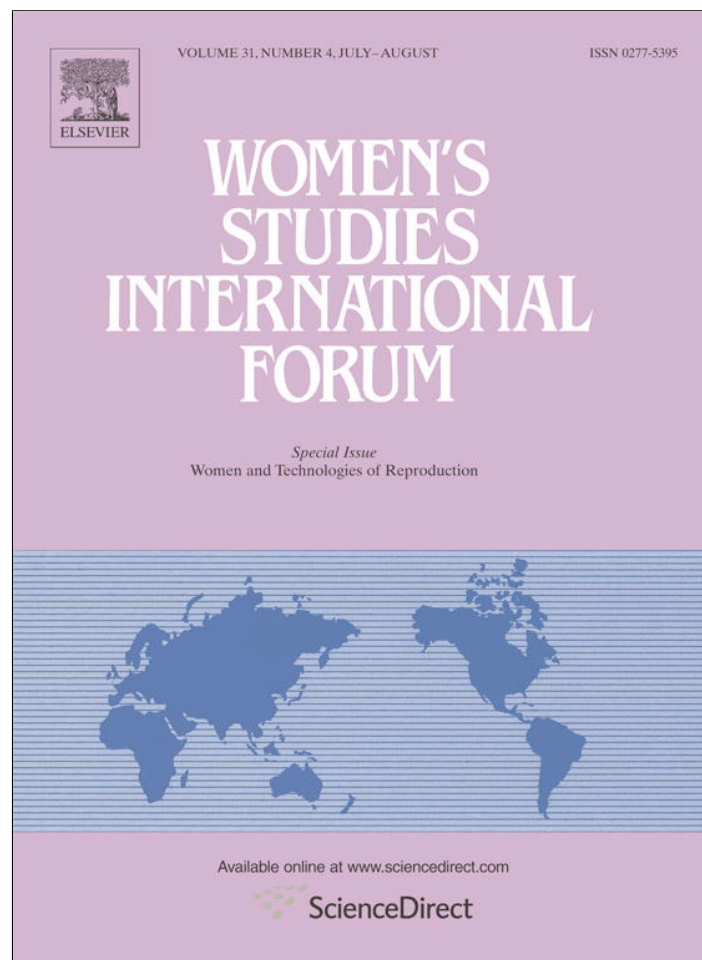


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# Who's the father? Rethinking the moral 'crime' of 'paternity fraud'

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### ARTICLE INFO

### SYNOPSIS

In Australia, men's mobilisation around discrepant paternity has led to numerous father-favouring changes to family law. Despite this, feminists have been slow to interrogate discrepant paternity discourse. In this article, I analyse and respond to the empirical and normative assertions contained in what Father's Rights discourse calls "paternity fraud". Fathers' rights discourse asserts that paternity fraud is rampant and harms men by denying them the biological experience of fatherhood and a chance to partner with a faithful wife who will bear their biological children. They claim biological fathers are harmed by the denial of knowledge of their biological children, while children are harmed by the absence of their biological father and by a lack of knowledge of paternal genetics critical to their health. I conclude that, while many fathers' rights claims about discrepant paternity fail to withstand scrutiny, a respect for the moral value of autonomy may compel feminists to give weight to several.

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Discrepant paternity, or what father's rights discourse calls paternity fraud, has become a rallying point for segments of the fathers' rights movement. Utilising the radical feminist insight of the 1960s that the personal is political, some Australian fathers' rights activists contend that the experience of a small group of men who discover through genetic testing that they are biologically unrelated to a child or children they have parented is paradigmatic of men's social and legal predicament in the post-patriarchal world of marriage, divorce, sex and reproduction (Cannold, 2002, 2005b; Turney, 2004b).

Historically, Australian fathers' rights groups have successfully engaged with the media and politicians to achieve desired changes to the family law system (Kaye & Tomie, 1998; Nicholson, 2004). In 2006, in response to successful advocacy by fathers' rights groups, additional father-favouring changes were made to the *Australian Family Law Act 1975* ([http://www.austlii.org/au/legis/cth/consol\\_act/fla1975114/](http://www.austlii.org/au/legis/cth/consol_act/fla1975114/)). These included a presumption of equal parenting responsibility and provisions that made it easier for social fathers to use DNA tests that disprove biological paternity to reclaim child support and property transferred to children they have parented, suspend child support payments for the duration of a disputed paternity action, and compel the Child Support Agency to collect refunds of child support to the child's mother (Australian Child Support Agency, 2006; Cannold, 2005a).

While the success of fathers' rights movements in achieving father-friendly changes to family law is not new, what is novel is the use by such groups of paternity fraud discourse to achieve these ends. However, despite the novelty of this discourse and its apparent potency in furthering the fathers' rights agenda, feminists have been slow to interrogate it.

In this article, I offer a feminist analysis of fathers' rights discourse on paternity fraud. Having distinguished between different social phenomenon that fathers' rights groups refer to as paternity fraud, I will unpack the empirical and normative claims made in paternity fraud discourse. Evolving definitions of fatherhood in Australia, England and the United States suggest that the mobilisation of men around paternity fraud is a consequence of accurate and affordable testing technology and legal/policy frameworks that ensure test results have significant social and fiscal implications for men, women and children.

### Types of paternity fraud: bureaucratic and cuckold

Fathers' rights discourse uses the term paternity fraud to refer to two distinct phenomena. The first is where non-biological fathers are assigned legal and fiscal obligations for children they have never parented and may not even have known existed. Men attempting to use DNA evidence of non-paternity to terminate such obligations are blocked by legal

and/or bureaucratic obstacles. As will be discussed later, this situation is most common in the United States where, in some jurisdictions, the ongoing legal viability of the age-old doctrine of presumptive paternity means that DNA evidence may not be deemed sufficient grounds for disavowing legal paternity.

The second referent for paternity fraud in fathers' rights discourse is the discovery by a man in a married or *de facto* relationship, through deliberate or incidental genetic testing, that he is not the biological father of one or more of the children he is parenting. In Australia, the case of Liam Magill is a classic case of what I will call 'cuckold' paternity fraud. Several years after separating from his wife Meredith, Magill subjected his three children to secretive DNA paternity testing that revealed that the two youngest were genetically unrelated to him. He successfully terminated child support payments for these children and, because he was in arrears for payments for all three children, was effectively offered a refund for previous amounts paid for the two when this debt was cancelled (Davies, 2007; Horin, 2005). Despite this, Magill pursued a claim for compensation from his wife on the grounds of deceit. While a lower court awarded Magilla \$70,000 for pain, suffering and economic loss, the Australian High Court eventually dismissed the case on the grounds that the tort of deceit was an inappropriate vehicle for remedying the wide variety of dissimulation that can occur in intimate relationships (ABC Radio, 2006; "Magill v Magill," 2005).

It is this second type of paternity fraud that the majority of paternity fraud discourse in Australia, England and—to a lesser extent—the United States refers, and which is the focus of this article.

### **Empirical and normative claims in the cuckold paternity fraud charge**

#### *Empirical*

##### *Incidence*

Father's rights groups claim that between 10% and 30% of children are being parented by men who are unaware they are not the genetic father (Gilding, 2005). These figures are used to support their contention that discrepant paternity is a widespread social problem in need of systemic address through changes to family law and policy (Gilding, 2004).

##### *Motivations for testing*

Fathers' rights discourse implies that men are the prime instigators of paternity tests in the face of duplicitous and resistant mothers. This depiction is particularly seen in the push by fathers' rights groups for 'motherless testing,' or the testing of the child's DNA without the mother's consent. In arguing in favour of the legality of this sort of testing, fathers' rights advocates claim that any law requiring the consent of both parents would effectively deny fathers the 'right to know' because mothers with something to hide would always withhold consent for the child to be tested. Men's confraternity was just one of a number of Australian father's groups opposed to legal restrictions on motherless testing for this

reason, as it told a recent inquiry by the Australian Law Reform Commission into the issue:

Calls to outlaw ... [motherless testing are] driven by a self centred desire by women to protect them from being sued, once these tests are used to expose their deceit and fraud. (Men's Confraternity, n.d.)

#### *Normative*

Fathers' rights discourse articulates four ways in which paternity fraud cheats or defrauds men or children: First, by creating a relationship between a man and a non-biological child/ren; second, by stripping non-biological fathers of the resources they need to start another family in which they can create and raise biological progeny; third, by denying the biological father knowledge of his progeny and/or a chance to form a relationship with that progeny; and fourth, by denying children full and factual knowledge of their biological origins and the resulting opportunity to both form a relationship with their biological father and to gain knowledge of paternity genetics essential to their health.

The central claim of paternity fraud discourse is that a man's relationship with a non-biological child does not constitute a real parent-child relationship, and that cuckold paternity fraud cheats or defrauds husbands of real fatherhood. The causative agent in this fraud is the unfaithful wife who, through her sexual infidelity and subsequent failure to disclose it, causes the man to form a relationship with a biologically unrelated child that he wrongly believes—and has a right to expect—is his biological progeny. In its arguments in favour of compulsory DNA testing at birth, Men's Confraternity reveals its understanding of authentic fatherhood as biological fatherhood:

DNA testing should be a compulsory procedure at the birth of every child born to ensure that the correct father is registered. Paternity must be determined via DNA testing at birth because any man can be deceived into believing they are the father. (Men's Confraternity, 2006)

Citing figures impossible to confirm, Men's Rights Online asserts that non-biological relationships between men and children provide no basis for legal paternity and its attendant fiscal obligations for children:

The Court System ... forc[es] males to continue paying child support for children that they are NOT the biological father of as DNA testing proves. It is also brought to the knowledge of the judges in the individual cases that DNA testing proves the male paying child support is NOT the biological father. ... A minimum of 1,600,000 (1.6 million) males are being forced to financially support children that they are NOT biologically related to. (Men's Rights Online, 2003–2006)

Implicit in much paternity fraud discourse are normative claims about the wrongs of female infidelity and subsequent duplicity with regard to it, and the potential reproductive consequences. Justice, the discourse suggests, requires men to be released from support obligations for children of the marriage not just because of the non-biological relationship

between father and child, but because they have resulted from illegitimate female sexual and reproductive activity. Argues one fathers' rights activist: "Some ... men in the USA are not the real fathers of the children that the mothers have purported them to be. They have been hoodwinked ... the hapless victims of lying women" (Angry Harry, n.d.).

Similarly, an American husband who discovered that his second child, then aged 12, was not biological kin justified his pursuit through the courts for relief from child support payments on the grounds that his existing obligations sent "the worst message. It said it was OK to cheat, have a child and pass it off as someone else's. ... [This case] supports the issue of paternity fraud. It's theft" (Kerlik, 2007).

Paternity fraud discourse also asserts that the law's creation or enforcement of male support obligations for unrelated children denies them the resources necessary to support relationships with faithful wives and biological children. For instance, Australian Paternity Fraud argues that paternity fraud cheats the husband of:

his best child raising years in pursuit of his dream to have his own biological children and raise a family but who has paid for a child that wasn't his and will continue to pay for long after he divorces the mother who can't be trusted as a wife. (Australian Paternity Fraud, 2000–2007)

Paternity fraud discourse also asserts that, when biological paternity is wrongly ascribed to the social father, the biological father loses the opportunity to know he has a biological child and/or accept rights to and responsibilities for this child. Australian Paternity Fraud, for instance, claims that paternity fraud "victims" include "the biological father that may not even know he is a father and who, when the deceit is uncovered, will suffer ... mental ... damage" (Australian Paternity Fraud, 2000–2007).

Finally, it is asserted that paternity fraud denies children necessary knowledge of their biological origins, the chance to form a relationship with their biological father and the knowledge of paternal genetics necessary for optimal medical treatment. The oddly-named Canadian Children's Rights Council contends that the child's "right to know" the identity of and to have a relationship with their biological father is enshrined in the UN Convention on the Rights of the Child. Similarly, Australian Paternity Fraud contends that among the victims of paternity fraud are:

the child whose identity is hidden and who will suffer both mental and financial damage when he/she discovers the truth and perhaps will never know the identity of his/her biological father while he/she is deprived of major medical information about his/her own biological father. (Australian Paternity Fraud, 2000–2007)

### **DNA paternity testing and the evolving legal definition of fatherhood**

DNA paternity testing is often credited with causing the paternity fraud phenomenon (Gilding, 2004; Turney, 2005). However, relevant social, legal and policy frameworks around marriage and divorce suggest that the mobilisation of fathers around cuckold paternity fraud has not only required the

existence of affordable, accessible and reliable genetic tests of paternity, but also a legal and policy framework that ensures test results have significant legal and financial implications for men, women and children.

When performed properly, DNA tests guarantee a 99.9% probability of paternity (Gilding, 2006, p. 85). Around 0.25 tests per 1000 persons are conducted each year in Australia, with the US rate around 1.2 tests per 1000 (Gilding, 2004).

The late 1980s was a critical moment in the social history of Western countries like Australia, England and the United States. The 1970s had seen the introduction of no fault divorce and a rapid rise in rates of marital dissolution and disputes about child custody and support obligations. At the same time, the reduction of social and legal stigma surrounding pre-marital sex and illegitimate children led increasing numbers of pregnant single women to choose to continue their pregnancies, with the consequent birth of growing numbers of children with no social father liable for their support. By the late 1980s, growth in households headed by single mothers had left large numbers of children living in poverty and government's expressing anxiety about spiralling welfare bills<sup>1</sup> (Cannold, 2002; Millar & Whiteford, 1993; Sheldon, 2001; Turney, 2003).

Legislators in both Australia and England saw the commercial paternity testing industry as a means of reducing the cost to taxpayers of growing numbers of socially fatherless children. They understood that, while not all children have social fathers, they all have biological ones, and that the new testing technology could, for the first time in history, reliably identify these men. The *Child Support (Assessment) Act 1989* in Australia and the *Child Support Act 1991* in the UK specified the use of DNA testing to identify the biological progenitors of the children of single mothers, so the biological fathers could be assigned support obligations for their progeny. As well, both Acts created child support agencies with significant powers to rectify divorced men's historically low compliance with court-ordered maintenance obligations by assigning child support liabilities using set formulas and deducting monies owing direct from delinquent fathers' salaries or bank accounts (Hirst, 2005, pp. 6–7).

Both the Australian *Child Support (Assessment) Act* and the UK *Child Support Act* rejected the 16th century English legal doctrine of presumed paternity that was the basis for the law's assignment of paternal rights and responsibilities for children. The doctrine assigned to a married woman's husband legal and financial rights and responsibilities for children of the marriage unless it could be proved that the husband was impotent, sterile or lacked access to his wife for the nine months preceding the birth (Rogers, 2002). Historically, then, it was not paternal biology but the man's relationship with the child's mother that was the basis of legal fatherhood. Social rather than biological fatherhood was chosen not just because of science's inability to reliably identify a child's male progenitor, but because such arrangements protected husbands from the damage to their reputations that could result from their wives being accused of infidelity, guaranteed them an heir, and protected children of the marriage from the significant social and legal consequences of illegitimacy (Hirczy, 1995; Rogers, 2002).

In the wake of the Child Support Act's jettisoning of the doctrine of presumed paternity, Australian courts have



consistently supported the Act's biological definition of fatherhood in instances where child support is at stake. This is despite the fact that the Act's biological definition of paternity conflicts with the legal definition of fatherhood found in legislation governing the parental status of adopted children and children conceived by sperm donation (in which the woman's husband is deemed the legal father). In the 1996 case of *B v J*, the judge invalidated a contract between the mother and the biological father that released him from financial responsibility for the child, citing the risk to taxpayer of being left with the bill if parents were free to contract such fiscal responsibility away<sup>2</sup>. In the 2002 case of *Re Patrick*, a man the mother considered a "known donor" was granted contact with the child on the grounds of his "genuine and profound paternal love" for a child bearing his "genetic blueprint" (Dempsey, 2004)<sup>3</sup>, while in 2003 another "known donor" was allocated fiscal responsibility for his genetic progeny conceived through sexual intercourse with one member of the lesbian couple parenting the child (ND & BM, 2003). The Magill case in Australia failed only because the tort of deceit was an inappropriate legal mechanism; the English courts granted leave in 2002 for a claimant to proceed with a similar action by social father, although the matter was settled before it went to trial (Editor, 2002). Such cases suggest that Australian and English courts conceive of a child's right to financial support from a male parent as inalienable, and grounded in the male's participation in that child's conception, regardless of whether that participation was intended, or what the intentions were of the child's mother. They seem, in other words, to give legal endorsement to the sexual and reproductive morality colloquially known as "you play, you pay" that feminists have long rejected as inadequate when used by opponents of abortion rights (Cannold, 2002).

In general, US courts appear to give more weight to the relationship status of men and what they have contracted or bargained with regard to obligations for children (Baker, 2004). For unmarried men, DNA evidence, a woman's assertion of a man's biological paternity (where uncontested by him within a prescribed period of time), or a man's voluntary acknowledgement of paternity may form the basis of a legal assignment of paternity. Once established, men may only disavow paternity through court proceedings that find establishment to have been made on the basis of fraud, duress, or material mistake of fact (Roberts, n.d.a). Case law to date suggests that, where timelines have expired, courts are reluctant to give leave for evidence to be presented that asserts paternity fraud. In *Hill v. Blevins*, the spouse of the mother voluntarily acknowledged paternity of the woman's child; six years later, the biological father sought to argue fraud in support of a claim to disestablish the spouse's paternity but, for reasons of timeliness, the court declined to overturn the acknowledgment, even though legal opinion suggested "a colorable claim of fraud had been pled, and likely could have been proven" (Roberts, n.d.a, p. 2).

For partnered men in the United States, presumptive paternity remains the basis for legal fatherhood, though pressure from fathers' rights groups has seen an increasing number of jurisdictions offer husbands some time-limited scope to undercut the biological basis of the presumption and disavow legal obligations for children using DNA paternity

test results (Epstein, 2004). However, it remains rare for social fathers to be paid 'refunds' for child support amounts already paid, and courts tend to enforce the statute of limitations on the presentation of evidence disconfirming biological paternity (Epstein, 2004; Roberts, n.d.b; Rogers, 2002). In 1997, the Superior Court of Pennsylvania refused Gerard Miscovich leave to submit DNA evidence disconfirming his biological paternity for the child of the marriage. While Miscovich was free to tell his six-year-old that he was not his father and discontinue his relationship with him—which he promptly did—the Court found he had missed his opportunity to rebut the paternal presumption on which his support obligations rested (Epstein, 2004). In *Clay v. Clay*, Mr Clay was able to use DNA evidence to disestablish paternity within the time limits allowed by Kentucky law, but was unable to pursue reimbursement of amounts paid on the grounds that his recovery would violate the best interests of the child (Epstein, 2004). The weight of such paternity judgements suggests that, while American jurists do not dismiss biological paternity as irrelevant, their overriding concern is the protection of a child's right to support. This leads them to support the pursuit of biological fathers where children are born to single mothers, but to favour the assignment of paternal responsibilities on a social basis where children born in wedlock are concerned.

This potted social and legal history suggests that, in Australia and England but particularly in the United States, both conditions necessary for men to mobilise around paternity fraud exist: Affordable and reliable genetic testing is available, and the legal and financial implications of test results for men, women and children are significant and profound.

### Responding to the empirical and normative claims asserted in the charge of 'paternity fraud'

#### *Incidence*

The calls of fathers' rights activists for systemic change to family law and policy rest on the claim that paternity fraud is rampant (Gilding, 2005). Gilding, however, concludes that claims of high rates of paternity fraud in Australian, UK and US populations are an 'urban myth'. Behind such claims are either data marred by biased sample selection and illegitimate analytical methods, or figures simply pulled from the air by private testing companies aware that male anxiety about female fidelity are good for business (Gilding, 2005). According to Gilding (2005, p. 9), real incidence rates are nowhere near the 10–30% asserted by fathers' rights groups but around 1% in Australia and the UK, and approximately 3% in the US.

Indeed, even these figures may overestimate incidence rates of paternal discrepancy. The studies on which Gilding's estimates (and slightly higher ones found in the scholarly literature) are based have been accused of revealing estimation methods incapable of determining whether the social father is aware of or has consented to the absence of a genetic relationship between himself and the child he is parenting (Bellis, 2005; Gilding, 2005). In other words, such methods appear to count the creation of social relationships between men and children through adoption, donor insemination and known non-monogamous sexual practices as instances of paternal discrepancy.

Such low estimates of paternal discrepancy are decisive with regard to the fathers' rights claim that paternity fraud is a widespread social problem in need of sweeping social solutions. Indeed, not only do such figures undermine the fathers' rights case for further systemic change to family law, policy and practice to address paternity fraud; they also raise serious questions about the justification for the considerable changes already made.

#### *Motivations to test*

While research data are scant, those available suggest a variety of motivations for both men and women to undertake or consent to tests that lead to the discovery of discrepant paternity. Counter to the picture offered by fathers' rights discourse, such tests are not always undertaken by men in the face of the mother's ignorance or resistance. Discrepant paternity may be discovered via a genetic test taken for other reasons. For instance, genetic tests may be performed on the parents of a sick child to ascertain whether the illness is caused by a hereditary condition or to determine whether the parent is a tissue match for a sick child. Parents of children diagnosed with a hereditary condition may also undertake genetic tests to discover their carrier status and the risk of transmission to future children (Lucassen & Parker, 2001; Roberts, n.d.b, pp. 2–3) Separated and divorced mothers may test their children in the hope that proof of the social father's non-paternity will allow them to block their ex-husband's access to children of the relationship. In the American case of *Barber v. Barber* a son was born in a marriage at a time when the husband knew the child might be unrelated to him genetically (conception occurred while the couple, already parents of one child, were separated). When the Barbers reconciled, Gary Barber chose to place his name on the child's birth certificate and to parent him, but when the couple divorced, Patti Barber sought—and eventually succeeded—in denying Gary further involvement with the boy on the grounds that he was genetically unrelated to the child (*Barber v. Barber*, 2003). Australian data suggest that separated and divorced mothers like Patti Barber may even enlist the assistance of the biological father in the process of getting the social father out of the picture, “despite him having had no previous contact or relationship with the child” (Turney, 2004a, p. 5).

It is perhaps worth noting that the potential for mothers to deploy DNA paternity testing technology against social fathers to deny them access to children they have parented within the marriage was an early concern expressed by academic lawyers about the widespread use of DNA testing technology and concomitant legal changes to definitions of paternity and paternal obligation (Hirczy, 1995; Shoemaker, 1981). This worry—about the risk testing posed to the maintenance of men's relationship with children—contrasts with what appears to be the main concern of contemporary academic lawyers: the claimed injustice of men's inability to shrug off support obligations—and be compensated for past amounts paid—for genetically unrelated children (Colb, 2006; Epstein, 2004; Rogers, 2002).

Single and divorced mothers may wish to test, or be coerced into doing so by the state, in order to facilitate the identification and/or enforcement of paternal support obligations (Turney,

2004a, p. 5). In Australia, England and the United States, a failure to identify and, where necessary, prove the paternity of their child's father may put all or part of the mother's welfare benefits in jeopardy (US House of Representatives, 2005; Sheldon, 2001; Turney, 2004a). In Australia, it is estimated that around one third of tests are sought by mothers wanting or needing—through obligations related to their pension—to enforce child support obligations from biological fathers (Gilding, 2004, p. 71; Pearson & Thoennes, 1996).

As well, men or parties acting on their behalf pursue tests. They do so, the evidence suggests, not to satisfy a disinterested pursuit of the truth—as Father's Right Discourse often suggests (Men's Confraternity, 2006; Smith, 2001–2002)—but in the hope of altering existing legal and fiscal obligations for children. For instance, Gilding (2004) found that around two thirds of tests conducted in Australia were initiated by men, their new wives, or their parents in the hope of using the results to alter existing support or other post-separation arrangements. The US Centre for Law and Public Policy, in reference to American men, noted similarly that “paternity and support issues are deeply intertwined. For this reason, an attempt to disestablish paternity is generally accompanied by an effort to end current and future support obligations” (Roberts, 2003, p. 2).

The link between men's, their new wives' or their parents' decision to test and the desire to alter legal responsibilities for children in the wake of relationship breakdown is further supported by Australian data showing that at least some men who test *know* that the child of the marriage is or may be genetically unrelated to them. Turney (2005) found that, among a group of 15 women keeping “paternity secrets,” several were partnered to men who knew a child of the marriage was or might not be their genetic offspring. One older man pressured his wife into swinging, and only raised doubt about the paternity of resulting children after they separated. Another persuaded his partner not to abort a child he knew had uncertain paternity because of the risk that it might be related to him.

Finally, men with little doubt about their biological paternity may test to humiliate estranged partners and/or delay paternity adjudication and the assignment of support obligations. One woman in Turney's study said that her ex-husband insisted on a court-ordered paternity test because:

he wanted to use it as a way of stopping a birth certificate being created ... for my son ... so that [it] could not be sent into Child Support, so he wouldn't have to pay anything for the time being. There was never any fear in his head that the child wasn't his. It was just that he'd been told somewhere along the line that if he put it off that way, he could stall things for a while. (Turney, 2004a, p. 6)

#### *Harm to men*

Available data suggest that short intervals or overlaps between sexual relationships, “swinging” and other non-traditional sexual patterns in spousal relationships and spousal separations, as well as occasional or persistent spousal infidelity, are the situational precursors to discrepant paternity (Turney, 2005). To put this another way, the cuckold

paternity scenario specified in fathers' rights discourse is only one of a number of ways that discrepant paternity scenarios come about. One can speculate that the exclusive focus in fathers' rights discourse on the cuckold scenario occurs because it is the only one where women, and women alone, violate social norms and expectations about spousal fidelity and honesty to the detriment of men, and therefore the only one that supports father-favouring changes to family law and policy.

Again, however, actual rates of spousal infidelity leading to cuckold paternity fraud are critical to the success of this case. In this regard, it seems worth noting that sex surveys conducted in Australia and Europe consistently find that men are about twice as likely as women to stray from a spousal relationship (Gilding, 2005). Thus, insofar as paternity fraud discourse seeks to leverage public anxiety about widespread female infidelity to achieve father-favouring family law outcomes, it lacks an evidential base.

Fathers' rights groups assertions that their spouses' failure to disclose paternity uncertainty denies them the chance to give or deny consent to parenting an unrelated child appears self-evidently true and problematic. This situation is in contrast to the experience of parenting donor-conceived children or adopted children, where men know and presumably give informed and voluntary consent to creating and parenting a non-biological child. The problem in such cases, in contrast to what is often asserted in father's rights discourse, is that men are denied the capacity to consent to a paternal relationship with a genetically unrelated child, not the creation of such a relationship *per se*. However, a necessary caveat to this conclusion (that mothers are morally culpable in such situations for failing to disclose discrepant paternity or paternity uncertainty) arises from cases where disclosure puts a woman or her child at risk of violence. In her interviews with 15 Australian women keeping "paternity secrets", Turney (2005, p. 14) found several women fearful that disclosure might engender violence, including one woman whose partner responded to her confession of a sexual liaison during a period of separation by kicking her to the floor, breaking a rib and nearly fracturing her skull.

Disclosure may be morally required in medical situations where men have both a right and a responsibility to give informed consent to medical interventions for themselves and their children. Currently, when incidental genetic testing reveals a case suspected (perhaps not always correctly) to be one of paternal discrepancy, medical staff fail to disclose these results to the social father (Lucassen & Parker, 2001). One study of medical geneticists in 19 nations found that 81% would disclose only to the mother, while 15% would claim that either both parents were responsible for the condition, or that the result was anomalous. Geneticists in Greece, India, Switzerland and Turkey said this case posed the greatest ethical dilemma, (Wertz & Fletcher, 1989, p. 20).

Such decisions appear to be based on an assumption by healthcare professionals that the mother is aware of the possibility or actuality of the social father's non-biological paternity, and is deliberately withholding this information from him. It is this view about her knowledge and decision to conceal such knowledge from the social father that informs the dominant healthcare worker view that they are obligated to protect the mother's privacy.

Interestingly, while this scenario suggests a presumption on the part of healthcare workers that paternal discrepancy is the cause of the result and that the mother is aware of this possibility, there is currently no evidence to support this view. Indeed, while incidents of paternal discrepancy are extremely rare, anecdotal evidence suggests that even where cuckold paternity fraud has been correctly identified, the mother may not be conscious of the problem. In 2005, the former girlfriend of Australian Health Minister Tony Abbott made public her reunion with the child she put up for adoption years earlier. Kathleen Donnelly had always nominated the Minister as the child's biological father, and organised for the two to meet. The entire event, including the first meeting between Abbott and Daniel O'Connor, was given extensive coverage in the Australian media. So was the subsequent revelation that another man was the child's biological father. The episode caused Donnelly, O'Connor, his adopted parents, his biological father, the Health Minister and his wife easily-foreseen embarrassment, giving weight to Kathleen Donnelly's subsequent assertion that she forgot about her one-night stand with Daniel's biological father because she was in love with Abbott and therefore chose to believe he was the only possible biological father (Murphy, 2005). Evidence for the psychological defence of denial rather than duplicity in women's mental management of paternity uncertainty also appears in the stories women told Turney (2005, p. 10) about their paternity secrets:

[Some women] assumed the father to be the man of the most enduring and regular sexual relationship, the obvious and most likely man. Sometimes they believed it was the one whom they "wanted it to be", a man they loved or respected and who was likely to provide the best possible environment for the child to be nurtured and in which to grow up. ... When the current partner or obvious man assumed paternity and was "happy with it", this ... firm[ed] up certainty for the mother.

Healthcare professionals may err in assuming that their silence colludes with the mother in covering up acknowledged paternity uncertainty; in denying social fathers relevant genetic test results, they also violate what is widely accepted as the pre-eminent value in contemporary medical ethics and practice: autonomy (Bennett, 2003). Without relevant genetic facts, not only is the man incapable of giving informed consent to his own treatment, but also to treatment for the couple or his child, potentially leading him inadvertently to consent to something that could cause harm. One could imagine, for example, a situation where the parents of a child with a genetically heritable condition are tested to ascertain their risk of passing on the condition to future children. Withholding results that reveal the man to be biologically unrelated to the sick child risks the couple consenting to *in vitro* fertilization and prenatal genetic diagnosis to avoid conceiving future children affected by the condition, a decision entailing unnecessary social and financial burdens for the couple and health risks for the woman.

#### *Harm to children*

The fathers' rights argument about a child's right to know takes in both the idea that the creation of a parenting

relationship between a father and a genetically unrelated child is wrong because it is not a 'real' parent–child relationship and the claim that children's health and identity formation are harmed by ignorance of their biological father's existence and paternal genetics. Claims of a child's right to know also encompass assertions about the harms to children's health resulting from non-disclosure of paternity uncertainty or discrepancy.

The claim that only biological paternity is real paternity is asserted rather than argued in father's rights discourse, and is contestable on moral, logical, evidence-based and consistency grounds. In particular, the lack of argument leaves many questionable assertions including, though not limited to: What makes biological parental relationships real or valid in a way non-biological ones are not? How can genetics be understood as critical to the creation of real parent–child relationships when parties to such relationships can die unaware that their social parent–child relationship was not accompanied by a genetic one? If non-genetically based relationships between men and children harm both, how can the deliberate creation of such relationships in some contexts, most notably where a couple is infertile, be justified?

With the exception discussed earlier, fathers' rights concerns about the costs to children's health of failure to disclose non-paternity appears to be unjustified. Health care professionals do not make emergency or other treatment decisions for children based on their knowledge of a parent's genetic or health status. Instead, health decisions made for a particular child will be made on the basis of that child's symptoms and of genetic and diagnostic tests conducted to discover their cause. Indeed, it is just such tests that reveal paternal discrepancy. While it could be surmised that older children may make lifestyle choices based on beliefs about genetic relationships (of the "my father's side of the family has a history of heart attacks so I had better watch my fat intake" sort), it is possible that such choices may not be significant or harmful enough to justify giving weight to this concern.

The central role that fathers' rights discourse gives to paternal genetics in the establishment of a child's identity may also be questioned. While reflective of dominant Western social understandings that biological or blood relationships form the basis of kinship, "non-biological parenting has existed for millennia as a successful and meaningful addition to or replacement for biological parenting" (McNair, 2004, p. 39). The recent Western valorisation of genes complicates the parental desire to disclose donor-assisted conception to children and the influence of donor conception on identity formation (see Kirkman, 2003). While some evidence exists to support claims that children may be harmed by the failure to disclose the existence of non-genetic parental relationships, this harm appears largely attributable to secrecy about the existence of such relationships rather than to a decisive role of genetic knowledge in identity formation (McNair, 2004, pp. 39–45). Indeed, the profound role social parenting plays in children's understanding of who they are may be why some adopted children choose not to pursue knowledge about their genetic parents and suffer no negative outcomes as a consequence (McNair, 2004). Of course, identity is hard to define and measure, but this does suggest that, while it may be preferable for parents to give their children a truthful account of their conception story, including information relevant to their genetic lineage, the failure to do so need not necessarily damage children's identity formation or overall social and psychological well-being.

The failure of fathers' rights discourse to problematise the potential harms to children resulting from men's behaviour around cuckold paternity raises questions about the sincerity of such concerns. For instance, the discourse is largely silent on the question of paternal motives for testing and silent about the harms caused by men who respond to test results disconfirming biological paternity by abandoning children they have parented from birth (Davies, 2007; Egerton, 1999; Turney, 2004a, 2005).

## Conclusion

In contrast to the gendered and non-nuanced depictions of cuckold paternity offered by fathers' rights groups, analysis and evidence suggest that discrepant paternity reflects the complex nature of sexual and intimate relationships at the end of the 20th and start of the 21st centuries.

At the heart of cuckold paternity fraud discourse is the claim that real fatherhood is biological fatherhood. However, neither this assertion nor assertions about the threat to children's health posed by non-disclosure of paternal genetics stand up well to scrutiny. In contrast, feminists who value autonomy may share concerns raised in cuckold paternity fraud discourse about the harm suffered by men and children when informed consent is denied.

Paternity fraud discourse has not arisen as a result of DNA testing technology, but its coupling with laws and policies that define legal paternity in biological terms ensures that test results have profound implications for men, women and children. It appears that the redefinition of fatherhood as a biological relationship may undermine the capacity of parents to maintain working relationships in the wake of marital dissolution, and for relationships between separated/divorced parent and child to thrive. Insofar as governments have a role, after marital dissolution, in sustaining workable relationships between parents and thriving relationships between parent and child, it is undermined by the redefinition of fatherhood as biological in legal and social policy.

As I have argued elsewhere (Cannold, 2002), defining fatherhood in social and intentional terms could end the nexus in law, social policy and the public imagination between biological fatherhood and fiscal obligations for children, undermine the 'you play, you pay' philosophy supported by biological definitions of fatherhood, and reduce demand for DNA paternity testing with their high costs to father–child relationships.

## Endnotes

<sup>1</sup> A 1998 paper claimed that the proportion of Australian families with children headed by a lone parent has increased from around 9% to 20% in the years from 1976 to 1998, with the number of sole parent families in receipt of income support increasing by an average of 5% a year since 1989. The authors note that the incidence of lone parenthood in Australia has not increased in the same proportions as in the US and the UK, suggesting that figures for both these countries would be higher (Rodgers & Wilson, 1998 <http://www.aifs.gov.au/institute/afrc6papers/rodgers.html>).

<sup>2</sup> In the final analysis, the man was not held fiscally responsible, but for reasons that had nothing to do with the formal agreement struck between the parties (see Sandor, 1997).

<sup>3</sup> This case had a tragic outcome when the mother, distraught at the judge's decree that contact between her son and his biological father should be sustained and ultimately increased, murdered the little boy before taking her own life (see Legge, 2002).



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