

## Kinship at the Border

Author : Courtney Cahill

Date : June 8, 2020

Nara B. Milanich, [Paternity: The Elusive Quest for the Father](#) (2019).

[Paternity: The Elusive Quest for the Father](#) is historian [Nara B. Milanich](#)'s fascinating new history on the quest for paternity across time and space. *Paternity* is at once a history of kinship that crosses borders and a meditation of kinship at borders. It reveals something that literature has long understood: that quests—including the quest for paternity, literary and actual alike—are less about what we find at their mythic end than about what we learn about ourselves along the way. It also shows that the quest for paternity, like all quests, raises more questions than resolves them.

At its most basic, *Paternity* is a history of paternity testing over time and around much of the globe. The bookends of Milanich's project are the Charlie Chaplin paternity drama that rocked 1940s San Francisco at one end (Pp. 1-8), and contemporary American family law's multi-faceted approach to paternity in an age of DNA testing and alternative reproduction at the other (Epilogue). In between, each of *Paternity*'s eight chapters features paternity disputes from different parts of the world at different points in time. Some of these disputes were motivated by a desire for money, as in the fairly common cases of inheritance lawsuits and child support actions. Others were prompted by a desire for citizenship, as in the case of Chinese immigration petitions in early-twentieth-century America. Still others grew from a will to live, as in the case of Jewish racial paternity trials in Nazi Germany.

Throughout this journey, Milanich captivates readers with her explanations of the machines and methods that were recruited by science, law, and social practice in the perennial—and perennially elusive—search for the father. She describes the oscillophore, a machine that purported to determine paternity by matching “the vibrations of electrons in a drop of blood” between alleged fathers and children. (P. 36.) She recounts the practice of crystallography, which claimed to prove heredity through the “characteristic crystal pattern” of blood. (P. 38.) She discusses the reliance on human blood types as the key to unlocking the secret of parentage (Chapter 3) and tells of the ways other than blood that were deployed by law and science to read paternity on the body—methods like *dactyloscopy* (fingerprinting) (P. 127), odontology (the science of studying teeth structure) (P. 120), and anthropometry (the science of studying the human body and its proportions). (P. 144.) “The secret of paternity could be hidden in the tips of the fingers, the curve of the nose, a telltale mole shared by child and putative parent,” Milanich writes. Science “treated paternity like maternity, as a bodily condition that could be empirically observed.” (P. 131.) In this sense, Milanich's history challenges a fundamental tenet of American constitutional law: that differential treatment of fathers and mothers is permissible precisely *because* the male body, unlike the female body, is thought to conceal indicia of parenthood.<sup>1</sup>

No less absorbing than *Paternity*'s history of paternity disputes across much of the world is its engagement with the question of kinship at the border. Sometimes, this is a literal border, as detailed in the riveting chapter on the United States government's targeted use of blood group testing on Chinese immigration petitioners (as opposed to petitioners from other countries) to weed out the fraudulent claims of “paper sons” (Chapter 8). More often, though, *Paternity* presses the question of kinship at symbolic borders, and the symbolic border that appears to interest Milanich the most is that which exists between biological and social paternity. It is here where *Paternity* really shines, offering invaluable insights for legal readers interested in the regulation of the family in a world where alternative reproduction and novel family formation have led to ever-more-diverse varieties of social and biological kinship.

In *Paternity*'s Prologue, Milanich tells readers that “despite the unprecedented power of modern genetic science, paternity remains ensnarled in a thicket of unresolved social, economic, and political questions.” (P. 9.) Every chapter

that follows debunks the idea that the history of paternity charts an evolution from performance to nature; from fiction to fact; from social paternity, embodied in legal doctrines like the marital presumption, to biological paternity, revealed through the marvels of science. Milanich shows that as the science of paternity testing grew more sophisticated and the fact of biological paternity became more accessible, social and political factors retained their power, often increasing, not decreasing, in significance.

For example, despite the availability of blood group evidence to disprove paternity in the early twentieth century, French courts “rejected [it] as ‘contrary to the general system of French law’ in which paternity was ‘not susceptible to direct proof’ and only to social ‘presumptions.’” (P. 115.) In both civil law and common law countries, “biological evidence ran aground on the shoals of social paternity” (P. 207), and biological evidence was often suppressed to avoid inconvenient truths, particularly when interracial relationships were involved.

On this last point, consider Chapter 7, which recounts the absorbing story behind an infamous lawsuit brought by an Italian husband, Remo Cipolli, against his wife, Quinta Orsini, who gave birth to a son whose biological father was an African-American GI stationed in Pisa following the city’s liberation by the Allies in 1944. Despite overwhelming biological and testimonial evidence that Cipolli was not his son’s biological father, a court in Pisa refused to credit it, ruling that Cipolli was the boy’s legal parent. For Milanich, the Cipolli case shows that sometimes biological paternity yielded to social paternity and to historically contingent factors, like post-Fascist Italy’s “privileging [of] marital paternity even when it was in manifest contradiction to cultural notions of biological truth.” (P. 199.)<sup>2</sup> It also demonstrates that “[t]he history of paternity testing is also an antihistory: a history of when law and social norms conceal the identity of the biological father and ... prohibit the use of scientific methods to reveal it.” (P. 207.)

Milanich concludes *Paternity* by showing that this subtle interplay between the biological and the social continues to inform the question of paternity even—or especially—today. *Paternity*’s Epilogue tackles the quest for paternity in the age of DNA, and there Milanich argues that “for all their novelty, scientific, commercial, social, and political developments recapitulate rather than revolutionize the history of paternity testing in the twentieth century.” (P. 247.) “[T]he dramatic advances of the DNA era have not resolved the tensions and ambiguities that modern paternity introduced almost a century ago,” she writes. Rather, “[t]he father is as ambiguous, as deeply contested, ... as elusive, as ever.” (P. 247.) Moreover, “the tensions between the social and the biological ... have been thrown into even sharper relief by a scientific test that promises to reveal the genetic tie with power and perfection.” (P. 263.)

In the end, *Paternity* shows that the history of the father has been the history of an “idea” (P. 21) and an “ideology” (P. 21)—an enduring “conceit.” (P. 15.) As noted earlier, quests at their heart are about questions, and “[t]he truly significant question about paternity,” Milanich says, “is not an empirical one—who is the father?—but a normative one—who do we want him to be?” (P. 266.) The normative father could be the person who best represents the state, or patriarchy, or marriage, or whiteness, or nationality. The point is that social and political factors have always shaped the answer to that question, and that the quest for paternity is less about *using* science to reveal the true father as it is about *bending* science to satisfy our fantasies about him.

*Paternity*’s social, legal, and political history of kinship should interest legal scholars invested in the question of how to regulate the family, particularly now that the science of reproduction has allowed new forms of social and biological kinship to proliferate. The book’s deconstruction of the border between social and biological kinship reminds us that biological understandings of the family are often no less fabricated than social ones, and that social kinship can become naturalized over time in ways that supplement or even supplant biological affiliation. In this sense, *Paternity* dovetails nicely with Professor Doug NeJaime’s new article *The Constitution of Parenthood*,<sup>3</sup> which not only unearths social kinship in the same Supreme Court precedents that enshrined biology as the foundation of constitutional parenthood, (NeJaime, Pp. 279-305) but also demonstrates that the law over time has naturalized social kinship. For instance, NeJaime shows that in many states today, the term “natural family” is synonymous with the functional and legal family, regardless of whether it originates in blood. (NeJaime, P. 333.)

In addition, *Paternity* reminds us that the “distinct ways of defining paternity have no necessary politics. Biological

essentialism is not inherently ‘conservative’ . . . Nor is there anything inherently ‘progressive’ about a social constructivist vision of kinship,” Milanich writes (P. 264). Kinship, she says, “has no preordained politics. Context is everything.” (P. 265.) This last insight struck a particular chord in me, someone who at times reflexively assumes that biological definitions of family are oppressively traditional and functional definitions liberatingly modern. Like all good histories, Milanich’s shows us that the history of the family has never been that simple, much as we might entertain the fiction that it is.

1. For a discussion of this trope in constitutional sex-equality law, see Courtney Megan Cahill, *The New Maternity*, 133 **Harv. L. Rev.** 2221 (2020). Milanich complicates this conventional narrative by showing that science and law *did* surveille the male body—even *more* than it did the female body—in the search for parenthood.
2. Milanich contrasts Italy’s privileging of the marital family over the pursuit for racial “purity” with Nazi Germany’s willingness to throw “open marital paternity to contestation . . . by state officials” in order to “reveal bioracial truth.” (P. 199.)
3. Douglas NeJaime, *The Constitution of Parenthood*, 72 **Stan. L. Rev.** 261 (2020).

Cite as: Courtney Cahill, *Kinship at the Border*, JOTWELL (June 8, 2020) (reviewing Nara B. Milanich, **Paternity: The Elusive Quest for the Father** (2019)), <https://family.jotwell.com/kinship-at-the-border/>.