDBOOK FOR NON-CUSTODIAL PARENTS 12 (2003), available at http://www.oag.state.tx.us/AG_Publications/pdfs/qa_ncp.pdf (explaining how to rescind an AOP); JOHN J. SAMPSON ET AL., SAMPSON & TINDALL’S TEXAS FAMILY CODE ANNOTATED § 160.307 cmt. (2003) (commenting that while 42 U.S.C. § 666(a)(5)(D)(ii) mandates that signatories must be provided with a right of rescission if a state is to retain federal support subsidies, no method of rescission is prescribed). *But see* OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., PUB. NO. OEI-06-98-00053, PATERNITY ESTABLISHMENT, USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS 12 (2000), available at <http://oig.hhs.gov/oei/reports/oei-06-98-00053.pdf> (commenting that in some states, automated systems can create a support order the same day that the AOP is signed—effectively cutting off the rescission period).

18. TEX. FAM. CODE ANN. § 160.308 (Vernon 2002) (establishing that an AOP signatory has four years from the date the AOP is filed with the bureau of vital statistics to challenge the acknowledgment and that the challenging party bears the burden of showing fraud, duress, or material mistake of fact). Additionally, federal law requires that this challenge be made in court. 42 U.S.C. § 666(a)(5)(D)(iii) (2003).

19. See CTR. ON FATHERS, FAMILIES AND PUB. POLICY & OFFICE OF THE ATT’Y GEN. OF TEX., HANDBOOK FOR NON-CUSTODIAL PARENTS 3, 13 (2003), available at http://www.oag.state.tx.us/AG_Publications/pdfs/qa_ncp.pdf (explaining that challenging a voluntary acknowledgment after sixty days involves filing a lawsuit and will likely require an attorney, but that many unmarried fathers cannot afford legal services).

logical father or that other potential fathers exist.²⁰ This ability to remain silent results in leverage in the paternity process and has spawned a brand of father shopping in which unwed mothers are handed unfettered ability to choose among partners or among paychecks.²¹ All she must do is convince a man that he is the father of her child long enough to secure a binding AOP. This is known as paternity fraud, and it is growing across the nation at an alarming rate.²²

Failure to pay child support carries dire consequences; so whether or not a man is exposed to this risk for eighteen years should not rest upon a mother's willingness to be truthful.²³ Rather, it should rest upon the facts. A vital premise of an AOP, as in any contract, is that the parties enter into it voluntarily. If a man chooses to sign, his signature is only

20. See TEX. FAM. CODE ANN. § 160.302(a)(2) (Vernon 2002) (recognizing that “[a]n acknowledgment of paternity must be signed, or otherwise authenticated, under penalty of perjury by the mother and the man seeking to establish paternity”). However, this statute only compels a woman to be truthful with regard to the existence of another presumed, acknowledged, or adjudicated father. *Id.* §§ 160.302(a)(3)(A)-(B). (4) (attempting to compel full disclosure and address the ability to falsely swear on an AOP by mandating that the signatories must “state whether there has been genetic testing and, if so, that the acknowledging man’s claim of paternity is consistent with the results of the testing”).

21. See *Child Support and Fatherhood Proposals: Hearing Before the House Comm. on Ways and Means*, 107th Cong. 107-38 (2001) (statement of Carnell Smith, Founder & Director, Citizens Against Paternity Fraud), available at <http://waysandmeans.house.gov/legacy.asp?file=legacy/humres/107cong/6-28-01/107-38final.htm> (asserting that “[t]he number of people affected by paternity fraud is potentially enormous”).

22. See Carl Prine, *Pa. Law Fosters Paternity Fraud*, PITTSBURGH TRIB.-REV., June 16, 2002, http://www.pittsburghlive.com/x/tribune-review/news/s_76766.html (reporting that “[a]bout 1.5 million [paternity] tests are performed annually [and], [i]f estimates are [correct], 500,000 American men find out every year that they’re not really fathers”) (on file with the *St. Mary’s Law Journal*). Vermont Representative Leo Valliere asserts, “We used to live under the assumption that the mother knew the father, and who she said was the father was the father. But that’s not always true, and too often it’s fraud. . . . It’s a theft of the worst kind. It’s an identity theft.” *Id.* The issue prompted the introduction of House Bill 503 before the Texas Legislature this year. H.R. 503, 2003 Leg., 78th Sess. (Tex. 2003). This bill would have established a vehicle for restitution from the child’s mother or biological father where another man has been ordered to pay child support for a child he later learns through genetic testing is not his. *Id.* The bill stalled out in committee. *Id.*

23. See *Child Support and Fatherhood Proposals: Hearing Before the House Comm. on Ways and Means*, 107th Cong. 107-38 (2001) (statement of Carnell Smith, Founder & Director of Citizens Against Paternity Fraud), available at <http://waysandmeans.house.gov/legacy.asp?file=legacy/humres/107cong/6-28-01/107-38final.htm> (stressing the fact that the woman is the only one who knows with “100% certainty [what] her intimate relations [were] near the conception date”); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., PUB. NO. OEI-06-98-00053, PATERNITY ESTABLISHMENT, USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS 11 (2000) (acknowledging that “some State and local respondents believe it would be better for parties to confirm paternity through genetic testing than [through] voluntary [knowledge]”).

truly voluntary if it comes after disclosure of all the facts. We now have the means to provide him the full disclosure he deserves through genetic testing,²⁴ and he should have the benefit of that information *before* he signs an AOP.²⁵

This Comment examines the current approach Texas uses to capture federal incentives in the area of establishment of paternity, the emerging trends, and the associated problems. Part II outlines the development of the AOP process, the impact of the federal mandates, and their implementation in the Texas Family Code and by the OAG. Part III analyzes the current AOP procedure in Texas, discusses why it is flawed, and offers a sounder approach. The conclusion, Part IV, sums up the issues presented and discusses the options for resolution of the problem and the immediacy of the concern.

II. BACKGROUND

A. *Birth of the Acknowledgment of Paternity Process in Texas*

Under Section 160.201 of the Texas Family Code, the father-child relationship can be established through a number of means.²⁶ First, a presumption arises that a man is the father of a child when he is married to the child's mother during statutorily prescribed time periods.²⁷ Second, the relationship can be established through an acknowledgment of pater-

24. TEX. FAM. CODE ANN. § 160.102(8) (Vernon 2002) (defining genetic testing in the context of paternity as an analysis of deoxyribonucleic acid (DNA) or of various antigens or enzymes, to determine an individual's genetic markers in order to exclude or identify him as the father of a child).

25. See ADMIN. FOR CHILDREN & FAMILIES, PATERNITY ESTABLISHMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., available at <http://www.acf.hhs.gov/programs/cse/pubs/2002/reports/essentials/c8> (discussing how “[g]enetic testing has made it possible to identify the father of a child quickly, relatively easily, and very accurately”) “[Genetic testing] can either exclude the alleged father as the actual biological father of the child, or determine his paternity with a very high degree of probability. The use of genetic testing has transformed the determination of paternity, turning it into a routine procedure that is scientifically verifiable.” *Id.*; see also JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED § 160.502 commissioners' cmt. to UPA § 502 (2003) (stating that “[t]he progress that science has made in understanding molecular genetics since the promulgation of UPA (1973) is phenomenal”).

26. TEX. FAM. CODE ANN. § 160.201(b) (Vernon 2002).

27. See *id.* § 160.201(b)(1) (indicating that “[t]he father-child relationship is established between a man and a child by an un rebutted presumption of the man's paternity of the child under Section 160.204”); *id.* § 160.204(a)(4) (announcing that a man is presumed the father of a child born during marriage to the child's mother; or, if he is married to the mother when the child is conceived, and the child is born within 300 days after the marriage is terminated; or, if “he married the mother of the child after the birth . . . [and] he voluntarily asserted his paternity . . . in a record filed with the bureau of vital statistics; he is voluntarily named as the child's father on the child's birth certificate; or he promised in a

nity process, the AOP.²⁸ Third, a court can adjudicate him the father.²⁹ Finally, the relationship can be established through an adoption or consent to assisted reproduction.³⁰ Thus, when a baby is born to an unwed couple wishing to be regarded as the parents, they can readily establish paternity through an acknowledgment process.³¹

Development of the protocol for acknowledging paternity began some time ago. In 1991, Jane Stout, a Child Support Investigator for Texas's OAG, was sent to implement a program designed to escort unwed parents on a "speedy trip through the legal system."³² The "Parkland Project" was the first of its kind in Texas.³³ It was designed to help alleviate the burden on the child support system by assigning a duty to pay child support immediately upon a child's birth.³⁴ Stout's mission was to approach unwed couples sitting in hospitals during the birthing process and to persuade the man to acknowledge that he was the father of the newborn child by signing a support agreement.³⁵ Stout reported that, at that time, 10,000 illegitimate babies were born in Dallas County every year, and her mission was "to get all of them" a father.³⁶ Her approach to each parent

record to support the child as his own"). A presumption of paternity under this Section can only be rebutted by an adjudication under Subchapter G. *Id.*

28. *See id.* § 160.201(b)(2) (indicating that "[t]he father-child relationship is established between a man and a child by . . . an effective acknowledgment of paternity by the man under Subchapter D, unless the acknowledgment has been rescinded or successfully challenged"); *id.* § 160.301 (Vernon Supp. 2004) (declaring that "[t]he mother of a child and a man claiming to be the biological father of the child may sign an acknowledgment of paternity with the intent to establish the man's paternity").

29. TEX. FAM. CODE ANN. § 160.201(b)(3) (Vernon 2002) (noting that "[t]he father-child relationship is established . . . by an adjudication of the man's paternity").

30. *Id.* § 160.201(b)(4), (5).

31. CTR. ON FATHERS, FAMILIES AND PUB. POLICY & OFFICE OF THE ATT'Y GEN. OF TEX., HANDBOOK FOR NON-CUSTODIAL PARENTS 9 (2003), available at http://www.oag.state.tx.us/AG_Publications/pdfs/qa_ncp.pdf (explaining that both parents can either go to court to establish paternity or can just sign an acknowledgment).

32. Michael Precker, *A Legitimate Approach: Jane Stout Helps Unwed Fathers Claim Their Babies to Safeguard Their Own Rights As Well As the Child's*, DALLAS MORNING NEWS, Jan. 2, 1991, at 1C, available at 1991 WL 4694121.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

was tailored to achieve arguably different purposes,³⁷ but she claimed that she “never had a dad refuse.”³⁸

Stout had couples fill out paperwork and usually simply agreed to set child support at twenty percent of his net income.³⁹ Stout explained the state's position on rights and responsibilities and set a court date to make the agreement official.⁴⁰ When the couple arrived in court, the time spent binding the man to his agreement was “about two minutes per baby.”⁴¹ While this was shockingly little time for anyone involved to fully comprehend what was happening, at the very least, a contact point was established between the judicial system and a man agreeing to assume arguably the most important obligation of his life.

By 1995, yet another first-of-its-kind campaign to establish paternities reared its head, but this time after parties had appeared in the courtroom.⁴² Harris County Court Master Harrison Greg, Jr., presiding over a docket of 500 Houston cases, took part in a cooperative effort with the Texas OAG.⁴³ A private genetic testing firm, GeneScreen, was brought into the courthouse for a massive blood sample collection from mothers, children, and alleged fathers for paternity testing.⁴⁴ At least this time, finding a father was based upon scientific evidence instead of a pitch.

In 1996, the Personal Responsibility and Work Opportunities Reconciliation Act (PRWORA) delineated significant federal requirements con-

37. See Michael Precker, *A Legitimate Approach: Jane Stout Helps Unwed Fathers Claim Their Babies to Safeguard Their Own Rights As Well As the Child's*, DALLAS MORNING NEWS, Jan. 2, 1991, at 1C, available at 1991 WL 4694121 (discussing the various approaches to prospective fathers such as, “Did you know that you have no rights to this baby?” and “If something happens to her, you know who gets the baby? Not you. They give it to her mom, or her sister or a foster home.”). To the baby's mother, however, Stout cautions, “This enables you to get child support. It makes sure the baby gets his Social Security benefits, military benefits, medical insurance. . . . [e]ighteen years is a long time. Believe me, if something happens, you're going to wish you'd done this.” *Id.*

38. See *id.* (reporting Stout's proud proclamations of a “personal record of 14 babies in one visit” and “I love doing two babies at once”). Comparatively, it appears to be a bit “like the cashier at McDonald's asking if you want fries with your burger.” *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See Assoc. Press, *Private Firm to Help Establish Paternity in Court*, DALLAS MORNING NEWS, Mar. 18, 1995, at 12F, available at 1995 WL 7471413 (quoting then-Attorney General, Dan Morales, stating that “[t]his is the first time in Texas history that state and local governments and the private sector have joined forces to establish such a magnitude of paternities”).

43. *Id.*

44. *Id.*

cerning paternity establishment for non-marital children.⁴⁵ A federal paternity establishment goal of ninety percent was set for all children born out of wedlock, and states were required to enact laws and procedures for administering voluntary AOPs in order to maintain eligibility for federal funds under the child support and welfare programs.⁴⁶ States were also required to allow an AOP to become a legally binding determination of paternity without court ratification.⁴⁷ Additionally, a limited time for rescinding the AOP had to be permitted.⁴⁸

In 2000, a national child support enforcement program was created between the federal government and the states under Title IV-D of the Social Security Act.⁴⁹ In Texas, the new Uniform Parentage Act (2000) was adopted and became effective on June 14, 2001.⁵⁰ In fact, Texas now has “the most progressive parentage legislation of any state.”⁵¹

Consequently, upon the birth of a child in Texas, an unwed man is given the option of signing a document to voluntarily assert that he is the father of the child.⁵² To comport with federal law, this option is made available at the birthing center or hospital and must be signed by both the mother and the alleged father.⁵³ The document must state whether there

45. See Personal Responsibility & Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 666(a) (2003) (imposing requirements that each state have laws in effect to increase the effectiveness of the child support program).

46. See generally 42 U.S.C. § 666 (2003) (outlining the required procedures that state child support agencies must follow).

47. See Personal Responsibility & Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 666(a)(5)(C)(i) (2003) (conditioning federal child support enforcement funds on the enactment of laws by individual states that broaden a man’s ability to voluntarily acknowledge paternity).

48. See *id.* § 666(a)(5)(D)(ii) (allowing the AOP to be rescinded “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”).

49. 42 U.S.C. § 651 (2003).

50. JOHN J. SAMPSON ET AL., SAMPSON & TINDALL’S TEXAS FAMILY CODE ANNOTATED 789 (2003).

51. See *id.* at 789-92 (explaining that, with the promulgation of the UPA (2000), all earlier Uniform Acts dealing with parentage were withdrawn by the National Conference of Commissioners on Uniform State Laws, resulting in UPA (2000) constituting the single remaining product on the subject).

52. See TEX. FAM. CODE ANN. § 160.301 (Vernon Supp. 2004) (providing that a man who claims to be a child’s biological father may sign the acknowledgment “with the intent to establish the man’s paternity”); JOHN J. SAMPSON ET AL., SAMPSON & TINDALL’S TEXAS FAMILY CODE ANNOTATED 791 (West 2003) (pointing out that voluntary acknowledgment of paternity is “entirely new and is driven by federal mandates that states provide simplified nonjudicial means” to achieve early paternity determination).

53. See TEX. FAM. CODE ANN. § 160.302(a)(2) (Vernon 2002) (recognizing that “[a]n acknowledgment of paternity must . . . be signed, or otherwise authenticated, under penalty of perjury by the mother and the man seeking to establish paternity”).

is a presumed father⁵⁴ involved and that there is not already an acknowledged or adjudicated father.⁵⁵ A statement must also be made indicating if genetic testing has been performed and whether the assertion of paternity is consistent with those results.⁵⁶

While an acknowledgment process existed in Texas prior to the federal mandate, an AOP served only to provide evidence of paternity and was not legally binding. Texas law was changed to make an AOP a legally binding document.⁵⁷ Signing an AOP makes a man the legal father of the child as soon as the document is filed with the Bureau of Vital Statistics.⁵⁸ As the legal parent, he is obligated by law to provide support for the child.⁵⁹ This support must be continuous until the child reaches eighteen years of age, graduates from high school, or is otherwise emancipated, whichever occurs latest.⁶⁰

Additionally, to comport with federal law, if a man signs an AOP but later finds out that he is not the father of the child, the Texas Family Code provides for rescission of the AOP, provided it is instituted within sixty days after the acknowledgment is signed, or before a proceeding to adjudicate an issue regarding the child occurs.⁶¹ After the expiration of the

54. *See id.* § 160.302(a)(3)(A) (stating that “[a]n acknowledgment of paternity must . . . state that the child whose paternity is being acknowledged: does not have a presumed father or has a presumed father whose full name is stated”); *see also id.* § 160.204 (outlining the situations where the law presumes a man to be the father of a child).

55. *See* TEX. FAM. CODE ANN. § 160.302(a)(3)(B) (Vernon 2002) (reiterating that “[a]n acknowledgment of paternity must . . . state that the child whose paternity is being acknowledged . . . does not have another acknowledged or adjudicated father”).

56. *See id.* § 160.302(a)(4) (stressing that “[a]n acknowledgment of paternity must . . . state whether there has been genetic testing and, if so, that the acknowledging man’s claim of paternity is consistent with the results of the testing”).

57. *See id.* § 160.305(a) (affirming that a valid AOP is equivalent to an adjudication of paternity and confers all rights and duties of a parent on the acknowledged father); *see also* 42 U.S.C. § 666(a)(5)(D)(ii) (2003) (requiring that an acknowledgment of paternity operate as a legal finding).

58. *See* CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., ACKNOWLEDGMENT OF PATERNITY 1 (2001), available at <http://www.texasag.org/aop/pdf/aopback.pdf> (stating that “[t]he biological father who signs this Acknowledgment becomes the legal father of the child when this document is filed with the Texas Department of Health Bureau of Vital Statistics” (emphasis omitted)).

59. *See* TEX. FAM. CODE ANN. § 151.001(a)(3) (Vernon 2002) (recognizing that a parent has “the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education”).

60. *See id.* § 151.001(b) (commenting that this duty “exists while the child is an un-emancipated minor and continues as long as the child is fully enrolled” in high school).

61. *Id.* § 160.307 (indicating that a signatory may rescind an acknowledgment by commencing a proceeding before the earlier of sixty days “after the effective date of the acknowledgment” or the date of a proceeding to adjudicate an issue relating to the child).

period for rescission, the Code allows for challenge only within four years of the date of the AOP.⁶²

To disseminate the AOP forms in birthing centers across Texas, the OAG developed the Paternity Opportunity Program (POP) in the summer prior to the effective date of PRWORA.⁶³ In 1999, the OAG provided training to over “1,800 staff of 1,400 hospitals, birthing centers, local registries, and foundations,” with another 2,000 people being trained in 2000 due in part to high turnover within the medical field.⁶⁴ Currently, the plan calls for thousands of individuals to be trained in AOP attainment by undergoing a yearly certification process.⁶⁵

While the voluntary acknowledgment of paternity process has undergone various modifications, genetic testing has remained threaded throughout. Perhaps this is because genetic testing provides the clearest answer possible to determining parentage and places the responsibility of parenting and support where it most likely belongs.⁶⁶ Because genetic testing, or DNA testing,⁶⁷ is verifiable and does not depend upon the

62. *Id.* § 160.308 (stating in relevant part that a signatory has four years after the effective date of the acknowledgment to file suit to challenge his paternity and has the burden to prove fraud, duress, or material mistake of fact).

63. CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 35 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf; see also Child Support Div., Office of the Att’y Gen. of Tex., *Paternity Opportunity Program*, at <http://www.oag.state.tx.us/child/outreach.shtml> (last visited Sept. 30, 2003) (describing the Texas Paternity Opportunity Program) (on file with the *St. Mary’s Law Journal*).

64. CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 35 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf.

65. *Id.*; Office of the Att’y Gen. of Tex., *Child Support Outreach Volunteer Program*, at <http://www.oag.state.tx.us/child/outreach.shtml> (last visited Sept. 30, 2003) (recruiting volunteers to put in at least four hours each week on a regular basis to help with paternity establishing activities by using the pitch, “[I]f you are part of an organization that believes in community service, if you are part of an intern or job training program that requires work experience, if you want the personal satisfaction of making a difference in the life of a child . . . we want you!” (emphasis removed)).

66. See *Little v. Streater*, 452 U.S. 1, 6-8 (1981) (explaining the historical development of the application of blood tests to the issue of paternity).

67. See TEX. FAM. CODE ANN. § 160.102(8) (Vernon 2002) (defining genetic testing as “an analysis of an individual’s genetic markers”). The term encompasses deoxyribonucleic acid (DNA) analysis as well as “blood-group antigens, red-cell antigens, human-leukocyte antigens, serum enzymes, serum proteins, or red-cell enzymes.” *Id.* § 160.102(8)(B); see also *id.* § 160.102(12) (defining the likelihood of parentage as the “paternity index”); *id.* § 160.503 (explaining that a specimen used for genetic testing can come from blood, buccal (mouth) cells, hair, or other tissue or bodily fluid); *id.* § 160.505 (delineating that “a man is rebuttably identified as the father of a child” if he has at least a ninety-nine percent probability of paternity).

truth of testimony, it can qualify as independent evidence.⁶⁸ Although genetic testing does not conclusively identify a father, it can conclusively exclude him.⁶⁹ Increasingly, it is being relied on to remedy what was misplaced the first time,⁷⁰ and has already gained recognition in other areas of the law.⁷¹

B. *Resulting Impact on Child Support Collections in Texas*

Since the federally mandated changes, efforts by the State of Texas to collect child support dollars and secure federal incentives have been overwhelmingly successful.⁷² The Texas OAG collected \$1.029 billion in child support in state fiscal year 2000,⁷³ “breaking the billion dollar barrier for the first time and vaulting itself into an elite group of state child support

68. See *Roberson v. State*, 16 S.W.3d 156, 165-69, 172 (Tex. App.—Austin 2000, pet. ref'd) (explaining whether DNA evidence standing alone can support a conviction and holding in the affirmative); Carl W. Gilmore, *Independent Evidence: A New Tool for Paternity Cases*, 86 ILL. B.J. 476, 477 (1998) (explaining that the concept of independent evidence is applicable in determining whether parentage has been fully decided).

69. See Carl W. Gilmore, *Independent Evidence: A New Tool for Paternity Cases*, 86 ILL. B.J. 476, 479 (1998) (indicating that paternity tests do have an inherent margin of error, so test results are expressed as a percentage of probability of paternity); see also *Cortese v. Cortese*, 76 A.2d 717, 719 (N.J. Super. Ct. App. Div. 1950) (quoting U.S. Supreme Court Justice William J. Brennan, writing for the majority as a member of the Appellate Division of the Superior Court of New Jersey, in *Beach v. Beach*, 114 F.2d 479 (D.C. Cir. 1940), who noted that “[t]he substantial weight of medical and legal authority attests their accuracy, not to prove paternity, and not always to disprove it, but ‘they can disprove it conclusively in a great many cases provided they are administered by specially qualified experts’”).

70. See *Bean v. Office of Child Support Enforcement*, 9 S.W.3d 520, 523 (Ark. 2000) (holding the biological father responsible for past due child support, future child support, and a duty to maintain the child’s health insurance, six years after the birth of the child, in spite of the fact that another man had signed an acknowledgment of paternity just two days after the birth of the child).

71. Martin Kasindorf, *Men Wage Battle on Paternity Fraud*, USA TODAY, Dec. 2, 2002, http://www.usatoday.com/news/nation/2002-12-02-paternity-usat_x.htm (noting DNA’s increasing impact in murder and rape cases in which an individual convicted of a violent crime can be set free based upon DNA, but an individual wrongfully charged with paying child support cannot find any relief in some instances) (on file with the *St. Mary’s Law Journal*).

72. See CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 21 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (acknowledging that “Texas will qualify for federal incentives in all five measurement categories”).

73. See *id.* at 19 (reporting that the \$1.029 billion collected in 2000 represents a thirty-six percent increase over 1998 collections).

programs.”⁷⁴ Collections in 2000 were \$161.2 million more than in 1999, and represented the “largest ever single-year increase for the program.”⁷⁵

In state fiscal year 2000, paternity was established for 48,481 children through the Texas OAG. In state fiscal year 2000, paternity was established for 48,481 children through the Texas OAG.⁷⁶ In each of the preceding two years, the Texas paternity establishment percentage exceeded 100%.⁷⁷ The OAG explains this seemingly impossible result by indicating that “more children had paternity established through the judicial, administrative, and acknowledgment of paternity processes than were born out-of-wedlock in the state in each of these years.”⁷⁸ This presumably indicates that not only is the OAG securing fathers for those children currently born out of wedlock, but also for children of prior years. In state fiscal year 2000, the Texas OAG filed 56,000 binding AOP affidavits.⁷⁹

III. ANALYSIS

A. *Winning the Federal Incentives*

Among states with large caseloads, California and Texas report the highest rates of child support collection growth and stand well above the national average in their ability to capture every support dollar possible.⁸⁰ Theoretically, these states should stand as models for success in other states. It is useful to examine, however, what drives the efficacy of such seemingly exemplary programs and what parallels may exist between them.

In California, a state-of-the-art computerized tracking system was implemented to search for fathers through avenues such as local employment and tax records.⁸¹ The system allowed authorities to finally track down a man who was allegedly indebted to his children for \$206,000.⁸²

74. *Id.* at 3.

75. *Id.* at 19.

76. *Id.* at 20.

77. CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 21 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf.

78. *Id.*

79. *Id.* at 35.

80. See *id.* at 3 (analyzing preliminary national data from large caseload states).

81. See Megan Garvey, *Net to Snag Deadbeats Also Snares Innocent County: Mix-ups Have Cost Time, Money and Reputation of Hundreds of Men*, L.A. TIMES, Apr. 12, 1998, at B1, available at 1998 WL 2417309 (reporting that the Los Angeles tracking system searches for alleged fathers through various local records, such as employment, tax, and motor vehicle registrations).

82. *Id.*

Unfortunately, the overzealous system actually identified the wrong man.⁸³ It took the wrongfully accused man and his attorney two months to convince the district attorney's office that there had been a mistake.⁸⁴ That such an egregious error occurred in a case where the amount owed was so extreme is glaringly indicative of the magnitude of the corresponding problem at much lower levels. In fact, this instance of misidentification is not an isolated event.

In 1998, over seventy percent of the paternity establishments in Los Angeles County were by default.⁸⁵ Jerry Fernandez, an attorney on the Family and Indigent Law Panel in Los Angeles County, claimed that as many as twenty percent of those default judgments accused the wrong man.⁸⁶ However, former Los Angeles County District Attorney Gil Garcetti asserted that even hundreds of mistakes were a small price to pay given the caseload they faced.⁸⁷

In sum, while California boasts a hugely successful paternity establishment program, a sampling of the numbers suggests somewhat of a Machiavellian approach that has tolerated significant error rates.⁸⁸ The California Court of Appeals sees the fallout of the program in cases that come through its courtrooms and has "chastised Los Angeles County for its win-at-all-costs approach."⁸⁹

At issue in Texas is whether the state, also in the lead, is succumbing to similar tactics—carelessly sifting through any potential fathers available to secure child support dollars. Given that the receipt of federal incen-

83. *Id.*

84. *See id.* (recognizing that Walter Vollmer, a fifty-six-year-old man who had been married for thirty-two years, received an apology letter from the district attorney's office, but not until his life had been virtually destroyed and his wife had threatened suicide).

85. *See id.* (quoting Deputy District Attorney Wayne Doss' explanation that when "[t]he system finds a man who it believes is a good match . . . it sends a bill," and if the man named does not appear within thirty days, a default judgment is entered). Because personal service is not required in family law cases, thousands of men have been ordered to pay child support through this process without even being aware of the action or appearing in court. *Id.*

86. Megan Garvey, *Net to Snag Deadbeats Also Snares Innocent County: Mix-ups Have Cost Time, Money and Reputation of Hundreds of Men*. L.A. TIMES, Apr. 12, 1998, at B1, available at 1998 WL 2417309.

87. *See id.* (reporting that (now former) Los Angeles County District Attorney Gil Garcetti defended his system by asserting that such a man "should be required to support the child until age 18 . . . because he failed to contest the paternity before final judgment"). The California Court of Appeals rejected his argument. *Id.*

88. *See id.* (alleging that "county records show that 502 innocent men took blood tests over the past 15 months to escape government action against them"). Hundreds of men have had to write letters and appear in court to clear their names. *Id.* In effect, the system "requires men to either pay up or prove their innocence." *Id.*

89. *Id.*

tives is now entirely based upon a state's performance, that the federal mandate for establishing paternitys is quite high (at ninety percent), that unwed parents make up the bulk of the caseload, and that federal mandates have expedited the paternity establishment process, Texas logically stands to make the most dramatic increases in its apparent efficacy through targeting the paternity issue. Child support collections in Texas have increased eighty-six percent over the last four years,⁹⁰ and the OAG has gone from failing to meet its goal in the area of paternity establishments in 1998 to exceeding 100% in 2000, as stated above. Could it be that the AOP process in Texas has become a trap door?

B. *Defining the Issue for Texas*

Certainly, if a man fathers a child, he must provide support to the best of his means. Logically, those fathers who actively choose not to support their children should face very stiff consequences. Conversely, if a man chooses to support a child that is not his, he should be permitted to do so if it will benefit the child. However, any such commitment should not be treated lightly. A man should only enter into such an agreement after he is fully apprised of the facts and can make a truly voluntary decision.

The issue is not that the AOP is available at all. The issue is that a man is asked and allowed to sign an eighteen-year commitment without knowing whether he is in fact the father of the child, and without adequate warning as to the magnitude of the risk he is assuming when he signs without a genetic test.⁹¹

C. *Statutory Attempts to Protect the Integrity of the Process*

Texas statutes fail to effectively address the issue. Section 160.302(a)(2) of the Texas Family Code does provide that "[a]n acknowledgment of paternity must: . . . be signed, or otherwise authenticated, under penalty of perjury by the mother and the man seeking to establish paternity."⁹² Also, an AOP is void if it "falsely denies the existence of a presumed, acknowledged, or adjudicated father of the child."⁹³ How-

90. See Press Release, Office of the Att'y Gen. of Tex., Attorney General Cornyn Announces Record-Breaking \$1.4 Billion in Child Support Collections (Sept. 18, 2002) (showing that, for the first time in history, over \$1.4 billion was collected in child support during the state fiscal year ending August 31, 2002, and that this is an eighty-six percent increase over the \$757 million collected in 1998) (on file with the *St. Mary's Law Journal*).

91. See *Rivera v. Minnich*, 483 U.S. 574, 583 (1987) (Brennan, J., dissenting) (reasoning that paternity establishment is more significant than resolving a dispute over money because "it is the imposition of a lifelong relationship with significant financial, legal, and moral dimensions").

92. TEX. FAM. CODE ANN. § 160.302(a)(2) (Vernon 2002).

93. *Id.* § 160.302(b)(3).

ever, these provisions can be distinguished from the problem at hand. The statute clearly only compels a woman to be truthful with regard to the existence of another presumed, acknowledged, or adjudicated father.⁹⁴ In essence, the mother is merely asserting that she was not and is not married to someone else or has, otherwise, stated his name; that she has not already obtained another man's signature on an AOP; and, that there has not already been an adjudication of paternity for this child. The essence of the problem is that the statute fails to compel the mother to be truthful regarding the existence of other unnamed potential fathers.

Section 160.302(a)(4) does attempt to compel full disclosure and addresses the ability to falsely swear on an AOP by mandating that the signatories must "state whether there has been genetic testing and, if so, that the acknowledging man's claim of paternity is consistent with the results of the testing."⁹⁵ This section is designed to prevent fathers from circumventing the adoption laws.⁹⁶ The issue at hand is distinguished in that it concerns the case in which no genetic testing has been done prior to the alleged father signing an AOP.

D. *The Office of the Attorney General Attempts to Protect the Integrity of the Process*

The Texas OAG has failed to adequately address the issue as well. The OAG did attempt to set out a plan to ensure that men understood the rights and responsibilities involved before signing an AOP. On the reverse side of the AOP is language called, "Benefits, Rights, and Responsibilities of Paternity."⁹⁷ The OAG also published a handbook on the

94. *Id.* § 160.302(a)(3)(A)-(B).

95. *Id.* § 160.302(a)(4).

96. JOHN J. SAMPSON ET AL., SAMPSON & TINDALL'S TEXAS FAMILY CODE ANNOTATED 804 (2003).

97. CHILD SUPPORT DIV., OFFICE OF THE ATT'Y GEN. OF TEX., ACKNOWLEDGMENT OF PATERNITY 1 (2001), available at <http://www.texasag.org/aop/pdf/aopback.pdf>; see also Child Support Enforcement Program; State Plan Requirements, Standards for Program Operations, and Federal Financial Participation, 64 Fed. Reg. 11,802 (proposed Mar. 10, 1999) (to be codified at 45 C.F.R. pt. 302, 303, 304), available at 1999 WL 122632 (responding to commentary solicited pursuant to the Notice of Proposed Rulemaking published in the Federal Register). The Notice states that

[t]he explanation of rights and responsibilities should describe the rights and responsibilities, including the duty to support the child financially, that each party will assume as a result of signing the acknowledgment. It should also describe rights that each party may be giving up by signing the acknowledgment (e.g., right to genetic testing). These rights and responsibilities will vary by State, depending on State law. Generally, we think a State is in a better position than the Federal government to determine the exact nature of such requirements in light of the State's particular circumstances.

Id.

AOP process,⁹⁸ as well as a video that birthing centers can show to new parents.⁹⁹ Survey forms were also developed on which parents are asked whether they were offered an AOP and the rights-and-responsibilities information at the hospital.¹⁰⁰

The rights-and-responsibilities portion of the AOP is a ten-point type, single-spaced document that generally states that “[s]igning this legal document gives you certain rights and responsibilities” and that a man “who signs . . . becomes the legal father of the child. . . .”¹⁰¹ The focus thereafter appears to be that the AOP simply “makes it easier for a child to receive benefits such as social security, military and veteran’s benefits, health care coverage and life insurance, as well as inheritance” and that custody and visitation may be available.¹⁰² Seemingly buried at the end of a paragraph—not at all clearly or conspicuously stated—are the words “you may be ordered to pay child support and medical support.”¹⁰³

Federal law mandates that a man must be advised of the consequences of signing an AOP.¹⁰⁴ Thus, the most significant focus of the rights-and-responsibilities language should instead emphasize that a man is signing an eighteen-year commitment to provide support for a child and carries heavily penalties if he fails at any point. A parent has a legal duty to

98. CTR. ON FATHERS, FAMILIES AND PUB. POLICY & OFFICE OF THE ATT’Y GEN. OF TEX., HANDBOOK FOR NON-CUSTODIAL PARENTS 3 (2003), available at http://www.oag.state.tx.us/AG_Publications/pdfs/qa_ncp.pdf (acknowledging that this handbook was created to explain the child support system and the legal processes involved).

99. See Admin. for Children & Families, U.S. Dep’t of Health & Human Servs., DCL-99-12, *Voluntary Paternity Acknowledgment Staff Training Videotape Script* (Feb. 12, 1999), at <http://www.acf.hhs.gov/programs/cse/pol/DCL/dcl9912.htm> (providing a script covering the AOP process to states for production of their videos and suggesting that states add a tag line at the end of the video or provide other written materials for state-specific information such as parental rights and responsibilities, visitation and custody provision, rescission policies, and a minor parents provision) (on file with the *St. Mary’s Law Journal*).

100. CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 36 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf; Child Support Div., Office of the Att’y Gen. of Tex., *Acknowledgment of Paternity Parent Survey* (2001) (on file with the *St. Mary’s Law Journal*).

101. CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., ACKNOWLEDGMENT OF PATERNITY 1 (2001), available at <http://www.texasag.org/aop/pdf/aopback.pdf>.

102. *Id.*

103. *Id.*, see also TEX. FAM. CODE ANN. § 154.181(a) (Vernon Supp. 2004) (requiring that “[t]he court shall render an order for the medical support of the child” in a suit affecting the parent-child relationship).

104. 42 U.S.C. § 666(5)(C)(i) (2002) (stating that the alleged “father must be given notice, orally, . . . and in writing, of the alternatives to, the legal consequences of, and the rights . . . and responsibilities that arise from, signing the acknowledgment”).

support his or her child.¹⁰⁵ Because the AOP specifically states that, when this signed document is filed with the state, a man becomes the legal parent of the child,¹⁰⁶ it logically follows that, upon signing, he will have an absolute duty to support the child in one form or another and that this responsibility continues, as indicated at Section 151.001(b) of the Texas Family Code, until the child reaches the age of eighteen, graduates from high school, or is otherwise emancipated, whichever occurs latest.¹⁰⁷ If the relationship between the man and the child's mother endures, he will have to support the child in the home. If the man's relationship with the mother terminates, a court will order him to pay support.¹⁰⁸ If the man later discovers that the child is not his, he will still have to pay support under all but the most limited circumstances. Thus, the language in the document—the words “may have to support”—are much too tentative to be considered accurately informative of the legal consequences of signing an AOP.

Furthermore, the rights-and-responsibilities language entirely neglects to mention the drastic penalties a man could face by signing an AOP and then failing to support the child, even if he later discovers that the child is not his own. Once again, federal law mandates that a man who signs an AOP must be told the legal consequences of signing. However, the words “garnishment of up to twenty percent of wages,”¹⁰⁹ “seizure of assets,”¹¹⁰

105. See TEX. FAM. CODE ANN. § 151.001(a)(3) (Vernon Supp. 2004) (acknowledging that a parent's duty to support includes providing their child with essentials such as food, shelter, education, medical and dental care, and clothing).

106. CHILD SUPPORT DIV., OFFICE OF THE ATT'Y GEN. OF TEX., ACKNOWLEDGMENT OF PATERNITY 1 (2001), available at <http://www.texasag.org/aop/pdf/aopback.pdf>.

107. See 42 U.S.C. § 666(a)(5)(D)(ii) (2003) (mandating that an AOP be a legal finding of paternity); TEX. FAM. CODE ANN. § 151.001(b) (Vernon Supp. 2004) (requiring that the “duty of a parent to support his . . . child exists while the child is an unemancipated minor and continues as long as the child is fully enrolled in an accredited secondary school . . . leading toward a high school diploma”); *id.* § 160.305 (Vernon 2002) (recognizing that a valid AOP confers all the rights and duties of a parent).

108. See TEX. FAM. CODE ANN. § 154.001 (Vernon 2002) (stating that “[t]he court may order either or both parents to support a child”).

109. *Id.* § 158.001 (expressing where payment of child support is ordered, “the court or the Title IV-D agency shall order that income be withheld from the disposable earnings of the obligor as provided by this chapter”); see also *id.* § 154.125 (outlining a schedule for child support computation based on the obligor parent's income).

110. See TEX. FAM. CODE ANN. § 157.312 (Vernon Supp. 2004) (establishing that “[a] child support lien arises by operation of law against real and personal property of an obligor for all amounts of child support due and owing, including any accrued interest . . . [and] . . . foreclosure . . . is not required as a prerequisite to levy and execution”); see also *id.* § 157.317 (mandating that “[a] child support lien attaches to all real and personal property not exempt under the Texas Constitution” and includes accounts in financial institutions, retirement plans, IRAs, life insurance proceeds, insurance settlements, workers' compensation and awards for negligence or personal injury claims); *id.* § 157.319 (recognizing that

“seizure of tax returns,”¹¹¹ “freezing of bank accounts,”¹¹² “destruction of credit ratings,”¹¹³ “revocation of driver’s and professional licenses,”¹¹⁴ “denial of a passport,”¹¹⁵ “public posting of name and picture,”¹¹⁶ and “jail sentence”¹¹⁷ do not appear at any place in the rights-and-responsibil-

property subject to a lien for child support “may not be paid over, released, sold, transferred, encumbered, or conveyed” unless released by court order or otherwise).

111. See OFFICE OF THE ATT’Y GEN. OF TEX., CHILD SUPPORT SFY 2001 ANNUAL REPORT 12 (2001) (claiming that the OAG collected over \$110 million by intercepting federal income tax returns); see also Press Release, Office of the Att’y Gen. of Tex., Att’y Gen. John Cornyn Announces Seizure of Federal Tax Rebate Checks from Delinquent Parents (Aug. 20, 2001) (acknowledging that “[t]he OAG’s child support division regularly works with the Internal Revenue Service and the Federal Office of Child Support Enforcement to collect past due payments of child support from the tax refunds of parents who have been ordered to pay child support”) (on file with the *St. Mary’s Law Journal*).

112. See TEX. FAM. CODE ANN. § 157.317(a)(1) (Vernon Supp. 2004) (stating that “[a] child support lien attaches to . . . an account in a financial institution”); see also *id.* § 157.311(1)(A) (defining an account as including “any type of a demand deposit account, checking or negotiable withdrawal order account, savings account, time deposit account, money market mutual fund account, certificate of deposit”); *id.* § 157.314(d) (Vernon 2002) (requiring that “[i]f a child support lien notice is delivered to a financial institution . . . the institution shall immediately . . . notify any other person having an ownership interest in the account that the account has been frozen” up to the amount of any arrearage owed by the obligor); CHILD SUPPORT DIV., OFFICE OF THE ATT’Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 37 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (explaining that “PRWORA requires states to enter into agreements with financial institutions doing business in the state for the purpose of securing information leading to the enforcement of child support orders”).

113. See 42 U.S.C.A. § 666(a)(7)(A) (2003) (requiring the state to report any non-custodial parent who is delinquent in support to consumer reporting agencies).

114. See TEX. FAM. CODE ANN. § 232.003 (Vernon 2002) (directing that “[a] court or the Title IV-D agency may issue an order suspending a license . . . if an individual who is an obligor owes overdue child support in an amount equal to or greater than the total support due for three months” and has failed to meet a repayment plan); see also *id.* § 232.001 (clarifying that “license” also includes a “certificate, registration, permit or other authorization”); *id.* § 232.002 (Vernon Supp. 2004) (enumerating which licensing authorities are subject to this chapter).

115. *Child Support and Fatherhood Proposals: Hearing Before the House Comm. on Ways and Means*, 107th Cong. 107-38 (2001) (statement of Rep. Herger, Chairman, House Comm. on Ways and Means), available at <http://waysandmeans.house.gov/legacy.asp?file=legacy/humres/107cong/6-28-01/107-38final.htm> (reporting that \$7 million in lump-sum payments was collected last year due to the passport denial program).

116. See TEX. FAM. CODE ANN. § 231.308 (Vernon 2002) (requiring that a “most wanted” program be developed by the Title IV-D agency using posters and news media to publicly identify obligors in public and private locations).

117. TEX. PENAL CODE § 25.05 (West 2002) (explaining that a person commits this offense if he intentionally or knowingly fails to support his minor child); see also CTR. ON FATHERS, FAMILIES AND PUB. POLICY & OFFICE OF THE ATT’Y GEN. OF TEX., HANDBOOK FOR NON-CUSTODIAL PARENTS 21 (2002), available at http://www.oag.state.tx.us/AG_Publi

ities language. Clearly, all of these potential consequences are very long-term and serious in nature, so an individual has a right to know that he is opening himself up to these, especially when the child may not, as a matter of fact, be his obligation.

The AOP form also states that “[a]ll parties must receive oral notice” of the form prior to signing.¹¹⁸ Presumably, this was to overcome any reading difficulties that might hinder comprehension. However, the oral notice is available by dialing a 1-800 number and listening to a recording which is simply a verbatim reading of the form.¹¹⁹ The form itself is confusing because it does little more than string together nebulous statements, and the oral recording adds nothing by way of explanation.

The Handbook for Non-Custodial Parents (Handbook) was also developed by the OAG and is in a more helpful format.¹²⁰ However, the Handbook still fails to arm an alleged father with the information he needs—such as how easy it is to get a genetic test, how much one costs, how it can be paid for, or how very crucial it is that he insist upon one at the birth of the child instead of at a later point. Instead, the language in the Handbook reminds him repeatedly that he most likely cannot afford any legal help and offers him only the free services of the OAG’s attorneys—who clearly represent opposing interests.¹²¹ The Handbook also tells the alleged father that if he signs the AOP, he will not have to go to court and “can be held responsible for child support,”¹²² but that if he

cations/pdfs/qa_ncp.pdf (noting that an obligor who fails to pay child support can be jailed for up to six months and is subject to fines up to \$500 for each violation in addition to attorney’s fees and court costs). Child support will continue to accrue while an obligor is in jail. *Id.*

118. CHILD SUPPORT DIV., TEX. OFFICE OF THE ATT’Y GEN., ACKNOWLEDGMENT OF PATERNITY 1 (2001), available at <http://www.texasag.org/aop/pdf/aopback.pdf>.

119. *See id.* (specifying that parents can also call 1-800-252-8014 and select option four to receive verbal information about paternity establishment); *see also* Child Support Enforcement Program; State Plan Requirements, Standards for Program Operations, and Federal Financial Participation, 64 Fed. Reg. 11,802 (proposed Mar. 10, 1999) (to be codified at 45 C.F.R. pt. 302, 303, and 304), available at 1999 WL 122632 (noting that it may be problematic to inform parents of rights and responsibilities via oral and written notice if the parent is unable to come to the birthing center). The response to this concern was that “[p]arents do not need to be present in order to receive an explanation of their rights and responsibilities” because written notice is on the AOP form and oral notice can be given via a recorded message on a telephone line. *Id.* Clearly, this dispels any hope that parents are, in fact, being given information which is missing from the forms, but that is needed to make an informed decision.

120. CTR. ON FATHERS, FAMILIES AND PUB. POLICY & OFFICE OF THE ATT’Y GEN. OF TEX., HANDBOOK FOR NON-CUSTODIAL PARENTS 3 (2003), available at http://www.oag.state.tx.us/AG_Publications/pdfs/qa_ncp.pdf.

121. *Id.* at 4.

122. *Id.* at 11.

requests a paternity test, he ultimately “will be ordered to pay child support.”¹²³ The implication is that he is somehow in a markedly better position if he will go ahead and sign, when precisely the opposite could be true if the child is actually not his. The Handbook advises more than once that “[i]f you are absolutely sure that you are the father of the child . . . you should . . . voluntarily acknowledge paternity.”¹²⁴ Herein lies the problem. In only the rarest of circumstances can an alleged father be absolutely sure that he is the only possible father of a particular child. Yet, the language suggests that it is entirely reasonable for him to assume such a conclusion. In reality, without a genetic test, the alleged father is taking a substantial risk that the mother of the child has been truthful with him concerning her relations.

Finally, the survey form that was developed to ensure that the couple received the AOP and Rights and Responsibilities document at the hospital appears inadequate to protect the integrity of the process.¹²⁵ While the man can attest to the fact that he was handed the forms, mere possession of them is not necessarily evidence that he was fully informed of his rights when the language on the forms is inadequate.

Where an AOP is signed in error, the window for rescission does not solve the problem. Tragically, the alleged father is not necessarily likely to find out there is a problem until the brief limitations period has passed, and in some cases, the limitations period can expire the same day the AOP is signed.¹²⁶ At that point, he can receive no relief unless he has the means to prove he was under duress, defrauded, or there was a material mistake¹²⁷—burdens he is not likely to meet successfully.¹²⁸ Self-help ge-

123. *Id.* at 16.

124. *Id.* at 9.

125. Tex. Office of the Att’y Gen., Child Support Program, Acknowledgment of Paternity Parent Survey (2001) (asking only very generally whether information has been handed out; not whether that person feels he understands anything or whether specific rights or alternatives, such as genetic testing or the availability of legal services, were ever discussed) (on file with the *St. Mary’s Law Journal*).

126. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., PUB. NO. OEI-06-98-00053, PATERNITY ESTABLISHMENT, USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS 12 (2000), available at <http://oig.hhs.gov/oei/reports/oei-06-98-00053.pdf>. The Office of Inspector General’s publication reports that

[c]ritics of the window argue that placing a limit on the time within which a parent may rescind violates due process laws in some States. In other States, automated systems allow child support orders to be created very quickly, sometimes the same day as the acknowledgment, effectively eliminating the time period for legal rescission.

Id.

127. TEX. FAM. CODE ANN. § 160.308 (Vernon 2002).

128. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., PUB. NO. OEI-06-98-00053, PATERNITY ESTABLISHMENT, USE OF VOLUNTARY PATERNITY AC-

netic tests are inadmissible unless the mother consents.¹²⁹ Further, with the recent passage of Senate Bill 1807, the Texas Legislature made Section 160.608 of the Texas Family Code applicable to proceedings to challenge or rescind an AOP.¹³⁰ Section 160.608 grants the court the discretion to deny a motion for genetic testing if it deems that disproving the father-child relationship would be inequitable.¹³¹

Exacerbating the problem is the Paternity Opportunity Program that the OAG developed to disseminate the AOP forms.¹³² Because the program allows any individual or employee of multitudes of entities to become certified to administer an AOP,¹³³ this potentially opens doors to rampant quality control issues.¹³⁴ Additionally, the certification process itself appears tragically ineffective. A mere thirty minutes spent online taking an open-book test¹³⁵ qualifies a person to present any unwed man with a document that immediately and legally binds him for eighteen years and exposes him to the risks outlined above.¹³⁶ He will have to hire a lawyer, if he can, and go to court to reverse its effects.

KNOWLEDGMENTS 12 (2000), available at <http://oig.hhs.gov/oei/reports/oei-06-98-00053.pdf>. The publication asserts that a strict interpretation of a showing of fraud, duress, or material mistake "suggests that the man cannot merely claim that he was given misinformation from the mother. However, OCSE has not specified what constitutes fraud, duress, or material mistake of fact through regulation, and State discretion has resulted in widely varying interpretations." *Id.* at 9.

129. Battle Robinson & Susan Paikin, *Who is Daddy? A Case for the Uniform Parentage Act (2000)*, 19 DEL. LAW. 23, 25 (2001).

130. Tex. S.B. 1807, 78th Leg., R.S. (2003).

131. TEX. FAM. CODE ANN. § 160.608 (Vernon 2002).

132. OFFICE OF THE ATT'Y GEN. OF TEX., CHILD SUPPORT SFY 2001 ANNUAL REPORT 13 (2001).

133. Office of the Att'y Gen. of Tex., *Child Support Outreach Volunteer Program*, at <http://www.oag.state.tx.us/child/outreach.shtml> (last visited Sept. 30, 2003) (on file with the *St. Mary's Law Journal*).

134. Implementing Part of the Paternity Establishment Provisions Contained in Section 331 of the Personal Responsibility and Work Opportunity Reconciliation Act, 64 Fed. Reg. 11,802 (proposed Mar. 10, 1999) (to be codified at 45 C.F.R. pt. 302, 303, 304), available at 1999 WL 122632 (expressing concern that wholesale involvement of various agencies may fail to provide adequate support to parents to allow them to make informed decisions concerning signing a voluntary acknowledgment).

135. Office of the Attorney Gen. of Tex., *Acknowledgment of Paternity (AOP) Certification Training*, at http://www.texasag.org/aop/aop_train.asp (last visited Jan. 4, 2003) (explaining that the training takes about thirty minutes to complete and that the trainee can view and print the state and federal law documents via the provided links) (on file with the *St. Mary's Law Journal*). The trainee will be asked a series of simple review questions that he or she must answer correctly to move forward. *Id.* The questions can also be closed out of and returned to as often as necessary. *Id.*

136. See *Rivera v. Minnich*, 483 U.S. 574, 583 (1987) (Brennan, J., dissenting) (noting that "[t]he obligation created by a determination of paternity is enforced by significant legal sanctions").

E. *Fully Informing the Alleged Father*

Once again, an AOP does not harm a man who actually is the biological father of a child. Clearly, such a person has an obligation to support his child, and subjecting him to penalties for failing to provide support is justified. On the other side of the issue, however, is the man who is not responsible for a child biologically, but who voluntarily signs an AOP because he believes he is the father. The problem seems to stem from the fact that male signatories are not stopping to determine where they stand.

The rights-and-responsibilities language on the AOP document casually states, "You may want to have a genetic test."¹³⁷ Arguably, a man who believes he is the father of a particular child would ask for genetic testing if he had any reason to believe that another potential father existed.¹³⁸ However, the mother is the only one who positively knows the history of her relations and whether this potential exists; yet, she has no obligation to speak. Further, because some mothers choose to withhold information, they are granted the virtually unfettered ability to create AOP contracts with unsuspecting alleged fathers. Genetic testing is critical in these circumstances.

F. *Actions in Other Jurisdictions*

Actions in other jurisdictions include various attempts to pass legislation aimed at curbing paternity fraud. The increased presence of such legislation reflects the growing sentiment that this issue must be addressed. Additionally, while courts have been addressing various forms of this issue for some time, recent decisions reflect an increasing emphasis on the need for early genetic testing as a target solution.¹³⁹

137. CHILD SUPPORT DIV., OFFICE OF THE ATTORNEY GEN. OF TEX., ACKNOWLEDGMENT OF PATERNITY 1 (2001), available at <http://www.texasag.org/aop/pdf/aopback.pdf>.

138. *Child Support and Fatherhood Proposals: Hearing Before the House Comm. on Ways and Means*, 107th Cong. 107-38 (2001) (statement of G. Alan Blackburn, Presiding Judge, Georgia Court of Appeals), available at <http://waysandmeans.house.gov/legacy.asp?file=legacy/humres/107cong/6-28-01/107-38final.htm> (emphasizing that "the law should not punish a purported father for failing to insist on a paternity test when he has no reason to believe that he is not the father"); see also *Wise v. Fryar*, 49 S.W.3d 450, 454 (Tex. App.—Eastland 2001, pet. denied), cert. denied, 534 U.S. 1079 (2002) (noting the testimony of Mr. Wise that at the time of his divorce, he did not see a need for paternity testing because he did not have any reason to question his paternity until he had received results of a cystic fibrosis screen showing that he was not a carrier of cystic fibrosis and in order for the youngest child to be his biological child, Mr. Wise would either have to have cystic fibrosis or be a carrier).

139. See *Ince v. Ince*, 58 S.W.3d 187, 193 (Tex. App.—Waco 2001, no pet.) (Vance, J., dissenting) (disagreeing with the majority opinion, in part, because Judge Vance believed then-current legislation (H.B. 638, 77th Leg., R.S. (2001), to become effective fifteen days later on Sept. 1, 2001, followed the principle that genetic testing "should be given effect

In 2002, Florida House Bill 379 sought to require genetic testing at birth and maintenance of the records by the health department.¹⁴⁰ However, the bill was tabled. In addition, Florida House Bill 73 was also filed in an effort to establish a child support restitution enforcement program within the Department of Revenue to reimburse paternity fraud victims.¹⁴¹ The bill required women to reimburse principal and interest to a defrauded man either in a one-time payment or through wage garnishment.¹⁴² Also, if the mother did not reimburse support she wrongfully collected, she was subject to the same penalties for non-payment as a non-custodial parent who failed to pay child support.¹⁴³ The restitution schedule also allowed the child, either during minority or at majority, to seek civil damages against the mother.¹⁴⁴

House Bill 73 also sought to require paternity testing in all child support cases, but the bill died in committee.¹⁴⁵ Additionally, where genetic testing excluded the alleged father of the child, the mother "shall be required to identify all possible prospective paternity candidates."¹⁴⁶ Should she be unwilling to identify other potential fathers, her inaction "will be construed as indirect criminal contempt of court."¹⁴⁷

Florida Senate Bill 1000 was introduced in 2002 to provide that "in any action in which a person is required to pay child support . . . an extraordinary motion for a new trial may be made at any time regarding the paternity of such child."¹⁴⁸ The motion must include genetic test results, and the court may not deny relief based solely on a signed voluntary acknowledgment of paternity unless the signer knew that he was not the biological father of the child at the time of signing.¹⁴⁹

even if a prior judgment made a contrary determination and even when that judgment came about because the person agreed to it").

140. See H.R. 379, 104th Leg., Reg. Sess. (Fla. 2002) (requiring genetic testing of all births and electronic recordation of paternity proceedings and maintenance of such records by the Department of Health). Additionally, "in any action in which a person is required to pay child support as the father of a child, an extraordinary motion for a new trial may be made at any time regarding the paternity of such child." *Id.*

141. H.R. 73, 104th Leg., Reg. Sess. (Fla. 2002).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. H.R. 73, 104th Leg., Reg. Sess. (Fla. 2002).

147. *Id.*

148. S.R. 1000, 104th Leg., Reg. Sess. (Fla. 2002).

149. See *id.* (clarifying that genetic testing must have been performed within ninety days prior to the motion and must indicate a zero probability that an individual is the father of the child).

While Florida's house bills have yet to muster enough support to move forward, even stronger legislation was introduced in Vermont this year.¹⁵⁰ Vermont House Bill 735 sought to create a crime of paternity fraud to carry penalties of up to two years imprisonment and up to \$5,000 in fines.¹⁵¹ House Bill 735 also required the court to vacate a child support order upon clear and convincing evidence that the obligor was the victim of paternity fraud and permitted restitution to be obtained from the mother.¹⁵² The bill stalled out in committee.

Georgia House Bill 369 was signed by the governor in 2002 to set aside a determination of paternity based on newly discovered evidence when, in part, a genetic test was properly conducted and the male did not have knowledge that he was not the biological father of the child when he signed an acknowledgment of paternity.¹⁵³ This type of legislation, aimed at protecting alleged fathers, is also moving through other states.¹⁵⁴

In California, Assembly Bill 2240 made it to the governor,¹⁵⁵ but was then vetoed in September 2002.¹⁵⁶ The bill sought to make it a crime to claim that a signatory on an AOP was the only potential father if he was not.¹⁵⁷ The bill required specific allegations to be made in a verified complaint in order to file a complaint to establish paternity.¹⁵⁸ For instance, a local support agency would need to administer a standardized paternity questionnaire to the mother of the child prior to filing against an alleged

150. H.R. 735, 2001-2002 Leg., Reg. Sess. (Vt. 2002).

151. *Id.*

152. *See id.* (amending 15 V.S.A. § 660 by adding Subsection (g), which states that "the court shall vacate a support order if the court finds, by clear and convincing evidence, that the moving party is not the biological father of the child who is the subject of the support order, and that the obligee knowingly and intentionally misrepresented the paternity of the child to the obligor").

153. H.R. 369, 146th Gen. Assem., Reg. Sess. (Ga. 2002) (enacted).

154. *See* H.R. 4635, 91st Leg., Reg. Sess. (Mich. 2001) (allowing individuals to obtain relief from child support orders when genetic testing has excluded them as fathers). Once again, relief may not be granted if an individual signs an acknowledgment of paternity with knowledge that he is not the biological father of the child. *Id.* Notably, even if an individual consents to his name being entered on a birth certificate, or makes admissions that he is the child's biological father, these events do not affect his ability to obtain relief if done prior to knowing that he is not the biological father of the child. *Id.*

155. A.B. 2240, 2001-2002 Leg., Reg. Sess. (Ca. 2002).

156. *See* Letter from Governor Davis to Members of the California Assembly, at <http://www.ncfmla.org/pdfdocs/vetomessage/vetomessage.pdf> (last visited Nov. 5, 2003) (acknowledging and explaining the reasons for A.R. 2240's veto) (on file with the *St. Mary's Law Journal*).

157. A.B. 2240, 2001-2002 Leg., Reg. Sess. (Ca. 2002).

158. *Id.*

father. The mother is to state whether there are other possible fathers and sign under penalty of perjury.¹⁵⁹

Although vetoed by the governor, the basis for Assembly Bill 2240 came from significant findings that did pass both sides of the California Legislature.¹⁶⁰ These include the assertion that "DNA genetic testing is recognized as scientifically valid by the courts of this country."¹⁶¹ Additionally, "[a] man who is adjudicated to be the father of a child . . . when he is not actually the biological father . . . may be financially liable for up to 19 years of child support."¹⁶²

In *Smith v. Department of Human Resources*, the Georgia Court of Appeals stated, "it is not the policy [of this state] to extort . . . support from persons who are not in fact the fathers."¹⁶³ Because Paul Smith believed he and his girlfriend were engaged in a monogamous relationship, he signed an AOP and consented to a support order when each of her two children were born.¹⁶⁴ He asserted that he had no reason to doubt whether he was their father and found out long after his separation from their mother that the mother had engaged in affairs outside the relationship.¹⁶⁵ When genetic testing later determined that Smith was not the father, he sought to reopen the paternity judgment.¹⁶⁶ The court noted that the fact that Smith had not demanded a paternity test prior to signing each acknowledgment of paternity was "one factor that should be considered in evaluating a party's diligence" before granting a new trial.¹⁶⁷

The Court of Appeals of Minnesota took a similar view of an alleged father who waived his right to a genetic test in the more recent case of *Turner v. Suggs*.¹⁶⁸ The appellant relied on the mother's unequivocal rep-

159. *Id.*

160. *Id.*

161. *Id.*

162. A.B. 2240, 2001-2002 Leg., Reg. Sess. (Ca. 2002).

163. *Smith v. Dep't of Human Res.*, 487 S.E.2d 94, 96 (Ga. Ct. App. 1997) (explaining that it is the policy of the state only to require fathers to support their children).

164. *Id.* at 95 (recognizing that Mr. Smith and the children's mother were living together at the time of the children's births and for a period thereafter, and that it was only long after they had separated that he learned that the mother had engaged in affairs outside the relationship).

165. *Id.*

166. *Id.* (asserting that the defendant signed the consent order because he believed he was the father of the children).

167. *Id.* at 96 n.1 (reasoning that a failure to insist upon paternity testing prior to signing consent orders is not necessarily indicative of a lack of due diligence because it may be not be unreasonable for a man to acknowledge paternity without further proof, if he has no reason to suspect the mother's fidelity).

168. 653 N.W.2d 458 (Minn. Ct. App. 2002).

resentations that he was the father.¹⁶⁹ The appellant stipulated to paternity, accepted responsibility for the child, and treated the child as his own.¹⁷⁰ Subsequent genetic testing excluded the appellant as the child's father.¹⁷¹ However, after the appellant successfully proved that the mother had fraudulently represented to him that he was the only possible father, the court reversed the lower court's summary rejection of the claim.¹⁷² The court reasoned that "to now penalize appellant for not seeking genetic tests before stipulating to paternity is to penalize him for not assuming [the mother's] *sworn* statements were perjured"¹⁷³ and to hold that parties can only "preserve their rights by disbelieving sworn statements relating to the identity of the person with whom a woman conceived a child would result . . . in a judicially mandated atmosphere of distrust . . . that is contrary to public policy."¹⁷⁴ The court further noted that this proceeding could have been avoided if genetic testing had been performed earlier.¹⁷⁵

The issue of paternity fraud went before the United States House of Representatives Ways and Means Committee in the summer of 2001.¹⁷⁶ Georgia Court of Appeals Judge G. Alan Blackburn encouraged legislators to address the paternity issue and characterized the present state of the law that requires a man to pay child support after genetic testing has proven he is not the biological father as "absurd."¹⁷⁷

169. *Turner v. Suggs*, 653 N.W.2d 458, 466 (Minn. Ct. App.2002) (noting that, while appellant never explicitly stated that he stipulated to paternity based upon the mother's statements, "a close examination of the record not just allows, but *compels* this inference").

170. *Id.* at 462.

171. *Id.* (emphasizing that even after the test results excluded the appellant, the mother continued to maintain that he was the only possible father).

172. *See id.* at 465 (criticizing the lower court decision which appeared to be based upon an implicit determination that the genetic test was defective although no evidentiary hearing was conducted and no finding was made to that effect).

173. *Id.* at 466-67.

174. *Turner*, 653 N.W.2d at 467 (favoring stipulations in family law cases).

175. *See id.* at 466 (recognizing, however, that appellant's failure to obtain genetic testing will not preclude an individual from challenging a paternity adjudication).

176. *See generally Child Support and Fatherhood Proposals: Hearing Before the House Comm. on Ways and Means*, 107th Cong. 107-38 (2001), available at <http://waysandmeans.house.gov/legacy.asp?file=legacy/humres/107cong/6-28-01/107-38final.htm>.

177. *Child Support and Fatherhood Proposals: Hearing Before the House Comm. on Ways and Means*, 107th Cong. 107-38 (2001) (statement of G. Alan Blackburn, Presiding Judge, Georgia Court of Appeals), available at <http://waysandmeans.house.gov/legacy.asp?file=legacy/humres/107cong/6-28-01/107-38final.htm>.

G. *Bringing Integrity Back into the Process Through Genetic Testing*

As stated above, even Ms. Stout agreed in 1991 that “[e]stablishing legal paternity at birth heads off many potential pitfalls,”¹⁷⁸ and the 1995 court reasoned that it was “more convenient to give the blood when the parties are already in court.”¹⁷⁹ Today, the Texas OAG agrees that establishing paternity at the outset, while everyone is together, is

the most convenient time. Everything is together in one place. The necessary forms are available at the hospitals in Texas. The father is likely to be with the mother at the hospital after the baby is born The father’s name will be put on the birth certificate without having to pay a fee Second, it’s the best time for the baby. The earlier in the baby’s life paternity is established, the more secure his or her future will be.¹⁸⁰

By far, the most straightforward solution to the problem is to require genetic testing at birth.¹⁸¹

In April 2000, the United States Office of Inspector General (OIG) examined implementation of the federal mandates concerning expediting the voluntary acknowledgment process at the state level.¹⁸² The study was comprised of surveys sent to child support enforcement offices in all fifty states and the District of Columbia, and there was a 100% response rate.¹⁸³ Additionally, a focus study was done on local-level implementation in six states, including Texas.¹⁸⁴ Concerns voiced at the state child support enforcement agencies were compiled and addressed in a report designed to identify problems with the use of voluntary acknowledg-

178. Michael Precker, *A Legitimate Approach: Jane Stout Helps Unwed Fathers Claim Their Babies to Safeguard Their Own Rights As Well As the Child’s*, DALLAS MORNING NEWS, Jan. 2, 1991, at 1C, available at 1991 WL 4694121 (explaining why paternity acknowledgment at birth is not always accomplished).

179. Associated Press, *Private Firm to Help Establish Paternity in Court*, DALLAS MORNING NEWS, Mar. 18, 1995, at 12F, available at 1995 WL 7471413.

180. Child Support Div., Office of the Att’y Gen. of Tex., *Paternity Establishment*, at http://www.oag.state.tx.us/child/cs_paternity.shtml (last visited Oct. 2, 2003) (on file with the *St. Mary’s Law Journal*).

181. Battle Robinson & Susan Paikin, *Who is Daddy? A Case for the Uniform Parentage Act (2000)*, 19 DEL. LAW. 23, 25 (2001) (commenting that “[t]he ability to ‘know’ a man’s biological relationship to a child through genetic testing is so powerful that it is increasingly difficult to weigh fairly other factors once DNA has been uncovered”).

182. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., PUB. NO. OEI-06-98-00053, *PATERNITY ESTABLISHMENT, USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS* i (2000) (indicating that the study was part of a larger project designed to focus on state paternity establishment practices).

183. *Id.* at 2.

184. *Id.*

ments.¹⁸⁵ Most pertinent here are the concerns that were voiced involving genetic testing in the acknowledgment process, such as concerns that some judges might not consider voluntary acknowledgments to be binding “because they genuinely believe parents should submit to genetic testing in nearly every case.”¹⁸⁶ In the study, the OIG found that “[forty] State child support agencies believe genetic testing should be used when any uncertainty about paternity exists on the part of any of the parties, and another six go further to say it should be used in all cases.”¹⁸⁷ A local agency administrator in one of the focus states asserts that “[t]esting in all cases eliminates later motions for testing after arrearages have accumulated.”¹⁸⁸

The Commissioners’ Comment to Uniform Parentage Act § 508 supports the idea that “[g]iven the fact that genetic testing in the modern age is not invasive—use of the buccal swab method means that the intrusion into the privacy of the individual is relatively slight compared to the right of the child to have parentage established,”¹⁸⁹ and “the establishment of paternity by genetic testing is in no way dependent on testing the mother of the child.”¹⁹⁰

185. *Id.* at 10.

186. *Id.* at 12.

187. OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HEALTH & HUMAN SERVS., PUB. NO. OEI-06-98-00053, PATERNITY ESTABLISHMENT, USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS 12 (2000).

188. *Id.*

189. TEX. FAM. CODE ANN. § 160.508 (Vernon 2002); *see also id.* § 162.005(b) (stating that “[b]efore placing a child for adoption . . . the child’s parent . . . shall compile a report on the . . . genetic history of the child to be adopted”); *id.* § 162.006(b)(3) (providing that the “department, licensed child-placing agency, or court retaining a copy of the report shall provide a copy of the report that has been edited to protect the identity of the birth parents . . . to . . . the adopted child, after the child is an adult”); *see also In re J.W.*, 97 S.W.3d 818, 823 (Tex. App.—Dallas 2003, pet. filed) (discussing the fact that the burden of submitting to genetic testing is minimal when compared against the burden a child faces through life when the father is unknown); Brief of Amicus Curiae Margaret Rosemary Ingle, *Wise v. Fryar*, 49 S.W.3d 450 Tex. App.—Eastland 2001, pet. denied (No. 11-00-00196-CV) (asserting that biological children “should have the same rights to know their genetic history and future as those of adopted children”); Child Support Div., Office of the Att’y Gen. of Tex., *Why Your Baby Needs a Legal Father*, at <http://www.oag.state.tx.us/child/why.shtml> (last visited Oct. 2, 2003) (explaining that an accurate family history of diseases, illnesses, and birth defects assists the child’s doctor in diagnosing, treating and preventing illnesses, so “[i]t is important for the doctor to know the father’s identity and his family medical history”) (on file with the *St. Mary’s Law Journal*).

190. JOHN J. SAMPSON ET AL., SAMPSON & TINDALL’S TEXAS FAMILY CODE ANNOTATED 819 (2003) (commenting that court-ordered testing of maternal relatives is not mandated in this section because establishing paternity does not depend upon testing the mother); *see also* TEX. FAM. CODE ANN. § 160.622(c) (Vernon 2002) (stating that testing of the mother is not a prerequisite to determining paternity).

Establishing the paternity of the child from the very beginning of the child's life would alleviate many of the problems we now face.¹⁹¹ Genetic testing should not only be offered at the time of birth, but should be required if a man is to establish his paternity through an AOP. A man should not be allowed to sign an AOP without it. In establishing a subsequent binding support order, genetic testing will ultimately be done.¹⁹² Genetic testing is certainly possible when the parties are already sitting in the hospital and lab samples are already being taken.¹⁹³ Up-front genetic testing is certainly less costly in the long-run than allowing arrearages to build up when the man later finds out he is not the father and ceases paying support,¹⁹⁴ or the real father has to be tracked down and brought into court long after his relationship with the mother has deteriorated.¹⁹⁵ Clearly, finding these fathers years later is a daunting task that few states are equipped to handle efficiently.

Arguably, privacy issues can be triggered whenever genetic material is taken. However, refusing a genetic test fails to achieve protection of genetic material because any laboratory or hospital that takes bodily samples already has access to that person's genetic material.¹⁹⁶ Additionally,

191. See Michael Precker, *A Legitimate Approach: Jane Stout Helps Unwed Fathers Claim Their Babies to Safeguard Their Own Rights As Well As the Child's*, DALLAS MORNING NEWS, Jan. 2, 1991, at 1C, available at 1991 WL 4694121 (stating that "[e]stablishing legal paternity at birth heads off many potential pitfalls").

192. OFFICE OF THE ATT'Y GEN. OF TEX., CHILD SUPPORT SFY 2001 ANNUAL REPORT 10 (2001) (declaring that a court order to collect child support cannot be issued "until legal paternity and a court order have been established"). House Bill 1461 was introduced before the Texas Legislature in an attempt to statutorily mandate genetic testing under the Texas Family Code. Tex. H.B. 1461, 78th Leg., R.S. (2003). The bill was left pending. *Id.*

193. See *Who's Your Daddy? DNA Testing Answers Questions of Betrayal, But Not Love*, (Nov. 29, 2001), at <http://www.abcnews.com> (stating, "The process is straightforward: The lab needs a blood sample, a cheek swab, or a strand of hair pulled from the scalp with the roots and follicle attached. DNA testing costs less than \$500, and results are available usually in two weeks.") (on file with the *St. Mary's Law Journal*).

194. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. OEI-06-98-00053, PATERNITY ESTABLISHMENT USE OF VOLUNTARY PATERNITY ACKNOWLEDGMENTS 11 (2000) (reporting that "[s]ome local offices we visited report that months or years later, when these fathers may no longer be in a relationship with the mothers or when required to make child support payments, they may either request genetic testing or become chronically delinquent payers").

195. See generally *Rodgers v. Woodin*, 672 A.2d 814 (Pa. Super. Ct. 1996) (concerning a mother who was allowed to bring a paternity action against a putative father twelve years after the birth of the child even though another man was listed on the birth certificate).

196. See DNA Reference Lab, Dep't of Forensic Science, <http://www.dnareference-lab.com/forensic.asp> (last visited Oct. 2, 2003) (noting that genetic analysis can be on "all biological samples such as hair, bone, teeth, saliva, blood and all other soft tissues") (on file with the *St. Mary's Law Journal*); Great Lakes Genetics, *Paternity Testing*, <http://www.paternity.com/faqs.htm> (last visited Oct. 2, 2003) (confirming that "paternity testing can

there already exists a provision in the Texas Family Code to address the problem created when someone releases a specimen submitted for genetic testing without a court order.¹⁹⁷

H. *Bringing Integrity Back into the Process Through Alternative Means*

Arguably, considering that the birth of a child is fraught with emotion for everyone involved, this is not the time to be contracting for fatherhood. While the federal mandate calls for a voluntary acknowledgment process to be available at the hospital and focuses on the time “immediately before or after the birth of a child,”¹⁹⁸ perhaps a reasonable waiting period prior to signing an AOP could be mandated in Texas that would still comport with the federal law.¹⁹⁹ Texas could model the AOP waiting period after the Texas adoption statute, which mandates a forty-eight hour waiting period “after the birth of the child” before a parent may sign to relinquish his rights in facilitating an adoption.²⁰⁰ In essence, it is a cool-down period that allows for some level of objectivity to return to the decision-making process and which makes the process seem a bit less predatory.

Certainly, the vital measure is to make certain that any man signing an AOP fully understands the agreement. Arguably, a prudent individual would refuse to sign a fifteen-year mortgage for the purchase of a house without first seeking some sort of legal guidance. Thus, it hardly seems logical that a man should be allowed to sign an eighteen-year commit-

take place from a wide variety of cells, including blood samples, cheek cells, tissue samples, and semen . . . due to the presence of DNA material in every cell of the body”) (on file with the *St. Mary's Law Journal*).

197. TEX. FAM. CODE ANN. § 160.511 (Vernon 2002) (stating that it is a Class A misdemeanor “if the person intentionally releases an identifiable specimen of another person for any purpose not relevant to the parentage proceeding and without a court order or the written permission of the person who furnished the specimen”).

198. 42 U.S.C. § 666 (a)(5)(C)(ii) (2003).

199. See Admin. for Children & Families, U.S. Dep't of Health & Human Servs., DCL-99-12, *Voluntary Paternity Acknowledgment Staff Training Videotape Script* (Feb. 12, 1999), at <http://www.acf.hhs.gov/programs/cse/pol/DCL/dcl9912.htm> (cautioning potential trainees that “having a baby is a pretty overwhelming situation so even simple tasks can seem difficult”) (on file with the *St. Mary's Law Journal*). The video seems to suggest that there is awareness at the federal level that focusing on the time immediately surrounding the birth of the child renders many parents ill-equipped to face the acknowledgment process objectively. *Id.*

200. See TEX. FAM. CODE ANN. § 161.103 (Vernon 2002) (stating that “[a]n affidavit for voluntary relinquishment of parental rights must be: (1) signed after the birth of the child, but not before 48 hours after the birth of the child, by the parent . . . whose parental rights are to be relinquished; (2) witnessed by two credible persons; and (3) verified before a person authorized to take oaths”).

ment to assume responsibility for a human being based on whatever information he receives from a hospital employee who took a thirty-minute course over her computer that morning.²⁰¹

Ideally, an attorney should be involved in the process of establishing paternity every time. The long-term effects on all the parties are much too great to treat this agreement so casually. However, given the logistical issues that may arise in expecting unwed parents to seek out and afford legal counsel, there must still be some provision to make certain that all parties are able to make fully informed decisions.

Currently, the OAG provides a wealth of informational assistance to the mother, but very little objective advice to an alleged father. For instance, the rights-and-responsibilities language and the Non-custodial Parent Handbook repeatedly remind the father how difficult it will be to afford an attorney and offer him only the services of the attorneys at the

201. See Admin. for Children & Families, U.S. Dep't of Health & Human Servs., DCL-99-12, *Voluntary Paternity Acknowledgment Staff Training Videotape Script* (Feb. 12, 1999), at <http://www.acf.hhs.gov/programs/cse/pol/DCL/dcl9912.htm> (instructing that many parents commonly ask if they have to sign an acknowledgment right away and that the appropriate response is to tell parents that they will need to complete an acknowledgment form before the birth certificate leaves the hospital if they are to get the father's information on the original birth certificate) (on file with the *St. Mary's Law Journal*). Also, it is noted that staff should remind parents that hospitals cannot keep the birth records for a very long time. *Id.* The instructions also stress that staff should reiterate to parents that, since they are already both at the hospital, "it's definitely best to do it now." *Id.* Additionally, the instructions mention that the parents can add the father's name later, but that they will "have to go to another location and probably pay a fee to do it." *Id.* There is arguably a slant on the delivery of this information in that it tends to mislead a father into thinking he is making a mistake to take any time at all to think about what he is signing. The truth is, there is no harm to him in not being listed on the original birth certificate and being added a few days later—after he has had time to get some advice and objectively think things over. And, the fee to change a birth certificate is roughly ten dollars—a very small price to pay compared to the mistake a man could be making if he signs too carelessly. See *Child Support and Fatherhood Proposals: Hearing Before the House Comm. on Ways and Means*, 107th Cong. 107-38 (2001) (statement of Nathaniel L. Young, Jr., Dir., Va. Dep't of Soc. Servs. Div. of Child Support Enforcement), available at <http://waysandmeans.house.gov/legacy.asp?file=legacy/humres/107cong/6-28-01/107-38final.htm> (stating that out-of-wedlock births make up seventy percent of the caseload in his state). Mr. Young goes on to state that "that is the problem we have to fix before we try to fix the outcome which is getting the child support paid. . . . Clearly, we believe that pay for performance is the way to go. We incentivize most of our child support workers on how well they do." *Id.* Young's agency reports that unmarried parents are the bulk of the problem and apparently advocates paying a form of commission to child support workers. *Id.* Taken together, this arguably creates a bias in the child support worker's approach to obtaining signatures on AOPs.

OAG.²⁰² Clearly, these attorneys represent the interests of the state and not those of the alleged father.²⁰³ Instead of being made to feel that he has no real ability to obtain legal services acting on his behalf, he should be made aware that low-cost legal services are available and given information about Legal Aid agencies.

An additional step in the right direction is to mandate that a standardized Miranda warning must be given on the AOP document itself. Advising men of their right to have an attorney present prior to the signing of an acknowledgment may serve to impress upon them the gravity of what they are being asked to sign.

At an absolute minimum, the language in the AOP should be changed to more honestly reflect the gravity of a signature. This could be achieved through the addition of a conspicuous statement throughout the AOP, Rights and Responsibilities form, and OAG literature that explains to the alleged father that he is signing a permanent commitment to support a child for eighteen years or more and exactly what the penalties will be if he fails in that duty. Further, he should be strongly cautioned against signing without a genetic test, and he should be told that the testing process is not necessarily complex or cost-prohibitive.

IV. CONCLUSION

Is Texas truly establishing paternity for the children born in this state or simply using any means possible to obtain signatures in order to meet federal incentive standards? Obtaining child support revenues through compelling payments from men who are not fathers and who have unknowingly signed their rights away is not sound long-term policy. Elizabeth Schroeder of the ACLU reports that she has received countless complaints from alleged fathers and asserts that this approach “tramples on civil liberties and ignores standards of due process.”²⁰⁴

Clearly, states must ensure that children are supported. Children are entitled to support, and custodial mothers deserve assistance from non-custodial fathers.²⁰⁵ Children are also entitled to know their parent-

202. CHILD SUPPORT DIV., TEX. OFFICE OF THE ATT’Y GEN., ACKNOWLEDGMENT OF PATERNITY 1 (2001), available at <http://www.texasag.org/aop/pdf/aopback.pdf> (stating that a man may hire an attorney if he has any concerns about signing the document).

203. TEX. FAM. CODE ANN. § 231.109(d) (Vernon 2002); CTR. ON FATHERS, FAMILIES AND PUB. POLICY & OFFICE OF THE ATT’Y GEN. OF TEX., HANDBOOK FOR NON-CUSTODIAL PARENTS 16 (2003), available at http://www.oag.state.tx.us/AG_Publications/pdfs/qa_ncp.pdf.

204. Megan Garvey, *Net to Snag Deadbeats Also Snares Innocent County: Mix-ups Have Cost Time, Money and Reputation of Hundreds of Men*, L.A. TIMES, Apr. 12, 1998, at B1, available at 1998 WL 2417309.

205. TEX. FAM. CODE ANN. §§ 153.001, 153.002 (Vernon 2002).

age.²⁰⁶ However, it logically follows that a man should only be compelled by law to support a child that he has in fact fathered.²⁰⁷ If a man chooses, and is to be allowed, to assume potentially not only the parental obligation belonging to another man, but also the parental relationship that arguably belongs on some level to the biological father and his child,²⁰⁸ then such an agreement must be based on full appraisal of the fact that he is not the child's father. In addition, he must be told what this agreement to support the child will continue to mean for him legally, especially if he and the mother do not stay together.

In sum, because Texas realistically depends upon federal incentives, measures must be taken to meet the ninety percent paternity establishment goal set by the federal mandate. The voluntary AOP process must remain available at or near the time of birth, and the sheer numbers of children born across the state demand large numbers of people available to administer the forms.²⁰⁹ Clearly, the AOP forms and processes need attention because they fail to provide objective advice for male signatories. However, the most effective solution lies in the initial premise that an AOP does no harm to a biological father. Genetic testing ensures that the man signing the AOP is, in fact, the biological father of the child

206. See 42 U.S.C. 666(a)(5)(A)(i) (2003) (mandating that states have a paternity establishment process that is available from birth until age eighteen); TEX. FAM. CODE ANN. § 160.606 (Vernon 2002) (allowing a child without a presumed, acknowledged, or adjudicated father to commence a paternity action at any time, including after the child becomes an adult); see also Brief of Amicus Curiae Margaret Rosemary Ingle at 10-11, *Wise v. Fryar*, 49 S.W.3d 450 Tex. App.—Eastland 2001, pet. denied) (No. 11-00-00196-CV) (asserting that children who are left without a determination of their genetic history are in a “medically precarious position for the rest of their lives [because they] will be at a distinct disadvantage if the need for a transplant, e.g. bone marrow, bone, organ, tissue, or rare blood becomes necessary at any time in their lives”).

207. *Rivera v. Minnich*, 483 U.S. 574, 576 n.2 (1987) (noting that “[t]he person alleged to be father has a legitimate interest in not being declared the father of a child he had no hand in bringing into the world” (quoting *Minnich v. Rivera*, 506 A.2d 879, 882 (Pa. 1986))).

208. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (stressing that a man has an undeniable private interest in his children that warrants protection). The Supreme Court has also recognized the right to conceive and raise one's own children as “essential.” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). This right has also been recognized as one of the “basic civil rights of man.” *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Additionally, the Court has emphasized that “the custody, care and nurture of the child reside first in the parents.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

209. Office of the Att’y Gen. of Tex., *Child Support Outreach Volunteer Program*, at <http://www.oag.state.tx.us/child/outreach.shtml> (last visited Sept. 30, 2003) (affirming that the “Paternity Opportunity Program (POP), was designed to address the state's large number of children born out of wedlock”) (on file with the *St. Mary's Law Journal*).

involved. While genetic testing at birth carries cost burdens,²¹⁰ the state's current cost level is exponentially higher than necessary.²¹¹ Genetic testing is currently being ordered only after the situation is completely beyond control. Arrearages will not be an issue if we help people take responsibility from the very beginning.²¹²

Testing prior to signatures also means full disclosure for all parties concerned. Not only is the time surrounding the birth of the child the most cost-effective time for the state to sign up an alleged father, but it is also the most cost-effective time to locate the biological father if the test results exclude the alleged father.²¹³ Should an alleged father who has been excluded as the biological father decide to sign the acknowledgment of paternity, at least he cannot come back into court years later and attempt to reopen the matter by saying that he did not know the truth when

210. CHILD SUPPORT DIV., OFFICE OF THE ATT'Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 70 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (reporting that "the OAG spent about \$2.4 million on paternity testing" in 1999); see also TEX. FAM. CODE ANN. § 160.506 (Vernon 2002) (stating that the "cost of initial genetic testing must be advanced: by a support enforcement agency, if the agency is providing services in the proceeding; [or] by the individual who made the request"). But see TEX. FAM. CODE ANN. § 160.506(b) (Vernon 2002) (allowing a support agency to seek reimbursement from a man found to be the biological father); CHILD SUPPORT DIV., OFFICE OF THE ATT'Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 24 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (noting that the Child Support Division usually will ask that testing costs be reimbursed by an alleged father who has been determined to be the biological father).

211. See CHILD SUPPORT DIV., OFFICE OF THE ATT'Y GEN. OF TEX., PROGRESS REPORT ON IMPROVING THE TITLE IV-D CHILD SUPPORT PROGRAM 72 (2000), available at http://www.oag.state.tx.us/AG_Publications/pdfs/sunsetreport.pdf (reporting that "[c]urrently, the program opens about 15,000 new cases per month . . . more than 80 percent require the establishment of a child support order"). Order establishment is labor intensive because as part of the procedure for obtaining an enforceable support order, the OAG must first locate the absent parent, have parties served, investigate income and assets, prepare legal filings, and then take the case to court. *Id.*

212. *In re C.C.V.*, No. 08-00-00345-CV, 2001 WL 997399, at *1-2 (Tex. App.—El Paso Aug. 30, 2001) (not designated for publication) (affirming a retroactive support order of \$35,771.07 against a father after the mother of the child made no attempt to contact the father until the child was eleven years of age).

213. See *Child Support and Fatherhood Proposals: Hearing Before the House Comm. on Ways and Means*, 107th Cong. 107-38 (2001) (statement of Rep. Cox, Member, House Comm. on Ways and Means), available at <http://waysandmeans.house.gov/legacy.asp?file=legacy/humres/107cong/6-28-01/107-38final.htm> (stating that "[a] staggering 93 percent of child support is in arrears . . . [and] the older the obligation gets, the longer it is not paid, the more likely it is it will never be paid at all").

he signed. Most importantly, compulsory genetic testing closes the door on a mother's ability to commit paternity fraud in the AOP process.²¹⁴

214. See *Little v. Streater*, 452 U.S. 1, 8 (1981) (carrying forward Justice Brennan's sage words, written as a member of the Appellate Division of the New Jersey Superior Court, thirty years prior: "The value of blood tests as a wholesome aid in the quest for truth in the administration of justice in these matters cannot be gainsaid in this day. Their reliability as an indicator of truth has been fully established." (quoting *Cortese v. Cortese*, 76 A.2d 717, 719 (N.J. Super. Ct. App. Div. 1950))).