EXPENDABLE CHILDREN: DEFINING BELONGING IN A BROKEN WORLD

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> Children's happiness is always hostage to adults' care and common sense. The objectification of children will persist despite law, just as servitude outlasted slavery. Yet I continue to believe that law could tell a less possessive and more selfless story to parents, one that is centered not in parents' rights but in children's needs.[1]

I. INTRODUCTION

The American Law Institute has tackled one of the most deeply contentious and emotional areas of law in a remarkably logical and moderate manner. Family dissolution, especially when it involves a lengthy relationship or children, shatters the dreams and disrupts every aspect of the lives of those involved. Just as the legal system cannot return health to one severely injured in an accident, it cannot restore the wholeness of the dissolving family. While some families navigate the difficult transition smoothly, many find themselves engaged in stressful negotiations or litigation. Post-separation outcomes which place children in poverty or at the center of ongoing battles undermines their well-being and development. The perpetuation of anger prevalent at the time of family dissolution also negatively affects the lives of all involved.[2]

While law cannot reunify the family, it can reduce the areas open to dispute, allow former partners to negotiate "in the shadow" of clear and fair rules, and provide judges coherent and manageable guidelines. The ALI's *Principles of the Law of Family Dissolution* go a long way toward achieving those goals. In light of the notable achievements of the *Principles*—too numerous to describe here—I only reluctantly undertake a critical analysis of the *Principles* concerning the definition of parent for purposes of child support. The *Principles'* child support section required the drafters to define who the "parents" are who have rights and responsibilities under that section. The primary definition of "par-

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1. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1865 (1993).

2. Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 THE FUTURE OF CHILDREN 143, 143-44 (1994); Richard E. Behrman & Linda Sandham Quinn, *Children and Divorce: Overview and Analysis*, 4 THE FUTURE OF CHILDREN 4, 6 (1994); Judith S. Wallerstein, *Children of Divorce: A Society in Search of a Policy*, *in* ALL OUR FAMILIES 66 (Mary Ann Mason et al. eds., 1998).

ent" is a person "who is defined as a parent under state law."[3] The difficulty with the primary definition is that state laws define "parent" in various ways. Due to varied definitions, the *Principles* seek to establish greater uniformity and fairness in the definition of parent for the purposes of child support.

In their effort to achieve uniformity and fairness, the ALI tackled the nettlesome clash among paternity presumptions, social fatherhood, and the new genetic technologies that unequivocally determine biological paternity. The *Principles* define a category of "parent by estoppel" that details the rights of nonbiological parents who claim custodial and decisionmaking responsibility for children.[4] The *Principles* also delineate circumstances in which individuals who are not defined as parents under state law are estopped to deny a parental support obligation.[5] In this commentary, I focus on this second definition of estoppel to deny a parental support obligation which raises vexatious and imponderable dilemmas for judges and legislators and those who seek to guide their lawmaking.

This commentary provides a brief background on some of the circumstances in which states currently provide conflicting and often unsatisfying resolutions regarding paternity, and thus responsibility for children born during the marriage or cohabitation of a couple. Second, it describes the *Principles*' efforts to address the inconsistencies and inadequacies of state paternity laws by adopting the concept of estoppel to deny parental support obligation. Finally, this commentary offers a critical evaluation of these efforts. While some aspects of the estoppel to deny a child support obligation are important steps forward, other aspects do not adequately resolve the most troubling situations that currently arise in the child support context when biological paternity comes into dispute.

The *Principles* are important for their equalization of the treatment of children born during marriage and during the cohabitation of their parents and for granting legal effect to explicit or implicit agreements to support children. The *Principles'* approach to estoppel is hamstrung, however, by several factors, including: 1) a failure to provide clear guidelines to judicial discretion, 2) an overly optimistic reading of the current caselaw concerning estoppel in disputed paternity situations, 3) failure to resolve an extraordinarily difficult logical dilemma, and 4) blindness to the deep and often gendered assumptions concerning morality that judges have invoked. While the *Principles* strive to find an equilibrium between fairness to adults and fairness to children in these perplexing situations, they have yet to make a strong case that the balance sought has been achieved. I argue that the *Principles* should consider a different approach, one that re-envisions parents as fiduciaries and creates greater certainty by strictly limiting judicial discretion.

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3. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 2.03(1)(a), 3.02(1)(a) (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES 2000].

4. *Id.* § 2.03(1)(b).

5. *Id.* § 3.02A. I am advised by Professor Grace Ganz Blumberg that this section will be renumbered as § 3.03. Email from Grace Ganz Blumberg, Reporter, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, to author (Feb. 21, 2001) (on file with author). Since at this time the only published draft describes it as § 3.02A, I will use this numbering system in this commentary.

II. CHILDREN OF UNCERTAIN PARENTAGE

Struggles to determine the legal paternity of children date back to ancient times. Until recently, maternity has rarely come into question,[6] but paternity has often been subject to attack. English common law considered children born out of wedlock to have no father, while it presumed that children born to a married mother were the offspring of the mother's husband.[7] The circumstances in which legal paternity comes into question vary widely.[8] Unwed mothers who are financially able to support their children may choose not to establish their child's paternity. However, mothers in need of financial assistance to raise their children may be required to either establish their children's paternity or maintain a presumption of paternity that has arisen in a particular man. Mothers who wish to eliminate a social or presumed father from their children's lives may challenge a presumption of paternity or seek to establish paternity in another man. Some biological fathers may seek to establish their paternity, while other men may seek to deny paternity at birth or at any time later in the life of a child.

The most common challenge to paternity at the time of family dissolution involves a husband's assertion that he is not the biological father of children born during the marriage and bears no legal responsibility for their future financial support. Less often, a wife may claim that someone other than her husband is the biological father and that the husband should therefore be denied visitation or custody of the children born during the marriage—or an alleged biological father will seek to establish his paternity of one or more of the children born during the marriage.

This commentary focuses on the disclaimer of parental support obligation by men who have been serving as the fathers of children born during marriage.[9] One common scenario is as follows: Ann and Bob have been married for seven years. It has been a difficult marriage, and both parents have engaged in extramarital affairs. Two children were born during the marriage. Cynthia is now six and David now four. Recently, during an argument, Ann informed Bob that he may not be David's biological father. Genetic testing verified that Bob was not David's biological father.

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6. Some high profile cases involving babies switched at birth have raised questions about the maternity and paternity of children. Reproductive technologies have created new opportunities to bring maternity into question. *See, e.g.*, *In re* Baby M, 537 A.2d 1227 (N.J. 1988); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). While the *Principles*' definition of parent generally applies to both genders, I focus my comments on men's parental rights and responsibilities, since these comprise the vast majority of situations in which such rights and responsibilities come into question.

7. HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 2-5 (1971).

8. For an extended discussion of the history and current legal developments concerning the marital presumption of paternity, see Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 103 W. VA. L. REV. (forthcoming 2001).

9. This disclaimer can be made by any individual who has been a social parent to a child in the context of a marital or cohabiting relationship. Throughout this commentary, I focus on men and marriage, for cases involving them dominate the case law. However, I attempt to evaluate the proposed principles and make suggestions for an alternative approach that would apply to social parent-child relationships regardless of gender or marital status.

This painful discovery, together with the high level of strife in their marriage, led Bob to leave the family home and file for divorce and custody. Bob's petition acknowledged paternity of Cynthia and requested custody of her; it denied paternity of David and any parental support obligation for him. Until Bob left the family home and filed his petition, he had acted as David's father, and they shared a close parent-child bond. Once he left the family home, Bob refused to visit with David and demanded to visit with and have custody only of Cynthia. David found this abandonment inexplicable, and his behavior reflects the trauma he is experiencing. It has created great confusion and pain for Cynthia as well, who feels guilty that her brother is excluded from her visits with her father.

This is not the only scenario in which a man who has been acting as a child's father denies child support obligations, but it is a recurring situation, one that has drawn sharply different analyses from different state courts. It also presents the most troubling situation for courts, who struggle to reconcile claims like Bob's and needs like David's.

III. ALI PRINCIPLE OF "ESTOPPEL TO DENY A PARENTAL SUPPORT OBLIGATION"

Throughout the *Principles*, the term "parent" is defined by state law.[10] The child support obligation is no exception. However, the ALI drafters also sought to impose the parental support obligation in exceptional circumstances on additional individuals whose "affirmative actions warrant imposition of a continuing support obligation to a child."[11] The provision adapts equitable estoppel to the situation of child support. Section 3.02A states that estoppel may arise when:

> (a) there was an explicit or implicit agreement or undertaking by the person to assume a parental support obligation to the child;
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> (b) the child was born during the marriage or cohabitation of the person and the child's parent; or
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> (c) the child was conceived pursuant to an agreement between the person and the child's parent that they would share responsibility for raising the child and each would be a parent to the child.[12]

The ALI drafters thus invoke situations that expand on the traditional marital presumption of paternity. Estoppel to deny a parental support obligation applies to children born during the cohabitation as well as during the marriage of the individuals involved.[13] It also applies to children who are conceived pursuant to or otherwise the subject of an agreement between two individuals to share the parental support obligation.[14] It includes both heterosexual and homo-

10. ALI PRINCIPLES 2000, *supra* note 3, §§ 2.03(1)(a), 3.02(1)(a).
11. *Id.* § 3.02A cmt. a.
12. *Id.* § 3.02A(1)(a)-(c).
13. *Id.* § 3.02A(1)(b).
14. *Id.* § 3.02A(1)(a).

sexual unmarried partners.[15] This effort to equalize the treatment of children born into different family structures is important and long needed.

Only a child and the child's parents are given standing to assert an estoppel to deny parental support obligation.[16] The court is instructed to consider several factors when determining whether to impose a support obligation under this estoppel theory:

> (a) whether the person and the child act toward each other as parent and child and, if so, the duration and strength of that behavior;
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> (b) whether the parental undertaking of the person supplanted the child's opportunity to develop a relationship with an absent parent and to look to that parent for support;
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> (c) whether the child otherwise has two parents who owe the child a duty of support and are able and available to provide support; and
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> (d) any other facts that may relate to the equity of imposing a parental support duty on the person.[17]

The section specifically states that estoppel does not include a continuing support obligation that arises simply from a person's cohabitation with or marriage to the child's parent.[18] The ALI drafters sought to distinguish the simple "stepparent" situation, in which individuals aid in caring for the children of their partner or spouse, from ones in which individuals have acted in some affirmative ways to create a continuing support obligation.

IV. EVALUATING ESTOPPEL TO DENY A PARENTAL SUPPORT OBLIGATION

Perhaps most important, the provisions concerning mutual agreements make an important contribution to the still evolving legal theories of support in the context of agreements between partners to conceive or share the support obligation for a child. They clarify that these agreements should be binding on all involved, and they end the many disparities in treatment between children born during marriage and those born during the cohabitation of their heterosexual or homosexual parents.[19]

The provisions concerning agreements to share parenting responsibilities involve an affirmative, and presumably knowing and voluntary undertaking by an individual toward a child. The other factors that the *Principles* advise courts to consider focus on the development of a relationship between the individual and the child, whether that relationship may have supplanted one with a biological parent, and whether the child has two other parents. These factors do

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15. *Id.* § 3.02A cmt. c.
16. ALI PRINCIPLES 2000, *supra* note 3, § 3.02A.
17. *Id.* § 3.02A(2)(a)-(d).
18. *Id.* § 3.02A(3).
19. Some courts have already begun to enforce similar agreements. *See, e.g.*, Rubano v. Dicenzo, 759 A.2d 959 (R.I. 2000) (enforcing parties' written agreement to allow former partner to have visitation with child).

not focus on an individual's voluntary choice to support a child with knowledge of the child's biological heritage. Rather, they focus on the effects of a lengthy parent-child relationship on the child herself.

For example, in one illustration provided by the *Principles*, a husband is prevented from denying a support obligation to his eleven-year-old child at the time of divorce. The explanation given is that his "long occupation of the paternal role has deprived his younger child of other possibilities."[20] The second illustration involves a husband who discovers that his wife is pregnant with another man's child and files for divorce while she is still pregnant. Since no father-child relationship was created and the husband has not supplanted the child's opportunity to develop a father-child relationship with his biological father, this husband would not be liable for child support under the *Principles'* concept of estoppel.[21] Both of these situations involve men who reject children upon learning that they are not their biological offspring. In the first illustration, however, the husband is held responsible on the basis of his acceptance of the paternal role and the passage of time. Thus, the two situations are treated differently based on the length of time that the parent-child relationship developed prior to genetic testing and the man's challenge to the parent-child relationship.

The third example exemplifies affirmative conduct by a stepfather that actively interferes with and encourages the legal termination of the child's relationship with his biological father.[22] The third illustration is closest to the situation involving explicit or implicit agreements because the stepfather knew that the child was not his biological child and affirmatively chose to interfere with the paternity claims of the biological father. These actions, which were intended to deprive the child of a legal relationship with his biological father, can be viewed as an implicit agreement to support the child.

The stepfather illustration includes two important factors: knowing and voluntary conduct by the stepfather and clear interference by the stepfather with the child's relationship with his biological father. Imposing a support obligation on the basis of these two factors has widespread acceptance by courts and is likely to gain acceptance by state legislatures that consider these *Principles*.[23]

The ALI estoppel principles that go beyond knowing and voluntary acceptance of a parental responsibility are more controversial. The *Principles'* discussion of these factors leave many important questions unanswered. They do not provide clear guidelines for judicial discretion; they ignore the majority court rule concerning the application of estoppel in child support situations; they fail to explain the different treatment of men who parent children born during or before their marriage to the child's mother; and they ignore the influ-

20. ALI PRINCIPLES 2000, *supra* note 3, § 3.02A cmt. a., illus. 6.

21. *Id.* § 3.02A cmt. d., illus. 7.

22. *Id.* at illus. 8.

23. *See, e.g.*, Perkins v. Perkins, 383 A.2d 634 (Conn. Super. Ct. 1977); Scott v. Scott, No. C-9527, 1983 WL 35759, at *1 (Del. Super. Ct. Oct. 28, 1983) (man who married mother aware that her infant was not his biological son, represented him to community as his son, and resisted efforts by biological father to obtain visitation estopped to deny paternity); Nygard v. Nygard, 401 N.W.2d 323 (Mich. Ct. App. 1986); Pietros v. Pietros, 638 A.2d 545 (R.I. 1994) (mother relied on husband's assurances that he would support her and a child he knew was not his biological offspring in deciding to continue pregnancy and marry husband); T. v. T. 224 S.E.2d 148 (Va. 1976).

ential and often gendered judicial assumptions concerning morality. Ultimately, the Comments fail to articulate a strong rationale for their chosen approach. Due to these failings, the *Principles*' approach to estoppel to deny a parental support obligation is unlikely to achieve the certainty and ongoing support for children for which it strives.

On their own terms, the factors and the illustrations of estoppel to deny a parental support obligation leave many questions unanswered. They do not explain what duration and degree of strength of a parent-child relationship is an adequate basis for estoppel. The illustrations indicate that while an eleven-year parent-child relationship is an adequate basis for finding equitable estoppel, a relationship that terminates prior to the child's birth is not sufficient.[24] No guidance is given, however, to ascertain at what point between these two distant time periods equitable estoppel would become applicable. This lack of guidance gives judges too much discretion and will lead to widely differing results under similar facts. In the situation described above, for example, these estoppel factors would not tell courts whether Bob would be required to continue to support four-year-old David.

Some states have used statutes of limitations to define the length of time during which challenges to paternity will be permitted. The shortest timeline is found in Louisiana, which generally only permits challenges during the first six months of the child's life.[25] Other states have chosen two or five year periods of time.[26] The Uniform Parentage Act of 1973 adopted a five-year statute of limitations, and the Uniform Parentage Act of 2000 revised it to two years.[27] Oklahoma has adopted a two-year statute of limitation, but confines its application to situations where the parent and the child have lived together for the two year period. The Oklahoma approach, which looks to readily identifiable factors, such as the child's age and residence with the alleged parent, gives courts a more easily administrable guideline and prevents courts from having to engage in more detailed, time consuming, and ultimately confounding inquiries into the "strength" of the parent-child bond.[28] Oklahoma's approach would make it clear whether Bob would be required to continue to support David in the example discussed earlier.

The *Principles* do not acknowledge that their approach to equitable estoppel bucks the trend in state law, which generally permits men to challenge their pa-

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24. Courts have struggled with these issues as well. *See, e.g*, Bergan v. Bergan, 572 N.W.2d 272 (Mich. Ct. App. 1997) (husband who did not know of lack of biological relationship with child not estopped from contesting paternity where here did so when child was only slightly more than two years old); Johnson v. Johnson, 286 N.W.2d 886 (Mich. Ct. App. 1979) (husband estopped from denying paternity where he had fulfilled parenting role for nine or ten years).

25. LA. CIV. CODE ANN. art. 189 (West 1993). *See also* Smith v. Smith, 672 So. 2d 1075 (La. Ct. App. 1996).

26. Two states, North Dakota and Colorado, that have adopted the five-year limitation, have refused to apply it to prevent a presumed father from challenging the presumption of paternity in a child support collection action brought more than five years after the child's birth. People *in re* Interest of L.J., 835 P.2d 1265 (Colo. Ct. App. 1992); *In re* Interest of K.B., 490 N.W.2d 715 (N.D. 1992).

27. UNIF. PARENTAGE ACT vol. v 9B U.L.A. 287 (1987). The National Conference of Commissioners on Uniform State Laws approved a revised version of the UPA in 2000. That version is available at http://www.law.upenn.edu/bll/ulc/upa/upa00ps.htm [hereinafter UPA 2000].

28. OKLA. STAT. ANN, tit.10, §§ 2, 3 (West 1993).

ternity and support obligation at the time of divorce, either affirmatively or as a defense to a claim for child support. Instead, the reporter's notes focus on states that have applied a broad version of estoppel to prevent divorcing husbands from denying paternity and state that the "common theme" of these cases "is that the child's interests may be jeopardized by allowing a husband who has taken paternal responsibility for his wife's children to suddenly disclaim them, leaving them financially and emotionally fatherless, when their biological father may be long gone."[29]

Most state courts and legislatures have not, however, taken this approach to paternity challenges at the time of divorce. The *Principles'* comments focus on cases that invoke equitable estoppel when withdrawal of a developed parent-child relationship will cause emotional harm and remove a previously available source of financial support.[30] More state courts, however, permit most men to disavow at the time of divorce children they have parented during the marriage.[31] States have done this through different means. In some cases, courts have rejected the applicability of the doctrine of equitable estoppel to paternity.[32] Other courts refuse to apply equitable estoppel to husbands who developed a parent-child relationship without knowledge of the child's biological heritage or to situations where the husband did not actively interfere with efforts to obtain financial support from the biological father.[33]

Equitable estoppel generally requires a litigant to show: 1) conduct or words amounting to a representation; 2) reasonable reliance; and 3) resulting prejudice.[34] Only a few courts have been willing to find that acceptance of the paternal role during the marriage despite lack of knowledge of the children's true biological paternity constituted an adequate basis for finding the first factor

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29. ALI PRINCIPLES 2000, *supra* note 3, § 3.02A, reporter's note at 294.

30. *See, e.g.*, Clevenger v. Clevenger, 11 Cal. Rptr. 707, 710 (1961).

31. Several states permit husbands to deny paternity at the time of divorce. *See, e.g.*, Gann v. Gann, 705 So. 2d 509 (Ala. Civ. App. 1997); Smith v. Smith, 845 P.2d 1090 (Alaska 1993); Golden v. Golden, 942 S.W.2d 282, 285 (Ark. Ct. App. 1997); *In re* Interest of L.J. III, 835 P.2d 1265, 1266-67 (Colo. Ct. App. 1993) (denial of paternity in divorce proceeding permitted if brought within five years of child's birth; no time limit within which to assert nonexistence of the father child relationship as a defense by a presumed father to a claimed duty of support); R.E.H. v. J.M.H., 736 P.2d 1226, 1227 (Colo. Ct. App. 1987); Dews v. Dews, 632 A.2d 1160 (D.C. 1993); Daniel v. Daniel, 695 So. 2d 1253 (Fla. 1997); Doe v. Roe, 859 P.2d 922 (Haw. Ct. App. 1993); *In re* Marriage of Adams, 701 N.E.2d 1131 (Ill. App. Ct. 1998); *In re* Marriage of Cooper v. Cooper, 608 N.E.2d 1386 (Ind. Ct. App. 1993); Crowder v. Commonwealth, *ex. rel.* Gregory, 745 S.W.2d 149 (Ky. Ct. App. 1988); Knill v. Knill, 510 A.2d 546 (Md. 1996); Quintela v. Quintela, 544 N.W.2d 111 (Neb. Ct. App. 1996); Ambrose v. Ambrose, 536 S.E.2d 855 (N.C. Ct. App. 2000); *In Re* Interest of K.B., 490 N.W.2d 715 (N.D. 1992); Swingle v. Swingle, No. 88AP –852, 1989 WL 110995 (Ohio App. Ct. Sept. 26, 1989); Pressley v. Pressley, No. 03A01-9311-CV-00400, 1995 WL 54490 (Tenn. Ct. App. Feb. 10, 1995); TEX. FAMILY CODE ANN. § 160.110(g)(3) (Vernon 2001); Masters v. Worsley, 777 P.2d 499 (Utah Ct. App. 1989); NPA v. WBA, 380 S.E.2d 178 (Va. App. 1989); *In re* Marriage of A.J.N. & J.M.N., 414 N.W.2d 68 (Wis. Ct. App. 1987).

32. *See, e.g.*, Cochran v. Cochran, 717 N.E.2d 892 (Ind. Ct. App. 1999); Harmon v. Harmon, No. 02A01-9709-CH-00212, 1998 WL 835563 (Tenn. Ct. App. Dec. 3, 1998); NPA v. WBA, 380 S.E.2d 178 (Va. App. 1989).

33. *See, e.g.*, *Knill*, *supra* note 31, at 546.

34. *See, e.g.*, B.E.B. v. R.L.B., 979 P.2d 514 (Alaska 1999).

of equitable estoppel, representation.[35] Others argue that it is unfair to impose a continuing duty of child support where the husband did not knowingly misrepresent his parenthood to the child in question.[36]

Many courts, however, have focused their equitable estoppel analyses on the third prong of the test for equitable estoppel, prejudice or detriment. They have sharply divided over the question of whether there is prejudice or detriment in these situations. The *Principles* focus on those courts that find emotional detriment an adequate basis for equitable estoppel or application of a strict statute of limitations for disavowals of paternity. The majority of courts that have considered this issue, however, consider emotional detriment to the child beyond the court's purview and have strictly limited "prejudice" to financial detriment. They also invoke a very narrow concept of financial detriment. The withdrawal of prior financial support does not meet their definition of detriment. Rather, these courts find detriment only where the husband's actions directly impeded the identification of and receipt of child support from the biological father.[37]

The majority view acknowledges that this approach makes the element of detriment difficult to establish "because it is rarely found that the husband's past provision of financial support has worsened the wife's and child's claim on other sources of support, including the biological father."[38] Contrary to the outcome advocated by the Reporters, these courts would not apply equitable estoppel to the husband who seeks to disavow an eleven year father-child relationship, and they would not require Bob, in the hypothetical situation described above, to continue to support David.

By ignoring the majority of cases that limit detriment to financial detriment, the Reporters miss the opportunity to fully explain their reasoning and to respond to the reasoning of courts that have chosen to reject or severely limit equitable estoppel. A close examination of the reasoning on behalf of the *Principles'* approach to estoppel and the reasoning adopted by the majority of courts reveals two very different approaches to the underlying issues. These issues involve: the effect of prior financial support and development of a social relationship; the motives of men who seek to disestablish paternity upon divorce; and basic notions of fairness.

The *Principles'* Comments describe challenges to paternity during divorce as "belated inquiries into the biological paternity of marital children, undertaken long after the family relationship has been well established as a social reality."[39]

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35. *See, e.g.*, Judson v. Judson, No. FA 94 0065962, 1995 WL 476848 (Conn. Super. Ct. July 21, 1995) (husband not permitted to deny paternity of twelve and six year old children in divorce proceeding; unclear if court is applying estoppel or best interests of the child); Watts v. Watts, 337 A.2d 350 (N.H. 1975) (ex-husband not permitted to deny paternity after discovery that children were not his biological offspring where had acknowledged children for fifteen years; "[to] allow defendant to escape liability for support by using blood tests would be to ignore his lengthy, voluntary acceptance of parental responsibilities").

36. *See, e.g.*, Dews v. Dews, 632 A.2d 1160 (D.C. 1993); *NPA*, *supra* note 32, at 178.

37. *See, e.g.*, B.E.B. v. R.L.B., 979 P.2d 514 (Alaska 1999); K.A.T. v. C.A.B., 645 A.2d 570 (D.C. 1994); *Knill*, *supra* note 31, at 546; Wiese v. Wiese, 699 P.2d 700 (Utah 1985).

38. K.B. v. D.B., 639 N.E.2d 725, 729 (Mass. App. Ct. 1994).

39. ALI PRINCIPLES 2000, *supra* note 3, § 3.02A cmt. d.

Under this view, the well-established parent-child relationship is an important "fact" that should not be disturbed upon divorce. The underlying assumption is that the marriage or end of the marriage is irrelevant to the parent-child relationship, which stands on its own after a period of time. In this view, children become the responsibility of one who fulfilled the parenting role because of the prior acceptance of responsibility to them.

Courts that reject this approach begin with a quite different premise: they begin with the general rule that "a parent owes a duty of support only to his or her natural or legally adopted child."[40] These courts argue that public policy favors encouraging men to treat their wives' children as their own while the marriage is still intact without fear of later repercussions.[41] This approach, they find, is consistent with strengthening the family.[42] Under this view, the child is benefitted by the assumption of the fathering role during the period of the marriage.[43] However, this assumption of the fathering role does not create a permanent parent-child relationship. Nor is this relationship seen as interfering with the child's right to obtain support from the biological father unless the husband has actively interfered with such efforts.[44] In addition, they argue that basing estoppel solely on the development of a parent-child relationship would make estoppel the norm, not an exceptional circumstance. "To rule . . . that the exception applies whenever a child has reached an age when he or she could have a meaningful appreciation of paternity would make the exception the rule and the 'rule' applicable only to one and two year olds."[45]

The comments to the *Principles* differ with these courts on the issue of motive as well. The comments express the belief that if husbands are estopped from denying a child support obligation, the motive for denying paternity will be eliminated. The comments state: ". . .a husband estopped to deny a support obligation under this section may understandably choose to relinquish his inquiry into biological paternity in order to enjoy a parental relationship with the child he is required to support."[46] The assumption is that the motive to deny the relationship is purely financial. With that motive removed, the father-child relationship would presumably continue undisturbed.

Some courts have rejected this view of the likelihood that financial responsibility will lead to continuation of the emotional bond.[47] They have found that an order requiring child support would not prevent a man from publicly declaring that the child is not his, and a support order may "destroy an otherwise healthy paternal bond by driving a destructive wedge of bitterness and resentment between the father and his child."[48] While the issue of motive may be resolvable by social science research, no such research is cited by either the courts or the *Principles*.

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40. *NPA*, *supra* note 32, at 180.
41. *Knill*, *supra* note 31, at 552.
42. *Id.*
43. *Id*
44. *Id.* at 550.
45. *K.B. v. D.B.*, 639 N.E.2d at 731 (Mass. App. Ct. 1994).
46. ALI PRINCIPLES 2000, *supra* note 3, § 3.02A. cmt. d.
47. *See, e.g*, B.E.B., *supra* note 37, at 519.
48. *Id.*

The *Principles'* comments also do not explicitly address the issue of fairness. The "fairness" of the *Principles'* estoppel approach seems to rest on the notion that a husband's "long occupation of the paternal role" usually deprives the child of a relationship with the biological father.[49] Fairness is implicitly defined from the child's, not the husband's, perspective. Instead of looking at the husband's development of the parent-child relationship with knowledge that he was not biologically related to the child and that his behavior would lead to a continuing support obligation, the *Principles* look at the effect of the parent-child relationship on the child. They assume that a lengthy father-child relationship "naturally" interferes with a child's relationship with a biological father.[50]

Those courts that have adopted a very narrow notion of equitable estoppel focus their fairness analysis on the husband, not the child. According to these courts, imposing a long-term support obligation on a man who, with or without knowledge of the child's biological origins, accepted and treated the child as his own until divorce, would unfairly penalize a man for conduct that public policy wishes to promote. These courts analogize such men to stepparents, who may freely support and care for their spouses' children with no fear of future liability for their care.

While the question of motive may be subject to empirical research, the other two fundamental differences between the *Principles'* approach and the majority judicial approach require further exploration. Should continuing financial responsibility be based on the established father-child relationship or limited to biological connection? Where does "fairness" lie?

An important impediment to the *Principles'* analysis of this issue may lie in an internal logical inconsistency in the *Principles'* approach. The *Principles* distinguish two groups: men who are already married to the child's mother when the child is born and men who marry the mother at some time after the child's birth. Under the *Principles'* approach, the first group of men, who fall within the common law presumption of paternity, can become obligated to support a child simply by fulfilling the parental role for an unstated period of time. The second group of men, commonly referred to as stepfathers, do not become obligated for child support after the termination of their marriage to a child's mother, even if they have participated in an equally well developed parent-child relationship for an equal length of time.[51] While the *Principles* appear to treat these two groups of men differently, the only important distinction between them is whether they were already married to the mother when the child was born. It is difficult to find a logical basis for making the child support obligation dependent on this distinction. Why does the "social reality" of the father-child relationship gain legal importance only if the husband was wed to the mother at the time of the child's birth? If fairness is judged from the perspective of the child, is this even a relevant factor?

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49. ALI PRINCIPLES 2000, *supra* note 3, § 3.02A cmt. d.

50. This principle has gained some judicial acceptance. *See, e.g.*, K.T. v. L.T., 387 S.E.2d 866 (W. Va. 1989).

51. ALI PRINCIPLES 2000, *supra* note 3, § 3.02A(3). This reflects state law trends, in which stepfathers are generally not required to furnish a child support after the dissolution of a marriage, and are likewise usually precluded from seeking custody and visitation after divorce. *See generally* MARTHA M. MAHONEY, STEPFAMILIES & THE LAW (1994).

Courts that have adopted a restrictive approach to equitable estoppel have analogized men who are married to the mother at the time of the birth of a child to stepfathers. They have found that while stepfathers may assume the status of *in loco parentis*, they are not compelled to continue the parental relationship after they separate from the mother.[52] Likewise, they assert, men who care for their wives' children born during marriage as their own do not assume a continuing obligation to do so.[53] Thus, they reject the distinction between these two groups of men. For the *Principles'* approach to equitable estoppel to work, the drafters must either provide a strong reason to distinguish these two groups of "fathers" or reconsider the distinction. This requires explicitly acknowledging the basis for placing responsibility on some nonbiological fathers. Just as the *Principles'* approach breaks down the traditional distinctions between children born during the marriage of their mother and alleged father and children born to unmarried parents, so too, the approach to estoppel would appear to negate distinctions between men who are presumed fathers through marriage and stepfathers.

The *Principles'* approach, which gives broad discretion to judges, may also be undermined by gendered assumptions of morality and responsibility. The *Principles'* Comments ignore the gender stereotypes that appear in some opinions. Husbands who did not know that they were not the biological fathers of their "children" are viewed as innocent victims of scheming, unfaithful women. Suspicious husbands who do not seek genetic testing are men who are trying to prevent marital strain.[54] Women are assumed to know who the biological father of their children are, and their decisions to maintain silence are described as dishonorable and deceptive.[55] Wives who did inform their husband of the true source of the conception of their child are still responsible for the later rejection of the child upon divorce. Husbands, however, who knew about the lack of a biological connection to the child but assumed a paternal role are often described as honorable men who were trying to hold their families together, not dads who reject children when they no longer are involved with their mothers.[56]

Given the broad discretion that the *Principles* allow the courts concerning application of the doctrine of estoppel, these gendered moral judgments about the conduct of wives and husbands will continue to affect decisions concerning husbands' responsiblities to support children born during a marriage. While the

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52. *NPA*, *supra* note 32, at 181.

53. *Id.*

54. *Id.* at 182; T.P.D. v. A.C.D., 981 P.2d 116, 120 (Alaska 1999).

55. *Masters*, *supra* note 31, at 503-04 ("[Mother] falsely led [husband] to believe that he was the children's biological father. [Mother], not [husband], acted inequitably in leading the children and [husband] to believe that [husband] was their biological child . . . . [I]f the children have been prejudiced, [mother] is the responsible party.").

56. *See, e.g.*, Miller v. Miller, 478 A.2d 351, 358 (N.J. 1984) (To invoke equitable estoppel against a stepfather "would create enormous policy difficulties. A stepparent who tried to create a warm family atmosphere with his or her stepchildren would be penalized by being forced to pay support for them in the event of a divorce. At the same time, a stepparent who refused to have anything to do with his or her stepchildren beyond supporting them would be rewarded by not paying support in the event of a divorce."); *In re* Marriage of A.J.N., 414 N.W.2d 68 (Wis. Ct. App. 1987). The courts are not uniform in this approbation, however. *See, e.g.*, Sekol v. Delsantro, 763 A.2d 405 (Pa. Super. Ct. 2000) (describing trial court's perception that husband was breaching his ethical and moral obligations to the child and finding paternity by estoppel vacated and remanded on appeal).

Principles' approach to estoppel focuses on the effect on the child, these moral judgments focus on the husband as the primary, innocent victim. This view of husbands as the innocent victims here requires a response.

Ideally, a child's parentage should be clearly and definitively determined at birth. No child should have to endure the discovery that a loved father denies paternity. Legal avenues to encourage both parents to clearly and permanently define their parent-child relationships should be encouraged. The state often forces paternity determinations in order to locate private child support for children on the public dole. It leaves the accurate identification of biological parentage to the option of women who are married or do not choose to seek child support or state financial assistance in raising their children. This laissez-faire policy, given the powerful interests that children have in the identification of their fathers, may need rethinking. In addition, parties who initiate paternity challenges during divorce or post-divorce should be strongly encouraged to seek mediation to attempt to prevent feelings of betrayal upon discovering a spouse's infidelity or the anger that often surrounds divorce from destroying otherwise positive parent-child relationships.

These approaches are, however, well beyond the scope of the *Principles*, which concern only the legal rules that govern family dissolution. While some courts have viewed child support as a benefit to the parent receiving it, the *Principles*, by clearly distinguishing spousal support payments and child support payments, identify child support as a benefit to the child. Thus, the moral culpability of the mother becomes irrelevant. We must face head on the choice between a father who may have been deceived about his biological parentage and a child who has given his love to and become dependent upon that parent.

I believe that this requires us to rethink the "public policy" notion that stepparents should be encouraged to parent and support children while they are living with or married to their parent without fear of any future liability toward the children. We make a fundamental mistake when we encourage adults to consider parental relationships with children impermanent, incidental to the adult marital or cohabitation relationship. In none of the cases citing this "public policy" has any evidence been cited that demonstrates that this approach is, in fact, in the interests of children.[57]

My suggested approach rejects the majority rule that has been applied to both presumed fathers and stepfathers. I believe that a case can be made that in choosing between the fairness concerns of individuals who may be estopped to deny parental support obligations and the children who have entered into a relationship with the only father they know, the fairness concerns are strongest for the children who have at all points been completely incapable of protecting their interests. While some individuals are innocent victims of deceptive partners, adults are aware of the high incidence of infidelity and only they, not the chil-

57. Studies demonstrate that children who lose a parent, especially through divorce, show lower levels of adjustment than other children. Paul R. Amato & Bruce Keith, *Parental Divorce and Adult Well-being: A Meta-analysis*, 53 J. MARRIAGE & THE FAMILY 43 (1991).

dren, are able to act to ensure that the biological ties they may deem essential are present.[58]

Under this suggested approach, to develop a parent-child relationship is to accept a fiduciary responsibility toward the child, one that is not dependent on the continuation of the adult-adult relationship.[59] Individuals who encourage children to depend on them to fulfill their role as parents have accepted an important position of trust in their lives that cannot be replicated by any other individual. The fiduciary responsibility of parents toward children is an important social norm for the law to enforce. This fiduciary responsibility can develop outside marriage, and it extends to stepparents as well, if they have assumed the parental role. The law should discourage adults from treating children they have parented as expendable when their adult relationships fall apart. It is adults who can and should absorb the pain of betrayal rather than inflict additional betrayal on the involved children.

While family law cannot wholly protect children from the mistakes and betrayals of adults, it can at the least prioritize their protection and security. The *Principles* adopt this priority at many turns, and makes an effort to do so here. The estoppel section can reinforce this fundamental value by acknowledging that individuals who parent children remain responsible for the care and upbringing of those children, even if they later learn that they do not have the biological connection they assumed was there. It should, however, do this in a manner that limits judicial discretion and creates as much certainty about the outcome as possible. Thus, I reject open-ended judicial determinations concerning a number of easily disputed factors. Instead, I suggest that a time limit be established, after which an individual is denied the right to contest the parental support obligation.

I suggest that the estoppel to deny parental support obligation continue to estop individuals who implicitly or explicitly agreed to parent a child. In addition, I believe that individuals who have for at least two years: 1) cohabited with the child and the child's parent, and 2) with that parent's consent developed a parent-child relationship with that child, should be estopped from denying a parental support obligation at the time of family dissolution.[60]

While this approach has some drawbacks, even for the children whose protection I am trying to place first, it has some important benefits. First, it is easy to administer. Unlike the *Principles'* proposed approach to estoppel, it clearly limits judicial discretion and will encourage negotiated solutions rather

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58. DNA Paternity Testing, now advertised on billboards, in the Yellow Pages, and on the Internet, is easily available, relatively inexpensive, and can be done in the privacy of one's own home.

59. I am grateful to Professor Scott and Dean Scott for their thoughtful development of this concept in Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

60. I select two years because it is in accord with the UPA 2000 and states such as Oklahoma and California. UPA 2000, *supra* note 27, § 607(a), (b); CAL. FAM. CODE, § 7541 (1994); OKLA. STAT. ANN, tit. 10, §§ 2, 3 (1998). However, I also believe that the time limit should be subjected to review based on studies of the attachment of children to their parents, and the age beyond which most children would experience detachment from a parental figure as especially traumatic. Quite possibly, a shorter timeline should be adopted. In addition, these provisions limit their statutes of limitations to children born during marriage. I would extend the time limitation to cohabitation relationships that involve parent-child relationships as well.

than lengthy and destructive litigation. It is in accord with one of the underlying value choices of the *Principles*, the rejection of fault as a factor in family dissolution. It gives individuals, usually men, time to obtain genetic testing and contest paternity, but prevents them from assuming that they may encourage a parent-child relationship only to cast it aside when they are no longer involved with the mother.[61]

Others have noted the cultural clash between the idea that no-fault divorce constitutes a "clean break" of the marital relationship and the ongoing, long-term dependency needs of children.[62] The *Principles* recognize that the "clean break" approach is not always an appropriate response to the dissolution of a marital or long-term cohabitation arrangement. Likewise, adults should be discouraged from searching for ways to obtain a "clean break" from the children for whom they have voluntarily—if not always with full knowledge of the child's biological heritage—accepted responsibility. Instead, the assumption of the parental role is a fiduciary responsibility that should not be easily cast aside.

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61. Professor Grace Glanz Blumberg has pointed out that same fear that imposing financial responsibility on some stepfathers after divorce will open the door to more custody and visitation claims by stepfathers. *See* email from Grace Ganz Blumberg, Reporter, ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, to author (Feb. 27, 2001) (on file with author). I note here that I approve of limiting the right to request child support under the estoppel provision to the child's parents and the child. It is my hope that this will aid in limiting the range of this provision in the context of stepparents where a child has two other involved and supportive parents. However, I do intend that in some instances children will be able to obtain support from more than two parents. This approach has been adopted by Louisiana. *See* Smith v. Jones, 566 So. 2d 408 (La. Ct. App. 1990), and advocated by Mary Louise Fellows, *A Feminist Determination of the Law of Legitimacy*, 7 TEX. J. WOMEN & L. 195 (1998).

62. *See, e.g.*, MILTON C. REGAN, ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE 147 (1998).