

Partitioning Paternity: The German Approach to a Disjuncture Between Genetic and Legal Paternity With Implications for American Courts

SHELLY ANN KAMEI*

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* Shelly Ann Kamei graduated *cum laude* from University of San Diego School of Law in May 2009. Ms. Kamei's honors include membership in Phi Delta Phi, the CALI Award for Excellent Achievement in Child Rights and Remedies (Fall 2007), the Children's Advocacy Institute's James A. D'Angelo Outstanding Child Advocate Award 2009, Pro Bono Service Recognition, and membership in the Order of the Coif. After passing the July 2009 California Bar, Shelly Ann Kamei relocated to Los Angeles, embarking on a career as a child advocate, with emphasis on special education law. She would like to thank Professor Bob Fellmeth for his assistance with this article. She would like to thank her husband Alan, her parents, and her mother-in-law for their support while she was a student at University of San Diego School of Law. She would also like to thank her late father-in-law Hiroshi, who gave so much of himself to improve his community, his country, and his world. His example inspired Ms. Kamei to pursue a career in public interest law.

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I. THE PROBLEM OF PATERNITY¹

The term “traditional nuclear family” conjures up images of a family unit comprised of a husband and wife living together under one roof with their genetic children.² In an age of single parent households,³ homosexual parentage,⁴ and medical innovation allowing for assisted

1. The focus of this article is on paternity determinations. Although issues of paternity arise far more frequently, issues of maternity have also vexed the courts. See SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW IN A NUTSHELL 66–68 (2003).

In American states that recognize homosexual domestic partnerships or legalized gay marriage, courts have been asked to intervene when the family unit dissolves. In such situations, a woman other than the child’s primary legal mother (i.e. birth parent, genetic parent or adoptive parent) may be found to be an additional legal mother. *E.g.*, *Elisa B. v. Super. Ct.*, 37 Cal. 4th 108 (2005) (holding that a lesbian woman who agreed to have a child with her partner who was artificially inseminated and who actively parented the child was a parent of the child); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005) (holding a woman who had signed a parentage stipulation was estopped from attacking it). Additionally, advances in assisted reproduction technology also present challenges in determining who qualifies as the legal mother of a child. *E.g.*, *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998) (holding that a married couple who had intended to have a child created through donor sperm and egg and gestated by a surrogate were parents in spite of a total lack of genetic or gestational relationship to the child).

Germany has faced similar issues. Germany bans joint adoption of children by non-married individuals, though one of the two partners can adopt as an individual. Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1741(2), available at <http://www.gesetze-im-internet.de/bundesrecht/bgb/gesamt.pdf>. In contrast to the strict rules for stranger adoption, the rules for stepparent adoption allow same-sex domestic partners to adopt the children of their partners. DAS GESETZ ÜBER DIE EINGETRAGENE LEBENSPARTNERSCHAFT [Domestic Partnership Act], Feb. 16, 2001, BGBl. I at 266, § 9(1), <http://bundesrecht.juris.de/bundesrecht/1partg/gesamt.pdf>.

In Germany, the most difficult problems of defining motherhood occur in issues of surrogacy. Bürgerliches Gesetzbuch [BGB] [Civil Code] § 1591 defines the mother as the woman who *gives birth* to the child, regardless of genetic relationship or intent. This is a statutory rule that cannot be altered by the parties, so if a woman wishes to use a surrogate to have a child, the surrogate will be deemed the legal mother and the intended mother will have to adopt the child in question in order to be deemed its legal parent. See generally DIETER SCHWAB, FAMILIENRECHT [Family Law] 244 (C.H. Beck 15th ed. 2007).

2. RAMSEY & ABRAMS, *supra* note 1, at 47.

3. As of 2007, 25.8% of American children were living with just one parent. Press Release, U.S. Census Bureau, 50 Million Children Lived with Married Parents in 2007 (July 28, 2008), <http://www.census.gov/Press-Release/www/releases/> (select 2008 from “Releases by Year”, then select “July” from “Releases by Month for 2008,” follow hyperlink to press release).

4. There are currently no reliable statistics on gay and lesbian parents as the United States Census Bureau has only recently begun to address the issue. Nevertheless, it is clear that homosexual parentage is widespread and there is at least one homosexual parent in almost all American counties. Joan Biskupic, *Same-sex Couples Redefining Family Law*

reproduction,⁵ this is often not the case.⁶ The modern family has genetic, emotional, functional, and social elements that both compliment and conflict with each other.⁷ Nevertheless, in defining the legal relationship between a man and a child in terms of parental authority, financial responsibility, and visitation rights, courts and legislatures have fashioned rules predicated on *either* proof of genetic paternity⁸ *or* the principal functional-social aspects of the family relationship.⁹ This either-or approach clearly serves a court's interest in efficiency, but it does so by sacrificing some elements of the complex, multi-faceted parent-child relationship.¹⁰

When a jurisdiction uses the either-or approach,¹¹ there can be only one man who is legally defined as *the* father¹² even if the child has an

in USA, USA TODAY, Feb. 17, 2003, at 1A, available at http://www.usatoday.com/news/nation/2003-02-17-cover-samesex_X.htm.

5. A striking example of the disjuncture between biology and legal parenthood occurs in cases where the sperm, egg, and gestational mother are all unrelated to the intentional parents. *E.g.*, *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 293.

In Germany, the child would be legally deemed to be the child of the woman who gave birth to him, regardless of intent or genetic relationship between the parties. SCHWAB, *supra* note 1 (discussing the implications of Section 1591 of the Bürgerliches Gesetzbuch). In order to change the legal status of the child with respect to the intended mother, an adoption would have to take place. *Id.* If the husband's sperm were used, he could become the legal father through adoption or by simply voluntarily acknowledging the child. *Id.* No such acknowledgement procedure is available to the intended mother. *Id.*

6. The United States Supreme Court expressly recognized that "[t]he demographic changes of the past century make it difficult to speak of an average American family." *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

7. See generally Janet L. Dolgin, *Genetic Evaluations: Blood, Genes, and Family*, 21 AKRON L. REV. 347 (2008); Angela Campbell, *Conceiving Parents Through Law*, 21 INT'L J.L. & POL'Y & FAM. 242 (2007).

8. See, e.g., *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273, 1279 (Kan. 1993) (holding that a twelve-year old boy could be made to pay child support to older babysitter who had initiated an inappropriate sexual relationship with him as he was the *genetic father* of the resulting child).

9. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (finding the *marital relationship* between one putative father and the child's mother determinative even where another putative father was undisputedly the genetic father and had maintained a relationship with the child).

10. While all courts have an interest in efficient determination of the issues before them, efficient determination of paternity is most evident in the probate context. *E.g.*, *In re Estate of Burden*, 146 Cal.App.4th 1021, 1027 n.2 (2007); *Estate of Griswold*, 25 Cal. 4th 904, 923-24 (2001).

11. Almost every American jurisdiction approaches paternity in an either-or fashion, which is the preference stated by the plurality opinion of the Supreme Court in *Michael H.*, 491 U.S. at 131. Louisiana alone has specifically disavowed that approach and acknowledged a concept of "dual [legal] paternity." *T.D. v. M.M.M.*, 730 So.2d 873, 875 n.2 (La. 1999).

active parent–child relationship with more than one man.¹³ Once legal paternity is established, the legal rights and responsibilities of other men are terminated.¹⁴ Often this means that a child will not have an opportunity to build or sustain a relationship with the excluded father.¹⁵ It can also prevent the child from obtaining useful genetic information that the genetic father could provide. Thus, the either-or approach often cuts off relationships between fathers and children where another man's paternity is legally preferable.

In Germany, the either-or approach to paternity creates a particularly acute constitutional conflict. The *Grundgesetz für die Bundesrepublik*

12. Justice Scalia rejects the notion of dual paternity stating “the claim that a State *must* recognize multiple fatherhood has no support in the history or traditions of this country.” *Michael H.*, 491 U.S. at 131 (emphasis added).

13. *Id.* at 114–16.

14. *See id.* at 131.

15. This was precisely the outcome of the decision of the Superior Court in the *Michael H.* case even though the excluded father was both the genetic father and a man who had acted as father (with the mother's consent) during the child's lifetime. *Michael H.*, 491 U.S. at 119. Justice Scalia's plurality opinion does nothing to rectify this, though Justice O'Connor's concurrence sees the issue of legal parenthood and visitation as two separate issues. *Id.* at 132–33. (O'Connor, J., concurring).

American states are divided on the ability of a genetic father to challenge the marital presumption. *Compare* *Barnes v. Jeudevine*, 475 Mich. 696 (2006) (holding that a genetic father has no standing to challenge the marital presumption even where he signed an affidavit of parentage and his name was on the birth certificate) *with In re* Paternity of S.R.I., 602 N.E.2d 1014 (Ind. 1992) (holding genetic father is allowed to establish paternity if petition is timely filed and he puts on clear and convincing evidence to rebut the presumption of legitimacy of the child born to a married mother).

In Germany, “[t]he right to free development of personality and the commitment to respecting and protecting human dignity are secured under Article 2, Paragraph 1, in conjunction with article 1, section 1 of the Basic Law.” *Vaterschaftstests* [Paternity Tests] Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court] Feb. 2, 2003, 117 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 202, 225 [hereinafter *Vaterschaftstests*]. This case is available for download directly from the German Federal Constitutional Court, which publishes its decisions on its official website. BVerfGE, 1 BvR 421/05 vom 13.2.2007 [Feb. 13, 2007], Absatz-Nr. (B-I-59), http://www.bundesverfassungsgericht.de/entscheidungen/rs20070213_1bvr042105.html. All decisions from January 1, 1998, to the present are available on the site.

This right is also protected to by the European Convention on Human Rights and implied by the protections afforded Children in the European Convention on the Rights to the Child. Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and The European Convention on Human Rights*, 21 INT'L J.L. POL'Y & FAM. 137, 142–43.

Deutschland, the German Constitution (Basic Law)¹⁶ places high value on the sanctity of the family and protection of children, imposing mandates on the state requiring affirmative protection of the family structure¹⁷ and affirmative state action to ensure a child's right to be financially supported by his or her parents.¹⁸ The Basic Law also contains an individually-held "personality" right to control one's genetic information.¹⁹ The personality right has been deemed to include a *right to know* one's genetic heritage, a concept that is not solely backward looking.²⁰ In terms of the personality right protected by Article 2 of the Basic Law, an individual has a right to know not only his or her ancestry, but also a right to know if his or her genes have been passed on to offspring.²¹ In the context of the modern family structure, this right to know information on one's offspring comes into conflict with the other parent's constitutionally-protected right to keep sexual history private.²² Additionally, an individual's right to know and control his own genetic information may conflict with another individual's right to remain in ignorance of his genetic information.²³ Because of the conflicts between these competing constitutional rights, Germany legally barred fathers from conducting clandestine paternity tests.²⁴

The ban on clandestine paternity tests left a doubting father with no effective way to exercise his right to know if he has genetic offspring in cases where the mother objected to testing of a child, as evidenced by the

16. The Basic Law for the Federal Republic of Germany has been in force since May 1949. Grundgesetz für die Bundesrepublik Deutschland [GG][Basic Law] May 23, 1949, BGB1. I 2248 at Präambel [Preamble].

17. Article 6 of the Basic Law for the Federal Republic of Germany provides that the state must affirmatively protect marriage and the family. GG arts. 6(1) & 6(2).

18. German parents have a constitutional obligation under Article 6 of the Basic Law to nurture and care for their children. *Id.* art. 6(2).

19. The German right of "personality" is protected by Article 2 of the Basic Law. *Id.* art. 2.

20. "Understanding and development of ones individuality is closely linked to knowledge of the underlying factors that make up one's individuality. This includes genetic origin." *Vaterschaftstests*, *supra* note 15, at 225//BVerfGE, 1 BvR 421/05 at Absatz-Nr. (B-I-59). The United Kingdom and Switzerland also protect the right to know as an absolute right of the child. Besson, *supra* note 15, at 139.

21. *Vaterschaftstests*, *supra* note 15.

22. *Vaterschaftsaskunft* [Paternity Inquiry] Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court] May 6, 1997, 96 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 56 (268–69) [hereinafter *Vaterschaftsaskunft*] (rights of genetic mother invaded when child wishes to force her to name her genetic father).

23. *Id.*

24. *Vaterschaftstests*, *supra* note 15, at 240//BVerfGE, 1 BvR 421/05 at Absatz-Nr. (B-III-92).

2007 decision of the Bundesverfassungsgericht²⁵ (Federal Constitutional Court) in the case of *Herrn S.*²⁶ As part of its decision, the Federal Constitutional Court ordered the national legislature to craft a solution that would effectively protect families and children while serving the underlying rights of all parties to the greatest extent possible.²⁷ The German government²⁸ responded by bifurcating the proceedings relating to paternity into a process to clarify a child's genetic origin²⁹ and a

25. The German Federal Constitutional Court is an independent and autonomous branch of the German government located in Karlsruhe. Bundesverfassungsgerichtsgesetz [BVerfGG][Code Regulating the Federal Constitutional Court] arts. 1(1), 1(2); It is regarded as co-equal to the legislative and executive branches. See GG arts. 20 & 92.

Unlike the United States Supreme Court, its sole function is judicial review of constitutional matters and resolution of disputes between the various state and federal branches. BVerfGG art. 13; GG art. 93. Thus, it is not a "super-appellate" court.

The highest court for civil appeals *within* Germany is the Bundesgerichtshof. GG art. 95; Gerichtsverfassungsgesetz [GVG][Court Organizational Statute] § 133; see also website of the Bundesgerichtshof [Federal Court of Justice], <http://www.bundesgerichtshof.de/> (select "Der BGH", then select "Aufgabe, Organisation").

Note that there are some instances where a German court can certify an unresolved question of *European law* material to a case before it to the European Court of Justice. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2008/C 115/01 art. 267, <http://eur-lex.europa.eu/en.index.htm> (select "Treaties"). See also Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court] Oct. 14, 2004, 11 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 307 (discussing the implications of a decision by the Third Section of the European Court of Human Rights on their own decision), *English translation available at* <http://www.bundesverfassungsgericht.de/entscheidungen.html> (select the English Version by clicking on the Union Jack Flag symbol, then select "Decisions", then select, "Oct." on the 2004 line, then scroll down and select "2 BvR 1481/04"); Mattias Hartwig, *Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human Rights*, 6 GERMAN L.J. 869; <http://www.germanlawjournal.com/index.php?pageID=11&artID=601>.

Further information on the Bundesverfassungsgericht [German Federal Constitutional Court] can be found at its website, <http://www.bundesverfassungsgericht.de/en> (select "Organization") [English version].

26. *Vaterschaftstests*, *supra* note 15.

27. *Id.*

28. GESETZ ZUR ERGÄNZUNG DES RECHTS ZUR ANFECHTUNG DER VATERSCHAFT [LAW SUPPLEMENTING THE RIGHT TO CHALLENGE PATERNITY], Mar. 13, 2008, BGBl. I Nr. 9 at 313 [hereinafter Law Supplementing the Right to Challenge Paternity], *available at* <http://www.bgblportal.de/BGBl/bgbl1f/bgbl108s0313.pdf>.

29. The process to clarify the genetic origin of a child is a *Klärungsverfahren* [Anspruch auf Klärung der Abstammung] [Clarification Proceeding]. Press Release, Bundesministerium der Justiz [German Ministry of Justice], Gesetz zur Vaterschaftsfeststellung in Kraft getreten [Law for Paternity Process Comes to Force] (Apr. 1, 2008), http://www.bmj.de/enid/fd3d3323682362531bf7d35fe3b1f407,7d7d9a706d635f6964092d0935303537093a095f7472636964092d0935323933/Pressestelle/Pressemitteilungen_58.html.

separate process to challenge legal paternity.³⁰ Thus, a doubting father³¹ can exercise his right to know if his legal child is his genetic offspring without simultaneously eviscerating the rights of the child and mother and without putting existing legal relationships at risk.³²

This paper will address the strengths and weaknesses of the German approach as well as the potential use of this approach by American states, with particular emphasis given to the conflict between the right to know one's origins and a child's right to care and support. Part II discusses the challenge of defining legal paternity in an age of genetic certainty. It will first give a brief explanation of how courts have used functional–social and genetic considerations in defining legal paternity. It will then evaluate the legal implications of this approach on the rights of the father, mother, and child.

Part III evaluates the special issues raised in the German system, where the constitutional mandates to protect the family structure and the right of a child to support³³ conflict with constitutionally protected individual personality rights.³⁴ It also discusses the conflict between the rights of the father, mother, and child inherent in the German system.

Part IV discusses the case of *Herrn S.*,³⁵ wherein the German Federal Constitutional Court ordered the legislature to create a process to protect legal paternity but allow for the determination of genetic paternity. This is followed by an overview of the legislative response that effectively bifurcated paternity proceedings in the German courts.³⁶

Part V evaluates the alternative avenues that the German legislature could have taken, focusing on the feasibility of such solutions in the German context. This includes a discussion of the discrepancies between a father's right to test and a mother's right to test, the potential

30. The process to challenge paternity is an *Anfechtungsverfahren* [Paternity Contest]. *Id.*

31. The decision allows only the legal father to bring a challenge, the rights of a mere genetic father can be much more proscribed. *Vaterschaftstests*, *supra* note 15, at 238//1 BvR 421/05 at Absatz-Nr (B-II-89). The new statutory section of the Family Code includes provisions that allow the process to be initiated by (1) the father against the mother and child; (2) the mother against the father and child; or (3) the child against both parents. BGB § 1598(a).

32. Bringing a procedure to clarify genetic origin has no impact on the legal status of the father. *Vaterschaftstests*, *supra* note 15, at 239//BVerfGE, 1 BvR 421/05 at Absatz-Nr (B-III-91).

33. GG arts. 6(1), 6(2).

34. GG art. 2.

35. *Vaterschaftstests*, *supra* note 15.

36. Law Supplementing the Right to Challenge Paternity, *supra* note 28, at 313.

to vest power to test in a neutral third party, and, the potential for mandatory testing at birth.

Part VI analyzes the gaps in the new German law and potential solutions to the resulting problems. These problems include lack of uniformity in testing standards and lack of effective punishment for men who continue to conduct secret DNA tests. In addition, I discuss the continuing tension between the rights of the parties as well as the high evidentiary burden placed on fathers who wish to challenge paternity.

Part VII discusses the exportability of the German approach to the American context and compares the German approach to the alternative concept of dual legal paternity.³⁷ Part VIII concludes with a comparative discussion of how the German approach and the dual legal paternity approach could be utilized in American jurisdictions.

II. THE LEGAL CHALLENGE OF DEFINING PATERNITY IN THE AGE OF GENETIC CERTAINTY BASED UPON LAWS DEVELOPED IN AN AGE OF UNCERTAINTY

In both Germany and the United States, the laws governing paternity begin with a strong presumption that the husband of a woman is the father of any child born to her (i.e., the marital presumption).³⁸ When children are born out of wedlock, both systems allow for voluntary acknowledgment³⁹ and judicial determination of paternity.⁴⁰ Both systems

37. See generally Melanie B. Jacobs, *My Two Dads: Disaggregating Genetic and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006) (discussion of the concept of dual paternity and suggestions for implementation).

38. The marital presumption in Germany is found in the statutory definition of paternity. BGB §§ 1592(1), 1594(2).

In the United States, the marital presumption is a matter of state law, evolved from a common law doctrine to a binding statutory principle. See, e.g., Cal. Evid. Code § 621(a) (1995); Cal. Fam. Code §§ 7540–41 (2004).

39. In Germany, a child born to a mother who is not married to the father at the time of birth has no father. A man may acknowledge paternity under BGB § 1592(2). The consent of the child's mother (or the child when the mother is not providing care) is required in order for a man to sign a voluntary declaration. BGB § 1595. The consent may be signed either before or after the birth of the child. BGB § 1594(4).

In the United States, the exact process varies from state to state. In California, a father may also acknowledge paternity by being named on the child's birth certificate (Cal. Fam. Code § 7540 (2004)) or by voluntarily signing a declaration of parentage (Cal. Fam. Code §§ 7570–77 (2004)).

40. In Germany, a man may also be determined to be the legal father of a child by a legal process pursuant to section 1600(d) of the Bürgerliches Gesetzbuch [Civil Law Code].

impose obligations on a father based solely on genetics, but do not grant him any rights based on genetic ties alone. Both systems also struggle with the legal rights of non-marital genetic fathers and the conflict of rights between mother, father(s), and child.⁴¹

A. From the Bright-Line Marital Presumption to the Struggle to Identify Non-Marital Fathers

In both Germany and the United States, the starting point for determining legal paternity is the “marital presumption.”⁴² The marital presumption states that the husband of the child’s mother is presumed to be the genetic father of the child in absence of some exceptional circumstances.⁴³ The presumption arose in an era when genetic paternity could not be scientifically determined with any level of accuracy and

In the United States, the exact process varies from state to state. In California, a man may be declared legal father by a court and ordered to pay child support. Cal. Fam. Code. § 7611(c) (2004).

41. In addition to the principal case discussed in this Comment (*Vaterschaftstests*, *supra* note 15) the German Federal Constitutional Court has addressed several issues related to paternity and paternity determinations. *E.g.*, BVerfGE, 1 BvR 1620/04 vom 1.4.2008 [Apr. 1, 2008], www.bundesverfassungsgericht.de/entscheidungen/rs20080401_1bvr162004.html [German language version only], (finding that legal father cannot be forced to have contact with his offspring); BVerfGE, 1 BvR 1444/01 vom 29.11.05 [Nov. 29, 2005], www.bundesverfassungsgericht.de/en/decisions/rk20051129_1bvr144401en.html [Official English Translation] (evaluating the claim of the natural father of a child born illegitimate who challenges the adoption of that child by the husband of the child’s mother); *Vaterschaftsanfechtung* BVerfGE, 2 BvR 696/04 vom 24.10.2006 [Oct. 24, 2006], www.bundesverfassungsgericht.de/entscheidungen/rk20061024_2bvr069604.html [German language version only], (dealing with the effect of disapproval of paternity where alleged father was a German national but mother of child was not).

Similar issues arose in the United States. *Compare* *Lehr v. Robertson*, 463 U.S. 248 (1983) (finding that a genetic father did not have standing to protest the adoption of his child by the current husband of the mother because he had not been active in raising the child and was not part of the putative father registry) *with* *Adoption of Kelsey S.*, 1 Cal. 4th 816 (1992) (finding that a genetic father who claims paternity of a child from an affair immediately after birth has standing where the married mother of the child wants to put the child up for adoption).

42. *See* BGB §§ 1592(1), 1594(2); Cal. Evid. Code § 621(a) (1995); Cal. Fam. Code §§ 7540–41 (2004).

43. In general, “impotence, sterility, or non-access to the wife” are sufficient to rebut the marital presumption. *See* Diane S. Kaplan, *Why Truth Is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 70, 73–81 (2000); Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547 (2000). Such factors will not rebut the presumption where there was consent by the husband to the conception. *See, e.g.*, *People v. Sorensen*, 68 Cal.2d 280 (1968) (holding that husband of mother had consented to artificial insemination and could be forced to pay child support).

was thus designed to ensure that the child was financially supported⁴⁴ and to preserve the sanctity of the traditional family.⁴⁵

Where no traditional family exists, courts and legislatures have struggled to set proper guidelines for determining paternity. Traditionally, children born out of wedlock were treated as having only one legal parent.⁴⁶ This resulted in the genetic father having no legal rights with respect to the children and the children having no legal rights with respect to the genetic father.⁴⁷

In the United States, this bias against illegitimacy began to change in the latter half of the twentieth century through action of courts and legislatures at both the state and federal level. During the late 1960s and early 1970s, American courts, including the United States Supreme Court, attacked this practice as a violation of the Equal Protection Clause.⁴⁸

44. In the Basic Law [German Constitution], the rights of a child to care and support, the duties upon parents to so provide, and the duty of the state to protect the family are part of the same article. GG art. 6.

45. In finding that the preservation of the family was more important than the genetic father's claim, Justice Scalia states that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the Institution of the family is deeply rooted in this Nation's history and tradition." *Michael H. v. Gerald D.*, 491 U.S. 110, 123–24 (1989) (plurality opinion).

46. Both the Germany and the United States began grappling with these issues at about the same time. See Sybille Buske, *FRÄULEIN MUTTER UND IHR BASTARD: EINE GESCHICHTE DER UNEHELICHKEIT IN DEUTSCHLAND 1900 BIS 1970*, [Miss Mommy and her Bastard: A History of Illegitimacy in Germany from 1900 to 1970] (Wallstein 2004); Michael Bohndorf, *The New Illegitimacy Law in Germany*, 19 INT'L & COMP. L.Q. 299–308 (1970); Irwin J. Schiffres, Annotation, *Discrimination on Basis of Illegitimacy as Denial of Constitutional Rights*, 38 A.L.R.3d 613 (1971); RAMSEY & ABRAMS, *supra* note 1, at 48–49.

47. For example, prior to the United States Supreme Court decision in *Stanley v. Ill.*, 405 U.S. 645 (1972), it was the practice of the State of Illinois to deem unmarried fathers as unfit to raise their own children. This standard applied only to unmarried fathers as all other types of parents were deemed fit unless proven unfit in a hearing. *Id.* See also RAMSEY & ABRAMS, *supra* note 1, at 48.

48. See e.g., *Gomez v. Perez*, 409 U.S. 535 (1973) (holding that children born out of wedlock are constitutionally entitled to the same right of support as are children of married parents); *Stanley v. Ill.*, 405 U.S. 645 (holding that unwed father could not be presumed unfit to assume care over his children); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (holding that children born out of wedlock who lived in an intact household with their unwed mother and father could seek recovery under the state's workers compensation law); *Levy v. L.A.*, 391 U.S. 68, 72 (1968) (holding that the Equal Protection Clause is violated by not permitting five children born out of wedlock to seek damages as a result of the wrongful death of their mother). *But see* *Matthews v. Lucas*, 427 U.S. 495 (1976) (holding that social security benefits could be denied to an illegitimate child where there was no communal household, no written acknowledgment

In 1973, the Conference of Commissioners on Uniform State Laws (NCCUSL) directly addressed this issue by promulgating the Uniform Parentage Act (UPA).⁴⁹ Faced with a rise in welfare costs and a failure of fathers to pay child support to non-marital children, the federal government passed laws that defined fatherhood broadly enough to encompass non-marital genetic fathers, providing them with a means of voluntarily establishing paternity and ensuring that they would be held legally responsible for the basic needs of their children if they do not voluntarily provide for them.⁵⁰ Thus, the American legal structure evolved from one hostile to parents and children in non-marital families to one extremely protective of the rights of children born out of wedlock.

A similar process of evolution occurred in Germany.⁵¹ Prior to unification, the laws of the Federal Republic (West Germany) moved from hostility to non-marital families to strong protection of the right of children born out of wedlock to be financially supported by their genetic fathers.⁵² The issue of non-marital children was raised again during the unification process because the laws of the former German Democratic Republic (East Germany) extended greater inheritance rights to non-marital children than the laws of the Federal Republic.⁵³ Consequently,

of paternity nor a judicial proceeding as the parents' marital status was relevant to the child's rights and obligations).

49. Unif. Act on Parentage (1973). The Act was revised in 2000, in response to the tremendous changes in reproductive technology. Unif. Act on Parentage (2000).

50. Title-IV of the Social Security Act established a federal level apparatus concerned with child support and establishment of paternity. 42 U.S.C. §§ 651–52 (2003). The law now requires mandatory DNA testing for paternity in certain cases (42 U.S.C. § 666(5)(B)(1) (2003)); state laws mandating determination of paternity by judicial process (42 U.S.C. § 666(a)(5)(D)(ii) (2003)); and that states accept acknowledgment of paternity validly entered into in another state (42 U.S.C. § 666(a)(5)(C)(iv) (2003)). Additionally, as a condition of receiving welfare benefits, a mother must now assign child support payments to the state to reimburse it for any welfare payments she receives. 42 U.S.C. § 649(29) (2003).

51. The laws of the Federal Republic (West Germany) are the principal source of concern since those laws govern the unified German state.

52. The German legislature addressed the issue of illegitimacy slightly before the United States in its reforms in 1969. GESETZ ÜBER DIE RECHTLICHE STELLUNG DER NICHTHELICHEN KINDER [LAW CONCERNING THE LEGAL STATUS OF NON-MARITAL CHILDREN] Aug. 19, 1969 BGBl. I at 1243. Caselaw on issues of equality between marital and non-marital children is still evolving. *See, e.g.*, BVerfGE, 1 BvL 9/04 vom 28.2.2007 [Feb. 28, 2007], Absatz-Nr. (C-II-77), http://www.bverfg.de/entscheidungen/rs20070228_1bv1000904.html, [German language only], (holding that the legislature breached Article 6(5) of the Basic Law by granting different durations for a maintenance claim to children born in wedlock and those born out of wedlock).

53. The East German Family Code made no distinction between marital and non-marital (i.e. "illegitimate") children. DIETER MARTINY, INTRODUCTION TO GERMAN LAW 260 (Mathias Reimann & Joachim Zekoll, eds. Kluwer Law International 2005).

when the two Germanys merged under the laws of the Federal Republic, the probate code was amended to prevent divesting of rights held by East Germans who had been born out of wedlock.⁵⁴ Thus, the current legal framework in Germany protects non-marital children's right to be supported by their genetic fathers and their right to inherit property from their genetic fathers.

Currently, both the German and American systems establish non-marital paternity by either voluntary acknowledgment⁵⁵ or judicial determination of paternity.⁵⁶ Both systems also evidence a fundamental disconnect between the responsibility that can be imposed on a genetic father and the rights a father can have based solely on genetic paternity: A father⁵⁷ can have obligations of care and financial support placed on

54. *Id.*

55. In Germany, a man may acknowledge paternity [*Vaterschaftsanerkennung*] under Bürgerliches Gesetzbuch [BGB] Buch 4 Familienrecht [Family Code] section 1592(2) (BGB § 1592(2)); *see also* SCHWAB, *supra* note 1, at 229–40, paras. 459–79.

In the United States, the exact process varies from state to state. In California, a father may also acknowledge paternity by being named on the child's birth certificate (Cal. Fam. Code § 7540 (2004)) or by voluntarily signing a declaration of parentage (Cal. Fam. Code § 7570–77 (2004)).

56. In Germany, judicial determination of paternity [*Vaterschaftsfeststellungsurteil*] is allowed under Bürgerliches Gesetzbuch [BGB] Buch 4 Familienrecht [Family Code] section 1592(3) (BGB § 1592(3)); *see also* SCHWAB, *supra* note 1, at 240–43 paras. 480–86.

In the United States, the exact process varies from state to state. In California, a man may be declared legal father by a court and ordered to pay child support. Cal. Fam. Code. § 7611(c) (2004).

57. The term “father” contains several elements and is generally broken down into categories based on the certainty of the man's “genetic”, “functional”, and “legal” relationship to the child. For example, California divides the genetic and functional aspects of fatherhood into five distinct categories:

1. An *alleged father* is a man who may be the genetic father, but genetic paternity has not been established;
2. A *genetic father*, is a man who has been confirmed as the genetic father of a child, but who has not achieved presumed fatherhood status as defined in most state statutes (*In re Zacharia D.*, 6 Cal.4th 435, 449, n.15 (1993));
3. A *Kelsey father* is a genetic father who acted promptly to assume his paternal obligations to the fullest extent possible, but is unable to attain presumed fatherhood status through no fault of his own (*Adoption of Kelsey S.*, 1 Cal. 4th 816 (1992));
4. A *presumed father* is a man who meets one of the following criteria and has not successfully rebutted the presumption of paternity:
 - a. He was married to the child's mother at the time of the child's birth or the child was born within 300 days of separation (Cal. Fam. Code, § 7540 (2004));
 - b. He married the child's mother after the child's birth and is either named on the child's birth certificate or has a voluntary or court-ordered child

him solely on the basis of genetic paternity,⁵⁸ but he cannot get rights in court proceedings, such as adoption proceedings⁵⁹ or juvenile dependency proceedings,⁶⁰ based solely on genetic paternity.⁶¹ While courts and legislatures have created complex schemes differentiating between types of fathers,⁶² there can be only one legal father. Genetic fathers have almost no rights over offspring born to a mother who is married to another man at the time of the child's birth⁶³ as the state's interests are best served by the efficient and unambiguous determination of "legal" paternity.⁶⁴

support obligation (*Id.*; Cal. Fam. Code § 7611(c) (2004)); He has lived with the child and held himself out as the child's father (*Id.*; Cal. Fam. Code § 7611(d) (2004)), or he and the mother have signed a voluntary declaration of parentage under Family Code §§ 7570–77 (2004).

58. There are several policy considerations that underlie this practice, including:

1. punishment of men who are deemed sexually irresponsible;
2. assumption of risk by men who choose to have sexual relations with a woman other than their wife; and,
3. the child's right to be financially supported. Jacobs, *supra* note 37, at 844–45.

59. For example, in California adoption proceedings, a genetic father must have attained presumed father status before his consent is required in adoption proceedings. Cal. Fam. Code § 8604(a) (2004).

60. For example, in California juvenile dependency proceedings:

Alleged fathers have the right to notice and an opportunity to show that they should be granted presumed father status. Cal. Welf. & Inst. Code § 361.2(b); California Rules of Court, Rule 1413(h); *In re Alyssa F.* 112 Cal.App.4th 846, 855 (2003). They have no right to custody or family reunification services. *In re Zacharia D.*, 6 Cal.4th at 435.

Genetic fathers have the right to notice and must be afforded an opportunity to show that they should be granted presumed father status. The court has discretion to grant family reunification services if it finds them to be in the child's best interest. *In re Raphael P.*, 97 Cal.App.4th 716, 726 (2002).

Kelsey S. fathers have the right to notice and an opportunity to show that they should be granted presumed father status. *Adoption of Kelsey S.*, 1 Cal.4th at 816. Failure to grant a *Kelsey S.* father visitation and other reunification services is a violation of due process rights and state statutory intent. *In re Julia U.*, 64 Cal.App.4th 532 (1988).

Presumed fathers have full standing as well as full constitutional and statutory rights. Cal. Welf. & Inst. Code §§ 311, 317, 319, 335, 337, 361.2, 366.21, 366.22, 366.26, 366.3; *In re Jesusa V.*, 32 Cal.4th 588, 610 (2004); *In re Jerry P.*, 95 Cal.App.4th 793, 804 (2002).

61. While not as severely constrained, a child's rights based on genetic ties alone are not absolute. See *Kenntnis der eigenen Abstammung* [Knowledge of One's Genetic origin] Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court] Jan. 31 1989, 79 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 256; *Ehelichkeitsanfechtung* [Action for Disavowal of Paternity] Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court] Apr. 26, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 263.

62. The California scheme delineated in note 57 is a typical example of a complex state scheme.

63. *Michael H. v. Gerald D.*, 491 U.S. 110, 119–20 (1989).

64. *Ex rel. Hermesmann v. Seyer*, 847 P.2d 1273 (Kan. 1993); *In re Parentage of J.S. v. Williams*, 550 N.E.2d 257, 258 (Ill. App. 1990).

*B. Rights and Interests Implicated by Paternity
Determinations*

While courts and legislatures certainly have an interest in efficient determination of legal paternity status, the primary difficulty with determining paternity based on a black-letter rule or upon a small set of immutable factors is that many of the complex and conflicting rights and interests of the parties are lost in the process. In order for paternity proceedings to adequately reflect the complexities of modern life, the rights and interests of the legal and potential genetic fathers, the rights and interests of the mother, and the rights and interests of the child must all be balanced against each other and against the state's interests in efficiency, preservation of the family structure, and in preservation of the child's right to support.

In almost all paternity proceedings, the rights and interests of legal and potential genetic fathers are in conflict. The typical case in both Germany and the United States involves a non-genetic father challenging the financial burdens imposed by legal paternity.⁶⁵ This usually occurs in cases where the legal father alleges that he assented to legal paternity only because he was fraudulently induced into believing that the child in question was his genetic offspring and in cases where a child born to the legal father's wife was not their genetic offspring.⁶⁶ In both types of cases, the fathers allege that the true responsibility for the child lies with its genetic father.⁶⁷ Accordingly, the legal father seeks to shift the financial burden for the child onto the genetic father who may not want the burden of supporting his genetic offspring.

While not the primary focus of the paternity challenges mounted by legal fathers in either system, an individual also has a right to control his

65. "Cuckholded" fathers have attempted to raise legal challenges in both Germany and the United States. *E.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice], XII ZR 207/03 vom 29.3.2006 [Mar. 29, 2006], <http://www.bundesgerichtshof.de/> (select "Entscheidungen", then select "Zugang zur Entscheidungsdatenbank des Bundesgerichtshofs", then from the "Kalender" select "März 2006" and scroll to find the case) [German language only] (denying father right to terminate parental status where wife was working as a prostitute at time of conception); *In re Paternity of Cheryl*, 746 N.E.2d 488 (Mass. 2001) (holding that man who had genetic evidence disproving paternity could not vacate a paternity judgment entered more than five years earlier).

66. *See, e.g., In re Paternity of Cheryl*.

67. *Id.*

own genetic information,⁶⁸ and a right to procreative freedom,⁶⁹ which taken together creates the subsidiary right to know the genetic origin of one's legal offspring.⁷⁰ Within this context, a potential genetic father has the right to know whether or not he is a genetic father and has an interest in knowing and supporting his genetic offspring.⁷¹ These particular rights and interests are often in direct conflict with the rights and interests of the legal father with respect to the children in question, particularly where the potential genetic father seeks to interject himself between the child and a legal father who wishes to continue to serve as the child's legal, functional, and social father.⁷² Hence, there are multiple points of conflict between legal and potential genetic fathers.

68. The German government has only recently begun to put some teeth into this privacy right by providing punishment for those who violate it, primarily in the form of fines. GESETZ ÜBER GENETISCHE UNTERSUCHUNGEN BEIM MENSCHEN [LAW CONCERNING GENETIC TESTING OF HUMANS], July 31, 2009, BGBl Teil 1, Nr. 50, 2529.

The United States lacks similar personal protection. See, e.g., *Wash. Univ. v. Catalona*, 437 F. Supp. 2d 985 (E.D. Mo. 2006) (holding that cells at issue in the case had been given to the University by the patients as an inter-vivos gift and that neither the patients nor the researching professor had the right to transfer the samples); *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla.2003) (holding that research participants retain no ownership of genetic materials they contribute for medical research); *Moore v. Regents of the Univ. of Cal.*, 51 Cal. 3d 120 (1990) (holding that individual who was being treated by the University retained no ownership rights in his discarded cells). Nevertheless, some courts do recognize the importance of control over information related to one's genetic make-up. As the Ninth Circuit has noted "[o]ne can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up." *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998).

69. The Supreme Court has never directly litigated on this issue. The highest court to address the issue was the United States Court of Appeals for the Sixth Circuit, which rejected the plaintiff's claim that the state's paternity and child support laws violated the rights of men to choose not to produce. *Dubay v. Wells*, 506 F.3d 422 (E.D. Mich. 2007) (denying father's 42 U.S.C. § 1983 claim that the state's paternity statutes violated his equal protection rights and holding that the rational basis test would be applied to state paternity laws).

70. The German Federal Constitutional Court ruled that visitation based solely on a genetic connection cannot be forced upon an unwilling party. BVerfGE, 1 BvR 1620/04 vom 1.4.2008 [Apr. 1, 2008], www.bundesverfassungsgericht.de/entscheidungen/rs20080401_1bvr162004.html [German language only].

The plurality in *Michael H.* supports this view as Justice Scalia rejected the child's guardian ad litem's opinion that the child's best interest was served by a relationship with the genetic father. *Michael H. v. Gerald D.*, 491 U.S. 110, 110, 115 (1989). Nevertheless, neither court has delineated what should happen when the genetic father and child both want visitation but the mother raises an argument that it is not in the child's best interest—particularly where it will damage her relationship with her current husband.

71. *Vaterschaftstests*, *supra* note 15.

72. The conflict was the root of the *Michael H.* decision. *Michael H.*, 491 U.S. at 110–15.

In addition to being in conflict with each other, the rights of the legal and potential genetic fathers are often in conflict with the mother's rights. The mother has a vested privacy right in her sexual history that is unavoidably invaded by any attempt by either a legal or potential genetic father to challenge her assertions about paternity.⁷³ In addition, the mother is often the physical custodian of the child and the guardian of his well-being, so the mother has an interest in protecting the child's privacy and the child's right to be supported by (at least) two parents.⁷⁴ When legal or genetic fathers seek to force determination of genetic paternity or to avoid the responsibility of legal paternity, the rights of the mother individually and her rights and interests as guardian of her child are always implicated.

The child in question also has a fundamental right to control his own personal information as well as a right to stability and support that is in conflict with the rights of his legal father, potential genetic fathers, and his mother. The right of a child to control his personal information includes the right to know his genetic origin. As with challenges to paternity brought by the legal father or potential genetic father, a child's challenge to his mother's word on his paternity necessarily invades his mother's right to privacy regarding her sexual history and may well invade the rights of the genetic father and other men who are implicated in the paternity proceeding.⁷⁵ Additionally, the right to know and control one's genetic information includes the implicit right to remain in ignorance and be left alone regarding the matter.⁷⁶ Consequently, if either the child or the potential genetic father(s) oppose testing, the rights of both parties cannot be protected. Either the right to know or the right to remain in ignorance must be sacrificed. Finally, even in cases where the facts are such that these rights are not in direct conflict, the child at issue has a right to a stable home life and the right to support,⁷⁷

73. The brief of the German Women Lawyer's Association [Der Deutsche Juristinnenbund] in the case of *Herrn S.* expressed this concern. *Vaterschaftstests*, *supra* note 15, at 215–16//*Vaterschaftstests*, BVerfGE, 1 BvR 421/05 Absatz-Nr. (A-I-36 & 37).

74. *Vaterschaftstests*, *supra* note 15, at 233//*Vaterschaftstests*, BVerfGE, 1 BvR 421/05 at Absatz-Nr. (B-II-81).

75. *Id.* at 233 //Absatz-Nr. (B-I-77).

76. The decision of the Bundesgerichtshof [Federal Court of Justice] in the *Vaterschaftstests* case included an expression of concern for the child's right to remain in ignorance. *Id.* at 209–10//Absatz-Nr. (A-II-15).

77. German parents have a constitutional obligation under Article 6 of the Basic Law to nurture and care for their children. GG art. 6(2).

both of which may be jeopardized by a finding of genetic nonpaternity on the part of the legal father, particularly in cases where the genetic father cannot or will not financially support the child. So even in cases where all parties agree to paternity testing, there are downstream consequences that implicate the rights and interests of the child.

The last area of conflict in paternity determinations is the conflict of the rights of the individuals with the interests of the state. While the custodial parent is the guardian of the child's rights,⁷⁸ the state has an independent interest in the paternity determination process. States have an interest in an efficient determination of paternity to avoid stress on the judicial and administrative systems.⁷⁹ States also have an interest in the preservation of family structures in order to promote a healthy and productive society.⁸⁰ Finally, states have an interest in the preservation of a child's right to be fully supported by his parents, as the state often bears the costs when parents do not adequately support a child.⁸¹ For these reasons, there are intractable conflicts between and among the rights and interests of the parties to the action and of the state itself.

III. SPECIAL ISSUES IN THE GERMAN SYSTEM

Balancing the rights and interests of all parties is especially vexing in the German context. German law and social mores tend to be more restrictive than the United States on issues of family law and reproductive freedom.⁸² Additionally, the German state, at all levels of government, has an affirmative constitutional duty to protect the family structure⁸³ and to ensure the rights and obligations of parents.⁸⁴ The German state also has a duty to protect the right of an individual to develop his or her own personhood,⁸⁵ which includes a right to know and control one's own genetic information up to and including the right to know one's genetic origin and the genetic origin of one's potential

78. *Vaterschaftstests*, *supra* note 15, at 229//Absatz-Nr. (B-I-69). In the United States, the Supreme Court used the issue of control over a child's rights to deny the father standing to sue in the famous *Newdow Pledge of Allegiance* case. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

79. *RAMSEY & ABRAMS*, *supra* note 1, at 58–59.

80. *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989).

81. *Ex rel. Hermesmann v. Seyer*, 847 P.2d 1273 (Kan. 1993); *In re Parentage of J.S. v. Williams*, 550 N.E.2d 257, 258 (Ill. App. 1990).

82. *See generally* MARTINY, *supra* note 53, at 262.

83. GG arts. 6(1) & (6)(2).

84. GG art. 6(2).

85. GG art. 1(1).

offspring.⁸⁶ European Union law reinforces this personality right.⁸⁷ Within this context, balancing of relative interests becomes even more difficult than in the American system.

A. *The Central Role of the Traditional Family in German Law*

In the United States, legal rights pertaining to the family structure and reproductive rights are negative rights (i.e. rights protected *against interference* by the state).⁸⁸ This is not the case in many European nations where the state must take an active role in protecting the traditional family and the sociopolitical structure that supports it. The result is both proactive policies of support for traditional families and laws that bar practices detrimental to the traditional family structure. For example, France does not allow surrogacy.⁸⁹ It bans postmortem conception from sperm taken from a deceased individual, regardless of whether or not he would have consented.⁹⁰ In vitro fertilization and other similar techniques are restricted to stable heterosexual couples of reproductive age.⁹¹ These laws demonstrate that France's pro-family policies are limited to a narrow, conservative notion of the "traditional" family.

86. *Vaterschaftstests*, *supra* note 15, at 225// BVerfGE, 1 BvR 421/05, Absatz-Nr. (B-1-58).

87. Besson, *supra* note 15, at 142.

88. J. McGregor & F. Dreifuss-Netter, *France and the United States: The Legal and Ethical Differences in Assisted Reproductive Technology (ART)*, 26 MED. & L. 117, 126–27 (2007); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that there is a fundamental liberty interest in "establish[ing] a home and bring[ing] up children" without state interference under the Fourteenth Amendment); *cf.* BVerfG, 1 BvR 691/03 vom 3.11.2005 [Mar. 11, 2005], Absatz-Nr. (13–24.), http://www.bverfg.de/entscheidungen/rk20051103_1bvr069103.html (holding that the state could not prevent parents from giving their child a first name that the local government had deemed a banned "last name" because it would be a violation of rights under Article 6(2) of the Basic Law).

89. McGregor & Dreifuss-Netter, *supra* note 88, at 120. The ban applies to both "full surrogacy (where the surrogate mother also provides oocytes) [and] partial surrogacy (where the couple undergo IVF before transferring the embryo into the surrogate mother's womb)." *Id.* If French citizens go abroad to employ a surrogate, the baby will only have a legal French parent if the father's sperm was used. *Id.* In that case, the French father will be recognized as the legal father, but the legal mother will be the birth mother of the child whether or not she bears any genetic relationship to the child or has any desire or intent to play a part in its upbringing. *Id.*

90. *Id.* at 132.

91. *Id.* at 121.

German law similarly protects the “traditional view” of the family in its laws governing reproductive rights. German law strongly discourages assisted reproduction.⁹² Surrogacy in all forms is banned outright. The first section of *Das Embryonenschutzgesetz* (Act for the Protection of Embryos) imposes criminal sanctions and fines for violations.⁹³ Additionally, surrogacy is forbidden under *Das Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern* (The Law Concerning Adoptive Placement of a Child and Prohibiting Surrogacy).⁹⁴ As a result of these two legal prohibitions, surrogacy contracts could never be enforced by a German court as they would be deemed *void ab initio*.⁹⁵ Thus, in the interest of protecting the traditional family structure, German law prohibits practices that are legal in the United States, including many that have gained a level of social acceptance by the American public.

In addition to general conservatism in reproductive matters, the German state highly values marriage, family life, and motherhood. The Basic Law states that marriage and family are under the special protection of the state,⁹⁶ as is the special role of the mother in a child’s life.⁹⁷ These

92. See SCHWAB, *supra* note 1, at 244, para. 487; MARTINY, *supra* note 53, at 262; see generally Andreas S. Voss, *The Right to Privacy & Assisted Reproductive Technologies: A Comparative Study of the Law of Germany and the U.S.*, 21 N.Y.L. SCH. J. INT’L & COMP. L. 229 (2002).

93. EMBRYONENSCHUTZGESETZ. [LAW PROTECTING EMBRYOS] BGBl. I 2001, S. 2702. In contrast, semen donation is not as strongly regulated. So long as the child has another legal father, the man has no relationship to the child. SCHWAB, *supra* note 1, at 245–46, para. 491).

94. Das Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern [The Law Concerning Adoptive Placement of a Child and Prohibiting Surrogacy], Dec. 22, 2001, BGBl. I at 3174 (F.R.G.).

95. Contracts that violate other laws are void under sections 134 and 138 of the Civil Code. BGB §§ 134 & 138.

96. GG art. 6(1). In its entirety, Article 6 states:

1. Marriage and the family shall enjoy the special protection of the state.
2. The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.
3. Children may be separated from their families against the will of their parents or guardians only pursuant to a law, and only if the parents or guardians fail in their duties or the children are otherwise in danger of serious neglect.
4. Every mother shall be entitled to the protection and care of the community.
5. Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.

Official English Translation of the Basic Law by the German Bundestag available at http://www.bundestag.de/interakt/informationmaterial_alt/fremdsprachiges_material/downloads/ggEn_download.pdf [PDF format].

97. GG art. 6(4).

provisions expressly include protection of the relationship between parents and their children, whether legitimate or illegitimate.⁹⁸ This protection is not limited to guarding individual and familial rights from outside interference (i.e. a negative right).⁹⁹ It is an affirmative duty of the government to take action to protect the family (i.e. a positive right) that must be obeyed even when it conflicts with other governmental interests.¹⁰⁰ For example, the Federal Constitutional Court overruled a decision by German immigration officials to deny an application to extend a visa because the individual in question was the father of a German national and the child had a constitutionally protected right to the preservation of her family.¹⁰¹ Thus, the affirmative protection of the family required by the Basic Law is so strong that it can override an otherwise valid state interest.

One final difference between the German and American family law system involves the levels of government that are actively involved in shaping paternity law. In the United States, family law matters are traditionally regarded as the province of the states, with the federal government acting primarily through the power of the purse.¹⁰² In Germany, there is extensive federal government regulation of family matters, including direct legislation on the issue of paternity.¹⁰³ Sections 1592 through 1600 of the (federal) German Civil Code address the issue of paternity,¹⁰⁴ covering such topics as the definition of father,¹⁰⁵

98. GG art. 6(5).

99. GG arts. 6(2) & 6(3). Such protection also exists in the United States. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

100. GG arts. 6(1) & (2).

101. BVerfG, 2 BvR 1001/04 vom 8.12.2005 [Dec. 8, 2005], Absatz-Nr. (B-I-15 through 36), http://www.bundesverfassungsgericht.de/entscheidungen/rk20051208_2bvr100104.html [German language only]. The combination of rights under arts. 6(1) and 6(2) means that development of the child, including spiritual development, that occurs through the nurturing and protection of the family structure must be actively protected by the state. (B-I-18).

102. One example of the difference is that determination of paternity is included in the federal Civil Code in Germany. BGB §§ 1590–1600. In the United States, this is a matter of state law. *E.g.* CAL. FAM. CODE §§ 215, 3172, 5604, 7550, 7551, 7555, 7570, 7573, 7574, 7575, 7577, 7641, 7646, 7647, 7648, 7648, 17406 (Deering 2009).

103. Book 4 of the [Federal] Civil Code is dedicated entirely to Family Law matters. BGB Buch 4.

104. BGB §§ 1592–1600.

105. BGB § 1592.

recognition of paternity,¹⁰⁶ and legal challenges to paternity.¹⁰⁷ When issues of family law develop in Germany, it is the German Parliament that ultimately resolves the issue after due consideration of the decisions of the federal courts.¹⁰⁸

B. German Right to Informational Self-Control

One of the issues faced by the German Parliament when legislating on family law matters is the balancing of its duties with respect to the protection of the family (and motherhood) against the individual rights expressly and impliedly guaranteed by the Basic Law. The Basic Law provides an express constitutional right to “free development of personality.”¹⁰⁹ This right and the right to human dignity protected by the first article of the Basic Law¹¹⁰ are often bundled with other rights to offer broader constitutional protection than either right could provide

106. BGB §§ 1594–98.

107. BGB § 1600.

108. For example, in the case of *Herrn S.*, the Federal Constitutional Court delineated all of the issues of concern and then mandated that the Bundestag [German legislative chamber] draft a law to resolve the issues within a specified time frame. *Vaterschaftstests*, *supra* note 15, at 243//BVerfGE, 1 BvR 421/05, Absatz-Nr. (C-I-100).

109. GG art. 2 states:

1. Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
2. Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.
3. Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

Official English Translation of the Basic Law, *supra* note 96.

In the famous census cases, the Federal Constitutional Court determined that informational self-determination was implicitly a part of the right enumerated in Article 2 of the Basic Law. *Mikorzensus* [Microcensus], Bundesverfassungsgericht [BVerfGE] [German Federal Constitutional Court] July 16, 1969, 27 Entscheidungen des Bundesverfassungsgericht [BVerfG] 1; *Volkszählungsurteil* [Census Case] Bundesverfassungsgericht [BVerfGE] [German Federal Constitutional Court] Dec. 15, 1983, 65 Entscheidungen des Bundesverfassungsgericht [BVerfG] 1.

110. GG art. 1 states

1. Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
2. The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
3. The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.
4. The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Official English Translation of the Basic Law, *supra* note 96.

standing alone.¹¹¹ Within this context, the Federal Constitutional Court developed a concept of the “right to informational self-control.”¹¹²

The right to informational self-control comes to play in many different legal contexts.¹¹³ It must be balanced against competing interests.¹¹⁴ For example, it protects the right of a transsexual to choose to go by a female or a male name, regardless of actual “assigned” (i.e. legal) gender.¹¹⁵ It protects the individual against dissemination of a technically manipulated image that gives the impression that it is an authentic portrayal of the individual.¹¹⁶ It also protects the right to know one’s genetic information.

The Federal Constitutional Court determined that the right to know one’s genetic origin is a distinct and essential part of the right of personality.¹¹⁷ In the opinion of the Federal Constitutional Court, knowledge of genetic origin is central to development of individual character.¹¹⁸ It is a right that the state must affirmatively protect.¹¹⁹ Consequently, the state cannot place unreasonable limits on the right, such as a two-year statute of limitations from attainment of majority that effectively prevented many young adults from discovering their genetic heritage.¹²⁰ However, this does not mean that the right to know one’s

111. Anke Freckmann & Thomas Wegerrich, *THE GERMAN LEGAL SYSTEM* 88–89 (1999).

112. BVerfGE, 1BvL 19/63 vom 16. Juli 1969.

113. For example, the Bundesgerichtshof [Federal Court of Justice] found that the right of personality came into play where an individual sought to keep his medical records from the hands of an insurance company investigating a claim of fraud on the part of the treating physician. *Persönlichkeitsrecht* [Personality Rights] Bundesgerichtshof in Zivilsachen [BGHZ] [German Federal Court of Justice in Civil Matters] Apr. 2, 1947, 24 Entscheidungen des Bundesgerichtshof in Zivilsachen [BGHZ] 72 (F.R.G.) 12–20.

114. *Id.* at 18, 22, and 23.

115. *Namensrecht und sexuelle Selbstbestimmung*, Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] Dec. 6, 2005, 114 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, 2006 (F.R.G.)/BVerfG, 1 BvL 3/03 vom 6.12.2005 [Dec. 6, 2005], Absatz-Nr. (B-46 through 71), http://www.bverfg.de/entscheidungen/1s20051206_1bvl000303.html [German language only].

116. BVerfG, 1 BvR 240/04 vom 14.2.2005, Absatz-Nr. (II-10 through 29), http://www.bverfg.de/entscheidungen/rk20050214_1bvr024004.htm [German language only].

117. *Vaterschaftsaskunft*, *supra* note 22, at 268–69 (“Das allgemeine Persönlichkeitsrecht umfaßt zwar auch das Recht auf Kenntnis der eigenen Abstammung” (the general right of personality also protects the right to knowledge of one’s genetic origin)).

118. *Vaterschaftsaskunft*, *supra* note 22, at 266.

119. *Id.*

120. *Ehelichkeitsanfechtung*, Bundesverfassungsgericht [BVerfGE] [German Federal Constitutional Court] Apr. 26, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BVerfG] 263 (F.R.G.).

genetic information necessarily encompasses a right to affirmatively obtain all relevant information in all situations.¹²¹ Under German law, the right to know one's genetic origin is fundamental, but not absolute.

The European Union developed similar concepts of the right to informational self-control and the right to know one's genetic origin. While the European Convention on Human Rights did not expressly guarantee a right to know one's genetic origin, courts have found that a right is implied from the protection of an individual's private life.¹²² The European Court of Human Rights (ECHR) discussed this right and determined that it was a fundamental right under European Union law.¹²³ As a result, the state has an affirmative duty to protect the right.¹²⁴ While this right includes a right to relevant information, it does not mean that a child has an absolute right to contact his genetic relatives.¹²⁵ Similar to the approach in the German national context, the ECHR has held that the right is not absolute and requires state actors to balance it against other rights, such as the privacy rights of the parents.¹²⁶

While both offer strong protection of the right to know, neither the Convention nor the Court provided universally accepted definitive guidance on how to accomplish the balance between competing rights implicated by such an inquiry.¹²⁷ In practice, each European Union member approaches the balance differently. Some, such as the United Kingdom, give more deference to the rights of mothers while others, such as Germany, give more deference to the rights of the child.¹²⁸

C. The Effect of Conflicting Rights in the German Context

In Germany, the balancing of various rights and interests involved in genetic parenthood led to outcomes very different from those that occurred in the United States. For example, in the German system there is no such thing as absolute parental anonymity in adoption proceedings,¹²⁹ and courts would likely not recognize a right to sperm

121. *Vaterschaftsaskunft*, *supra* note 22, at 266.

122. Besson, *supra* note 15, at 142.

122. Besson, *supra* note 15, at 142.

123. *Id.* at 151.

124. *Id.* at 144.

125. *Id.* at 146.

126. *Id.* at 147.

127. *Id.* at 150.

128. *Id.* at 153.

129. Adopted individuals in Germany are entitled to a copy of their original birth certificate containing listing the names of the parties. An adoptee is only required to write to the register in the city of his birth. 79 BVerfGE 256. A person over sixteen may access

donor anonymity because the child's right to know would trump the parental right of privacy.¹³⁰ In addition, the use of baby flaps, the German equivalent to safe havens, is legally problematic. Baby-flaps pit the right of the child to know his genetic origin against the privacy rights of the mother and the interest of society in having unwanted children placed in appropriate adoptive homes.¹³¹ Such flaps are tolerated because they serve the admirable goal of saving children, but it is unclear how the Federal Constitutional Court would rule if presented with a case where it had to directly address the conflict between the personality rights of the child and laudable policy of saving the life of unwanted infants.¹³²

While the right of the child to know his origins does not automatically take precedence, it is a firmly held right that must always be balanced against any other rights in play. For example, the Federal Constitutional Court has held that when the right of the mother's privacy and her own informational self-determination collide with the child's right to know his genetic origin, the child's rights do not always win, but must always be considered and must always be given great weight.¹³³ For example, in a case where a child brought suit to force her genetic mother to reveal the names of her potential genetic fathers, the court weighed the privacy rights of the mother in keeping her sexual history private against the right of the child to know his or her genetic heritage.¹³⁴ While the child's right was not absolute, the mother's privacy right was also not absolute.¹³⁵ Both parties' rights and interests must be carefully considered.

In contrast, when it comes to the father's right to keep his sexual history private, German courts are much less protective and frequently require exposure of potential genetic fathers, holding that a child's right to know his genetic origin and his right to be supported by his genetic

the public register, which keeps records on the origin of the child. PERSONENSTANDGES ETZ [PERSONAL STATUS LAW] § 61(2)(1) BGBI. I S. 1188, 1189. They also have a right to see their adoption file. DAS GESETZ ÜBER DIE VERMITTLUNG DER ANNAHME ALS KIND UND ÜBER DAS VERBOT DER VERMITTLUNG VON ERSATZMÜTTERN [LAW REGULATING ADOPTIVE PLACEMENT AND PROHIBITING SURROGACY] § 9(b)(2) BGBI. I S. 3171, 3174.

130. MARTINY, *supra* note 53, at 262; SCHWAB, *supra* note 1, at 245, para. 491.

131. Katherine O'Donovan, "Real" Mothers For Abandoned Children, 36 LAW & SOC'Y REV. 347 (2002).

132. *Id.* at 367.

133. *Vaterschaftsaskunft*, *supra* note 22.

134. *Id.*

135. *Id.* at 269.

father are paramount.¹³⁶ Arguably the far most dramatic case illustrating the discrepancy between the privacy rights of mothers and those of potential genetic fathers is known as the *Online Sex Auction Case*.¹³⁷ In this case, a German woman became pregnant after selling her sexual services in an online auction that guaranteed anonymity to the woman's sexual partners.¹³⁸ When the site that hosted the auction was sued in order to obtain the names of the men who "won" the auction, the civil court in Stuttgart ruled that even though the internet website had an interest in protecting the privacy of its users and the men had an interest in remaining anonymous, the interests of the child in learning the identity of his or her genetic father and being supported by him were more important.¹³⁹ It ordered the website to reveal the identities of the bidders so that genetic testing could reveal the identity of the genetic father¹⁴⁰ who would then likely be subject to a judicial process to declare him the legal father. Thus, even where German men have strong privacy interests in keeping their sexual history private and they may have other children and other families that may be affected by a positive paternity test—the right of a child to know his genetic origin and his right to be supported by his genetic father usually prevail.

IV. THE CASE OF *HERRN S.* AND ITS AFTERMATH

While genetic paternity has long been subject to forcible determination through legal process in order to protect the rights of the child, German men have not traditionally had corresponding means of enforcing their right to know if a child is their genetic offspring. Potential genetic fathers have not had a right to insert themselves into a child's life and legal fathers have not had a right to know whether their legal children are also their genetic offspring. Out of this context, the case of *Herrn S.* arose.¹⁴¹

136. Part of the reason for this discrepancy may be that German mothers are afforded special constitutional status and protection because of the constitutionally mandated protection of the family. GG art. 6(4); see Diana Zacharias, *The Protection of Mothers in British and German Constitutional Law: A Comparative Analysis and a Contribution to the Implementation of the European Convention on Human Rights in the Domestic Legal Area*, 9 GERMAN L.J. 27, 45–53 (2008).

137. *Going, Going, Pregnant: Online Sex Auctioneer Ordered to Reveal Customer's Identities*. SPIEGEL ONLINE, Feb. 13, 2008, <http://www.spiegel.de/international/zeitgeist/0,1518,535063,00.html>.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Vaterschaftstests*, *supra* note 15, at 207//BVerfGE, 1 BvR 421/05 Absatz-Nr. (A-II-11).

A. *The Case of Herrn S.*

Herrn S. lived with the mother of the child in question during the period of conception in a *nichtehelicher Lebensgemeinschaft* (non-marital domestic partnership).¹⁴² Herrn S. voluntarily recognized the girl shortly after her birth in 1994.¹⁴³ In 2001, he brought an unsuccessful challenge to his status as legal father based on a medical report stating he was 90% infertile.¹⁴⁴ The court held that the medical report did not satisfy the evidentiary requirements necessary to overturn a voluntary declaration of paternity and therefore dismissed his challenge.¹⁴⁵

In 2002, he renewed his challenge in the *Amtsgericht Hildesheim* (District Court of Hildesheim).¹⁴⁶ This time, his challenge was based on a clandestine DNA paternity test that he commissioned after obtaining a piece of his legal daughter's chewing gum.¹⁴⁷ In addition to the DNA test, he had expert opinion supporting his contention that there was 100% certainty he was not the father of the child.¹⁴⁸

The mother of the respondent, acting as her legal representative, objected to the introduction of the DNA report and expert opinion as evidence in the proceedings.¹⁴⁹ The court excluded the DNA test results because the test was conducted illegally under the law in force at the time.¹⁵⁰ While the expert opinion could be admitted, it was insufficient to challenge paternity.¹⁵¹ Even with the report, the court would not grant "official" paternity testing because Herrn S. had no reasonable suspicion that another man (i.e. a specific man) was the genetic father of the

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Amtsgericht Hildesheim* 37 F 37525/02 KL. The *Amtsgericht* is the German local district court that handles civil law affairs. The family court section will be composed of one or more judges specifically assigned. *Gerichtsverfassungsgesetz* [Code Regulating the Courts] GVG § 23(c).

147. *Vaterschaftstests*, *supra* note 15, at 207-08//BVerfGE, 1 BvR 421/05 Absatz-Nr. (A-II-12). *Herrn S.* conducted the test without the knowledge and consent of the mother who legally had sole care and custody of the child. *Id.* at 207-08//Absatz-Nr. (A-II-11,12).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

girl.¹⁵² Thus, Herr S. had no legal way of challenging legal paternity of a child he could not have sired.

Herr S. then appealed to the highest civil court in Germany, the *Bundesgerichtshof* (Federal Court of Justice),¹⁵³ which also affirmed the trial court's ruling.¹⁵⁴ The court held that a father could not merely assert that he was not the genetic father and use expert testimony to prove him right.¹⁵⁵ He must instead present evidence that objectively points to a strong possibility of another specific man being the father.¹⁵⁶ Since the evidence of infertility was not sufficient to meet the standards for a successful challenge, his request for paternity testing on this ground was denied.¹⁵⁷

The Federal Court of Justice then addressed the mother's refusal to consent to testing and found that her mere refusal did not constitute sufficient grounds for legally cognizable suspicion of nonpaternity required to raise a paternity challenge.¹⁵⁸ In the Court's view, the refusal to consent to DNA testing constituted a legitimate exercise of the child's right to informational self-determination and was not merely an exercise of the mother's interests.¹⁵⁹ Because involuntary testing of the child for *any purpose* interferes with the child's constitutional right to informational self-determination, involuntary testing is only warranted where there is statutory authority that adequately protects the interests of the individual tested and serves some overriding interest of the society at large.¹⁶⁰ When balanced against the right to govern one's own information, the father's interest in judicial determination of nonpaternity failed to warrant intrusion.¹⁶¹

The Federal Court of Justice further found that using a mother's refusal to consent to testing against her in a paternity case would undermine the

152. *Id.* After the decision of the Hildesheim court was finalized, the *Oberlandesgericht* Celle [Provincial Court of Appeal in Celle] rejected the father's subsequent appeal on similar grounds. *Id.* at 208//Absatz-Nr. (A-II-13).

153. The *Bundesgerichtshof* is the highest court for civil appeals in the land. GVG § 133. In the majority of cases, it is the court of last resort. 2008 Brochure for The Federal Court of Justice at 1. http://www.bundesgerichtshof.de/cln_136/SharedDocs/Downloads/EN/BGH/ArchivBroschuerenEng/FuerDNB/brochure2008.html [PDF Format].

154. *Vaterschaftstests*, *Bundesgerichtshof in Zivilsachen* [BGHZ] [German Federal Court of Justice in Civil Matters] Jan. 12, 2004, XII ZR 227/03 <http://www.bundesgerichtshof.de/> (select "Entscheidungen", then from the "Kalendar" select "Jan. 2004" and scroll to find the case) [German language only].

155. *Id.* § 1.

156. *Id.* at II-2.

157. *Id.* at II-1.

158. *Id.* at II-2(a).

159. *Id.* at II-3(a).

160. *Id.*

161. *Id.* at II-3(e).

spirit and purpose of the constitutional protection of her own personality rights, including her privacy rights.¹⁶² This is so when the refusal occurs after unauthorized testing has occurred and that testing shows the legal father is not the genetic father.¹⁶³ Herrn. S's request for paternity testing on this separate ground was thus denied.¹⁶⁴

The Federal Court of Justice also found that the result of the paternity test, based on illegally obtained DNA samples could not serve as evidence of nonpaternity nor could it serve as a basis for meeting the stringent requirements for doubting paternity sufficient to trigger a court ordered test.¹⁶⁵ This is in part because such tests do not meet basic evidentiary standards.¹⁶⁶ But even where a court believes that the samples and testing results would otherwise meet the standards of evidence of German courts, use of clandestine tests is still banned because it violates the constitutionally protected rights of the child to control his own genetic information, to have a stable family life, and to be supported financially.¹⁶⁷

While the decision was primarily concerned with the rights of the child, the Federal Court of Justice acknowledged that the German Constitution guarantees a father a right to know whether he is also a genetic father of his legal children.¹⁶⁸ The legal father's right, however, enjoys a lesser degree of protection than the rights of the child, as evidenced by the current statutory scheme.¹⁶⁹ The Court noted that the German Parliament had faced the dilemma of paternity testing and chose to omit a requirement of DNA testing in every case, opting to favor the preservation of the family.¹⁷⁰ Thus, the statutory scheme expressly subjugated the rights of a father to know whether his legal children are his genetic children to the rights of the child.¹⁷¹

162. *Id.* at II-3(a).

163. *Id.*

164. *Id.*

165. *Id.*

166. The court would be unable to verify whether the DNA samples tested actually came from the child and alleged genetic father. It would also be unable to determine whether the laboratory that conducted the tests used accepted scientific techniques in testing and standards in evaluating the results. *Id.* at II-2(b)(aa).

167. *Id.*

168. *Id.* at II-3(b).

169. *Id.*

170. *Id.* at II-3(c).

171. *Id.*

While the Federal Court of Justice based its decision to subjugate the father's rights on legislative intent, the German Parliament was not content with the decision of the Federal Court of Justice. Within weeks of the decision, the Free Democratic Parliamentary Group set forth a proposal *To Simplify the Method of Paternity Tests and Protect Fundamental Rights*.¹⁷² Additionally, in April 2005, the states of Baden-Württemberg¹⁷³ and Bayern¹⁷⁴ (Bavaria) both submitted bill requests to the *Bundesrat* (Federal Council),¹⁷⁵ the legislative chamber that represents the interests of the states and through which all federal level bills are initiated.¹⁷⁶

Herrn S. was similarly discontented with the decision of the Federal Court of Justice. In February 2005, he lodged a constitutional complaint against the ban on paternity testing by legal fathers without maternal consent.¹⁷⁷ He claimed the ban and the decision of the Federal Court of Justice violated his basic constitutional right of personality under Article 2.2 and Article 2.1 of the Basic Law.¹⁷⁸

The Federal Constitutional Court heard the case in February 2007.¹⁷⁹ The court affirmed the existence of the father's right of personality and mandated that the German Parliament must create a paternity-testing process wherein the right could be protected.¹⁸⁰ Nevertheless, the outcome was a pyrrhic victory for Herrn S. As expected, the Federal Constitutional Court upheld the lower courts' decisions with respect to the admissibility of the DNA evidence to rebut legal paternity and rejected the father's attempt to be relieved of the financial obligations of legal paternity.¹⁸¹

172. BTDrucks 15/4727. *available at* <http://drucksachen.bundestag.de/drucksachen/index.php>.

173. BRDrucks 280/05, *available at* http://www.bundesrat.de/nn_8340/DE/parlamentsmaterial/berat-vorg/suche-beratungsvorgaenge-node.html?__nnn=true.

174. BRDrucks 369/05.

175. German federalism involves a division of federal power not only between the executive, legislative and judicial, but also between the federal government and state governments. Thus, the sixteen state governments participate directly in the formation of federal policy through the Bundesrat. *See* Bundesrat "Roles and Functions", <http://www.bundesrat.de/EN/Home/>.

176. All federal bills are submitted first to the Bundesrat, which has the first say on any federal legislation. *Id.*

177. *Vaterschaftstests*, *supra* note 15.

178. *Vaterschaftstests*, *supra* note 15, at 311//BVerfGE, 1 BvR 421/05 at Absatz-Nr. (A-I-17).

179. *Vaterschaftstests*, *supra* note 15.

180. *Vaterschaftstests*, *supra* note 15, at 203//BVerfGE, 1 BvR 421/05, Ruling 1.

181. *Vaterschaftstests*, *supra* note 15, at 203//BVerfGE, 1 BvR 421/05, Ruling 2.

The court first stated that a mere allegation that a legal father is not the genetic father is insufficient to sustain a paternity challenge.¹⁸² The challenging father must present evidence to objectively show that his doubts about paternity are justified.¹⁸³ This effectively means that a father must show that there are specific other men who could be the genetic father of the child.¹⁸⁴

The court also held that Article 2, Paragraph 1 of the Basic Law, in conjunction with Article 1, Paragraph 1, provides a general personal right to know the genetic origin of one's legal children.¹⁸⁵ This is because a key aspect of individuality is awareness of self and of familial relationships.¹⁸⁶ This includes the right of a child to know their genetic origin and the right of a parent to know the genetic origin of his legal children.¹⁸⁷ Thus, a legal father has the right to know whether there is a genetic connection between himself and his legal children.¹⁸⁸

While a father has a clear constitutional right to know the genetic origin of a legal child, the federal laws existing at the time of the decision afforded him no independent right of investigation.¹⁸⁹ In German law, an unmarried mother was the sole holder of the child's legal rights.¹⁹⁰ If she objected to DNA testing, the father had no legal recourse to compel testing and thus, was deprived of his right to know the genetic origin of his legal children.¹⁹¹

To rectify this inequity, the Court held that the general right of personality guarantees not only the right of a man to know the genetic origin of his legal children, but also the possibility to exercise this right.¹⁹² The German Parliament failed to make an appropriate procedure available by which the right to knowledge of a child's genetic origin could be asserted and enforced. Therefore, the fundamental rights of the father were left without any means of protection.¹⁹³ The Federal

182. *Id.* at 204//BVerfGE, 1 BvR 421/05 at Absatz-Nr. (A-I-4).

183. *Id.*

184. *Id.*

185. *Id.* at 225//Absatz-Nr. (B-I-58).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 240//Absatz-Nr. (B-III-92).

190. *Id.* at 240-41//Absatz-Nr. (B-III-94).

191. *Id.*

192. *Id.* at 226//Absatz-Nr. (B-I-61).

193. *Id.* at 226//Absatz-Nr. (B-I-62).

Constitutional Court thus mandated that the German Parliament create a process through which legal fathers who doubt that they are the genetic fathers of their children can obtain paternity tests.¹⁹⁴ The procedure to be created had to be separate and apart from a legal proceeding contesting paternity.¹⁹⁵

B. The Federal Government Responds

Within months of the Court's decision, the federal government began its work.¹⁹⁶ It eventually adopted the *Gesetz zur Ergänzung des Rechts zur Anfechtung der Vaterschaft* (Law Supplementing the Right to Challenge Paternity).¹⁹⁷ The law separated the clarification of genetic paternity (or non-paternity) from the legal challenge to paternity.¹⁹⁸ In so doing, it effectuated changes to the federal level Family Code and the Code of Civil Procedure.¹⁹⁹

The new law effectively bifurcated paternity proceedings into those clarifying the genetic heritage of their legal children and those challenging their status as legal parent.²⁰⁰ A legal father now has a right to bring suit for either type or determination, or for both types of determinations.²⁰¹ While the father pursues a clarification procedure, the normal two-year statute of limitations for paternity proceedings is tolled and does not begin to run again until six months after a determination is reached.²⁰² For example:

A child is born in June 1998. The Husband of the Mother is deemed to be the legal father by operation of law. He finds out in June 2008 that his wife had an affair at the time of conception. He would normally have two years to challenge legal paternity. So the statute of limitations would begin to run in June 2008. However, if he started a process to clarify genetic paternity, the statute of limitations on the legal paternity challenge tolls during the pendency of the clarification procedure and for six months after a determination. So if he gets a determination

194. *Id.*

195. *Id.* at 227–28//Absatz-Nr. (B-I-65).

196. Many proposals were put forth including: BRDrucks 193/07 (B); BRDrucks 549/1/07; BTDrucks 16/6649; BTDrucks 16/5370; BTDrucks 16/6561; BTDrucks 16/8219; BRDrucks 130/8.

197. Law Supplementing the Right to Challenge Paternity, *supra* note 28, at 313.

198. *Kabinett beschließt Gesetz zur Vaterschaftstellung* [Cabinet Adopts Law Regarding Paternity] (Press Release from the Bundesministerium der Justiz) [Federal Ministry of Justice], July 11, 2007, <http://www.bmj.de> (select “Service”, then select “Presstelle”, then select “Pressemitteilungen”, then scroll to find the press release).

199. *Id.*

200. *Id.*

201. *Id.*

201. *Id.*

202. *Id.*

of genetic non-paternity in December 2008, the period to challenge legal paternity begins to run again in June 2009.²⁰³

Thus, if a father wants to pursue a clarification of genetic paternity, he can do so without putting his legal paternity (or his right to challenge legal paternity) in jeopardy.²⁰⁴

While the focus of *Herrn. S.* was on the right of the father to clarify the genetic origin of his legal child, the adopted law is not limited to the rights of the father. The revisions to the Family Code allow clarification proceedings to be brought by: (1) the father against the mother and child, (2) the mother against the father and child, or (3) the child against both parents.²⁰⁵ The other parties in the transaction are strongly encouraged to give consent, but if it is not freely given, the family court can order that individuals submit themselves to testing.²⁰⁶

Where the court is forced to intervene, it can only order testing after consideration of potential harm to the child.²⁰⁷ This should include express consideration of potential harm to the child's existing quality of life and the physical and psychological vulnerabilities of the child.²⁰⁸ For example, if a child is ill and the results of the test could worsen his condition, then the process cannot go forward.²⁰⁹ Such a prohibition is not permanent, however, and the testing should be continued if the child's situation were to improve sufficiently.²¹⁰ The details of implementing this scheme were not addressed in the law or the changes to the Code, leaving implementation largely to local authorities.

V. ANALYSIS OF THE ALTERNATIVE AVENUES OF PROTECTING THE CONFLICTING RIGHTS AND ANALYSIS OF FEASIBILITY OF EACH ALTERNATIVE

The process chosen by the German Parliament was not the only available option. The German Parliament could have allowed for private

203. Adapted from the example in *Kabinett beschließt Gesetz zur Vaterschaftstellung*, *supra* note 197.

204. *Id.*

205. BGB § 1598(a)(1).

206. BGB § 1598(a)(2).

207. BGB § 1598(a)(3).

208. *Kabinett beschließt Gesetz zur Vaterschaftstellung*, *supra* note 197.

209. *Id.*

210. *Id.*

testing by both the mother and the legal father. It could have decided to simply vest authority for testing in the local *Jugendamt* (Youth Authority Office). It could have also required mandatory testing of every child either at birth or when legal paternity is declared. While there is an appeal to each of these options, they present particular problems in the German system.

A. Allowing Private Testing With Consent of Either Legal Parent

The German Parliament could have vested authority to privately test in the legal father. The mother's DNA is not needed for the test, so her informational rights in her genetic information are not implicated and her right to privacy is no more implicated than it would be in a compelled procedure, or when the state initially requires her to name a potential genetic father.

The problem with this approach is that German law, unlike American law, provides that the mother is the *sole* custodian of the rights of a nonmarital child.²¹¹ Her control over the child's rights extends even to deciding if, and to what extent, the father can have visitation with the child.²¹² A nonmarital father has input into these matters only if the mother consents and a joint custody declaration is filed.²¹³ Despite judicial constitutional challenges, fathers have been unsuccessful at chipping away mothers' sole custodial control.²¹⁴ While there are some limits on a mother's control,²¹⁵ it is unlikely that the Federal Constitutional Court or the German Parliament would go so far as to vest the father with the power to make decisions such as allowing private DNA testing.

211. BGB § 1626(a)(2).

212. BGB § 1711(1).

213. BGB §1626(a).

214. See *Sorgeerklärungen* [Clarification of Custody and Care], BVerfG, 1 BvL 20/99 vom 29.1.2003 (Jan. 29, 2003), http://www.bverfg.de/entscheidungen/ls20030129_1bvl002099.html [German language only].

215. See, e.g., BVerfG, 1 BvR 1444/01 vom 29.11.2005 (Nov. 11, 2005), http://www.bverfg.de/entscheidungen/rk20051129_1bvr144401en.html [German language only] (holding that a mother cannot simply decide to have her new husband adopt the child over the father's objection where there was a pre-existing relationship between the legal father and child, but declining to imbue the case with deep constitutional significance); Marie-Therese Meulders-Klien, *The Status of the Father in European Legislation*, 44 AM. J. COMP. L. 487, 504 (1996) (discussing the authority of the Youth Authority Office, not the mother, in deciding when to pursue a paternity action against an alleged genetic father).

B. Vesting Decision to Test in Neutral Third Party

In Germany, the local Youth Protection Office, acting through the authority of the local courts, has a right and a duty to act in the best interests of the children in its district.²¹⁶ For example, if a father refuses to voluntarily recognize paternity, the Youth Protection Office initiates paternity proceedings.²¹⁷ It can even force an uncooperative mother to name the genetic father of the child.²¹⁸ The Youth Protection Office also has the authority to act as a legal adviser.²¹⁹ The German Parliament, therefore, could have vested the Youth Protection Office with the authority to make decisions on testing paternity. The likely reasons it did not make this the per se solution (and instead left the matter up to local authorities) are (1) the primary interest of the Youth Protection Office is protecting the child's financial support, therefore, it has a vested interest in denying requests if it fears that a challenge of legal paternity status may follow; (2) the delicate nature of the request requires a more judicial solution than it does an administrative and bureaucratic one; and (3) the Youth Protection Office lacks the resources to handle the extra workload the duty would entail. Nevertheless, it is possible that some localities will choose this solution since they have been vested with wide discretion in choosing implementation methods.

C. Requiring DNA Testing or Waiver of Testing at Time of Birth, Acknowledgement of Paternity or Judicial Determination of Paternity

The final alternative solution would be for the German Legislature to require mandatory DNA testing or waiver of the right to test at some discrete time point, such as birth, when an acknowledgement of paternity is entered, or when a judicial determination of paternity is made. There are several problems with this approach. First, it would be a waste of resources, as the vast majority of cases would reveal that the alleged

216. BGB § 1666; *see also* Marie-Therese Meulders-Klien, *The Status of the Father in European Legislation*, *supra* note 214, at 501.

217. *Id.*

218. *Id.*

219. BGB §§ 1712–1716.

father is the genetic father.²²⁰ Additionally, some parties may not want the testing for social, moral, or emotional reasons. Further, the state should not force testing on unwilling parties absent the infringement of some other party's rights (e.g., a potential genetic father). Finally, the approach would be a violation of the state's affirmative duty to protect the family structure. Thus, requiring mandatory testing would be neither efficient nor constitutionally permissible.

VI. ANALYSIS OF THE RELATED ISSUES THE GERMAN CONSTITUTIONAL COURT AND LEGISLATURE DID NOT ADDRESS WITH RECOMMENDATIONS FOR ACTION

While the method chosen by the German Parliament may be the best choice from a set of imperfect options, it is not without its flaws. The most noticeable flaw is that the lack of testing standards specified in the law and the delegation of the implementation of the law will create a lack of uniformity between cases. Additionally, there are many rights and interests of the parties that are not addressed by the law and will create further problems for German courts. The law itself does not specify penalties for violation and there were no penalties in force at the time of its adoption.²²¹ Though penalties were later added through the subsequent *Gesetz über genetische Untersuchungen beim Menschen* (Law Concerning Genetic Testing of Humans) (hereinafter *Gendiagnostikgesetz*),²²² the penalty for secret testing is only 5,000 Euros,²²³ an amount insufficient to deter many fathers. A lack of effective penalties creates little incentive for a doubtful father to submit to a judicial process when he can secretly test with little consequence. Finally, while the Court addressed the issue of proof in a paternity proceeding, the solution leaves many dissatisfied because the high burden of challenging paternity remains in place.

220. The opinion of the Ministry of Justice for Baden-Württemberg submitted in the case of *Herrn S.* asserts that in over 80% of cases the DNA test shows the legal father is actually the genetic father. *Vaterschaftstests*, *supra* note 15, at 215–16//BVerfGE, 1 BvR 421/05 at Absatz-Nr. (A-II-27).

221. *Vaterschaftstests*, *supra* note 15, at 213–14//BVerfGE, 1 BvR 421/05 at Absatz-Nr. (A-III-20). The Federal Ministry of Justice notes that there are no criminal sanctions for using the data.

222. GESETZ ÜBER GENETISCHE UNTERSUCHUNGEN BEIM MENSCHEN [LAW CONCERNING GENETIC TESTING OF HUMANS] [GENDIAGNOSTIKGESETZ], July 32, 2009, BGB1 Teil 1, Nr. 50, 2529.

223. *Id.* § 26(2) [Abschnitt 7].

223. *Id.* § 26(2) [Abschnitt 7].

A. Lack of Uniformity

The delegation of the actual process of bringing paternity challenges to states and local authorities has created two problems: lack of testing standards inherent in the law, and lack of standards for bringing a request and for conveying the results to the interested parties in the least damaging way possible.

While the German Parliament provided great detail about the process of bringing a proceeding to clarify a child's genetic origin, it omitted requirements for the actual process of conducting the test. Giving the delegation to state and local authorities creates a potential for doubt about accuracy and fairness in the testing process. The problem is complicated by the fact that the tests affect not only German nationals, but also interested parents and children who may be from countries where the rules for custody and paternity are different.²²⁴ Thus, there is potential for litigation on both a national and international scale.

Another problem created by delegation of implementation to state and local authorities is the lack of set national standards for obtaining a test. A father in Berlin may face greater hurdles and a longer wait time than a father in Stuttgart. In addition, there are no guidelines for conveying the information to the parties after the results come back. Given the potentially devastating nature of the results, some federal guidelines are needed.

B. Unresolved Rights and Interests

In addition to the lack of uniformity in testing, the Federal Constitutional Court and the German Parliament left many unresolved issues regarding the rights and interests of the parties. It is possible that the states and local authorities will create methods of addressing them, but the difficult balancing of conflicting interests remains.

The child has the right to be left alone and may desire not to know the truth about his genetic heritage. The Federal Constitutional Court rejected the latter concern. It stated that the child does have a right to remain in ignorance if he so chooses, but that should not prevent the legal father

224. See, e.g., BVerfG, 2 BvR 420/99 vom 9.3.1999 (Mar. 9, 1999), http://www.bverfg.de/entscheidungen/rk19990309_2bvr042099.html [German language only] (Swedish father, German mother); BVerfG, 2 BvR 1001/04 vom 8.12.2005 (Dec. 8, 2005), http://www.bverfg.de/entscheidungen/rk20051208_2bvr100104.html [German language only] (Father from Serbia and Montenegro, German mother).

from exercising his right to know.²²⁵ According to the Court, the right to non-knowledge does not carry the same weight as the positive right to know.²²⁶ While this dispenses with the child's right to remain in ignorance, it does not dispense with the child's right to be left alone. This right must be necessarily sacrificed in order for the father's right to be exercised.

Conversely, the child may wish to know the truth, but be otherwise prevented from determining the truth, particularly if the legal mother and father collude to prevent the child from having knowledge of, or contact with, his genetic father or other genetic relatives. In some cases, the collusion is in the best interests of the child. For example, collusion is preferable in situations of abuse or when the genetic father is a violent criminal, mentally ill or otherwise unfit. Nevertheless, it cannot be assumed that withholding of information is always in the best interest of the child. Given that the legal parents cannot uniformly be trusted to protect the child's affirmative right to know, the best solution would have someone else bear the duty to protect the child's right. The German Parliament did not address this issue, but a scholar evaluating the implementation of the right in the European context suggests that the state should bear the duty to the child to ensure that he can find out his true genetic heritage when he is old enough to make the decision for himself.²²⁷ While the Federal Constitutional Court has held that the German state has a positive duty to ensure informational self-determination under its Article 6 obligations,²²⁸ it is unclear how it could effectively and efficiently protect this right, as mandatory universal testing is impractical and unconstitutional. Thus, there is likely no effective way to protect the child's right to know where the legal parents prevent him from ever doubting the genetic connection between himself and his legal father.

A final interest of the child that was not fully addressed by the new clarification procedure is the interest of the child in having ongoing contact with those who matter to him. Unfortunately, there is no way to protect this interest within the context of a clarification procedure or under any other judicial process. While the state can force the mother to allow access by a legal father and it can force a mother and legal father

225. *Vaterschaftstests*, *supra* note 15, at 229–30// BVerfGE, 1 BvR 421/05, Absatz-Nr. (B-I-70).

226. *Id.*

227. Besson, *supra* note 15, at 145.

228. For example, in the *Vaterschaftstests* case, the Federal Constitutional Court delineated all of the issues of concern and then mandated that the Bundestag [German legislative chamber] draft a law to resolve the issues within a specified time frame. *Vaterschaftstests*, *supra* note 15, at 243//BVerfGE, 1 BvR 421/05, Absatz-Nr. (C-II-100).

to allow access by a genetic father, it cannot force a father to have contact with a child and it would not do so because forced contact is not within the best interests of the child.²²⁹

Under German law, the mother is the sole protector of a nonmarital child's rights and the guardian of his well-being. Consequently, she has a vested constitutional interest in protecting her existing relationship with her child from disturbance.²³⁰ A clarification procedure necessarily negates the status quo and implicates this right.

The clarification procedure also puts the mother's personality rights at stake in terms of her right to keep her sexual history private. It is unclear just how much sexual history a woman must reveal if the paternity test turns up negative with respect to the legal father and the child wishes to know the identity of the genetic father. There is no relevant case law by the Federal Constitutional Court that post-dates its decision in the case of *Herrn S.* It is unclear whether the case law that pre-dates the decision is still applicable, since the ruling is a departure from its previous decisions regarding the rights of the father. The Federal Constitutional Court in the case of *Herrn S.* seems to suggest that the mother's rights to privacy with respect to the alleged father are limited because she opened herself up to intrusion by alleging paternity.²³¹ Whether or not this limitation on the mother's rights would apply when the child is the challenging party is an open question.

The solution of the Bundestag also does not resolve the right of the father to be protected from clandestine tests conducted *by the mother*. Private tests conducted by the mother are not a *prima facie* violation of the rights of the child because she is the custodian of the child's rights. So long as the child is not old enough to assert his rights on his own, no violation has occurred. In contrast, clandestine private testing always implicates the father's rights. While a taking of the father's DNA for testing purposes without consent would be an unequivocal violation of the father's rights, it is possible for the mother to test without directly

229. BVerfG, 1 BvR 1620/04 vom 1.4.2008 (Apr. 1, 2008), http://www.bverfg.de/entscheidungen/rs20080401_1bvr162004.html [German language only].

230. GG art. 6(1).

231. *Vaterschaftstests*, *supra* note 15, at 233//BVerfGE, 1 BvR 421/05 at Absatz-Nr. (B-I-77).

using the father's genetic material. In "reverse paternity testing,"²³² a determination is made by comparing the DNA of siblings to see if the members of the sibling groups have the same father. Under the current law, it is unclear what would happen to a mother who conducted such a test.

In addition, the new law does not adequately address the rights of men who suspect they are genetic fathers but have no legal relationship to the child, particularly where there is a legally recognized father. The case of *Herrn S.* would imply that these men have a right to know whether or not they have genetic children but the strong constitutional protection of the family and the rights of the child would have to be weighed against that right. If the genetic father has no recourse to compel testing where there is an existing functional legal family, he is left in the same situation as *Herrn S.* While it is unclear how the courts will address this type of case, it is clear that a case invoking the constitutional right of a non-legal father to determine if a child is genetically his offspring is on the horizon.

C. Penalties for Violation of Rights by Secret Tests and the Risk of Continued Secret Testing

While the difficulty of exercising rights under the law is problematic, the most critical problem with the new law is the lack of effective penalties for clandestine tests, coupled with the difficulty in bringing paternity challenges means that doubtful fathers have little incentive to do anything but continue clandestine tests. Under the legal scheme in force at the time the law was adopted, there were no criminal penalties for conducting such tests.²³³ While the subsequently enacted *Gendiagnostikgesetz* imposed fines on any party²³⁴ who tests genetic relationships without consent, the amount is only 5,000 euros.²³⁵ Thus, many doubtful fathers will continue to obtain "illegal" clandestine tests rather than submit to judicial process.

232. For a description of reverse paternity testing see Francisc Mixich, Mihai Ioana & Vlad A. Mixic, *Paternity Analysis In Special Fatherless Cases Without Direct Testing Of Alleged Father*, S146 FORENSIC SCIENCE INTERNATIONAL S159 (2004).

233. *Vaterschaftstests*, *supra* note 15, at 213–14/BVerfGE, 1 BvR 421/05 at Absatz-Nr. (A-III-20). The Federal Ministry of Justice notes that there are no criminal sanctions for using the data.

234. GENDIAGNOSTIKGESETZ § 26(1)7 [Abschnitt 7] (subsection (a) addresses testing by mothers and fathers who wish to clarify the genetic origin of their children; subsection (b) addresses testing by the children; subsection (c) addresses testing by any other persons).

235. *Id.*

*D. Ongoing Issues Involving Use of Genetic Testing in
Legal Paternity Challenges*

Even if German fathers could have ready access to genetic testing, they would likely remain dissatisfied. The Family Code starts with a strong presumption of legal paternity that is very difficult to overcome.²³⁶ There is a long line of cases where fathers have attempted to overcome the presumption and lost. For example, the Federal Court of Justice denied paternity challenges to men where the man asserted the existence of a contract between him and his wife not to have children²³⁷ and even where the mother of the child worked as a prostitute at the time of conception.²³⁸ If a man finds out by legal means that his legal children are not his genetic children, he can only recover from the genetic father and not from the mother of the child or the state, even if they knew he was not the father when legal paternity was imposed.²³⁹ Where the man can prove that another man is the genetic father, recovery will be limited to extreme cases, such as when the genetic father lived with the mother and children since the dissolution of the relationship between the mother and legal father.²⁴⁰ Thus, while the Federal Constitutional Court wisely bifurcated the issue of genetic origin and the issue of legal paternity, it has not heard the last of disgruntled non-genetic legal fathers.

236. BGB § 1600(c).

237. BGHZ 97, 372 Bundesgerichtshof, IX ZR 200/85, Apr. 17, 1986 (holding that even if it found that such a contract existed it would be void for interfering with the wife's fundamental right to procreate, which cannot be proscriptively waived). English language translation available at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=897.

238. BGHZ, Bundesgerichtshof, XII ZR 207/03, Mar. 29, 2006 (noting that the wife had agreed to use condoms), <http://www.bundesgerichtshof.de/> (select "Entscheidungen", then from the "Kalendar" select "März 2006", scroll to decision, click hyperlink) [German language only].

239. *See, e.g.*, BGHZ, Bundesgerichtshof, XII ZR 144/06, Apr. 16, 2008 (holding that mother and genetic father could not stop the test and that genetic father had to compensate legal father for the expenses in raising the child) <http://www.bundesgerichtshof.de/> (select "Entscheidungen", then from the "Kalendar" select "Apr. 2008", then scroll to decision and click hyperlink) [German language only].

240. *Id.*

VII. THE EXPORTABILITY OF THE GERMAN SOLUTION TO AMERICAN COURTS

While much can be learned from the German approach, the German solution to the disjuncture between genetic and legal paternity cannot simply be transplanted to American courts. The American concept of the right to know genetic origin and the right to control information is not as fully developed as the German concept. This is because the German right is part of an express constitutionally protected positive right of personality²⁴¹ whereas the American right—to the extent it is acknowledged to exist—has been defined within the framework of the negative right to privacy.²⁴² In spite of an arguably greater threat to personality rights,²⁴³ American courts and legislatures have been much more hesitant to expressly protect them.²⁴⁴

A. *The Right to Know in the American Context*

In contrast to the strongly protected German right, the American right to know one's genetic heritage is a nascent concept that is being formed almost exclusively through the lens of negative privacy rights²⁴⁵ in the adoption context. Until recently, there was no recognition of the right to

241. The German system has an agreed-upon social vision that the state must support. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 975. As part of its duty to support the dignity of man, the German state must ensure the personality rights of the individual. *Id.* at 968. Thus, the German right of personality and all of its constituent parts are *positive rights* subject to express federal protection. *Id.* at 1002.

242. The American right to privacy is a *negative right* to be free from state interference. *Id.* at 969. It is, in essence, the right to be left alone.

243. For a discussion of the issue of control of genetic information, see Yael Bregman-Eschet, *Genetic Databases And Biobanks: Who Controls Our Genetic Privacy?*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (2006); June Mary Z. Makdisi, *Genetic Privacy: New Intrusion A New Tort*, 34 CREIGHTON L. REV. 965 (2001).

244. Federal protection of genetic data is limited to specific contexts such as use of genetic tests in the healthcare and employment context. *See, e.g.*, THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008, Public Law No. 110-233, 122 Stat. 881 (May 21, 2008). States provide little additional protection for the rights of individuals to control their genetic materials and information derived from them. Only twelve states require consent before genetic testing is performed on a sample. Only twenty-seven require consent before disclosing genetic information. Only five define genetic information as personal property and only one defines a DNA sample as personal property. National Conference of State Legislatures "State Genetic Privacy Laws", <http://www.ncsl.org/programs/health/genetics/prt.htm>.

In contrast to the paucity of protection offered by most states, Alaska has a fairly comprehensive genetic privacy law. AS § 18.13.010 It provides for a private right of action and for criminal penalties for illegally taking or illegal use. §§ 18.13.020; 18.13.030.

245. Eberle at 1034.

know because the personality *rights* of the child were never considered in the initial adoption process and the *best interest* of the child was deemed best served by secrecy.²⁴⁶ This is beginning to change.

In addition to the increase in contractually-open adoptions,²⁴⁷ several state legislatures have moved toward openness in adoption, choosing differing approaches to the issue. Some states grant a right to have adoption records opened under certain specified conditions;²⁴⁸ some states have mutual consent registries or employ confidential intermediaries;²⁴⁹ other states created unrestricted registries.²⁵⁰

Even though states are moving toward openness in adoption, the “right” of a child to know his genetic origin is unsettled. Some states do not recognize a “privacy” interest in knowing one’s origin.²⁵¹ Others see it as a right that outweighs the right of genetic parents’ *presumed* preference for privacy.²⁵² There is no clear majority rule on the matter and states seem to be moving in different directions.

246. This was not always so. In the early days of the American republic, no right to know was necessary because closed adoptions were rare. Informal and open adoptions were the norm in the United States until the 20th Century, when closed adoptions became the norm. Recent demographic and social changes have led to a decrease in the number of children available to adopt. This in turn led a greater number of contractually-open adoptions. RAMSEY & ABRAMS, *supra* note 1, at 310–11.

247. *Id.*

248. *Compare In re George*, 625 S.W.2d 151 (Mo. App. 1981) (holding that a fatal leukemia condition that could potentially be treated with a bone marrow transplant from a close blood relative was not sufficient good cause to open an adult adoptee’s records) *with Doe v. The Ward Law Firm*, 579 S.E.2d 303, 306 (S.C. 2003) (finding sufficient good cause when an adopted child faced serious mental health problems as well as “respiratory problems and a cyst on his brain”).

249. For example, the state of Illinois has both a statutorily-authorized registry (750 ILCS 50/18.04) and a statutorily-authorized confidential intermediary program (750 ILCS 50/18.3a).

250. For example, Alabama, Alaska, Kansas, Oregon and New Hampshire have open adoption laws. ALA. CODE §§ 22-9A-12(c) & (d) (1975); ALASKA STAT. § 18.50.500(a) (2004); KAN. STAT. ANN. § 65-2423(a) (2003); N. H. REV. STAT. ANN. § 5-C:16(1) (2004); OR. REV. STAT. §§ 432.240(1) & (2) (2003).

251. *See, e.g., Alma Soc. Inc. v. Mellon*, 601 F.2d 1225 (2d Cir. 1979) (holding that adoptees cannot challenge New York’s “closed” adoption statute because the state appropriately recognized the privacy interests of the natural and adoptive parents; the state has an interest in protecting those interests; and that neither the Fourteenth Amendment Due Process and Equal Protection Clause, nor the Thirteenth Amendment rights of the adoptees would be violated).

252. *See, e.g., Doe v. Sundquist*, 106 F.3d 702 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 5 (upholding a Tennessee statute mandating openness of adoption records unless there is a veto by the interested party filed with the state because the veto provision provided a sufficient balancing of interests).

Outside of the adoption context, few American courts have dealt directly with the right to know one's genetic heritage and the Supreme Court has not definitively ruled on the issue. The issue was raised indirectly in the case of *Michael H. v. Gerald D.*,²⁵³ but the case is problematic as there was no clear majority on any matter except the outcome of the specific case.²⁵⁴ Additionally, the plurality opinion written by Justice Scalia represents a break with past precedent that expressly granted the genetic father constitutionally protected due process rights.²⁵⁵

While a majority of justices agreed with the disposition of the case of *Michael H.*, there was no clear majority view on the justification for the decision. Justice Scalia's plurality opinion rests on his view that the marital presumption is of primary importance in deciding the matter.²⁵⁶ In the face of the marital presumption, a genetic father does not have a fundamental liberty interest in having a relationship with his genetic offspring.²⁵⁷ Thus, the plurality would deny both the child²⁵⁸ and the nonmarital genetic father the right to rebut the presumption of paternity and the right to contact in cases where another man is the legal father.²⁵⁹

As several commentators have pointed out, not all genetic and adoptive parents want records sealed. See, e.g., Rosemary Cabellero, *Open Records Adoption: Finding The Missing Piece*, 30 S. ILL. U. L.J. 291 (2006).

253. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1949).

254. Only Chief Justice Rhenquist fully agrees with Justice Scalia. *Id.* at 112 (plurality). Justice O'Connor and Justice Kennedy concur in the judgment with respect to the disposition of the case, but write separately to express disagreement with Scalia's rationality and the scope of his decision. *Id.* at 132 (O'Connor, J., and Kennedy, J., concurring). Justice Stevens also concurred in the judgment based on the facts of the case, but expressly disagreed with Scalia's analysis of parental rights. *Id.* at 132-33 (Stevens, J., concurring). Given the positions of the concurrences, Justice Brennan's dissent is correct in noting that a clear majority of the court (i.e. five justices) would have afforded the genetic father constitutional rights with respect to their genetic offspring. *Id.* at 136 (Brennan, J., dissenting).

255. Justice Scalia ignored a long line of cases that would have allowed an unwed father with a full commitment to being a responsible parent protection under the due process clause. As Justice Stevens points out, Justice Scalia's point of view represents a break with precedent. *Id.* at 133. (Stevens, J., concurring) (citing *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Ill.*, 405 U.S. 645 (1972)). The Supreme Court had previously given non-marital genetic fathers constitutionally protected interests: "[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the Due Process Clause." *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (quoting *Caban*, 441 U.S. at 392) (citation omitted).

256. *Michael H.*, 491 U.S. at 120 (plurality).

257. *Id.* at 120 (plurality).

258. *Id.* at 131.

259. *Id.* at 120 (plurality).

In contrast, Justice Stevens' concurring opinion rejected the plurality's belief that a natural father can *never* have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth.²⁶⁰ In citing precedent contrary to the plurality's rationale, Justice Stevens left open the possibility that a genetic father has a right to have a relationship with his genetic offspring:

"I think cases like [*Stanley v. Illinois* and *Caban v. Mohammed*] demonstrate that enduring 'family' relationships may develop in unconventional settings. I therefore would not foreclose the possibility that a constitutionally protected relationship between a natural father and his child might exist in a case like this. Indeed, I am willing to assume for the purpose of deciding this case that Michael's relationship with Victoria is strong enough to give him a constitutional right to try to convince a trial judge that Victoria's best interest would be served by granting him visitation rights."²⁶¹

While it is possible to read *Michael H.* as a blanket proscription against the rights of genetic parents, neither the states nor the federal government have followed Justice Scalia's reasoning in the plurality opinion. Under federal law, the marital presumption can be rebutted if genetic test results show that a man other than the mother's husband is a child's genetic father.²⁶² State courts have reached similar conclusions.²⁶³ At a minimum, genetic fathers are afforded the procedural right granting them the chance to show that contact between the genetic father and child is in the child's best interest.

Because the right to rebut paternity and to seek a relationship with the genetic child exists, the lesser included *right to know* of the existence of a genetic relationship must be said to exist. While some courts have denied the existence of a right to know in the context of adoption,²⁶⁴ a better view would be to hold that the right to know exists in both contexts, but that the balancing of rights and interests in the adoption context is more likely to favor a subjugation of the right to know to the

260. *Id.* at 133 (Stevens, J., concurring).

261. *Id.* [citations and footnotes omitted].

262. 42 U.S.C. § 666(a)(5)(G) (2006).

263. *See, e.g., Callendar v. Skiles*, 591 N.W.2d 182 (Iowa 1999) (holding that a genetic father has a paternal interest in a child born to a woman married to another man); *Louisiana ex rel. Wilson v. Wilson*, 855 So.2d 913 (La. Ct. App. 2003) (holding that the genetic father and the mother's husband are both obligated to pay child support as the husband married the mother when she was pregnant with another man's child).

264. *See, e.g., Alma Soc. Inc. v. Mellon*, 601 F.2d 1225 (2nd Cir. 1979).

privacy rights of the other parties, the interest of the state in encouraging adoption, and the interest of the child in being adopted.²⁶⁵ Thus, while American courts have approached this in a different context than German courts,²⁶⁶ a right to know exists and must be balanced against other rights and interests in cases where paternity is in question.

While the right to privacy has traditionally shielded the identity of genetic parents in the adoption context,²⁶⁷ courts in other contexts have found that there is no absolute right to control information derived from one's genetic material that is inherent in the right to privacy.²⁶⁸ Similarly, courts have found an individual has no right to control use of his genetic material once it has been voluntarily given to a third party.²⁶⁹

265. While the balancing process would favor subjugation of the right to know at the point of adoption and during childhood (as the child's interests and rights are protected by the legal parents), it does not resolve the issue of adult adoptees who seek information on their genetic parents. Resolving this issue is beyond the scope of this Comment. See generally Caroline B. Fleming, *The Open-Records Debate: Balancing the Interests of Birth Parents and Adult Adoptees*, 11 WM. & MARY J. WOMEN & L. 461 (2005); Susan Whittaker Hughes, *The Only Americans Legally Prohibited From Knowing Who Their Birth Parents Are: A Rejection of Privacy Rights as a Bar to Adult Adoptees' Access to Original Birth and Adoption Records*, 55 CLEV. ST. L. REV. 429 (2007).

266. In America, it is often genetic fathers seeking rights in the face of established legal paternity in another man, such as the case of *Michael H.*, 491 U.S. at 113–15. The German debate was framed in the context of a legal father seeking to clarify the genetic relationship of children he thought were sired by another man as was the case for *Vaterschaftstests*, *supra* note 15.

267. See, *Alma Soc. Inc.*, 601 F.2d 1225.

268. American courts and state legislatures have broad power to compel the taking of genetic material and testing of the material for state ends even in the face of invasion of the privacy rights of others. See, e.g., *Shults v. Superior Court of Butte County*, 113 Cal.App.3d 696 (1980) (holding that the state could force taking of blood samples in a case of welfare fraud where the issue of paternity was determinative); CAL. HEALTH & SAFETY CODE §§ 125000–125001 (West 2006) (requiring genetic screening of infants). In requiring genetic testing of infants, the state has the potential to invade the privacy rights of parents as finding a genetic issue in a child will imply that one or both parents are the source and may be a carrier. Alternatively, it may reveal that the alleged father is not the genetic father of the infant.

In addition to taking for direct state use, some states allow the data they collect to be used for research purposes beyond the scope of the original taking without additional consent from the person providing the sample. For example, MICH. COMP. LAWS SERV. ANN. § 333.5431 (West 2001) expressly allows for blood specimens taken to be used for medical research regardless of consent of the person giving the sample.

269. See, e.g., *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064 (holding individuals retain no ownership rights over genetic materials they provide to researchers); *Moore v. Regents of Univ. of Ca.*, 793 P.2d 479 (Cal. 1990) (holding that patient treated by the University retained no ownership rights in his discarded cells and could claim no right to profits University acquired through their use). *But see* *Norman-Bloodsaw v. Lawrence Berkeley Labs.*, 135 F.3d 1260, 1269 (9th Cir. 1998) (“[o]ne can think of few subject areas more personal and more likely to implicate privacy interests than that of one's health or genetic make-up”).

Thus, there is no broadly recognized right to privacy in one's genetic information in the American legal system. Nevertheless, courts have been hesitant in many areas, including genetic information of one family member that affects another family member.

Where otherwise private genetic information has an impact on other members of the genetic family, courts have struggled to strike a balance between the privacy rights of the individual and the need to know the information by family members whose very lives may depend on timely receipt of the information.²⁷⁰ Some courts have held that physicians treating a child have a duty to warn the parents if the child has a hereditary disease that could be passed on to future children conceived by the couple.²⁷¹ Other courts have found a reciprocal duty where the patient-parent was diagnosed with a genetically inheritable carcinoma.²⁷² While courts are beginning to find the existence of a right to know where there is a manifest threat to physical well-being, it is not yet clear how far the right to know will extend where the situation is not so dire or where the principal benefit sought is psychological well-being.²⁷³

B. *The Competing Concept of Dual Legal Paternity*

Concern with the physical and psychological well-being of children has led to a call for a dual father paradigm wherein relative legal rights are based on biology, intent, and social relationships.²⁷⁴ In the dual-father model, the child gets the benefit of emotional, social, and financial support from two men as well as access to known genetic history.²⁷⁵ The genetic father gains visitation rights, but the functional-social father does not lose his legal rights over the child and may continue being the principal decision maker, caregiver, and father figure to the child.²⁷⁶

270. See generally Susan M. Denbo, *What Your Genes Know Affects Them: Should Patient Confidentiality Prevent Disclosure of Genetic Test Results to a Patient's Genetic Relatives?*, 43 AM. BUS. L.J. 561 (2006).

271. See, *Schroeder v. Perkel*, 432 A.2d 834 (N.J. 1981) (holding that daughter's physicians had a duty to inform parents that the girl had cystic fibrosis, a hereditary condition, deprived them of the right to make an informed choice about having additional children).

272. See *Pate v. Threkel*, 661 So. 2d 278 (Fla. 1995).

273. For a discussion of the psychological benefits that arise from being able to form one's identity, see Besson, *supra* note 15, at 141.

274. For a discussion of the two-father paradigm, see Jacobs, *supra* note 37, at 851.

275. *Id.*

276. *Id.* at 852.

Thus, the approach rejects the zero sum approach of choosing either genetic or functional-social paternity.

The compromise solution of dual paternity is used in the state of Louisiana. In Louisiana, the concept of dual paternity allows a child, or the state on behalf of the child, to seek financial support from the genetic father even though the child was conceived or born during a time when the mother was married to another man.²⁷⁷ Thus, a genetic father cannot escape financial obligations to his genetic offspring merely because another man is the legal father, nor is a legal father's status as the legally sanctioned decision maker and caregiver affected by the finding of genetic paternity in another man.²⁷⁸

Dual paternity in Louisiana is not merely predicated on shared financial responsibility. It allows the genetic father a chance to rebut the presumed genetic paternity of the legal father and to establish a right to have contact with the child.²⁷⁹ The right to seek an avowal of paternity is not absolute,²⁸⁰ but will be recognized so long as the man either has a pre-existing relationship with the child or seeks a relationship with the child after knowing or having reason to know of the existence of the child.²⁸¹ Additionally, the right to be legally recognized as the genetic father does not imply a right to custody, only a right to contact in the best interests of the child.²⁸² Where a genetic father does not act in a timely fashion or cannot meet the minimum showing that contact is in the best interests of the child, he can be subject to an obligation of support even though he does not possess any positive parental rights.²⁸³ Thus, while the Louisiana approach allows for the existence of two legally recognized fathers, it does not split the legal rights flowing from paternity equally nor does it guarantee a genetic father an absolute right to contact with his genetic offspring.

277. See LA. REV. STAT. ANN. § 46:236.1 (2007).

278. *State ex rel. Williams v. Howard*, 898 So.2d 443 (La. Ct. App. 2004); *Smith v. Cole*, 553 So.2d 847, 854 (La. 1989).

279. LA. CIV. CODE ANN. art. 198 (1999). Article 198 was enacted in 2004. Even before its enactment, courts recognized the right of a genetic father to institute an avowal action. See *State ex rel. Williams v. Howard*, 898 So.2d 443; *Putnam v. Mayeaux*, 645 So.2d 1223 (La. Ct. App. 1994).

280. *W.R.M. v. H.C.V.*, 951 So.2d 172, 178 (2007); *Smith v. Jones*, 566 So.2d 408, 414 (La. Ct. App. 1990).

281. *Smith*, 566 So.2d at 414. A genetic father who knows, or has reason to know, that a child is genetically his but fails to assert those rights for a significant period of time cannot later seek to establish a legal relationship. *Geen v. Geen*, 666 So.2d 1192, 1194 (La. Ct. App. 1995).

282. *Staten v. Brown*, 940 So.2d 105, 110 (La. Ct. App. 2006).

283. *T.D. v. M.M.M.*, 730 So.2d 873, 876 (La. 1999).

VIII. BIFURCATED PATERNITY IN GERMANY AND LOUISIANA
WITH IMPLICATIONS FOR AMERICAN COURTS
AND LEGISLATURES

Given the conflict of rights involved in resolving the disjuncture between genetic and legal paternity addressed in section II(B) above, it seems no approach could provide a comprehensive solution that would please all parties. In practice, the German approach and the dual paternity approach both leave some rights and interests unprotected.

While the German approach best protects the informational rights of all parties by guaranteeing a strongly held right to know, it does not adequately protect the rights and interests of the child in being cared for and supported by all those individuals who have a genetic or legal connection to it because there can be only one legal father. Nor does it guarantee a child a right to have a meaningful relationship with a genetic, but not legal, father. In contrast, the dual paternity approach, as adopted by Louisiana, provides better protection for the child's right to care and support.²⁸⁴ Thus, the Louisiana conception of dual paternity provides a broader protection of the underlying rights of the child to be cared for and supported by more than one father and the rights of father and child to have contact with one another.

While the Louisiana approach is generally more protective of the rights of genetic fathers than the German approach, it is not more protective of their rights in every situation. In situations where a father has no meaningful access to the child, but wants only clarification of the child's genetic heritage, the German right to know would provide clarification. Additionally, where a legal father wanted to know the genetic origin of his legal children but did not wish to disturb the underlying legal relationships, the German approach is more protective.

The German approach is also more protective of the informational rights of the child, which would include a right to know genetic history

284. In Germany, a finding of genetic non-paternity does not change underlying support obligations, (*Vaterschaftstests*, *supra* note 15 at 227=28//Absatz-Nr. (B-I-65)) whereas the Louisiana dual legal paternity approach can lead to an underlying increase in total support provided to the child. *Vaterschaftstests*, note 15, at 227=28//Absatz-Nr. (B-I-65); *Smith v. Cole*, 553 So.2d 847, 854 (La. 1989). There seems to be no logical reason why the German legislature could not mandate a dual-paternity approach. Indeed, in Germany, familial maintenance obligations are actually much broader than in the United States. They include obligations between grandparents and grandchildren and run in both directions. BGB § 1601 ("Lineal relatives are obliged to provide each other support.").

for the physical well-being of the child but also a right to know genetic heritage for the emotional and psychological wellbeing of the child.²⁸⁵ In contrast, the Louisiana approach is focused on the father's rights and is not concerned with a child's right to know.²⁸⁶ Additionally, where the right to know has been discussed in the American system, the primary focus is on medical necessity, not self-development and related psychological factors.²⁸⁷ Thus, the German approach is in some ways much broader than the Louisiana concept of dual paternity and the nascent American concept of a right to know one's genetic heritage.

Even though neither approach provides comprehensive protection of the rights and interests of all parties, both the German and the dual paternity approach protect rights and interests more thoroughly than the majority of American jurisdictions. Most American jurisdictions are only beginning to recognize informational rights and, aside from Louisiana, do not recognize the potential for more than one legally recognized father. One of the reasons for this is the belief that such legal recognition would have a destabilizing effect on the family structure. Nevertheless, there is no evidence that recognizing two legal fathers is any more destabilizing than the societal norm of blended families where children are raised by stepfathers but maintain a legal relationship to their genetic father. Indeed, courts have recognized the importance of stepparents²⁸⁸ and other de facto parents²⁸⁹ and granted them visitation with children to whom they have played a parental role even though the legal parent still holds a full complement of legal rights over the child. Thus, courts have already acknowledged that children can have more

285. *Vaterschaftstests*, *supra* note 15, at 225//Absatz-Nr. (B-I-58). In the European conception of personality rights, both adults and children have a right to know genetic relationships. Thus, the majority of European countries allow children the independent right to now once they attain the age of majority, but some states provide them with access much sooner. Besson, *supra* note 15, at 144.

286. See LA. CIV. CODE ANN. art. 198; *T.D. v. M.M.M.*, 730 So.2d 873.

287. Medical, not psychological, factors underlie the right to know in the American adoption context.

288. See, e.g., *In re Marriage of Riggs and Hem*, 129 P.3d 601, 608 (Kan. Ct. App. 2006).

289. Some states allow non-parents custody rights under equitable doctrines. RAMSEY & ABRAMS, *supra* note 1, at 76–77; CONN. GEN. STAT. ANN. § 46b-57-59 (granting “full or partial custody, care, education and visitation rights” to “any interested third-party... upon such conditions and limitations as [the court] deems equitable”); ORE. REV. STAT. § 109.119 (granting visitation rights based on emotional ties.) Cf. WIS. STAT. § 48.92(2) (West 2008) (allowing a judge to order post-adoptive visitation by natural parents where it would be in the child's best interest). *But cf.* *Troxel v. Granville*, 520 U.S. 58 (2000) (holding that mother could limit visitation right of genetic grandparents of child whose father had committed suicide and whose stepfather adopted child).

than one parental figure in their lives and that recognition of those figures does not diminish the rights of the legal parent to the point where recognition should not be allowed. In this regard, the dual paternity approach adopted by Louisiana courts is not incongruous with what courts are already doing in other contexts. The dual paternity approach merely ensures that the legal obligations and legal rights of the genetic father and child are secured without unnecessarily severing the rights and relationships of the child to a non-genetic legal parent.

In spite of being compatible with the underlying principles of family law, the dual paternity approach adopted by Louisiana does not offer complete protection for the reasons stated previously. Thus, the best approach for American courts and legislatures to take with respect to paternity determinations would be to blend the dual paternity and the informational rights approaches. The informational rights of both the fathers and the child should be recognized and given deference in any proceedings regarding a child's relationship to his genetic and legal fathers. This should not represent a means for a legal father to escape responsibility for the financial care and support of his child. Rather, it should represent an opportunity for the state, in the best interests of the child, to acknowledge that more than one man has played a role in the creation of and care provided to the child, to require that both men bear the financial responsibilities of that relationship, and to allow a relationship to develop between the child and the child's fathers.

