TAXATION WITHOUT DUPLICATION: MISATTRIBUTED PATERNITY AND THE PUTATIVE FATHER’S CLAIM FOR RESTITUTION OF CHILD SUPPORT

Shawn Seliber

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TAXATION WITHOUT DUPLICATION: MISATTRIBUTED PATERNITY AND THE PUTATIVE FATHER’S CLAIM FOR RESTITUTION OF CHILD SUPPORT

Shawn Seliber

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I. Introduction

After a steamy romance, Dawn and Gary discovered that Dawn was pregnant.\(^1\) After Dawn’s child was born, Gary, under court order, began paying child support.\(^2\) When he sought visitation she refused and demanded a paternity test, correctly predicting that the test would exclude him as the child’s father.\(^3\) A court reversed the paternity judgment giving Gary prospective relief—he no longer had to continue paying support.\(^4\) What about retroactive relief; did he get back the support he had already paid?\(^5\)

This Note will address the question of whether a putative father is entitled to restitution of child support paid under a paternity judgment that is subsequently reversed because a paternity test excludes him as the child’s father.\(^6\)

The advent of DNA testing has uncovered many instances of misattributed paternity. Indeed, a surprising number of people were fathered by someone other than the man they believe to be their dad.\(^7\) Because DNA tests are convenient, requiring only a cheek swab of man and child,\(^8\)

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\(^1\) See In re Haller, 839 A.2d 18, 19 (N.H. 2003) (describing the facts that lead to the eventual paternity, visitation, and child support enforcement action).

\(^2\) Id. at 19.

\(^3\) Id. at 19–20.

\(^4\) Id. at 20.

\(^5\) He did not. See In re Haller, 839 A.2d at 22 (refusing to award restitution because the state had not been unjustly enriched by the plaintiff).

\(^6\) Women must pay child support too, so why not ask the question in sex-neutral terms? Misattributed maternity is rare. See Ronald K. Henry, The Innocent Third Party: Victims of Paternity Fraud, 40 FAM L.Q. 51, 74 (2006) (describing hospital safeguards to ensure that mothers leave with the children they have delivered: The hospital "takes the footprint of the baby, places a wristband on the mother and the baby, [and] provides twenty-four hour video monitoring of the nursery"); see also Margaret Cronin Fisk, $2.3M Settlement in Va. Wrong Baby Case, NAT’L L.J., May 21, 2001, at A6 (describing the settlement reached between Paula Johnson and the University of Virginia Medical Center after a paternity test revealed that she is not biologically related to the child she is raising).

\(^7\) See Mary R. Anderlik & Mark A. Rothstein, DNA-Based Identity Testing and the Future of the Family: A Research Agenda, 28 AM. J.L. & MED. 215, 221–22 (2002) (discussing studies showing that between five and thirty percent of children born into a marriage are "quasi-marital" children); see also Carolyn Abraham, Mommy’s Little Secret, GLOBE AND MAIL, Dec. 14, 2002, at F1 (noting that Dr. Jeanette Papp, director of genotyping and sequencing at the University of California Los Angeles, estimates the misattributed paternity rate to be fifteen percent).

\(^8\) See Paula Roberts, Truth and Consequences: Part I. Disestablishing the Paternity of Non-Marital Children, 37 FAM. L.Q. 35, 37 (2003) ("Testing can now be done by simple cheek swab (rather than drawing blood), only the man and child need be tested (eliminating the need for the mother’s cooperation), and test results are highly dispositive.").
inexpensive at approximately $100, and widely available online and by mail order, misattributed paternity has become more likely to be discovered. At the same time, federal child support enforcement laws have become increasingly aggressive, which means that paternity is more likely to be misattributed. The combination—increasing paternity misattribution coupled with the increasing ease of identifying it—is a recipe that makes our question ripe for analysis.

Part II of this Note will address child support, misattributed paternity, and the legal trajectory of our question. Part III will address restitution law; while less prominent than its common law siblings—tort, contract, and property—restitution is indeed a freestanding body of law with its own focus, its own rules, and its own precedent. Part IV will identify and discuss four legal approaches to answering our question. Part V will consider the child support recipient’s restitutionary defense—the change-of-position defense. A bit about the defendants in our claim before we proceed: a putative father will usually seek restitution from the child support recipient; that recipient will be the state if the mother is on welfare, or the mother herself if she is not. A putative father might also seek restitution from the biological father, but that claim will not be considered here because it presents a host of different legal issues.
II. Child Support, Misattributed Paternity, and the Restitution Claim

A. Child Support as a Legal Obligation

Child support, as a public policy, is premised on the uncontroversial notion that a biological parent—whether or not they have a relationship with their child—is obligated to pay support. The obligation is "among the most fundamental obligations recognized by modern society." As such, under federal and state law, biology alone creates a duty of support—there need not be any further relationship between the parent and the child. How important is biology? Even victims of statutory rape and sexual assault have been required to support their offspring.

Child support may be the debtor's most serious obligation. The debtor may be liable for up to 21 years of support. Wage garnishments for child support usually will take priority over any other liens against the debtor. Further, child support is not dischargeable in bankruptcy.

The "[c]onstitutional and statutory prohibitions that forbid imprisoning a debtor to collect a civil debt" do not necessarily extend to child support debtors. Rather, child support debtors "are often imprisoned..."
for contempt."\(^{22}\) The California Supreme Court rejected a Thirteenth Amendment challenge to contempt sanctions for failure to pay child support, analogizing a parent's duty to pay child support to other forms of "constitutionally permissible enforced labor," including military and jury service.\(^{23}\)

1. The Impact of Federal Law

Federal child support laws have become increasingly aggressive since the 1970s. Under Title IV-D of the 1974 Social Security Act, welfare recipients must assign their right to collect child support over to the state as reimbursement for welfare expenses.\(^{24}\) The Family Support Act, which was enacted in 1988, required states to set targets for paternity establishment.\(^{25}\) The Omnibus Budget Reconciliation Act of 1993 required states to implement a number of procedures for securing those paternity establishments, including procedures for voluntary paternity acknowledgment and default judgments.\(^{26}\) Finally, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA),\(^{27}\) enacted in 1996, instituted performance-based incentives relating to "establishment of paternities, establishment of child support orders, collections on current child support payments, collections on past-due child support payments (i.e., arrearages), and cost effectiveness."\(^{28}\) One glaring omission from these performance metrics is that states are not expected to track the rate at which paternity is misattributed.\(^{29}\) Indeed, states risk losing

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\(^{22}\) Id.

\(^{23}\) See Moss v. Superior Court, 17 Cal. 4th 396, 410 (Cal. 1998) (stating support of a minor child is as important a social obligation as compulsory military service, enforced labor as punishment for a crime, jury service, and other constitutionally permissible enforced labor).

\(^{24}\) See 42 U.S.C. § 608(a)(3) (2000) ("States . . . shall require, as a condition of providing assistance to a family under the State program funded under this part, that a member of the family assign to the State any rights the family member may have . . . to support from any other person.").


\(^{28}\) CARMEN SOLOMON-FEARS, PATERNITY ESTABLISHMENT CHILD SUPPORT AND BEYOND 22 (Susan Borotti & Donna Dennis eds., Novinka Books 2003).

federal incentive money should they fail to establish paternity in 90% of welfare cases. The results of such a rule were manifested in 2002 when then-California governor Gray Davis vetoed a bill aimed at reducing paternity fraud because increasing the accuracy of paternity establishments would jeopardize $40 million in federal funding.

As of 2003, total child support arrearages were approximately $70 billion, 70% of which was owed by debtors with incomes below $10,000 per year. One commentator explains that "the desperate economic circumstances of most fathers of children on welfare almost ensures the failure of the child support system to effectively address child poverty."%

B. Misattributed Paternity

The fact that 10% of us were fathered by someone other than the man we believe to be 'Dad' should not be surprising—human desire for multiple partners is far more natural than monogamy. Indeed, the birds and the bees are not monogamous either. Of the 310,490 paternity tests conducted by the American Association of Blood Banks in 2001, nearly one-third of putative fathers were excluded, clearly demonstrating the axiomatic principle that where paternity misattribution is suspected, error rates are much higher. One commentator estimates that the number of misattributed paternities may exceed one million.

30 42 U.S.C. §§ 609(a)(8), 652(g)(1) (imposing a penalty based on failure to comply with the statute).
35 See Abraham, supra note 7, at F1 (describing a study in which the DNA of 4,000 mammalian species was tested, and resulted in the finding that "[b]irds, bees, snails, snakes, fish, frogs . . . not even mites are monogamous").
37 Henry, supra note 6, at 60.
Neither federal law nor the law of any state requires a paternity test to establish paternity. Instead, paternity is most commonly established by the marital presumption, the voluntary (often, delivery-room) acknowledgment, judicial determination (very often by default), and finally, by behavior, more specifically, by a man holding a child out as his own. Given paternity testing's accuracy and convenience, reliance on these other methods is like using the hand across the forehead in lieu of the thermometer.

There are at least four arguments as to why misattributed paternity is a problem. First, children and fathers are deprived of a relationship with one

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38 Instead, a party may request genetic testing upon a showing of good cause alleging or denying paternity. 42 U.S.C. § 666(a)(5)(B)(i) (2007).


41 Roberts, supra note 8, at 3.

Unif. Parentage Act § 4(4) (1973) has been adopted in 19 states. In recent articles, family law professors—expanding on the "fatherhood by nurture rather than nature" idea—have proposed considerable redefinition of the rights and obligations of biological fathers. The proposals rest on the feminist idea that the mother, because she carries the child, has superior or exclusive parental rights. Under their schemes, fathers would, in effect, acquire additional parental rights through their relationships with mothers. Accepting that mens' parental rights are limited, and can be redefined, the corollary can be accepted; that is, mens' parental obligations can be redefined too.

Melanie B. Jacobs proposes that a biological father should have an absolute right of visitation but no right to custody. Melanie B. Jacobs, My Two Dads: Disaggregating Biological and Social Paternity, 38 ARIZ. ST. L.J. 809, 852–56 (2006). Katharine Baker proposes that a biological father should have no absolute parental rights, but should be obligated to pay a child support tax. Katharine K. Baker, Bargaining or Biology? The History and Future of Paternity Law and Parental Status, 14 CORNELL J.L. & PUB. POL'Y 1, 45–48 (2004). Nancy Dowd, similarly, proposes that a biological father should have no absolute parental rights, but should have the full responsibility of paying child support. Nancy E. Dowd, Parentage at Birth: Birthfathers and Social Fatherhood, 14 WM. & MARY BILL RTS. J. 909, 917 (2006). Interestingly, though their policy proposals starkly contrast with the proposals of those favoring equal parental rights, much like many equal rights proponents, Dowd and Jacobs advocate mandatory paternity testing. Dowd views paternity testing as favorable to the marital paternity presumption. Id. at 929. Jacobs likes mandatory paternity testing to prevent later paternity disestablishment. Melanie B. Jacobs, When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims, 16 YALE L.J. & FEMINISM 193, 201 (2004) (arguing for mandatory paternity testing to prevent paternity disestablishment).
another. Second, families are set up for an emotional bombshell should the truth be discovered. Third, the obligation of support is placed on the wrong man. Fourth, the man who should fulfill that obligation, the child's father, is allowed to ignore it. The child support debtor whose paternity has been misattributed is like every other taxpayer other than the child's parents—the child is not his. The burden of supporting that child, however, is largely his; in effect, he is saddled with a disproportionate tax.

On the other hand, from the child support recipient's perspective, misattributed paternity is largely irrelevant if a misattributed putative father will pay the same support as the biological father. Of course, should the misattributed putative father be easier to collect from or have a larger income, he is a favorable source of support. While the threat of losing support prospectively as a result of a paternity disestablishment keeps misattributed paternity from being completely irrelevant, any risk of prospective loss can be mitigated by collection from the biological father.

Misattributed paternity becomes considerably more relevant to the recipient when the error puts their child support in jeopardy retroactively, that is, if they will have to make restitution to the misattributed debtor should the error be discovered. Once again, this paper's question is whether a putative father is entitled to restitution of child support paid under a paternity judgment that is subsequently reversed because a paternity test excludes him as the child's father. That question's practical import is that a negative response tolerates the status quo by allowing misattributed paternity to remain largely irrelevant to the recipient. An affirmative response, conversely, might prompt a fundamental change in the way paternity is established. If misattributed paternity became a problem, not just for the debtor, but also for the recipient, paternity testing would be the solution.

42 Henry, supra note 6, at 68 (advocating the position that the anger and resentment which flows from forced involuntary payments necessarily produces a worse relationship between a man and child than a relationship entered into voluntarily by the man).
43 See Martin Kasendorf, Men Wage Battle on 'Paternity Fraud', USA TODAY, Dec. 12, 2002, at A23 (describing one man's reaction to his paternity being misattributed as "an acid sense of betrayal.").
44 Henry, supra note 6, at 52 (describing a victim of paternity fraud as a man who "is indentured with coercively enforced obligations for eighteen to twenty-one years for someone else's child.").
45 Id. at 55 (explaining that once a man becomes a victim of paternity fraud, he has virtually no options at law to remedy the mistake).
46 Suits to establish paternity may be brought at any time before a child is eighteen. See 42 U.S.C. § 666(a)(5)(A)(i) (stating that procedures regarding paternity establishment are permitted at any time before the age of eighteen).
47 See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18, cmt. 12 (Tentative Draft No. 1, Apr. 1, 2001) (noting a hypothetical under similar conditions that both asks this question and answers it in the affirmative).
Arguments for mandatory paternity testing have been made quite effectively, with numerous rationales.48

C. The Restitution Claim

Our question jumps ahead to the misattributed putative father’s third and final step in seeking redress. His first step, of course, is discovering the error—he needs to get a paternity test. His second step is disestablishing paternity. Because of barriers to disestablishing paternity, misattributed child support debtors may not be able to obtain prospective relief from child support orders, let alone retroactive relief.49 Approximately one third of states have no specific statutory processes for rescinding paternity acknowledgments.50 In states which have adopted the Uniform Parentage Act, a putative father may have a small window from the date of the paternity judgment to bring a disestablishment claim,51 though often misattributed putative fathers will not discover the error until many years later.

Several states have statutorily addressed the effect of paternity disestablishment on support obligations. The statutes can be distinguished by whether prospective relief is mandatory52 or discretionary.53 The issue

48 See, e.g., June Carbone & Naomi Cahn, Which Ties Bind? Redefining the Parent-Child Relationship In An Age Of Genetic Certainty, 11 WM. & MARY BILL RTS. J. 1011, 1024 (2003) (arguing for mandatory paternity testing to provide secure parent-child relationships); Henry, supra note 6, at 52 (arguing for mandatory paternity testing to protect men from paternity fraud); Dowd, supra note 40, at 929 (arguing for mandatory paternity testing as favorable to the marital paternity presumption as a means of ensuring that children have a source of support); Greenwood, supra note 39, at 458 (concluding that paternity testing should be mandatory in part to prevent mothers from committing paternity fraud); Jacobs, supra note 41, at 201 (arguing for mandatory paternity testing to prevent paternity disestablishment); Niccol D. Kording, Little White Lies That Destroy Children’s Lives—Recreating Paternity Fraud Laws To Protect Children’s Interests, 6 J.L. & FAM. STUD. 237, 266 (2004) (arguing that absent an existing father-child relationship paternity testing should be mandatory to prevent family discord caused by the discovery of misattributed paternity); Kristen Santillo, Disestablishment of Paternity and the Future of Child Support Obligations, 37 FAM. L.Q. 503, 513 (2003) (noting that paternity testing should be mandatory in cases where a father is signing a voluntary acknowledgment).

49 Tresa Baldas, Parent Trap? Litigation Explodes Over Paternity Fraud, NAT’L L.J., Apr. 10, 2006 (describing the frustration attorneys and mens’ rights advocates have with the inability to get even prospective relief in cases of misattributed paternity).

50 Roberts, supra note 8, at 35.

51 See, e.g., Cal. Fam. Code § 7541(b) (1997) (requiring a husband’s motion for disestablishment to be filed by time the child reaches two years old).

52 See, e.g., Iowa Code § 600B.41A(4) (2005) (giving mandatory relief from arrearages and future obligations should paternity be disestablished).
appears to be moot in both Arkansas and Georgia, where statutes expressly limit retroactive relief to arrearages; thus, these states create an odd situation in which the delinquent child support debtor benefits by being relieved of past obligations, while the debtor who has fulfilled his obligations cannot recover restitution.

III. Restitution Law

A. Restitution as a Freestanding Body of Law

Restitution, though less prominent than its common law siblings, tort, contract, and property, is a freestanding body of law with its own focus, its own rules, and its own precedent. Indeed, it is the fourth corner of the common law. We might say that contract law concerns duties created by promises; tort law concerns duties sans promises; and property law concerns ownership of real and personal property. Freestanding restitution law concerns benefits, specifically those benefits conferred by plaintiffs which unjustly enrich defendants.

Restitution law covers legal problems that are not covered by other substantive areas of the common law, a concept demonstrated by the following simple example. Consider, for instance, a bank that mistakenly makes a deposit into a customer’s account. No gift was intended, no contract between the parties was breached, no tort was committed, and no property right was infringed. However, because the customer was unjustly enriched, he must make restitution. A restitution problem is solved with a two-part inquiry into the following question: When a party has conferred a benefit upon another, does justice require that the benefit be returned?

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53 See, e.g., 750 ILL. COMP. STATE. ANN. 45/7(b-5) (1998) (allowing a putative father to receive prospective relief from support obligations should he be excluded by DNA test).
54 See ARK. CODE ANN. § 9-10-115(f)(1)(D) (2007) (providing that a misattributed father who has already paid child support is not entitled to a refund of those payments); see also State v. Phillippe, 914 S.W.2d 752, 755 (Ark. 1996) (finding that the statute precluded an award of restitution of child support paid to the state by a misattributed putative father).
55 See GA. CODE ANN. 19-54-7(d) (2002) (providing that a misattributed father who has already paid child support is not entitled to a refund of those payments).
56 RENDLEMAN, supra note 10, at 383.
57 RESTATEMENT OF THE LAW (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. b (Discussion Draft, Mar. 31, 2000).
58 RENDLEMAN, supra note 10, at 383.
59 Id.
60 Id. at 385 n.1.
The first part is the threshold question, indicating that if the defendant has not received a benefit, then there cannot have been enrichment. A benefit is either an addition to the defendant's wealth or a requested performance rendered to the defendant. The first part of the inquiry is easier to answer than the second. The wealth of the child support recipient, be it the mother or the state, will have been increased in the form of a direct benefit, money. Furthermore, the payment of support is a performance requested by the defendant that will have been rendered. The second part of the inquiry, the justice question, is tougher. Reasonable people are apt to disagree about what justice requires and thus coming to a consensus can be relatively difficult. Thankfully, in answering the justice question, courts are able to rely upon the confining and informative strictures of rules and precedent.

B. The Subsequent-Reversal-of-Judgment Rule

Indeed, in considering our question, a court need only apply the well-established subsequent-reversal-of-judgment rule. The Supreme Court, in considering our question, a court need only apply the well-established subsequent-reversal-of-judgment rule.

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61 Id.
62 See George E. Palmer, The Law of Restitution § 1.8 (1995) (determining that a benefit is either an addition to the defendant's wealth, or a performance requested by the defendant that has been rendered).
63 Cf. Audrey G. v. Robert T., 144 Misc. 2d 313, 314 (N.Y. Misc. 1989) (finding no unjust enrichment in a claim for restitution of child support paid by a misattributed putative father to a mother because the money was paid for the child's benefit, and, according to the court, must have been assumed to have been spent on the child). The court did not explain the definition of benefit upon which it relied. Id. Inducing a workable definition from the court's analysis is difficult—the court would not, of course, conclude that a parent need not pay their child's tuition, or medical bills, simply because the service had been provided for the child's, rather than the parent's, benefit.
64 Courts are also not given questions that are so discretion-maximizing as to make uniformity itself an element of justice—impossible.
65 See Restatement (Third) of Restitution and Unjust Enrichment § 18 (Tentative Draft No. 1, Apr. 1, 2001) (stating the rule that "[a] transfer or taking of property, in compliance with or otherwise in consequence of a judgment that is subsequently reversed or avoided, gives the disadvantaged party a claim in restitution to the extent necessary to avoid unjust enrichment"); Restatement of Restitution §§ 73–74 (1937) (stating the rule that "a person is entitled to restitution of a benefit which he has conferred upon another, induced thereto by a levy under or a threat of execution of a judgment or process which is void as to him, if the execution thereof would subject him to serious risk of substantial loss" and "[a] person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final; if the judgment is modified, there is a right to restitution of the excess"); see also Palmer, supra note 62, at § 9.9(b) (explaining that "[a]lmost as a matter of course, restitution usually has been granted of money paid or other benefits transferred under a judgment subsequently reversed").
Court has stated the rule as "what has been given or paid under the compulsion of a judgment the court will restore when its judgment has been set aside and justice requires restitution." Let us again consider an example: An insurer was found liable to a couple on a death claim after their daughter's prolonged, unexplainable absence. When the daughter turned up, the judgment against the insurer was set aside. Under the subsequent-reversal-of-judgment rule, the couple had to return the payments that the insurer made upon hearing of their daughter's initial disappearance.

The court, in the first go-round, was put in the unenviable position of determining liability without the dispositive fact. That is, they did not have the daughter's body. When courts must determine paternity, that dispositive fact is a paternity test. Given that courts make decisions based on incomplete information, the best the legal system can do is make corrections when new facts become known. This, of course, explains why the judgment against the insurer was set aside. Just setting aside the judgment, however, without also awarding the insurer restitution would have not only been an empty gesture and not a correction—the insurer would have been unreimbursed just the same. Likewise, in our claim, the error is not corrected until the money has been returned to the former child support debtor, money that he should not have paid in the first place. The subsequent-reversal-of-judgment rule is an absolute necessity in a just legal system, and as such, is applied "almost as a matter of course."

The rule, however, is not applied as a matter of course when a paternity judgment has been set aside and the payor seeks restitution of child support paid. To be sure, courts have straightforwardly applied the rule, making little "reference to the particular nature of the controversy."

See United States v. Morgan, 307 U.S. 183, 197 (1939) (finding that funds paid to the district court during a ratemaking dispute should have remained with the court as a possible source of restitution pending the outcome of the rate determination).

See Alexander Hamilton Life Ins. Co. v. Lewis, 550 S.W.2d 558, 558–59 (Ky. 1977) (finding that, when an insurance judgment was set aside because the presumed-dead daughter was found alive, money paid in fulfillment of that judgment had to be repaid).

Id. at 559–60.

This paper argues that using any method other than a paternity test is like "using the hand across the forehead in lieu of the thermometer." See supra Part II.B. Courts do, however, use other methods, such as "the marital presumption, the voluntary . . . acknowledgement, judicial determination . . ., [and] behavior." See supra notes 39–41.

PALMER, supra 62, at § 9.9(b).

In re Marriage of Cook, 663 S.W.2d 789, 790 (Mo. Ct. App. 1984) (awarding restitution of child support paid during pendency of appeal before judgment was reversed). See, e.g., Kohl v. Amundson, 620 N.W.2d 606 (S.D. 2001) (ordering mother to pay restitution to putative father for child.
However, as discussed in more detail below, many courts have failed to apply the rule and denied restitution.

C. Permutations

What explains the discrepancy? Before we tackle that question, let us answer its corollary, an easier question: What does not explain the discrepancy? The facts of the individual cases. Our claim can have a host of permutations. First, the child support recipient could be the mother or the state. Second, paternity might have been established by behavior, marriage, a paternity acknowledgment, or some other judicial mechanism, like default. Third, the putative father might not necessarily be the party who moved to disestablish his paternity; it may have been the mother, or even the biological father.\textsuperscript{73}

The basic claim could contain a number of different fact patterns, although, in some, the plaintiff might be more sympathetic than in others. Some readers might sympathize with Gary, the plaintiff in this Note’s introductory scenario. A less sympathetic plaintiff might have voluntarily acknowledged paternity despite knowing that the child might not be his, established a relationship with the child, and then moved to disestablish paternity. While the degree to which the plaintiff is sympathetic is a reasonable explanation for the case discrepancy, it is not the correct one. Cases with nearly identical fact patterns have reached opposite results. Indeed, it is not the facts at all that explain the discrepancy. The cases are distinguishable by the legal analyses used to resolve them.

IV. Four Approaches to Answering the Question

The analysis in this Note is not exhaustive, but rather is focused on restitution. Supporting the contention that freestanding restitution is being ignored when misattributed putative fathers seek restitution of child support,
one commentator categorized the legal approaches taken in considering these claims without even mentioning freestanding restitution. 74

A. Following the Rule

As previously discussed, one approach is to follow the rule of restitution. The court must correctly identify the claim as one involving restitution law. The court then must identify restitution law's applicable rule, the subsequent-reversal-of-judgment rule, and straightforwardly apply it making little "reference to the particular nature of the controversy." 75 These opinions are notably brief. 76

B. Fraud as a Prerequisite to Restitution

Probably the more common approach to answering our question involves making fraud a prerequisite to restitution as a remedy. Courts using this approach treat restitution as a remedy alone, ignoring restitution as a freestanding body of law. 77 This error leads courts to substitute tort as the applicable substantive body, thus making fraud a prerequisite to recovery. If the defendant, the child support recipient, is the state, the state will not have committed fraud. If the defendant is the mother, she may well have committed fraud, but proving it, especially years after the fact is difficult. In cases in which the mother has clearly committed fraud, courts have maneuvered to deny restitution. For example, in Miller v. Miller, a paternity test excluded an ex-husband; he then sought restitution of child support he had paid his ex-wife. 78 The court denied the claim, explaining that restitutionary relief was only available for extrinsic fraud—fraud outside of the trial. 79 The court explained that while the ex-wife may have committed extrinsic fraud before and during the marriage, it was not "perpetrated . . . in


75 See In re Marriage of Cook, 663 S.W.2d 789, 790 (Mo. Ct. App. 1984) (awarding restitution of child support paid during pendency of appeal before judgment was reversed).

76 See case cited at infra note 72 (describing cases following the subsequent-reversal-of-judgment rule of restitution).

77 See supra Part III.A. (discussing restitution as a freestanding body of law).


79 Id. at 905.
the procurement of the support order. Making fraud a prerequisite to restitution—whether the defendant is the state or mother—often results in denial of the claim.

Let us return to the case that served as the introduction to this Note, *In Re Haller.* The New Hampshire Supreme Court denied the restitution claim against the state, explaining that "to be entitled to restitution there must not only be unjust enrichment, but also the person sought to be charged must have wrongfully secured a benefit." The state, of course, had not wrongfully secured the support in the sense that they had committed fraud; rather, the state had collected support based on, in part, the debtor's acknowledgment of paternity. His acknowledgment may have been the result of the mother's fraud, but she was not the defendant. In *Smith v. Ohio Department of Human Services,* an Ohio appellate court denied a restitution claim against the state, and, referring to the fact that the agency had not committed fraud, gave the following explanation: "[T]he [plaintiff]'s unjust impoverishment does not necessarily correspond to any unjust enrichment on the part of the state."

In *Atcherian v. State,* the Alaska Supreme Court awarded restitution, but only retroactive to the date that the putative father brought the motion to vacate the judgment, explaining that full restitution would only be available had there been "agency misconduct or impropriety." In a twist on the fraud analysis, a Virginia trial court, in *Buck v. Buck,* denied restitution to a misattributed putative father, explaining that "equity" prevented finding that the mother had committed fraud because the putative father himself had been suspicious that she had committed fraud and yet still had entered into the divorce decree which provided for the support.

1. An Institutional Defense

Making fraud a prerequisite to restitution when the state is the defendant amounts to an institutional restitutionary defense. When a state
collects child support from a misattributed putative father it is not committing fraud, it is acting under a legal duty. The Atcherian court explained that the plaintiff had not given a compelling reason to hold the state liable for "undertaking legally authorized collection efforts." The explanation ignores restitution law's central question. Unjust enrichment is that compelling reason; indeed, it is the substantive breach, which gives rise to the restitutatory remedy. If a judgment is reversed then any transfer under that judgment, to an individual or the state, was "improper." As such, "the misapplication of the state's coercive means deprives them of their ordinary justification as legalized coercion."

In fact, institutions should be more likely to be held accountable for a mistake (misattributed paternity) than individuals, because of superior mistake-avoiding capability and superior ability to insure against loss. Moreover, an institution should be held strictly liable when "mistakes are frequent and of only moderate magnitude from the institution's point of view, while rather infrequent, but significant from the viewpoint of the individual." The mistake is of minimal magnitude to the child support enforcement agency because the putative father is not necessarily any less favorable a debtor than the biological father. In light of the rate of misattributed paternity, the mistake is frequent from the state's point of view. The child support debtor's perspective is the polar opposite: To the debtor, the error's magnitude is enormous and the frequency is rare.

2. Mistake Alone Justifies Recovery

Fraud should not be a prerequisite to restitution as a remedy when the defendant is the mother, in part because the fraud inquiry is troublesome. To the extent that a mother, without divulging her sexual history, wrongly allows a man to erroneously acknowledge his paternity, she has committed fraud by concealing a material fact to induce the putative father to act to his

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87 Atcherian, 14 P.3d at 976.
88 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, Intro. to Topic 3 (Tentative Draft No. 1, Apr. 1, 2001) (pointing to unjust enrichment as a compelling reason for restitution as a remedy).
89 Id.
90 Id.
92 Id. at 64.
detriment. However, this raises two other important questions: Is it fair to expect women to divulge their sexual history when men are not expected to divulge theirs? Moreover, is it realistic to expect a mother to divulge her sexual history to a potential father of her child given the possible harm to their relationship? Humans may not be monogamous, but infidelity is not accepted easily.

More importantly, fraud should not be a prerequisite to recovery when the defendant is the mother because mistake alone is grounds for recovery, and every case of misattributed paternity involves either fraud or mistake. If the mother did not conceal the material fact—that more than one man may be the father—then she at least mistakenly identified the wrong man as the father of her child. Absent a memory-incapacitating cause or absent a paternity test, a mother who has not been monogamous knows that the putative father may have been misidentified. If the putative father himself acknowledged paternity, he, of course, was mistaken. The fraud inquiry is unnecessary.

Mistake is grounds for recovery: "[R]estitution may be required when the person benefiting from another's mistake knew about the mistake. . ." Moreover, the recipient should be deprived of a benefit obtained by a material misrepresentation even if she believed her statements to be true. Indeed, a recipient may be liable for restitution even if the transferor

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93 See BLACK'S LAW DICTIONARY 685 (8th Ed. 2004) (defining fraud as a "knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment").

94 See Bouchard v. Frost, 840 A.2d 109, 112 n.2 (Me. 2004) (denying the plaintiff’s restitution claim for child support payments made to the Department of Human Services). During her interview for public assistance benefits, the mother had submitted an affidavit identifying the plaintiff as the child’s father and denying that anyone else could be the child’s father. Id. at 110. When a paternity test later excluded the plaintiff as the child’s father, the mother claimed she had been sexually assaulted by a stranger during the period of conception but had blocked the assault from her mind. Id. at 111 n.2. The court denied the plaintiff’s restitution claim. Id. at 112.

95 At least one state has criminalized paternity fraud, so the distinction between fraud and mistake might be important for a reason entirely separate from the restitution claim. See, e.g., IND. CODE ANN. § 16-37-2-2.1(f) (2006) (making paternity fraud a misdemeanor, rendering the distinction between fraud and mistake important for a reason entirely separate from the restitution claim). In Mississippi and Rhode Island, paternity fraud is punishable as perjury. See MISS. CODE ANN. § 93-9-37 (1962) (articulating that paternity fraud is punishable as perjury); R.I. GEN. LAWS § 15-8-22 (2003) (same).


97 See FISCHER, supra note 96, at § 120.3 (discussing negligent misrepresentation).
negligently conferred the benefit by failing to ascertain the facts. In *Naugle v. O'Connell*, the Tenth Circuit Court of Appeals found that trustees, despite negligently failing to determine a retiree's "complete employment history" before granting him benefits, were entitled to restitution of erroneous retirement benefit payments. A man who acknowledges paternity without first determining his partner's sexual history has an even stronger claim to restitution because he has not been negligent at all—he can only know his partner's sexual history to the extent that she accurately shares it with him.

### 3. Explaining the Error

Courts err by making fraud a prerequisite to restitution, and ignoring that mistake alone justifies recovery. The plaintiff may seek "restitution as a freestanding remedy based on the defendant's unjust enrichment alone; the defendant's breach of contract, tort, or violation of plaintiff's property is not a prerequisite." Professor Doug Rendleman, an adviser to the *Restatement (Third) of Restitution and Unjust Enrichment*, explains that "[i]f restitution were a tort . . . the American Law Institute could scuttle its Restatement." What accounts for the error?

One explanation is that courts are avoiding restitution law's arguably more difficult justice question in lieu of tort law's fraud question. Could it be easier to decide whether there has been concealment of a material fact and inducement than it is to decide what justice requires? Probably not. After all, the tort path does not sidestep the justice question. Take proximate causation: A judge will have to decide if the but-for cause of a defendant's harm is attenuated to a degree such that it should give rise to liability. That is a justice inquiry; the judge is deciding whether it would be just to impose liability for the creation of a particular cause. Application of law necessarily requires that justice be considered.

Maybe ignorance is a better explanation. Restitution is no longer a regular part of the law school curriculum. Restitution scholarship has atrophied. Andrew Kull, Reporter for the Restatement (Third) of Restitution,

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98 See id. § 43.3 (referencing Naugle v. O'Connell, 833 F.2d 1391, 1398 (10th Cir. 1987)).
99 Naugle, 833 F.2d. at 1398.
100 RENDLEMAN, supra note 10, at 383.
101 Id. at 404.
102 See RESTATEMENT (SECOND) OF TORTS § 328B(f) (1979) (stating that it is the duty of the court to determine whether "defendant's conduct is a legal cause of harm to the plaintiff").
103 My first exposure to restitution as a freestanding body of law was in Professor Doug Rendleman's Remedies course. Generally, restitution is not taught as a specific course.
puts it bluntly: "American lawyers today (judges and law professors included) do not know what restitution is."\textsuperscript{104} Part of the problem might be the terminology. Restitution is the term for both a substantive body of law and its remedy. Restitution law might have been better served had it been named unjust enrichment, a more descriptive term that would have distinguished the substantive body of law from its remedy.\textsuperscript{105} Indeed, the drafters of the Restatement (Third) of Restitution and Unjust Enrichment contemplated omitting the term restitution from the Restatement’s title; however, they decided that there was too much inertia to change now.\textsuperscript{106}

Still another explanation for fraud being a prerequisite to restitution analysis is result-first judging. Judges might be thinking: Someone has to pay child support. So what if the guy paying is not the father, he slept with the mother, and his money is just as green as the father’s is. Someone else might be paying support for one of his kids, therefore, it all evens out.\textsuperscript{107} If results-first judging is what is going on, then it is reckless for the restitution approach to require fraud analysis. These courts could avoid making bad precedent by playing the policy trump card.

\subsection*{C. The Policy Trump Card}

The Virginia Supreme Court, in denying a former husband restitution of spousal support paid under a judgment subsequently reversed, explained that "divorce and related matters constitute a distinct category, one not always subject to the body of jurisprudence generally applicable to common law suits and actions."\textsuperscript{108} This approach is an improvement because it leaves restitution precedent relatively unscathed. Plus, it is more transparent; the court is admitting that it is forcing its desired result. Still, the approach is troubling in two respects. First, individual plaintiffs are denied justice. Second, the policy analyses courts have relied upon are myopic. We will consider two examples.

\begin{footnotesize}
\begin{itemize}
  \item[\textsuperscript{104}] Andrew Kull, Rationalizing Restitution, 83 CAL. L. REV. 1191, 1195 (1995).
  \item[\textsuperscript{105}] RESTATEMENT OF THE LAW (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. b (Discussion Draft, Mar. 31, 2000).
  \item[\textsuperscript{106}] Id. § 1, cmt. c.
  \item[\textsuperscript{107}] If the description does not reflect the attitude of courts, it at least reflects Child Support Enforcement Agency culture, a culture which viewed putative fathers as "riffraff." See SOLOMON-FEARS, supra note 28, at 48 (describing the attitude towards putative fathers).
  \item[\textsuperscript{108}] Reid v. Reid, 429 S.E.2d 208, 210 (Va. 1993).
\end{itemize}
\end{footnotesize}
1. Incentives

The *Haller* court justified denying a misattributed putative father restitution from the state, explaining that to award restitution would create a "perverse incentive structure" in that neither the mother nor the father would need to take paternity establishment seriously. The court feared an incentive without a reward.

A mother receiving welfare does not receive child support from the putative father, so she need not take paternity establishment seriously because misattributing paternity will not affect her receipt of benefits. Similarly, the prospect of recovering restitution is hardly an incentive for a man to disregard whether he is being misidentified as a father. Even if he could recover restitution, legal fees, and prejudgment interest, he would not have profited. Moreover, he would have exposed himself to a uniquely painful emotional bombshell, wage garnishment, and jail. The court failed to mention the perverse incentive structure its decision perpetuated. A state can be indifferent to the accuracy of paternity establishment so long as it will be able to keep the child support it collects from fathers and non-fathers alike.

In *McBride v. Boughton*, the putative father had supported the mother and child voluntarily rather than under legal compulsion. The mother told the plaintiff that he was the father of her child, convincing him to move back to the United States from Chile. He worked for the first year of the child's life so the mother could stay home with the child. In the second year of the child's life, he became a full-time caregiver and the mother returned to work. Then the mother told the plaintiff she was moving the child away. In response, the plaintiff filed a paternity proceeding seeking custody. When a paternity test excluded him as the

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110 See Kasindorf, supra note 43, at A23 (recounting stories of men who feel deceived by their partner after discovering that they are not the child’s biological father).
111 See Part II.B. (discussing the irrelevance of paternity determination to the person receiving the child support payments).
113 Id. at 117.
114 Id. at 118.
115 Id.
116 Id.
117 Id.
father, he sought restitution from the mother of the money he had spent supporting the child.\footnote{118} The court denied his claim, explaining that its decision would incentivize men to get paternity tests if they were unsure as to their own paternity—thus preventing paternity disestablishment.\footnote{119} The court thought its decision was consistent with the legislature’s intent to prevent disestablishment, as evidenced by the two-year statute of limitations in which a married man could contest his own child’s paternity.\footnote{120} Given that 71% of paternity judgments in the state were issued by default though, the court’s reading is inconsistent with the state’s broader child support enforcement scheme.\footnote{121} A better reading of legislative intent is that the state wanted to maximize child support collection. That end, in fact, would not best be served by incentivizing paternity testing because men who would otherwise have become child support debtors would be excluded as fathers, as the plaintiff in this case would have been had he gotten a paternity test. Moreover, the court ignored the disincentive it created for mothers to ensure that they were in fact collecting support from biological fathers. By allowing the mother to retain the benefit, i.e. support, the court rewarded her paternity fraud, thus setting up the very situation the court was hoping to prevent—future paternity disestablishment.

2. Man versus Child

One experienced family attorney chalks up the indifference to accurate paternity establishment to a "man vs. child" mentality.\footnote{122} That mentality is explicit in \textit{McBride v. Boughton}—the court explained that paternity disestablishment must be disincentivized because even a possibility of "potential emotional and psychic costs to the child [caused by the severing of a parental bond] are far more significant than any financial injury a grown

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\footnote{118} Id. at 118–19.
\footnote{119} Id. at 124.
\footnote{120} Id.; see also \textsc{Cal. Fam. Code} §§ 7540–7541 (1992) (stating the statute of limitations for married men to contest paternity).
\footnote{121} See \textsc{Sorenson}, \textit{supra} note 40 (estimating that 71% of the California parents who owed child support arrears in March 2000 had at least one child support order set by default).
\footnote{122} See Matt Welch, \textit{Injustice by Default: How the Effort to Catch "Deadbeat Dad's" Ruins Innocent Men's Lives}, \textsc{Reason Magazine}, Feb. 2004, at 49 (explaining that although a balance of science and modern convention must be established, if pitted against one another the law always defaults to depriving the man instead of the child); see also \textsc{Solomon-Fears}, \textit{supra} note 28, at 48 (explaining that Child Support Enforcement Agency culture viewed putative fathers as "riffraff").
\end{footnotes}
man might suffer." Given the facts, the analysis was incorrect. Once the plaintiff discovered that he was not the child’s father, he stopped seeking custody and instead sought restitution; the parental bond was severed. As a legal principle, the court’s pitting of a man versus a child is easily rejected; accepting the principle would make laws criminalizing nonviolent crime by juveniles largely unenforceable; e.g., punishing a child for stealing a man’s car (financial harm) would surely expose the child to psychic and emotional harm. The principle is also shortsighted. Financial harm to a man is likely to cause financial harm to any other children he may be supporting, biological or not. Worse still, the man versus child principle is based on a hierarchy of parties. Stephen Douglas defended slavery with the same decision by hierarchy approach, explaining that “in all contests between the negro and the white man, he was for the white man.” If courts fashion themselves as policy makers, they do both men and children alike a disservice by pitting them against one another.

D. Is the Child Support Debtor a Volunteer?

One family law professor has argued against mandatory paternity testing because it might reduce the number of child support debtors, referring to those debtors as “volunteers.” Volunteers, of course, are not entitled to

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123 McBride, 20 Cal. Rptr. at 123.
124 Id. at 118.
125 See id. at 123–24 (stating that if restitution was granted under these factual circumstances, the result would be to prioritize the father’s desire to be made whole rather than the needs of the child).
126 See Weaver v. Solone, No. FA980160460, 42 Conn. L. Rptr. 63, 2006 Conn. Super. LEXIS 2760 (Conn. Super. Ct. Sept. 7, 2006) (implying the effect child support debt might have on a parent’s ability to support their other children). The plaintiff’s eldest child was diagnosed with a fatal genetic disorder. In the course of genetic testing, he was excluded as the father of the eight year-old child for whom he had been paying support. Id. at *5. He sought restitution so that he might be better able to care for his oldest child. Id. at *6. The court, treating biologic paternity as one factor in a balancing test, gave the father prospective relief but required that he pay the state arrearages. Id. at *23. See also Nicholas Riccardi, DNA Shakes Up Child Support Law Rights: System is Challenged by Men Forced to Pay for Children Who are Not Theirs, L.A. TIMES, Apr. 15, 2002, at 1 (discussing the response of one father, who was paying support for his ex-girlfriend’s child under a default paternity judgment, while also supporting a wife and children: "[T]he best interests of whose child? My children are suffering now.").
128 See, e.g., Welch, supra note 122, at 49 (asserting that if the man and child are involved in a dispute, the child wins by default, thus allowing no room for policy discussion).
129 See Murphy, supra note 33, at 376 (arguing that required genetic testing does not increase the likelihood of a father’s participation in a child’s life because often the father doubts the biological link but stays around nonetheless).
This characterization is wrong, and not just for the obvious reason that the child support debtor is under legal compulsion to pay.

First, "a person who acts to protect their own legal interest, even though it is ultimately determined that they were not liable, is not a 'volunteer' because their act was not truly voluntary." For example, in *Perkins v. Worzala*, an insurer believed that it was liable and made settlement payments to the defendant before its ultimate liability was determined. Because the insurer was later found to have no coverage obligation, the Wisconsin Supreme Court awarded the insurer restitution.

Similarly, when a putative father acknowledges paternity he is acting to protect his own legal interest, and a tremendously important one at that—his parental rights.

Second, a party who acts due to a mistakenly perceived moral duty to contribute is not a volunteer. In *Deskovick v. Porzio*, the plaintiffs, at their father’s behest, paid a considerable amount of money in medical bills for their father while he was still living. After his death, the plaintiffs discovered that they had been misled; the father could quite easily have paid the bills himself. Because they had acted under a perceived moral duty, rather than as volunteers, they had a restitution claim against the estate.

In *Detroit Automobile Inter-Insurance Exchange v. Detroit Mutual Automobile Insurance Co.*, after an insurer denied an insured’s claim, the broker who sold the policy to the insured paid the claim because of a perceived moral obligation. Upon determination that the insurer was legally compelled to pay the claim, the broker recovered restitution against the insurer.

Similarly, a putative father is not a volunteer when he mistakenly acknowledges paternity believing he has a moral obligation due to the false belief of paternity.

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130 See Fischer, supra note 96, at § 43.1 (explaining that the "volunteer principle" related to claims of unjust enrichment precludes the volunteer father from benefits of restitution absent "valid reason").

131 Id.

132 Perkins v. Worzala, 143 N.W.2d 516, 517 (Wis. 1966).

133 Id. at 518.

134 See Fischer, supra note 96, at § 43.1 (explaining that when an individual acts pursuant to a legal obligation to a legal obligation then they forfeit their status as a volunteer).


136 Id.; see also Fischer, supra note 96, at § 4.2 (citing Deskovick for the principle that the law does not treat persons acting under moral obligation as volunteers).


138 Id. at 82.
The volunteer who wants to help support someone else's child can join the Boy Scouts or the Big Brothers.\(^\text{139}\) He is free to donate money to a parent so that the parent might better support their child. The misattributed child support debtor, however, is saddled with a disproportionate tax.\(^\text{140}\) A taxpayer is unlikely to take pleasure from his contribution—despite the good use to which tax dollars might be put—because legal compulsion is precisely the way to deprive someone of the satisfaction of doing a good deed.\(^\text{141}\)

V. The Change-of-Position Defense

The initial question posed by this paper has been answered: When a paternity judgment is reversed because a paternity test excludes the putative father, he is entitled to restitution of the child support he paid under that judgment, whether the recipient was the mother or the state. The applicable restitutionary defense to his claim is the change-of-position defense.\(^\text{142}\)

The defense, keeping with restitution law’s aim of achieving justice, allows a defendant who would otherwise be liable to avoid liability because of a change in circumstances that would make the payment of restitution inequitable.\(^\text{143}\) Think back to the earlier example, where the bank mistakenly deposited $500 into a customer’s account and was entitled to restitution.\(^\text{144}\) Instead though, imagine the customer was expecting a $500 deposit and so he withdrew the money. On the way home from the bank he was robbed. In this instance, he can raise the change-of-position defense.\(^\text{145}\)

The change-of-position defense is usually unavailable to a defendant who has consumed the benefit to be returned, which means that the benefit

\(^{139}\) See Henry, supra note 6, at 68 (positing that "a man who is free to follow his voluntary will in pursuing a relationship with a child will have a better relationship than a man who is filled with rage and resentment because he continues to be forced to make involuntary payments on the basis of a falsehood").

\(^{140}\) See supra Part II.B. (describing the role of the misattributed child support debtor).


\(^{142}\) See In re Marriage of Stern, 846 P.2d 1387, 1393–94 (Wash. Ct. App. 1993) (finding that a statutory right to restitution of money paid under a judgment subsequently reversed extended to child support orders, subject to the change-of-position defense).

\(^{143}\) See DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION § 4.6 (1993) (stating if a "defendant reasonably changes position in reliance on [a] benefit so that liability for restitution would be inequitable, his liability to make restitution is reduced or terminated accordingly").

\(^{144}\) See RENDLEMAN, supra note 10, at 431–32 (presenting a situation where a bank customer is erroneously credited $500 due to a computer error).

\(^{145}\) See id. (describing when the change of position defense would be available to the customer).
TAXATION WITHOUT DUPLICATION

was used to increase her assets or reduce her liabilities.\textsuperscript{146} The consumption element is consistent with restitution's purpose. The claim for restitution is effective for the very reason that the defendant is not entitled to retain a benefit. As such, the defendant was not entitled to consume that benefit either. The change-of-position defense is not a "but-I-spent-your-money-already" defense. The consumption element bars states from using the change-of-position defense because states use child support money to reduce their welfare liabilities.

It seems that the consumption element would bar a mother from using the defense too, and what if she simply cannot afford to pay back the support? Mothers, despite the consumption element, are not necessarily precluded from using the defense because a defendant's financial hardship, her inability to return the benefit, can overcome her own consumption of that benefit.\textsuperscript{147} The financial hardship principle is codified in federal law: "[U]ndue hardship" may permit partial discharge of student loans in bankruptcy.\textsuperscript{148} Social security overpayments need not be repaid if repayments would be "against equity and good conscience."\textsuperscript{149} Indeed, restitution's subsequent-reversal-of-judgment rule provides leeway for the defendant's financial hardship to be considered: A plaintiff is entitled to restitution "unless restitution would be inequitable."\textsuperscript{150} Considering that financial hardship is important—in some cases, requiring a defendant to make restitution may cause a greater injustice than would providing the plaintiff with no remedy.\textsuperscript{151}

Financial hardship is an especially important consideration when the mother is the defendant.\textsuperscript{152} Since child support money is given for current support, as opposed to future support like a college trust, it is likely that

\textsuperscript{146} See DOBBS, supra note 143, at § 4.6 (noting that "[w]hen the benefit is consumed or expended in ways that (a) do not increase assets or reduce liabilities . . . a strong equity appears in favor of the recipient and the defense may be effective to bar restitution").

\textsuperscript{147} See id. (pointing out that particularly vulnerable defendants may receive favorable treatment).

\textsuperscript{148} 42 U.S.C. § 404(b) (providing that there shall be no adjustment or recovery by the United States if such person is without fault or "such recovery is . . . against equity and good conscience").

\textsuperscript{149} 11 U.S.C. § 523(a)(8).

\textsuperscript{150} RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18, cmt. 12 (Tentative Draft No. 1, Apr. 1, 2001).

\textsuperscript{151} See supra notes 161–62 (discussing compelling reasons not to require restitution).

\textsuperscript{152} The Second Circuit Court of Appeals has defined financial hardship, or "undue hardship," in the context of student loan discharge in bankruptcy as a situation in which "the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans." Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987).
support money will have been spent by the time a restitution claim is brought. Further, if the mother is still supporting the child then she may also be losing support prospectively as result of a paternity disestablishment. The loss of current and ongoing support coupled with liability for support received is a recipe for financial hardship. Of course, the consideration is irrelevant when the state is the defendant because it can always afford to pay the money back.

A second hurdle exists for the defendant wanting to use the change-of-position defense: The defendant who commits fraud is generally barred from using it. The fraud bar makes sense. The change-of-position defendant is given a pass, either because they never consumed the benefit, or because they simply cannot afford to give it back. The defendant who gets the benefit through fraud, however, does not deserve such a pass.

As discussed earlier, the fraud inquiry, in the context of paternity disestablishment, is troublesome for various reasons. First, a claim for disestablishment may be brought years in the future; stale evidence leads to mistakes. Second, and more importantly, the majority of misattributed paternity probably involves fraud on the mother’s behalf if fraud is strictly construed to mean concealment of a material fact to the detriment of the plaintiff. That material fact is the mother’s sexual history. While some women might be open with potential fathers as to the probability that they have not fathered their children, many certainly are not. Even so, it is not fair to expect women to divulge their sexual history in the context of a fraud inquiry when there is no reciprocal duty placed on men. Further, it is not pragmatic because many women are unlikely to risk losing a mate to protect this interest. This clearly shows that the fraud inquiry, both in the context of the restitution claim and the defense to it, is moot.

153 DOBBS, supra note 143, at § 4.6.
154 See supra Part IV.B.2 (describing why the fraud inquiry is unnecessary to determine the child support debtor’s substantive entitlement).
155 See supra Part II.C. (describing the approaches of different states towards paternity disestablishment).
156 See supra note 93 (explaining that Black’s Law Dictionary defines fraud as the “knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”).
157 See supra Part IV.B.2. (explaining that women are unlikely to divulge their sexual history and may stand to lose benefits from doing so, especially when men are not expected to do the same).
158 Id.
VI. Conclusion

This Note makes a modest claim: A man who pays child support under a paternity judgment that is subsequently reversed—because a paternity test excludes him as the father—is entitled to restitution. He is entitled to full restitution should the recipient be the state. If the recipient is the mother, he is entitled to restitution if she can afford to make it. Neither the state nor the mother are precluded from collecting all of the support to which they are rightfully entitled, but they will need to collect it from the child’s father, which is what should have happened in the first place.

The claim is modest because it requires only the application of a rule—restitution law’s subsequent-reversal-of-judgment rule—that is applied "almost as a matter of course." This Note has succeeded if it has managed to identify and correct the errors that prevent some courts from applying this rule. The claim reflects more than just a desire for legal precision. If forcing a man to pay child support for another man’s child is a "manifest injustice," refusing to return to him money he should never have had to pay in the first place is a manifest injustice too. Awarding restitution achieves individual justice, which is supposed to be the hallmark of our legal system.

Awarding restitution might also serve as an impetus for modernizing legal mechanisms for paternity establishment. Today, although paternity testing has become convenient and affordable, neither federal law nor the law of any state requires a paternity test to establish paternity. Misattributed paternity is a problem: it prevents the true father from developing a relationship with his child, places the obligation of child support on the wrong man, and sets up

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160 PALMER, supra note 62, § 9.9(b).
161 Williams v. Williams, 843 So. 2d 720, 723 (Miss. 2003) (vacating an order of child support against ex-husband after a paternity test excluded him as the father of the child of the marriage).
162 Correctly identifying fathers the first time around might be less costly than misidentifying fathers, paying them restitution, and then trying to collect from biological fathers. Even so, government actors will not necessarily choose the most cost-effective course of action. See Daryl. J. Levinson, Making Governments Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. CHI. L. REV. 345, 419–20 (2000) (explaining that government actors respond to political incentives not financial ones).
163 See supra note 38 (explaining that a party has the option to request genetic testing to determine paternity upon showing of good cause).
164 See supra Part II.B (describing the incidence of mistaken paternity).
families for emotional trauma should the truth be discovered.\textsuperscript{165}

The legal system should not be indifferent as to whether it has accurately imposed the tremendously important legal obligation of child support. To grant restitution to misattributed putative fathers is a refusal to tolerate that indifference. As this Note explains, courts need not consider these policy implications at all; rather, courts can be part of the solution simply by properly applying the law.

\textsuperscript{165} See supra Part III.C (describing emotional trauma from incorrect results).