

What is the crime if men seek confirmation that children are theirs?

Barry Pearson

25th July 2003

Summary

Some men want to know if the children they are told are theirs really *are* their children. The normal method available to find out is a DNA paternity test. Some of these tests can work with just samples from the man and the child.

Some people want to restrict what those men can do to find out. Some people want those men to obtain the permission of the mother before they go ahead. Others want to ensure that men get the permission of a court first. Such people typically propose legislation to restrict one or more parts of the paternity testing process.

There are many forms that such legislation could take in theory. This paper attempts to describe the range of options available to legislators. It also discusses whether those options could be detected and prosecuted. This paper focuses on unofficial paternity tests where one of the samples is of the commissioner of the test. These paternity tests are freely available via the Internet from several countries.

The conclusion is not very surprising. The testing process may leave no trace on anyone that could be detected and lead to prosecution. Sometimes only the man will ever know that the test has been performed. Its only direct impact on him will be to inform him whether or not he is the father of the child. It would be hard to legislate when it is not even clear who, if anyone, is a victim of the test.

Effective legislation would require clear identification of the problem to be solved. There would probably have to be international agreement that this is a problem that needs to be solved. But at the moment there isn't a clear understanding of what behaviour is wrong.

A reason for the confusion is that some disquiet about paternity testing is cultural. The UK and Australia appears to favour restrictions on taking samples and commissioning the tests. Germanic countries appear to favour genetic openness, although some express concern about paternity testing. The US places few constraints on the provision of paternity tests, but often restricts how much influence they can have. More women in the US than the UK say that if a genetic diagnosis detects non-paternity as a side effect, the husband should be told.

Any move to legislate needs clarity about *what* behaviour needs to be prevented, and *why*.

Barry Pearson

Chief Analyst of Child Support Analysis:

<http://www.ChildSupportAnalysis.co.uk/>

Contents

Summary

Contents

About the author

Introduction

Policing the collection of samples

Policing the commissioning of tests

Policing the provision of paternity testing services

Policing the use of information gained from tests

Conclusions

About the author

Barry Pearson is a business analyst with a special interest in child support reform.

His degree was in Mathematical Physics. His earlier career was especially in the design of large-scale computer systems. As a result he was appointed a Fellow of the British Computer Society. His more recent career was in business consulting, typically applying solution-oriented engineering and modelling principles to the analysis of business problems.

He became interested in the reform of the UK's child support system, after an earlier special interest in social security and welfare reform. Barry contributed at the Green Paper stage of the CSA reform process. He gave evidence to the Social Security Select Committee after the CSA White Paper was published. He is consulted by, and provides information to, academics, the media, politicians and lobby groups on child support matters.

Barry is the Chief Analyst for Child Support Analysis, a small independent think-tank that aims to take a comprehensive look beyond the current stage of the UK's child support reforms towards what should follow them. He also edits their web site:

“Child Support Analysis *for the 21st Century*”:

<http://www.ChildSupportAnalysis.co.uk/>

Barry is a Licentiate of the Royal Photographic Society, and displays some of his photographs at: “Photography by Barry Pearson”

<http://www.Barry.Pearson.name/photography/>

Introduction

This paper discusses unofficial paternity tests where the commissioner supplies one of the samples. Such tests include home testing kits, but they could be other sorts. There is overlap with other types of DNA tests, but little time is spent on them here.

Legislators face two key challenges. They must try to match new laws to undesired behaviour without side effects. And they must ensure that wrongdoing can be detected and prosecuted. This paper does not propose what the undesired behaviour is. Other sources do that, based on emotion, ethics, outcomes and rights. Different people have different views of what behaviour is undesired. There is no consensus, so those are political decisions.

It is vital to understand that the issues about paternity testing are vastly different from the issues about other forms of DNA testing. The ethics, outcomes and rights have to be analysed separately. Indeed, most of the literature already treats them separately.

Genetic diagnosis examines the genes that make proteins. In effect genes are the recipes used to develop a body. Knowledge of a person's genes provides a unique insight into their body. Paternity tests use other parts of the DNA. They compare two or more samples to seek how much is common. They provide information about whether two people are related. They don't describe either person. (Actually, some say whether the child is a boy or a girl!)

There are four main stages in the paternity testing process at which actions could be made unlawful. Each of these stages has a section in this paper.

1. Collecting the samples to be tested
2. Commissioning the test using those samples
3. Providing the testing service itself
4. Using the information gained from the test

In order to deter wrongdoers, their crimes have to be detected then prosecuted. There are various ways that the police detect actions against the law. Here are the basic methods that were considered while writing the following sections.

- A. A victim reports the crime
- B. A witness reports the crime
- C. A consequence of the crime is detected
- D. Activities are constantly monitored to spot crimes
- E. The police sweep an area to find criminals or crimes
- F. An incident is shown by further evidence to be a crime

Within any one of the four main stages, there are a number of options. They tend to have different ways of detecting them.

Detection and prosecution will often only be possible if other nations cooperate on the chosen trigger points. For example, if each of the four stages can be done in nations where they are legal, there may be no crime even if no nation allows all four stages. The views of other nations are identified here where this is known.

Policing the collection of samples

Walking away with someone else's DNA is not inherently bad behaviour. It would be impossible to make the collection of samples from a person an absolute offence.

It is almost impossible to be close to someone and not take away his or her DNA. Obtaining a DNA sample is often a trivial activity that is just like other activities that cannot be made criminal offences, especially for people who are close. It could not sensibly be a criminal offence simply to remove a child's hair from a hairbrush. Or to pick up a sticking plaster that covered a cut finger, or chewed gum, a licked envelope, a handkerchief, or an old toothbrush.

To make the collection of samples an offence, it would have to be qualified. For example, it could be "collection of a sample *with intent to use it for a paternity test*". This may be plausible in the case of a buccal swab, which has few other uses. For the other types of sample, the intent could only be apparent later. It would need detection later in the process.

Another way of qualifying the collection of samples is by combining it with the sort of offences we already recognise. There are already laws about assault, theft, human rights, harassment, data protection, and similar. The law could be "assault *and collection of a DNA sample*", or "theft *and ... (ditto)*". But if the penalties are the same as for the existing offence, there would be no point in making this a special case. If the penalties are greater than for the existing offence, the prosecution will have to be able to show that the intention was to collect a sample. This suffers the problems of the previous paragraph. In what cases would "assault *and plucking hair*" be a greater offence than other forms of assault?

Suppose the way of defining the offence is to combine it with an existing offence. This will typically fail to deter unofficial paternity tests. A common use of them is within a household. Assault, theft, harassment or rights abuses are not normally necessary to obtain the sample.

It is possible simply to use the standard laws of assault, theft, human rights, harassment, data protection, etc. These are offences with clear victims and detection methods, where the law tries to solve agreed problems. Those are a suitable basis for laws about paternity testing. Perhaps those laws need to be reviewed to ensure they don't permit taking DNA samples.

Another approach would be only to penalise the *collecting* of the sample once the sample has been submitted for a paternity test. That would need the *commissioning* of the test to be detected. That is discussed in the next section.

Suggestions to ban the collection of samples appear mainly to come from the UK. Examples quoted in the UK to justify this approach include California's *Kerkoriam versus Bing* case, and fears about unauthorised testing of the Royal Family. Both are examples of "third party" paternity testing. Their issues don't resemble those of the "personal knowledge" paternity tests that are the subject of this paper. These cases don't illuminate the problem to be solved.

It *may* be possible to deter the taking of samples from celebrities. It normally won't be possible to prevent the taking of samples from one's own (putative) children. This stage appears to be the wrong place to legislate. Why do some people favour it?

Policing the commissioning of tests

Commissioning a paternity test using a home kit involves: finding the testing service; obtaining the testing kit; paying for the test; posting the samples in the envelope provided; then obtaining the report. Each stage is a potential point of detection that could lead to prosecution. But that doesn't mean that each stage is bad behaviour that deserves prosecution.

It is easy to find services that supply home testing kits to the UK. There are eighty or more such services visible on the Internet. They are based in ten or more countries. It would take international agreement to make them unavailable. This is unlikely to be forthcoming.

Companies providing home testing kits know how to help their customers hide their use of the test. They can send the kit to a different address from the customer's own. They can appear benign on a bank or credit card statement. Some deliver the result over the Internet.

How could use of such tests be detected? Could this plausibly be done by monitoring mail to specific overseas addresses? (The materials don't need parcel post). Or by monitoring money transfers to specific overseas accounts? Could these lists of prohibited destinations even be maintained? No: this would be a very expensive and intrusive operation.

Could this be achieved by asking other nations to monitor the use of their paternity testing services by UK citizens and report them to authorities in the UK? The FBI ran *Operation Candyman* to monitor the use of child pornography services in the US. They reported UK customers to UK authorities, hence *Operation Ore*. But there is international consensus that child pornography services are wrong. There is no such consensus about paternity testing.

Perhaps the paternity testing services could be persuaded not to accept clients from the UK. But unless national laws elsewhere, including individual laws of 50 US states, prohibit such trade, why turn down business? Only one precedent has been found. Some US paternity testing service providers will not send home testing kits to addresses in New York State.

Suppose that the above problems could be overcome. Would the use of such a test be an absolute offence? That would make it easier to detect whether an offence had been committed. But the Secretary of State for Health said "this new offence should not interfere with proper lawful access to private paternity testing"¹.

If the offence were "*to commission a test where some samples have been obtained without consent*", how would this be detected? Suppose an envelope were detected that contains two bags with hair follicles, and only the name of the commissioner. How would the other person be identified and asked about consent? That could be more damaging than the original test.

Australia may attempt to ban the commission of a paternity test unless all people with parental responsibility for the child consent to it². That is a stronger constraint even than authorising major surgery for the child. Their approach will suffer all of the above problems.

¹ Government Response To The HGC's Report: Inside Information: Balancing Interests In The Use Of Personal Genetic Data, John Reid, 24th June 2003.

² Essentially Yours: The Protection of Human Genetic Information in Australia, Australia Law Reform Commission, 14th March 2003.

Policing the provision of paternity testing services

The UK government can regulate service providers based in the UK. The government does not have jurisdiction over service providers elsewhere. The government probably cannot hide foreign services that advertise over the Internet from UK citizens³. It can only influence whether those service providers accept UK customers by agreements, not by UK law. There are perhaps eighty or more such service providers visible on the Internet. They are based in ten or more countries. About five out of six such services are based outside the UK.

There is nothing like a Hague Convention to draw upon⁴. Could the UN Convention on the Rights of the Child be used? Or could it be extended? There are two problems with this. The first is that the UN considers it to be in the interests of children to know their biological parents. The second is that the United States hasn't ratified that UN Convention.

The FBI ran *Operation Candyman* to monitor child pornography services in the US. They reported UK customers to UK authorities, and this initiated *Operation Ore*. But societies will not criticise people who commission paternity tests in the way that societies criticise people who commission child pornography. There are two fundamental reasons for this:

1. Child pornography is considered to be unconditionally wrong. There are no official child pornography services run by the government. It isn't just *unofficial* child pornography services that are seen to be wrong.

Paternity testing is not considered to be unconditionally wrong. There are official paternity tests used by the government. Sometimes government policy needs accurate identification of parentage. It is mainly the personal use of tests that *some* people think is wrong, not paternity tests themselves.

2. Legal sanctions against child pornography are applied against people that society easily judges are in the wrong. They are against people who make child pornography, and those who buy it. This appeals to people's sense of justice.

Legal sanctions against people who commission paternity tests would not be against clear wrongdoers. Perhaps a mother committed adultery that resulted in a child. She deceived the husband, and probably the child and other people too. Yet some people want to apply legal sanctions against the perceived victims, the man and/or child.

The Government accepts the view established by the Courts that it is generally in a child's best interest to know the truth about their biological origins⁵. It is unlikely to seek international agreements that paternity tests are generally wrong.

Any country connected to the Internet, with postal and financial services, can host paternity testing services. Should putative fathers be forced to use unregulated foreign services?

³ Australia attempts a form of Internet censorship for certain activities it bans such as interactive gambling.

⁴ The relevant Hague Conventions on Private International Law tend to deal with parents or children moving between countries (maintenance, adoption, parental responsibility, etc).

⁵ Government Response To The HGC's Report: Inside Information: Balancing Interests In The Use Of Personal Genetic Data, John Reid, 24th June 2003.

Policing the use of information gained from tests

There are some important proposals in the wider field of genetic diagnosis. One is that an organisation such as an employer or insurance company should not *ask* for the results of a diagnosis. Another view is that organisations should not be allowed to *act* upon the information resulting from these tests. A number of countries have such views. They do not want to create a “genetic underclass”.

Those views have no relevance to paternity testing. Paternity tests provide information about whether two people are related. They don't describe either person. Children with misattributed paternity are not an underclass. “Bastardy” is a now quaint concept.

Should a commissioner of an unofficial paternity test be able to exploit the results of the test? What does the question mean?

- The question may be whether the commissioner should be able *to change the operation of official bodies*, such as government agencies, by using the results of the test. The answer is that he should *not* be able to. And typically he can't, so this needs no change. An unofficial paternity test has no chain of custody. No person or agency need act upon the test report. Any government agency should ignore the report.
- Or the question may be whether the commissioner should be able *to act differently* as a result of the test. The answer is that his range of options should remain identical, because the unofficial test has not provided any reason to grant him different options. However, he may obviously choose different options within that existing range.

The result of the test has simply become the knowledge of its commissioner. It enables him or her to make informed, rather than uninformed, decisions and actions. Those decisions and actions will typically be similar to those that he or she *could* have made without that knowledge. It would typically be impossible to deduce that the person has based the action on a paternity test. He could not be prosecuted for it.

This section describes the last stage of the paternity testing process. Its importance depends on what the objectives of proposed legislation are. (This is not clear).

- If the concern is what men *do*, then this may be the key stage. The legislation could ensure that men can only do what they could have done without the test.
- If the concern is what men *know*, then this stage is too late. By this stage they have learned the truth. If that is undesired, he must be stopped at an earlier stage.

The United States tends to focus on what men *do*. For example, individual states control what influence a paternity test result has on child support liability. Germanic nations appear to favour genetic openness, and have a more open approach to paternity testing.

The focus in the UK and Australia appears to be controlling what men *know*. Some people in the UK appear to be concerned with the collection of samples. Both countries appear to be concerned with the commissioning and provision of tests. But it is hard to police what people know.

Conclusions

Legislators face two key challenges. They must try to match new laws to undesired behaviour without side effects. And they must ensure that wrongdoing can be detected and prosecuted. This paper is restricted to unofficial paternity tests where the commissioner supplies one of the samples. The question posed by this paper is:

“What is the crime if men seek confirmation that children are theirs?”

The narrow view of this question is to decide what is bad behaviour, then to frame the law to convict such men. There are many options. The hard part is to detect and prosecute any crime defined by such laws. This paper describes many options for laws, and relates these to the likelihood that such laws could be policed. It also discusses approaches by other nations.

The wider view of this question is why should society legislate against their quest? What is inherently bad about their behaviour? What threat do they pose to innocent citizens? What threat do they pose to society? Who are their critics?

This paper is not the place to provide all the answers. But it gives some important clues. It shows the difficulty of detecting such actions. Yet no one has died. Hopefully, no one is living in fear. Where are the victims, if any? Why aren't they notifying the authorities of the crime? Why is it unlikely that all other nations will cooperate? *What is the crime?*

Sometimes victims of crimes only become visible later. Children who have been abused may be unable to speak at the time, but live with the mental scars for the rest of their lives. They may be able to trace their hardship back to someone who adversely impacted their lives. Who is coming forward to claim that they are the victims of unofficial paternity testing?

Unofficial paternity tests deliver knowledge about oneself. If the law bans them, this will be a rare example. It will be an example where seeking the truth about oneself is a crime. That is why policing it appears so hard. Policing is normally about physical things. It is physical to be robbed, or assaulted, or killed. It can be detected and policed. Paternity testing is about knowledge, and attempting to police the acquisition of knowledge requires “thought police”.

A man may examine his wife's and child's blood groups. He may use the parent/child eye-colour-matching charts on the Internet. He may check his diary and realise he was out of the country at the likely time of conception. No one would make these actions illegal. So why would people want to make DNA paternity testing illegal? It alarms some people because:

- It is cheap and easy.
- It is very reliable.
- It is unobtrusive and no one need find out.
- It works retrospectively.

There is no international consensus that seeking paternity knowledge is wrong. It is at most a cultural matter. There is no international consensus that any one of the four key stages of the paternity testing process *needs* to be policed. This emphasises the importance of the question: *what is the crime?*

END