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Anti-Anxiety Law: Winnicott and the Legal Fiction of Paternity

Winnicott's good-enough mother does not, on the face of it, seem to have anything to do with the process of fact-finding in law. Yet there is an uncanny similarity between Winnicott's theory of the good-enough mother and the legal understanding of factual knowledge, both of which are premised on the unattainability of perfection and the need to construct simulacra of truth on the basis of merely probabalistic evidence. In Winnicott, this theory of knowledge is presented in terms of the process whereby the (good-enough) mother enables the infant to acquire the illusion of contact with a reality outside of himself on the basis of a repeated convergence of subjective need (i.e., hunger) and objective provision (i.e., milk provided at the right moment). In law, a surprisingly similar theory of knowledge as illusion/construction is presented in terms of standards of proof that fall substantially short of certainty and in the concept of the legal fiction. The way that legal fictions work to construct beliefs in reality and to shape reality itself is explored through the example of the fiction of legitimacy, according to which the husband is the father of a child born to a married woman, as a matter of law, regardless of biological facts to the contrary. A close analysis of the legal fiction of paternity reveals the unexpected similarities between Winnicott's theory of the good-enough mother and the legal theory of adequate, albeit less than perfect, factual knowledge. The analysis shows that one of the key functions of legal fictions is the suppression of the anxiety that attends uncertainty. In this respect, law serves as a matrix of belief in much the same way as Winnicott's good-enough mother does.

"I would put it this way. Some babies are fortunate enough to have a mother whose initial active adaptation to their infant's needs was good enough. This enables them to have the illusion of actually finding what was created (hallucinated). . . . Eventually, such a baby grows up to say 'I know there is no direct contact between external reality and myself, only an illusion of contact, a midway phenomenon

that works very well for me when I am not tired. I couldn't care less that there is a philosophical problem."

—D. W. Winnicott, *Human Nature*

1

In this passage from his mid-life writings collected in the volume *Human Nature*, D. W. Winnicott draws a highly suggestive and characteristically elusive connection between a psychological problem and a philosophical one. The psychological problem is the basic problem of human development that always absorbed Winnicott: the process of becoming a self, or a person, in the passage from infancy to maturation. This is the problem that Winnicott famously construed as a problem of mothering—mothering, because the provision of nurture and care is essential to the process of human development and psychological well-being; a problem, because mothering is always imperfect, and when it is not “good enough,” psychological trouble and developmental failures ensue. The philosophical problem is the basic problem of human knowledge, a problem that has occupied philosophers of epistemology for centuries. To put it in process terms more in keeping with the parallel to the problem of mothering suggested here, it is the problem of *knowing*, of attaining a (correct) understanding of reality. More precisely, it is the problem of knowing under conditions of uncertainty—where “there is no direct contact between external reality and myself.” *Contra* more objectivist pictures of human knowledge, it seems that Winnicott took it for granted that human knowledge (or attempts at knowing) always proceeds under conditions of uncertainty where there is no such direct contact.

Unlike the problem of mothering, the problem of knowing is *not* a problem that Winnicott is much associated with. Indeed, Winnicott assumes a rather dismissive posture toward it here, implying that it is only felt to be a problem by those unfortunates who did not receive good-enough mothering themselves. The philosophical problem, in other words, is only a problem for people with psychological problems. Everyone

else, apparently, makes do without much reflection with some kind of “midway phenomenon” that “works very well” (except when we are “tired”).

In this essay, I want to consider the possibility that Winnicott’s theory of good-enough mothering might have a lot more to do with and a lot more to tell us about that midway phenomenon than the passage explicitly suggests. (If Winnicott seems to dismiss the problem of knowing and his own interest in it, perhaps he doth dismiss too quickly.) If we recruit Winnicott into the company of philosophizers occupied with the problem, we can pose some new and interesting questions about it and imagine some interesting answers to those questions, beginning with this basic one: What *is* the link between the problem of mothering and the problem of knowing in the face of the lack of direct contact with reality and consequent uncertainty that is the inescapable human epistemological condition?

Winnicott’s explicit answer is that the link is psychological, developmental: a preoccupation with the philosophical problem, fueled by an inability to accept the midway phenomenon of an “illusion of contact” with reality, results from inadequate mothering. I would like to suggest some deeper links buried in this passage. One type of link worth excavating is a parallelism. The features of the good-enough mother bear an uncanny resemblance to a particular conception of “adequate” knowledge practices articulated in various branches of Western thought devoted to the philosophical problem of knowledge. The similarities are striking enough to make one wonder if it is a mere coincidence, or if there is a deeper connection between the good-enough mother and the good-enough knower posited by Western philosophy. Beyond the parallels, we might find (or create/hallucinate) a homology or still deeper intellectual links between the two sets of ideas.

Regarding the first type of link, Winnicott’s conception of good-enough mothering is remarkably similar in its details to a particular (and particularly influential) conception of “good-enough knowing,” which I have referred to elsewhere as the “doctrine of adequacy” (Stolzenberg 1999, 225), articulated in early modern theology, rhetoric, science, and, above all, law. The doctrine of adequacy is spelled out especially clearly in theories of legal evidence and the “legal fiction,” one of the

most intriguing forms of legal evidence. The need to know things arises in many domains of social life, but it appears with special urgency in the legal domain for two basic reasons. First, it is not just idle curiosity that propels us to seek knowledge. To put it otherwise, the quest to relieve the anxiety of not-knowing is not merely an intellectual pursuit. It grows out of the experience of lacking certainty about things we urgently, sometimes desperately, want to know. Is this a dagger which I see before me, or just my fervid imagination? Will I go to hell if I don't follow the preacher? Is the sushi safe to eat? Does he love me, or does he love me not? These are questions we really need to know the answers to, where the difference between reality and illusion (or delusion) matters. The questions of fact that occupy the law are no less pressing. A husband vanishes. Is he dead or alive? Can the wife mourn? Can she remarry? A body lies dead. Whodunit? A property dispute arises. Where does the boundary lie? A baby is born. Who is the father?

In the context of adjudication, not only are the questions of pressing practical importance, but there is no avoiding adopting a solution to the problem of knowledge, however imperfect the solution may be. In the face of contradictory truth-claims, a decision is demanded, and even if a court decides not to decide, that in and of itself is a decision that will have important consequences for the claimants.

This brings us to the second feature of legal adjudications that makes the problem of knowledge especially pressing: judicial decisions (including the decision not to decide) have enormous practical impact, *consequences* that are backed up and enforced by the power of the state.

For these reasons, neither legal practitioners nor philosophers of law have the luxury of avoiding the problem of knowledge. Whether that makes them psychologically damaged, as the quotation from Winnicott seems to imply, is a question I leave to the mental health experts to decide. What I will venture to claim is that, in confronting the problem of knowledge, legal practitioners and theorists have typically had recourse to a practice of legal word-magic that constitutes precisely the sort of "midway phenomenon" that Winnicott alludes to as a practical solution to (and way of avoiding) the problem of knowledge.

The midway phenomenon in law takes many different forms, most tellingly, the legal fiction and the legal presumption, discussed at greater length below, but also more familiar devices for managing and suppressing uncertainty, like standards of proof (e.g., “beyond a reasonable doubt”) or levels of judicial scrutiny (in effect, presumptions of varying strength that statutes are constitutionally valid and rest on an adequate factual basis). Drawing the parallels between these ostensibly good-enough forms of judging and Winnicott’s good-enough mother allows us to consider whether Winnicott’s theory sheds any new light on the legal doctrine of adequacy and the legal practices associated with it. In turn, we can ask whether that doctrine sheds any light on Winnicott’s theory. Beyond the parallels, there may be deeper connections between the good-enough mother and the good-enough judge, not only a homology, but also, perhaps, functions in common. Maybe when we look through the lens of legal theory, the good-enough parent will be seen to be carrying out the kinds of legal regulative functions that are conventionally assigned to the judge. Conversely, looking through the lens of psychoanalytic theory might reveal that good-enough judging is performing the psychological functions of the good-enough parent. It is the latter possibility that I want to play with.

At least one important psychological function that good-enough judging seems to serve is the alleviation, or management, of anxiety. That uncertainty generates anxiety in many circumstances is undeniable. What I am interested in is the particular way that the law manages and copes with that uncertainty, often acknowledging and denying it in the same breath. I want to suggest that one of the key functions of the legal mechanisms that do this is the suppression of the anxiety that attends uncertainty. Uncertainty breeds anxiety. And anxiety breeds longing for relief. Long before modern medicine delivered anti-anxiety drugs and psychiatry in its various forms, the law patented its own form of therapy for treating anxiety.

Like psychoanalysis in at least one important respect, this “law therapy” is a talking cure. In law, words, verbal formulas and incantations, are the tools used to alleviate anxiety. And, as in psychoanalysis, these legal words have a genuinely transformative, almost thaumaturgic effect.

There are several different patented formulas in law for alleviating anxiety, including the aforementioned standards of proof, legal presumptions, and legal fictions. None treats the symptom of anxiety directly. Instead each operates by treating the state of anxiety that stems from not knowing something that one wants or needs to know. In other words, law therapy is a form of cognitive therapy (combined with behavioral therapy) rather than a psychodynamic method of treatment. It operates on the knowledge-state, not directly on the emotional state. It does not delve into the psyche of the individual sufferer. Nor does it aim to dispel denial as psychoanalytic talking cures do. In fact, it often cultivates denial. But the form of denial that it cultivates is deliberately fragile. The characteristic form of denial in law is the legal fiction. Like other fictions, legal fictions suspend disbelief. But the belief-states engendered by that suspension vary. Sometimes, the suspension of disbelief gives rise to a wholly new set of beliefs, those posited by the law. Other times it has the effect of confirming previously held beliefs. At still other times, the legal fiction remains suspended between two different belief-states or just collapses into a state of unresolved doubt.

Indeed, the law dispenses with absolute certainty of belief as a matter of course, as labeling certain outcomes “fictions” makes perfectly clear. The acceptance of less than perfect certainty is also reflected in the various standards of proof employed in the law. Ranging from a mere preponderance of the evidence to beyond a reasonable doubt, all of them fall substantially short of certainty. The question I am interested in is: what is it that enables us to content ourselves with less than certain knowledge in legal contexts, where judgments are made with such enormous practical consequences? How does the law allay the anxiety that typically accompanies the state of wanting-to-know, and needing-to-act-on-knowledge, in the face of not-knowing-for-sure?

The law achieves this remarkable result with a form of word-magic that, like other talking cures, has real transformative effects both on the human psyche and on human behavior. Like other forms of therapy (and like other forms of denial), the legal talking cure is far from fail-safe. It doesn't always work, and even when it does, it produces its own characteristic

side effects. Oftentimes, the side effects cause a resurfacing or intensification of the very anxiety that the legal therapy is meant to suppress. Yet, notwithstanding these common side effects, what is most remarkable about the legal talking cure is just how effective it is.

2

As a concrete illustration of how the legal talking cure both works and doesn't work, demonstrating its characteristic effects and side effects, I turn to one of the most evocative legal doctrines to be found in our legal system: the presumption of paternity. The presumption of paternity, also known as the presumption of legitimacy, is one of the oldest laws on the books, embedded in so many different legal traditions that it is about as close to a cultural universal in law as we get, itself evidence that the needs it serves run deep. It is a legal doctrine that assigns legal paternity, the legal status of the father, to the husband of the mother of a child. In other words, as a matter of law, the husband *is* the father, and the child *is* the legitimate issue of the marriage—regardless of biological facts to the contrary. To put it more precisely, the husband is legally *presumed* to be the biological father; but the presumption has always been (and to a great extent remains) an “irrebuttable presumption”—a quintessential legal oxymoron representing the first obvious sign of word-magic and magical thinking in the law.

It is precisely this oxymoronic character and the judicial refusal to recognize contradictory facts that led centuries of legal commentators to refer to the presumption of paternity as a “legal fiction.” Notwithstanding a long tradition of denunciation (Bentham famously criticized the “lies” of the “technical lawyer”), legal fictions occupy a time-honored place in the law as useful and necessary devices for adjudicating cases (Ogden 1932, 146; Fuller 1967). They are a particularly illuminating site for exploring the parallels between Winnicott's good-enough mother and the law's good-enough judge because it is here that the law most candidly acknowledges the limits of legal knowledge and the makeshift nature of the solutions to the problem of knowledge that the law accepts. The essential

features of these makeshift solutions and the doctrine of adequacy that authorizes them—the legal analogue to Winnicott’s theory of the good-enough mother—are omnipresent in the law but most clearly exhibited in the practice of applying legal fictions. In turn, the characteristic features of legal fictions are most clearly on display in the example of the fiction of legal paternity. Indeed, if necessity is the mother of invention, the presumption of paternity could fairly be said to be the father of all legal fictions.

So how does the presumption of paternity work (and not work)? What needs does it satisfy, and how well does it satisfy them? In short, what does it *do*?

It is easiest to see what the functions of the presumption of paternity are in the context of the premodern society in which it first emerged. In traditional societies, lacking the scientific technology for verifying, or even understanding, the genetic basis of paternity, establishing biological paternity was obviously subject to uncertainty in a way that biological maternity, made visible in pregnancy and birth, is not. Of course, that asymmetry alone does not explain the anxiety surrounding the inherent uncertainty of paternity. If nothing of importance turned on biological paternity, there would be no need to know. But in a society that attaches great value, honor, status, identity, and the transmission of wealth to patrilineal descent, as virtually every traditional society did, it is easy to understand the anxiety that would grow out of the inherent uncertainty of paternity.

Absent scientific means of proof, the one way to overcome the inherent uncertainty of paternity was by ensuring sexual fidelity, in particular female sexual fidelity. A man might have multiple sexual partners without endangering his confidence that the children born to a particular female partner were his, but the mere possibility that a woman could have more than one (hetero-) sexual partner creates a cloud of uncertainty over the paternity of her children. Of course, male sexual freedom also threatens to undermine the certainty of paternity by challenging the exclusivity of other males’ access to female sexual partners. The time-honored solution to this problem was marriage, a social institution that, regardless of whether it took the particular form of monogamy or male polygamy (but never female polygamy), was always structured so as to

enable a man to establish exclusive rights of sexual access to a woman. A wife was, by definition, a woman in whom one man had established exclusive rights of sexual access. Hence the common equation of wives with property, an equation that was drawn without embarrassment for centuries before it became a subject of feminist critique. If a man could be sure that his privilege of sexual access was exclusive, then he—and everyone else—could be equally sure that any children she bore were his. Whatever other social functions or symbolic meaning marriage contained, it was always at its heart a means of perpetuating the male bloodline and certifying biological paternity.

Seen in this light, the presumption of paternity was just one part of a whole web of laws and social institutions designed to enforce the norms of sexual fidelity and thereby certify biological paternity. Among other laws that served the same purpose were the various prohibitions on premarital and extramarital sex customarily traced to the Bible alongside the laws of bastardy, which upheld the value of procreation within marriage by attaching a heavy stigma to children born out of wedlock.

Like the presumption of legitimacy, the law of illegitimacy effaced biological paternity in situations where the circumstances leading to a child's conception did not conform to the prescribed behavioral ideals. In keeping with the fictive nature of the definition of paternity that the presumption enshrined, English common law stated that the "bastard hath no legal father" and is *filius nullius*, the child of no one, or alternatively, *filius populus*, the child of everyone. In practice, these amounted to the same thing because the obligation to support and protect a child fell exclusively to the father. Under English common law (as in the legal systems of many traditional societies), the father-provider was not just a cultural ideal, it was also a legally mandated, judicially enforced role. The legal status of fatherhood came with both rights and duties, subjecting the legal father to the obligation to care for his children and provide for them, while endowing him with the right to his child's obedience, labor, and to custody of the child itself. The child was as much the property of the paterfamilias as the traditional wife was, but "ownership" of both of these species of property was figured paternalistically as a kind of stewardship that coupled the privileges of paternal control with attendant duties on the

part of the father to love and protect those in his charge and, in the case of children, to prepare them for their emancipation upon attaining the age of maturity. Thus, to state that “the bastard hath no legal father” was precisely to say that nobody owed those duties to the child born out of wedlock, save for the minimal duty to provide charity for the destitute, which was customarily assumed by the parish (i.e., “the people”).

Clearly, the laws of bastardy were punitive in both effect and design, discouraging people from violating the prescribed norms of sexual behavior by imposing extremely harsh penalties on the offenders—or, more precisely, on their offspring. The child born out of wedlock was literally an outcast, cast out of the circle of protective obligation that fathers (and fathers alone) were under a duty to provide. This meant the denial of all of the rights that were the legitimate child’s legal due: the right to an inheritance; the right to economic support; the right to paternal care, custody, and a proper education; the right to the father’s very name. Effacing every link to the biological father, the illegitimate child was bereft of the very basis of social identity. The law did not simply stigmatize the children of the guilty parties; it further punished them for the sins of their fathers by denying them the material rights and status privileges that legitimate children derived from their legally recognized fathers.

Juxtaposed against this punitive system, the presumption of paternity is puzzling. At first blush, it seems not to be at all punitive in character. Indeed, it seems to condone the very behaviors that the rest of the legal system condemned. Deliberately assigning paternity to husbands who were not the biological father, while refusing to recognize the paternity of the father in fact, the presumption appears to display a flagrant disregard for the integrity of the male bloodline that other legal institutions were designed to defend. Far from punishing anyone for sexual behavior that undermined people’s ability to ascertain who the father of a particular child was, the presumption of paternity bestowed benefits. Unlike the bastardy laws, the function of the presumption of legitimacy was to *spare* children the social opprobrium and material disadvantages that attached to the stigma of illegitimacy, while turning a blind eye to the underlying act of adultery, thus sparing the adulterers as well. Likewise, the

presumption protected the husband from public disgrace, while freeing the biological father of all of the economic duties and other obligations customarily imposed on fathers by law.

At least on the face of it, all this would seem to have the effect of allowing men to commit adultery with married women with impunity. True, this result was counteracted to some degree by other laws and social sanctions that did impose penalties for the act of adultery (though not for its procreative consequences). It was further negated by the one exception to the presumption of paternity that courts recognized: husbands were granted legal standing to rebut the presumption when they could demonstrate that they were “beyond the four seas,” i.e., out of the country. Outside of this narrow exception, however, the presumption remained irrebuttable. Like every other aspect of the behavioral ideal, the occurrence of sexual relations between husband and wife was simply assumed and treated as a fact not subject to refutation except in the rare instance covered by the four seas exception when a husband’s sexual access to his wife was a logical and physical impossibility.

The presumption of paternity thus sheltered all the involved parties—cuckolded husbands, adulterous lovers, and their progeny—under the mantle of marriage, protecting them from the stigma of the sexual transgressions that had led to a child’s birth. Of course, denying people the right to go to court to challenge the presumption couldn’t stop tongues from wagging and suspicions from arising outside of court. Certainly there were cases where the courts’ refusal to recognize the facts was accompanied by private knowledge, public gossip, and a family left to cope with its open secret as best it could (within the constraints of the husband’s legally imposed obligation to provide for “his” children). These were the cases in which the legal paternity of the husband was recognized to be a blatant fiction. (They also supplied the grist for many a literary fiction, including *The Red and the Black*, *Bleak House*, and *Daniel Deronda*.) But almost certainly these cases were not the norm. It is reasonable to assume that much of the time the adultery was successfully kept secret, if not from the husband, then from the public, if not from the public, then from the child—and sometimes from all three. In situations like these, the presumption would serve not only to protect the husband and children’s reputation, but

also to protect them from even *knowing* the unsettling facts. In many cases, the biological mother would be the only one to know, and even she might be in the dark about the reproductive consequences of her sexual activities. In all such cases, the effect of the presumption would be to make at least some of the interested parties *believe* in the fiction of the husband's paternity—a highly effective form of legal make-believe whose very success concealed its fictional nature from most if not all of the parties involved.

In the vast majority of cases, however, there was nothing fictional about the belief promoted by the presumption, if by fictional we mean untrue. Figures are hard to come by, but it seems safe to assume that the majority of wives *were* faithful to their husbands. And even when they weren't, their children still could have been "sired" by their husbands. In these cases, there was nothing false or fictive about the assignment of paternity to the husband that was decreed by law and insulated from legal challenge. Rather, the effect of the presumption in cases such as these was simply to ratify the biological facts, while preventing the husband's honor from being impugned.

This leaves us with a very perplexing picture. From one point of view, the presumption of paternity reflected and reinforced the prevailing values and norms of sexual behavior; from another point of view, it undermined them. The belief in the sanctity of marriage, the prohibitions on extramarital sex, the value of sexual fidelity (especially on the part of women), and, underlying all of these, the supreme importance of perpetuating (and certifying) the male bloodline—these fundamental values were symbolically affirmed by the presumption of paternity just as they were enforced by the bastardy laws and laws against fornication and adultery. The presumption of paternity *presupposed* marriage and sexual fidelity within marriage, assigning paternity to *husbands* and conferring *legitimacy* on children born *in wedlock*. Indeed, it only applied in cases of marriage. (Where the mother wasn't married, the laws of bastardy kicked in.) Monogamy in marriage thus was not just an aspirational ideal, which people might or might not fulfill; it was the indispensable presupposition on which the presumption of paternity depended. Reading the law literally, it was as if violating the ideal of sexual fidelity within marriage was not just a moral wrong—a sin—but a conceptual *impossibility*.

But if the presumption of paternity functioned on a symbolic level to rule out the very possibility of violating the prevailing values and sexual norms, it functioned on a practical level to license their violation. At least that is how it functioned in the case where the husband was not the father in fact. In such cases, the presumption permitted precisely what the rules supposedly prohibited—the “siring” of a married woman’s child by “another man”—and it did so without subjecting the guilty parties to punishment. It not only protected the children from suffering the sins of their father (and mother), contrary to the law of bastardy; it actually bestowed the imprimatur of legitimacy. In the same vein, far from making sure that biological paternity was correctly ascertained, it falsely attributed paternity to the husband, withholding legal recognition of the real father’s perpetuation of *his* bloodline. Seen in this light, it is hard to see how the presumption of paternity functioned either to certify paternity or to uphold the integrity of marriage.

With such contradictory effects, in some ways strengthening people’s ability to ascertain the identity of the biological father, in other ways weakening it, in some ways fortifying the sanctity of marriage, in other ways violating it, the presumption of paternity appears to be highly paradoxical. All of its paradoxical effects derive from the bewildering idea that a purely fictitious legitimate birth could somehow substitute for the real thing. Without more explanation, it is hard to understand why the law would trade away such highly prized social desiderata as the perpetuation of a man’s bloodline and the exclusivity of his conjugal rights for a mere semblance of those same things. Which raises the question underlying all legal fictions: why substitute fiction for reality? What good could it possibly serve? Wouldn’t the fiction inevitably collapse under the weight of the fundamental paradox of a fictitious fact?

3

It was Winnicott (1986, 30) who said the mark of psychological health is the ability to tolerate paradoxes, to learn to live with them without seeking to resolve them. In that spirit, we might seek not to resolve the paradox of the presumption of paternity

but to illuminate and make some kind of social sense out of it by looking at the presumption from a more dynamic point of view. It is tempting to think of the presumption of paternity as a thing of the past, a vestige of an outmoded legal culture that has outlived its traditional functions and no longer has any useful role to play. Indeed, over the last few decades, a number of lawsuits have been brought by putative biological fathers claiming that the presumption is inconsistent with fundamental constitutional values recognized today, and should be overthrown. One of these constitutional challenges, the case of *Michael H. v. Gerald D.*, made it all the way to the Supreme Court in 1989. These legal challenges were the natural outgrowth of an earlier movement to reform the bastardy laws, a legal advocacy project of the 1970s that was highly successful in removing the stigma of illegitimacy and abolishing most of the legal disadvantages historically imposed on children of unmarried mothers. Today, children born to unmarried women share almost all of the rights historically possessed by legitimate children, including the right to their father's support and their father's name. At the same time, the women's movement succeeded in abolishing many of the gender distinctions that historically differentiated mothers' and fathers' roles, so that now, legally, both the mother and the father are subject to the various obligations of parenthood (e.g., to provide economic support) while being endowed with the same parental privileges (e.g., to have custody and control). The emergent fathers' rights movement has also played a role in extending the financial obligations of parenthood to mothers, while demanding more visitation for fathers and challenging the preference for maternal custody in cases of divorce.

In light of these legal reforms and the sweeping social changes that have taken place over the last half-century, the presumption of legitimacy looks increasingly archaic, and the policy rationales traditionally adduced to justify the law no longer seem very persuasive. In a society that no longer stigmatizes unmarried mothers and their children, the idea that the presumption is necessary to protect children from the stigma of illegitimacy doesn't carry much force. Courts have also said that the presumption is necessary to preserve the "tranquility of marriage," but this too seems to be an outdated justification in a society that no longer punishes people for adultery, and

where divorce is widespread. The historical justifications for the presumption were inextricably linked to old ideas about the “sanctity of marriage,” but the sanctity of marriage can no longer function as a coherent rationale when the traditional model of marriage, and the underlying conceptions of gender and sexuality on which it was based, are widely contested and the very idea of legislating sexual morality is viewed with suspicion. In a world where childbearing and childrearing are increasingly detached from legal marriage, and sex has been freed from procreation, the idea that children can only be born in wedlock is simply outmoded. As for the perpetuation of the male bloodline and the need to certify paternity, these are functions that would seem to be far better served by modern science and new technologies such as DNA testing than by a law that makes marriage proof of paternity—if these are goals that should still be pursued at all.

Indeed, one of the ironies of recent historical developments is that at the same time that the science for *proving* biological paternity has been perfected, the equation of paternity with biology has been called into question. In many ways, this is a period of time in which the biological model of paternity (and parenthood in general) is ascendant. Modern science has greatly improved our ability to identify the biological father of a child through DNA tests, and scientists have also developed new reproductive technologies making it much easier for people to *produce* children that are genetically related to them. Many people who formerly faced physical or social barriers to biological reproduction—couples struggling with infertility, singles, gay and lesbian couples, anyone who either by choice or circumstance does not participate in the practice of heterosexual procreation—can now have genetic offspring rather than adopting or fostering a child, or not having a child at all.

All of these “alternative lifestyles” challenge the traditional model of the family inasmuch as they reject the assumption that procreation can and should only take place in the context of a religiously or legally sanctioned heterosexual union (i.e., the traditional institution of marriage). But they also adhere to the traditional model inasmuch as they still place a premium on biological reproduction and continue to define parenthood in biological terms. The age-old desire to perpetuate bloodlines

both fuels and *is* fueled by the new reproductive technologies. And if the new technologies make it easier for *women* to perpetuate their bloodlines without submitting to the “coverture” of a husband, which is what the traditional institution of marriage required, the evidence suggests that many people using new reproductive technologies are still motivated by the traditional concern with perpetuating *male* bloodlines. In either case, the concern with genetic, biological reproduction remains paramount.

Yet at the same time that modern science has fortified the idea that maternity and paternity are natural biological categories, other cultural forces have weakened the traditional biological conception of parenthood and undermined the traditional exaltation of paternity as a social ideal. In the first place, parenthood, like marriage, is no longer a cultural or religious imperative; or if it is, it is one that people are free to opt out of. In the second place, rival definitions of parenthood have emerged based on psychological rather than biological bonds. According to the prevailing theory of “psychological parenthood” (Davis 1987; 1996), the true essence of the parent-child relationship consists in the bonds of attachment and emotional identification that are forged in the caretaking relationship. There have always been alternatives to the biological model that base the definition of parenthood upon the performance of a particular social role. The traditional assignment of paternity to men who perform the role of husband/provider is a case in point. But it is only in modern times that the social functions associated with the *maternal* role have been identified as the true essence of parenthood and elevated to the apex of the definitional criteria of a parent. Not only maternity but paternity too has been redefined as a primarily psychological relationship, constituted by the bonds of emotional attachment produced by proper nurturing behavior.

The ascendance of the psychological model of parenthood resulted from the convergence of many social and intellectual forces. The feminist movement played a key role in valorizing the emotional and caretaking functions of parents, and ascribing them to fathers as well as mothers. But nothing contributed more to the rise of this conception of parenting than the field of psychology. The psychological parent theory was the brainchild

of twentieth-century psychology, in particular, those post-Freudian psychologists and psychoanalysts, including Anna Freud, John Bowlby, and of course Winnicott himself, who turned their attention to the preoedipal phase of early childhood development from infancy onward, highlighting the importance of the emotional bond between parent and child in the development of healthy, functioning individuals. It was as a direct result of their pioneering theories that *parenting*—newly recognized as a singular and singularly important kind of *activity*, meriting the coinage of a new verb—came to challenge the biological *parent*, a purely static status category in which the ability to *parent* lies *in potentia*. At the urging of these influential psychologists, the idea that the parent-child relationship is defined in terms of the fulfillment of (or shortfall from) essential psychological functions, such as bonding and caretaking, was explicitly incorporated into various branches of family law, giving rise to the doctrine that parental rights should be conferred on the “de facto” or “psychological” parent, and removed from the parent who fails to perform her caretaking functions adequately. Of course, the psychological parent did not completely displace the biological conception. As we have seen, the biological definition of parenthood has persisted and in some respects has even been strengthened by modern developments such as the advent of new reproductive technologies and genetic testing. But in numerous legal cases where parental rights staked on biology come into conflict with claims based upon the performance of the psychological caretaking functions of a parent, psychology has succeeded in persuading courts and policymakers (and the public at large) to favor the “psychological parent” over the biological one.

Indeed, if the biological definition really reigned supreme, then one would expect to have already seen the abolition of legal institutions such as the presumption of paternity (and marriage itself) whose historic function was to prove paternity indirectly in the absence of direct proof. In the past, there was no better way of proving paternity than drawing “the natural” inferences from wedding vows. But now that we have the technology, why not just do a genetic test?

This is the position implicit in the several lawsuits that were brought by putative biological fathers starting in the 1980s, chal-

lenging the legal presumption of paternity: the genetic father is the *real* father or, as is commonly said, “the natural father,” entitled to legal recognition *as such*. The existence of a de facto parent-child relationship is not what qualifies someone for legal recognition as a father; rather, the reverse is true—a psychological parent-child relationship is what the genetic father is entitled to establish. Antiquated laws that infer paternity from marriage and deny “natural fathers” their “natural right” to form such relationships have no justification because they are no longer necessary now that we can prove paternity through DNA testing. It follows that there is no compelling interest served by the presumption of paternity that could justify denying the rights and privileges of paternity to the real father. DNA testing should be used to ascertain the identity of the real father, and the legal rights of paternity should be bestowed upon him.

Appealing to deep-seated intuitions about the “naturalness” of fatherhood, this line of argument was endorsed not only by partisans of biological fathers’ rights, but also by child advocates, feminists committed to overcoming gender stereotypes, and the great run of people to whom the view that the biological father is the “real” father with a “natural” right to “his” child is just common sense. Indeed, most people are surprised to discover that the law, in the form of the presumption of paternity, denies biological fathers the opportunity to establish their paternity. Yet the Supreme Court flatly rejected this “common sense” in the case of *Michael H. v. Gerald D.*, which upheld the constitutionality of the presumption of paternity and denied that the biological father has a right to contest the husband’s paternity and assert his own paternal rights.

It is easy to dismiss this decision as being based on nothing more than the atavistic views of the judicial conservatives who currently dominate the Court. But the reality is that it is not only conservative “family values,” such as the sanctity of marriage, that are protected by the presumption of paternity. In fact, substituting direct scientific proof for the “fiction” of a husband’s paternity would have far-reaching consequences that should trouble liberals every bit as much as conservatives.

Consider this: Do you know who your father is? *How* do you know? Do you really *want* to know?

Chances are, you do know (or at any rate, you think you know) who your biological father is. And chances are you are

right. But your belief is almost certainly not based on the kind of scientific proof supplied by DNA tests or even the less reliable blood test customarily used in paternity suits. In fact, in all likelihood, your belief is based on nothing more than your experience of growing up in a family that was *represented* to you by the people who called themselves your parents as being related to you biologically in that particular way. (Hence the well-known adoption fantasy.) Perhaps these representations were further confirmed by your physical observations, or by observations of character traits that “run in the family,” or just a deep-seated inner sense. You can “feel it in your bones.” Many of us have had this sensation. But then, a significant percentage of people who feel this way turn out *not* to be biologically related to the people they spent their whole lives believing were their parents.

This is the surprising result of the tens of thousands of DNA tests that have now been administered under the auspices of the genome project and, more recently, as part of a new immigration policy restricting family unification. As many as 5% of the men who undergo DNA testing have been surprised to discover that the children they have taken to be their own are not their genetic offspring; conversely, as many as 5% of the people tested have learned that the person they thought was their biological father is not. Some estimates of the false paternity rate are even higher, hovering around 10% (Seabrook 2001; Shea 2006). As the news coverage of these results attests, the revelation of the gap between appearances and reality in these situations has real shock-value, not only for the people directly involved, but for the public at large. Yet perhaps we should be more surprised by the large percentage of cases in which the attribution of paternity to the husband is *not* mistaken. Quite obviously, legal and extralegal social norms proscribing extramarital affairs have never been all that effective, in no small measure because their reproductive consequences usually escape detection. Yet something—some mechanism that does *not* rely on detection—is leading many people not only to *abide by* the norms, but also to *believe in* the norms and (what is not quite the same thing) to *believe that* the norms are widely abided by.

The fact that we *are* surprised by the cases of mistaken paternal identity, and that we continue to be surprised notwithstanding mounting evidence of the frequency of mistaken attributions, is a testament to the ongoing force of the pre-

sumption of paternity and the “old” ideas about the sanctity of marriage and sexual fidelity on which it depends. Without our being much aware of it, the presumption of paternity is in fact still very much in effect, silently operating to reinforce our belief that a married mother’s children are the biological progeny of her husband—even though we typically lack any direct proof or scientific evidence to confirm (or disprove) our supposition. Of course, in special circumstances, doubts arise. And there are still other circumstances where it is common knowledge that someone other than the husband is the “real” father. (This common knowledge, too, can be mistaken.) But these circumstances continue to be regarded as “exceptional” (Scalia 1989, 113). And the fact remains that, in most cases, the paternity of the children is never questioned—which is precisely the effect of the presumption of paternity.

In order to understand the role that the legal presumption plays in producing and policing this effect, just consider what would happen if a challenge to its constitutionality were to succeed. Suppose we went further and, in addition to abolishing the presumption of a husband’s paternity, we instituted a system of mandatory paternity testing to ascertain the identity of each child’s biological father. Contemplating this scenario, it should become clear that it is not just the conservative family values crowd that has much to fear from the abolition of the traditional legal doctrine. Far from constituting a liberal utopia, in which “natural fathers” would enjoy their “natural rights” with their equally natural children in undisturbed freedom and harmony, mandatory paternity testing looks a lot more like the technology of a totalitarian state where Big Brother—or Big Father—is watching you, probing into the most intimate realms of family and sexual life.

Once we recognize that a system of mandatory paternity testing amounts to a coercive system of surveillance, rather than a utopia of natural rights, we can see more clearly what the benefits of the traditional doctrine are. The interests that the institution of genetic testing threatens to invade are precisely the interests that the presumption of paternity protects, to wit, the interests of those who would be injured by disclosure of the facts surrounding the conception of a child. That includes most obviously the married women who have knowledge that

they want to conceal, but also, albeit with more ambiguity, the other parties to the affair, all of whom stand to benefit in various ways from *not* having the facts exposed. Seen in this light, the legal presumption is plainly revealed as a kind of “don’t ask-don’t tell” policy: if no one questions her child’s paternity, then a married woman who has successfully concealed an affair leading to the conception of a child can “get away with it.”

Courts have recognized this substantial privacy interest underlying the presumption, but they have tended to attribute it to all the family members or the family unit as a whole (that is, the legally recognized family unit, composed of husband, wife, and kids, excluding the biological father), rather than focusing on the mother’s privacy interests in particular. And, indeed, as suggested above, the entire family does stand to benefit from the privacy bestowed on it by the legal ban on challenges to paternity. That said, it is the wife, more than any of the other family members, who typically has more access to the facts surrounding a child’s conception than anyone else, as well as more reason to want to keep this knowledge secret, and much more to lose if she were placed under a legal regime that permitted the paternity of her child to be contested—or worse still, made paternity transparent.

This analysis might lead us to conclude that the main ongoing function of the presumption of paternity is to protect the privacy of the woman. Indeed, the presumption of paternity does confer substantial benefits on the married woman, not only privacy, but, along with that, a considerable amount of power to control her personal situation, in particular the power to control *who knows what*. Of course, the wife’s power to control access to knowledge about the facts of paternity is not unlimited. As we have already seen, under the traditional doctrine, husbands have long had the right to contest paternity under the “four seas exception,” and that exception has been widened so that, today, the doctrine gives husbands legal standing to challenge the presumption of their paternity under any circumstances. But while, in theory, husbands could exercise their right to test children’s paternity routinely, husbands are rarely moved to exercise their right to test paternity except when they already know, or suspect, that their wife has had an affair. Even then, husbands rarely take legal action. The practical upshot of this

is that the presumption effectively gives the wife a good deal of control over her husband's ability to learn the facts. Even though she lacks a formal veto over the husband's right to test the children's paternity, the legal presumption makes it much easier for her to conceal facts that might *motivate* her husband to exercise his right by preventing *other* parties from challenging his paternity over her objection.

It is by preventing such actions by putative biological fathers and children (or people purporting to represent the interests of the children) that the traditional presumption does most of the practical work of suppressing knowledge of the unsettling facts. Under the doctrine of the presumption of paternity, the child has no legal right to challenge the presumption, and neither does the biological father, except as an accomplice to the wife. Current legal doctrine now grants wives, as well as husbands, legal standing to challenge the husband's paternity. But unlike husbands, who in theory have free rein to challenge the presumption, wives are permitted to bring a challenge only if they obtain a supporting affidavit from the putative biological father. This means that the wife and the biological father, acting together, can challenge the presumption and assert the biological father's legal paternity against the wishes of the husband. But neither one of them has the power to challenge the presumption acting alone. And while this leaves the wife at the mercy of her (erstwhile) lover, the opposite is also true: the biological father is entirely dependent on the wife's cooperation if he wishes to establish his legal paternity. If the wife decides to stick with the presumption and have legal paternity assigned to her husband, there is very little the biological father can do about it.

Clearly, then, wives enjoy substantial benefits under the traditional doctrine, which they would forfeit in a regime of mandatory paternity testing. Recognizing this illuminates some of the doctrine's hidden functions, but it only compounds the paradox of the presumption of paternity. Why would judges committed to the most patriarchal conception of sexuality and marriage have adopted a law that enables *wives* to *lie* to their *husbands* about the very things that ostensibly were most important to them? Undeniably, the traditional doctrine *did* (and still does) enable women to subvert the values deemed by

tradition to be most sacred: male honor, the vows of marriage, the exclusivity of a man's conjugal rights. But it defies belief to suppose that granting women the power to lie about adultery was the *intended* effect. Far more likely, this consequence was inadvertent, the proverbial "perverse effect" that thwarts the best-laid human designs.

This being so, one would expect to find, along with these unintended effects, other effects more congruent with the stated values of the presumption. That is, one would expect to find that the presumption advances *male* interests and the stated *societal* interests in upholding the sanctity of marriage and enabling men to perpetuate and certify their bloodlines, notwithstanding the occasional perverse effect. In fact, the traditional doctrine does serve these interests, but because of the presumption's more glaring paradoxical effects, this effect is harder to discern. Now that we have teased out those paradoxical effects, however, the intended functions of the presumption of paternity can be brought to the surface.

One male interest protected by the presumption has already been noted in passing. That is the male interest in privacy, specifically, the interest in preventing the disclosure of embarrassing or painful information. Both the husband, who wants to preserve his reputation and honor, and the adulterous lover, who wants to avoid entanglements and the embarrassment of a public scandal, have motives of their own for wanting to prevent public disclosure of the facts, separate and apart from the wife's. Granted, not everyone granted this protection by the traditional presumption *wants* to prevent such disclosure. Doubtless, there are cases in which the husband, the biological father—or the child—would prefer to know the truth. The recent attempts by putative biological fathers to overthrow the presumption are a testament to that preference, but the fact is that there have been very few such attempts, just as the cases in which husbands challenge the presumption are few and far between. There are various reasons for this, but in part it is a reflection of the fact that not every husband, erstwhile lover (or child) *wants* to overthrow the presumption that obscures the truth.

Indeed, it is very hard to say if a person wants to know the truth, or if knowledge of the facts is in his best interests, or what even constitutes the truth of paternity. Is it necessarily a benefit

to learn “the truth” about paternity after living for years with a contrary belief about who your father is? Is it a benefit to learn that you are not the “real” father of people you have taken to be your children, or to discover that you *are* the “natural” father of children, years after the fact, who have been raised without you? These are all situations in which the psychological theory of parenthood might be marshaled to dispute the proposition that the biological father is the “real” father, and to counsel against the revelation of “the truth,” i.e., the biological truth. In part this is because in these situations the child has already developed a “de facto” father-child relationship with someone other than the biological father, and the effect of rebutting the husband’s paternity would be to disrupt an established, ongoing psychological bond, a turn of events that, attachment theorists tell us, could cause serious psychological damage.

But even if the law were changed to give biological fathers the opportunity to establish paternity while the child’s capacity to form attachments is still plastic, *before* the years have gone by and a father-child bond is cemented with the husband, it still is a matter of considerable debate whether it is in the best interests of the child to let the biological father form a father-child relationship. Especially when a wife and husband want to raise the child as “their own,” the proposition that a relationship with the biological father is in the child’s best interests is hotly debated, not only between proponents of the psychological parent theory and opponents who favor a biological model, but also *among* those who subscribe to the psychological conception, with some proponents of the psychological theory arguing that biological fathers should have the opportunity to form a relationship, and others holding that biology is largely if not totally irrelevant to the selection of a father figure, while still others dispute the gendered proposition that a father figure is necessary at all.

The fact of the matter is that there are both harms *and* benefits to disclosure, and as a result, the feelings of the people who are in these situations are deeply ambivalent just as social policy is deeply ambivalent about the biological father’s rights. People differ in their psychological reactions, and they differ in their assessments of the reactions that other people have. This is at least partially due to the fact that we hold competing

psychological and biological conceptions of what a “real” parent is. The only thing that is clear amid this ambivalence is that everyone affected by the presumption has at least *some* interest in preventing the disclosure of the biological facts (even if they also have countervailing interests). Notwithstanding the fact that the mother’s interest in concealing the facts is obviously hostile to the interests of the husband, the child, and the biological father in certain ways, husbands, children, and biological fathers also have an interest in suppressing the facts. But unlike the mother, whose privacy interest is limited to blocking the disclosure to *others* of information that she already (and often, she alone) has, the other parties have an interest in blocking their *own* acquisition of knowledge in addition to preventing others from finding out. A husband might not care to have the truth revealed in public, or to learn the truth himself. A child has a similar psychological interest in not being made the subject of a stigma or a spectacle and not learning disquieting facts. As for biological fathers, history suggests that their interests in establishing their paternal rights are often outweighed by their countervailing interest in *escaping* the burdens of paternity, not least, the burden of knowledge and the responsibilities that come with that knowledge.

In short, there is a powerful desire *not* to know the truth, which is well served by the legal fiction of paternity. The kind of not-knowing pursued here has to be distinguished from the state of not-knowing-for-sure, discussed at the beginning of this essay, which impels the quest to establish paternity in the first place. The latter is a state of uncertainty and factual ambiguity in which one cannot decide, but one wants to know, which of two different possibilities is true. (The husband is/is not the father, the wife was/was not faithful.) By contrast, the former is a cognitive state based on the desire not to know, best characterized as a state of denial or wishful thinking in which one flatly refuses even to consider one of the possibilities. It is this form of not-knowing that is facilitated by the presumption of paternity, whereas the anxious state of not-knowing-for-sure is what the presumption attempts to cure.

But we still haven’t established *how* the presumption relieves the uncertainty of not-knowing-for-sure. If it works through denial, it is hard to understand how that state of denial isn’t

undermined by the obviousness of the fact that the law is fostering denial. If anything, the knowledge that the law allows the fact of adultery to be concealed would seem to exacerbate the doubts and suspicions that activate the anxiety of uncertainty in the first place. So long as the possibility of deceit can't be ruled out, husbands are condemned to an endless churning of possibilities: your beliefs might be false, your wife may have deceived you, her child might not be your child. Or, from the point of view of the child, your mother may have deceived you and your father, or your mother and father may have jointly deceived you, and your father might not really be your father. The falsehood might be exposed, and you might be humiliated and cast out of the bosom of the family. On the other hand, the falsehood might never be exposed, and you might never know the truth. All of these anxieties (and guilt-ridden wishes) are prone to arise when the facts of paternity are ambiguous (as they always are). The only thing that can relieve them is knowledge, or rather, *belief*. To *believe* (that the husband is the father) is precisely to suspend the uncomfortable awareness that the facts are ambiguous and consequently fidelity and paternity are inherently uncertain. But we still lack an adequate explanation of how the presumption generates belief in the absence of an objective proof of the truth of the matter.

If the fiction of paternity's only function was to preserve the husband's reputation and outward appearance as a man of honor, or to shield people from facts they'd rather not know, then we might conclude that the belief fostered by the legal fiction of paternity is a sheer illusion. Not the kind of illusion that Winnicott describes, which involves a basic congruence between what is "hallucinated" and what is "actually found," but rather, a deception, a show, a sham, something completely at odds with external reality. But if this is what a legal fiction is—a falsehood, a deception, a factual proposition at odds with external reality, or at the very least lacking any evidentiary grounding in reality—then it is hard to see how it can perform any of its functions effectively. A fiction that blatantly disclaims its own grounding in external reality would seem to be self-defeating. As with literary fictions, the suspension of disbelief achieved by such avowed untruths is by nature temporary, and must inevitably collapse. Sooner or later, *knowing* that what one is consuming is mere fiction, one has to "get back to reality."

But the fact is that the illusion that the husband is the biological father *is* commonly sustained even though it is fictive. The number of cases in which a husband's paternity is questioned is astonishingly small, far smaller than the number of cases in which the attribution of biological paternity to the husband is actually mistaken. Somehow, doubts about paternity are put to rest without any proof of the fact. So the question remains: what sustains the illusion? What sustains the belief that people are acting in accord with the prescribed norms of sexual fidelity in a particular case when we all know as a general matter that people often *don't* act in accord with the prescribed norms and, moreover, that such transgressions often escape detection?

4

In the remainder of this essay, I want to consider two possible answers to this question that, curiously, amount to the same thing. One possibility to be pursued is probabilism, that is, the acceptance of mere probabilities in lieu of scientific certainties—a paradigmatic example of the “midway phenomenon” to which Winnicott's quotation alludes. The other possibility is trust. If we are not to be completely cynical about the institution of marriage (or monogamy, more generally), then we might describe marriage not as a form of property in which men establish exclusive rights of sexual access to women, but rather, as a practice of mutual trust.

In addition to explaining what makes people believe in a husband's paternity in the face of ambiguous facts, marriage as trust, as opposed to marriage as property, also explains our resistance to a Big Brother system of mandatory paternity testing. Would your average husband *want* to subject his wife to a scientific test every time she becomes pregnant? Maybe so. But to do so bespeaks not just the inherent uncertainty of paternity but also an inherent lack of *trust* on the part of a husband in his wife. Indeed, the implementation of a system of scientific testing would not merely *reflect* a lack of trust; it would itself be corrosive of the mutual trust and the leap of faith that a commitment to monogamy entails.

This alone might support a refusal to institute a system of mandatory genetic testing and justify the traditional presumption. But it still doesn't explain how the presumption of paternity puts doubts to rest. After all, the practice of trust is as inherently fragile as a legal fiction is. Indeed, trust and fiction are but two aspects of the same thing. We have already seen that the fiction of paternity presupposes sexual fidelity—trust. But if the belief in the fiction of paternity depends on trust, then that just shifts the question from the puzzle of how a fiction is constructed and sustained to how trust is built up and sustained.

This is precisely the question that Winnicott undertook to answer with his theory of the good-enough mother. The mother-infant relationship is, of course, the prototypical relationship of trust. In Winnicott's analysis it is constituted not only by the emotional bonds of attachment but also by *cognitive* bonds of subjective belief (on the part of the infant) woven together with the external validation of the mother. For Winnicott, the maternal task, in addition to providing physical nourishment, is to generate "illusion," his term for the cognitive state in which self and objects external to the self are first differentiated, and a sense of external reality begins to form. Like physical nourishment, the maternal nourishment that Winnicott sees as necessary for the sense of self and reality to emerge is conveyed initially through breast-feeding (or an equivalent "feed"). As the opening quotation succinctly explains, illusion results when the infant has the repeated experience of having its needs met, which can only happen when the mother is sufficiently responsive to her child's needs. If the mother's "initial active adaptation" to her child's needs is not good enough, for example, if she makes the child wait too long, then the baby is deprived of the experience of "finding" what he has "created" or imaginatively constructed out of his wants. But when the mother *does* satisfy the baby's hunger, the baby has the experience, or "illusion," of contact with external reality.

It is important to stress that in using the term "illusion" to describe the perception of reality that the infant acquires (when mothering is good enough), Winnicott is *not* suggesting that the perception is untrue. As Adam Phillips (1988) explains in his brief intellectual biography, for Winnicott, illusion is not "something deceptive." Rather, "it is by way of illusion, and indeed

only through illusion, that the infant can get to reality.” Illusion is generated when the infant “fantasizes a satisfying breast, at which point the real breast is made available by the mother.” Initially, the infant does not perceive “the real breast” as an object apart from itself and its own needs and desires. Rather, as Phillips elaborates, the first feed is a “moment of illusion” in which “it is as though, from the infant’s point of view, he has created the mother he eats” (83). As Winnicott describes it, “simple contact with external or shared reality has to be made by the infant’s hallucinating and the world’s presenting, with moments of illusion for the infant in which the two are taken by him to be identical which they never in fact are” (1955, 154). From the infant’s point of view, “he has made what he has, in fact, found.” But the experience of repeatedly finding what he has made ultimately leads him to develop the sense that he has found what he has, in fact, fantasized. In short, “fantasy is not a substitute for reality but the first method of finding it” (Phillips 1988, 83–84).

In order for illusion to occur, it is neither necessary nor possible for the maternal figure to satisfy the baby’s needs perfectly. All that is necessary is that the mother be *sufficiently* responsive to validate a belief in the existence of an external world. And that she do this over and over again. Over time, the child begins to “build up a belief in his environment,” his ability to tolerate delayed gratification grows, and the mother can “gradually limit her availability and so ‘disillusion’ the child” (Phillips 1988, 64, 121). Thus is born the adult sense of reality in which “I know there is no direct contact between external reality and myself, only an illusion of contact, a midway phenomenon that works very well for me when I am not tired.”

The difference, then, between a mature sense of reality and the infantile one is not that the latter is an illusion while the former is not. There is no room in Winnicott’s account either for a sense of reality that is free of illusion or for a conception of illusion that is antithetical to truth. Rather, the mature person *recognizes* that her perception of reality is an illusion, but is not troubled by this “philosophical problem,” so long as her illusory perception of reality “works” (Phillips 1988, 119).

For those who *are* occupied with the philosophical problem, it will be obvious that Winnicott’s account of the sense of reality

acquired in the normal course of human development is what philosophers refer to as a pragmatist theory of truth. Eschewing the possibility of any “direct contact” with the external world, while also eschewing a more radical skepticism, the pragmatist accepts the “midway phenomenon” of imperfect approximations of reality, derived from experience, which work well enough even though they don’t satisfy the objectivist criterion of an exact reflection of, or correspondence with, reality. The “truths” that are perceived are probabilistic, generalizations from past experience. (When I cry for milk, *usually* milk is delivered; ergo, there must be something out there delivering me milk.) The criterion of the validity of a truth statement or factual proposition is thus not accuracy but *usefulness*. (“It works very well for me.” Or it doesn’t.) While falling short of the standard of perfect certainty, the pragmatists’ probabilistic truths (like Winnicott’s good-enough mothers) are adequate to the practical needs of the situation. As applied to any particular case, they are constructions, fabrications, fictions spun from the human mind, but so long as they are *useful fictions*, they satisfy the pragmatist criterion of truth. And, on the pragmatists’ account, that is the best that we can hope for. So long as it works, for practical purposes, it’s good enough.

What is remarkable is not just how much Winnicott’s definition of the good-enough mother echoes the pragmatist conception of the good-enough knower of the truth. Winnicott also presents the good-enough mother as the progenitor of the good-enough knower. Alongside physical growth, emotional security, and a sense of self, the (pragmatic) sense of reality is a *product* of adequate caretaking in the early years. Thus, Winnicott’s account of how trust and emotional security are built up is at one and the same time an account of how a belief in the real is developed as well as an account of how our beliefs about what is real are necessary fictions.

This brings us finally to a position where both the mystery of how the legal fiction of paternity can *work* as a *useful, believable, sustainable* fiction and the relation between Winnicott’s good-enough mother and the legal fiction can be unraveled.

In order for the legal fiction of paternity to work, it has to be believable. And in order to be believable, the fiction of a husband’s paternity has to be validated by experience. To be

validated by experience does not require that the attribution of paternity to a husband be valid in every single case. It suffices—it is adequate, it is *good enough*—if it is valid, or experience supports its validity, in *most* cases. So long as it is true more often than not, then there is an experiential basis for the generalization. And indeed, it *is* true that in the majority of cases, husbands are the genetic fathers of the children born to their wives. If this were not the case (and it is of course not a necessary, but only an empirically contingent truth), then the fiction of paternity would no longer be validated by experience. And then it would no longer work to induce belief. But so long as experience confirms that husbands are *usually* the genetic father, experience will confirm that the statement that the husband is the father has the validity of a *probabilistic truth*, and for that very reason it will tend to support a belief in the actual paternity of a husband in a particular instance.

That being the case, we might question the characterization of the presumption of a husband's paternity as a fiction. If the presumption accurately reflects a probabilistic truth, then the ascription of paternity to a particular husband that results from the application of the presumption seems not to be a falsehood (let alone a deception). Either it is factually true that *this* husband is the biological father or, alternatively, the law is not saying that it is a certain truth that this husband is the father; it is just saying that it is *probably* true. In either case, the law is not making a false statement but rather a true one. In which case, why characterize it as a fiction at all?

This question was taken up and answered by Lon Fuller (1967) in his classic book on legal fictions, originally published as a series of articles in the *Illinois Law Review* in 1930–1931. In his career as a legal scholar, spanning roughly the same period of time as Winnicott's career, Fuller developed the richest analysis of the nature and functions of the legal fiction that legal theory has yet produced, focusing on the question at hand: what makes a factual proposition a "fiction"? What do we mean by "fiction" when we apply that term to the factual propositions dictated by law, and what is the relationship between what we call fiction and what we call reality or empirical truth? The answer that Fuller provides is striking in its resemblance to Winnicott's ideas about transitional phenomena and the "potential space" between fictions and reality.

Fuller begins by disputing a distinction commonly drawn between legal presumptions and legal fictions, according to which “a fiction assumes something that is known to be false” while “a presumption assumes a fact that *probably* is true” (1967, 40). This distinction collapses, according to Fuller, for two reasons. On the one hand, presumptions may be irrebuttable, and if such a presumption is applied to a case in which the probabilistic generalization does not hold, then it will result in a false characterization of the facts in that case. On the other hand, legal fictions can be applied to cases in which the “made-up” facts are true (40–48).

In the first case, one is tempted to say that the law is perpetrating a falsehood. But that is only true as regards the immediate case; in *most* of the cases to which it will apply, the factual assumption enshrined in the law will hold true. At least it will hold true in the majority of cases so long as the assumption is based on “common sense,” i.e., it draws an inference that “is justified by ordinary experience” (Fuller 1967, 45)—in other words, so long as it is an accurate generalization. For the application of a presumption to be justified, the factual premise it presumes must be a generalization validated by experience.

Because it is just a generalization, inevitably there will be cases in which the factual proposition dictated by the presumption does not accord with the actual facts. But the number of such cases is by definition small. (Otherwise, we would be dealing with a false generalization.) In the vast majority of cases, so long as the underlying generalization itself is not false, the application of the presumption will result in an accurate description of the actual facts.

Conversely, Fuller argues that the law is still engaged in the construction and promotion of a fiction even when the fiction accurately reflects the facts of a particular case. This is because legal fictions always operate by way of presumptions. “The ordinary fiction,” Fuller observes, “simply says, ‘Fact A is present’ and would cease to be a fiction if Fact A were in reality present in the case.” Legal fictions, however, are not like the “ordinary fiction.” They have the form of a conclusive presumption, which says, “The presence of Fact X is conclusive proof of Fact A.” Thus, for example, A’s marriage to X (Fact X) is conclusive proof of his paternity. Expressed in the form

of a presumption, we can presume/infer A's paternity (Fact A) from his marriage to X (Fact X). In Fuller's analysis, "this statement is false, since we know that Fact X [marriage] does not 'conclusively prove' Fact A [paternity]." Moreover, "this statement, that Fact X proves the existence of Fact A, remains false, *even though Fact A may by chance be present in a particular case*" (1967, 41–42; italics in original). In other words, even when it is true that A is the biological father, the statement is false because what it is saying is that A's marriage is *proof* of his paternity, and that is not true.

Fuller thus makes three critical points, which resonate with the pragmatist conception of knowledge and Winnicott's as well. First, legal fictions take the form of legal presumptions and, vice versa, legal presumptions necessarily involve a fiction. To put it another way, legal fictions and legal presumptions are in essence the same thing. Second, legal fictions/presumptions are undergirded by probabilistic truths. As a result, in *most* cases, their application results in an accurate or "true" description of the empirical facts (e.g., the husband is the father). And in *every* case, the factual proposition mandated by the law is *likely* to be true. This is why legal fictions cannot be distinguished from an assumption of a fact that is *probably* true (i.e., a presumption). But (and here we reach the third point), even when they produce correct descriptions of the facts in a particular case, they still entail a fabrication because the factual propositions they dictate are unproven; they rest on assumptions, not on proof. And no matter how much we deceive ourselves, probabilities are not the same as certain proof. They are no proof against the possibility (however improbable) that the facts in *this* particular case fall outside the realm of the probable. The fact (and it may well be a *fact*) that *most* husbands are the biological fathers of their wives' children is no guarantee that a particular husband is the biological father—nor is it any guarantee that the generalization will continue to hold in the future. Equating a merely probabilistic truth with the actual truth in a particular case is necessarily based on the illusion that probabilities are (proof of) actualities, and this of course is a fiction—a useful fiction to be sure, but a fiction, nonetheless.

This analysis gives us a better understanding of how the legal fiction of paternity can shift us out of a state of inherent

uncertainty about the identity of the father into the state of conviction—what Winnicott would call the potential space between reality and illusion—that alone can deliver us from the anxiety of uncertainty. A conviction that A is the father might be true, or it might be false. If we focus only on the cases in which it is false, we can't see the mechanism that makes the fiction work. But if we look at the presumption of paternity from a more dynamic perspective, considering its effects in the aggregate rather than in the isolated case where the husband is not in fact the father, the willingness of individuals to accept the presumption as an accurate description of *their* situation becomes much more understandable. In fact, we substitute mere probabilities for certainties, accepting merely probabilistic truths as the truth in our particular case, *all the time*. Indeed, as Winnicott and everyone else who adopts the pragmatist conception recognizes, that is the *only* mode of cognition we have. And it works very well. Most of the time. Except when we are tired.

From this point of view, the legal fiction of paternity can readily be explained as a cost-effective solution to the problem of *proving* biological paternity. If the fiction is based not on a falsehood but rather a generalization, that is, if it rests on probabilistic truths, then it is not inimical to the male interest in correctly ascertaining paternity, as first appeared to be the case. Instead, it can be seen as the most efficient way of getting the facts right in the greatest number of cases. In a society that lacks the technology to prove genetic paternity directly, the legal fiction of paternity constitutes a necessary trade-off between getting the facts right in *most* cases and litigating the facts of the matter in each and every case—a costly, and ultimately inconclusive, endeavor. Rather than demand direct proof, the law could rest on generalizations that didn't need (and weren't permitted) to be litigated on a case-by-case basis.

This efficiency/evidentiary rationale for the presumption might seem to be outmoded now that we have the scientific technology to prove paternity on a case-by-case basis at a relatively low cost. But as we have seen, there are still substantial costs to genetic testing. The risk of error has been dramatically reduced to the point where the accuracy rate of genetic tests approaches 99%, and costs of testing itself have likewise been dramatically lowered, so from a strictly financial point of view

universal DNA testing may now be perfectly feasible. But as we have seen, inadequate methods of proof and risks of error are not the only costs to be taken into account. There are also social costs, such as the costs of invading personal privacy and corroding trust, that explain our ongoing resistance to testing and support the trade-off in favor of relying on the generalization (that husbands are *usually* the fathers of the children born to their wives) rather than demanding scientific proof.

The logic of probabilism goes a long way toward helping to explain how legal fictions make people actually *believe* the facts dictated by a legal presumption. In order to *make beliefs*, the law has both to posit a legal fiction and to suppress the knowledge or the conscious awareness that it *is* a fiction that is being posited. This is precisely what probabilism serves to do, not only in law but in every human cognitive enterprise. Whether it is because we are hard-wired to do so, as cognitive psychologists hypothesize, or whether it is a function of cultural conditioning, we human beings are normally very good at putting low likelihood possibilities, as we say, “out of our minds.” And when we do so, the *perception* of a gap between the probable and the actual, the fictional and the real, the subjective conviction and the objective reality, disappears. In short, we believe. That is the basic logic of probabilism, and that is the logic on which the legal fiction relies.

But legal fictions do more than just make people *believe* in a particular factual proposition. They also make people *behave* in ways that produce the facts that are subject to our cognition (i.e., the products of legal make-believe). And by inducing this *behavioral* change, legal fictions collapse the distinctions conventionally drawn between the descriptive and the prescriptive functions of law. Usually, we distinguish the prescriptive function of the law, when law tells us what we can and can't do, from the descriptive function of telling us what *is*. The latter “fact-finding” function has largely escaped the attention of those who apply psychoanalysis to law (Frank 1930; Goodrich and Carlson 1998). Instead, psychoanalysis has tended to see law exclusively in the mode of the forbidding father who lays down the behavioral injunctions, the prohibitions, the thou-shalt-nots—and the occasional thou shall. Psychoanalysis has *not* tended to focus on law in its fact-finding mode, even though the finding of facts—the

declaration of what *is* the case in a particular case—is obviously an equally indispensable function of the law. Jurists, on the other hand, while ever alert to the importance of fact-finding, have traditionally drawn a sharp line between the descriptive function of settling the facts and law in its normative mode. But as the more sophisticated analyses have shown, questions of law and questions of fact are inextricable. Nowhere is this better borne out than in the operation of legal fictions.

The application of a probabilistic truth is in essence a prediction. On the basis of generalizations of past experience (husbands are usually the fathers of their wives' children), we *predict* that this husband is the father of his wife's child. With the force of law behind it, the prediction becomes self-fulfilling. The law does not merely reflect a behavioral truism; it actively encourages people to behave in the way described. It doesn't just make people *believe* the facts; it makes the facts themselves, which of course supports the belief, which in turn leads people to act in conformity with the beliefs, in an endless—though not unbreakable—cycle.

This prescriptive or normalizing function of the law of paternity (and legal fictions in general) is the hardest of all of the functions of the fiction to discern, hidden as it is under the grammatical structure of a merely descriptive statement. But a dynamic analysis, which looks at the *systemic* effects of the fiction rather than considering its effect in a single case taken in isolation, brings this hidden function into view.

Consider once again the comparison of the legal fiction of paternity with the traditional laws of bastardy. The laws of bastardy are a paradigmatic example of law in its prescriptive prohibitory (paternal) mode. On first analysis, the presumption of paternity appeared to be entirely devoid of this punitive dimension that characterizes the laws of bastardy. But the picture changes once we adopt a more dynamic—and psychodynamic—perspective. The psychodynamic perspective informs us of the inherent duality and consequent ambivalence of parents' desires vis-à-vis their children (and vis-à-vis each other) and the corresponding ambivalence of the child's desires vis-à-vis the parent. That means that every parental benefit is indissolubly coupled with a potential harm. Every right is linked to an obligation, and every child's interest in protection and attachment is

likewise coupled with a desire to escape the would-be caretaker. Joining this psychodynamic perspective to a dynamic analysis of the law, which looks at systemic effects of law in the aggregate, rather than focusing on the isolated case, it becomes clear that everything that was previously characterized as a benefit and protection from punishment under the presumption of paternity can equally be characterized as just the opposite: as harm and punishment.

Thus, the biological father who is spared the obligations of fatherhood is simultaneously denied a father's rights, the right to connect as well as the more traditional right to perpetuate his metaphysical identity (the bloodline) and his material identity (wealth) through intergenerational transmission. Likewise, the child who is protected against the stigma of illegitimacy and the disruption of "family tranquility" is denied the opportunity to bond or even to know her "real" father, as well as the opportunity to inherit and otherwise receive the various material and non-material benefits that he has to bestow. The wife who benefits from control over her privacy is at the same time caught in a deception, and the husband whose reputation and peace of mind might be protected is made a cuckold, saddled with the responsibilities of fatherhood for a child who, according to a persistent logic, "isn't really his," deceived by his wife, culturally a figure of mockery. Perhaps the ultimate punishment that parents are subjected to under the presumption of paternity is bearing the responsibility for inflicting harm on their child (and on each other), while the child has to suffer the sins of her (manifold) parents, both the sin of their absence and the sin of their presence.

All of these effects cannot fail to operate as penalties that (a) deter people from acting in violation of the rules, and (b) punish people who have broken the rules of sexual behavior with the infliction of nontrivial harms. In this respect, the presumption of paternity is not at all unlike the traditional laws of bastardy, and other traditional forms of sexual regulation, which use/d the coercive power of the state and the threat of punishment to discourage people from violating the laws of traditional sexual morality. They are, on deeper inspection, a paradigmatic example of the prescriptive law of the father, which lays down prohibitions, in particular sexual prohibi-

tions, in order to secure his exclusive access to the wife—part and parcel of the same disciplinary apparatus as the bastardy laws and other laws that punish people for deviating from the prescribed norms of sexual behavior.

There is yet another way in which the traditional presumption operates to induce conformity to the rules of traditional sexual morality, not through punishment but rather through the inculcation of values. We already observed that the presumption operates on a symbolic level to promote the values of traditional sexual morality. In other words, it serves an educative function, teaching people to *believe in* procreation and (heterosexual) marriage and the value of containing sex and procreation in marriage in addition to teaching them to *believe that* these norms have been complied with in a particular case. These functions are all mutually reinforcing: the descriptive functions of the law—defining *what* a father is and deciding *who* a father is—reinforce the coercive function, which in turn reinforces the symbolic function, which in turn reinforces the descriptive function, etc., etc. It is thus a perfect example of what Foucault calls the process of “normalization,” in which a descriptive norm produces (through the joint operation of external punishment and internalization) the prescriptive norms that it presupposes (Ewald 1991).

All of these functions, taken together, provide a comprehensive explanation of how the legal fiction of paternity works—how the fiction operates to certify our belief in the paternity of the husband, notwithstanding the ever-present possibility that people might have violated the norms, and things might not be what they seem. They demonstrate that the legal fiction works not only to construct our beliefs but also to construct the facts that we believe in, as well as the values that those facts reflect. And they explain how our lurking doubts and anxieties about whether the facts really reflect our stated values are successfully repressed through the reduction of uncertainty about the facts in any particular case.

These functions of the legal fiction of paternity are representative of how all legal fictions work. The law is filled with “legal fictions” that fill in the hole of factual uncertainty with a legally stipulated belief or factual proposition that is admittedly a legal construction. And they work very well. Most of the time.

When we are not tired. Even when the law does not candidly refer to the facts it makes up as fictions or constructions, it takes little work to demonstrate that the factual “findings” on which verdicts depend are always constructed out of probabilities, greater or lesser, which always fall disturbingly short of certainty. The recent use of DNA testing to expose the faultiness of our process of criminal conviction is a most disturbing case in point, but the inherent risk of error exposed by the Innocence Project, which seeks to overturn wrongful convictions, is omnipresent and ineradicable.

Legal scholars, in particular scholars of legal evidence, have always been mindful of the inherently fictive, constructed (i.e., probabilistic) nature of legal knowledge. This awareness amounts to what I have called the legal doctrine of adequacy, the doctrine that holds that mere probabilities are an adequate—not a perfect, but an adequate—substitute for certainty. They are deemed to be an adequate substitute because there is no better alternative, because it is the best we can do—there is no perfect knowledge (just as there is no perfect mother or father) to be had. What the good-enough judge can do is not provide certainty, but at least provide the soothing illusion of certainty, thereby suppressing the anxiety that inevitably attends the state of uncertainty and doubt about things that one needs to know.

The elimination of uncertainty is precisely what legal presumptions/fictions *do*, or what they aim to do. And if there is obviously an important distinction between aiming to eliminate uncertainty and actually achieving that aim, perhaps what is most remarkable about legal fictions, such as the presumption of paternity, is how often they succeed in this aim, notwithstanding their admittedly fictional character. And if it seems obvious that what they actually produce is the *illusion* of certainty rather than the reality, then that is just to confirm the parallelism between good-enough judging and good-enough mothering.

The maternal function of the law thus comes into view. Law is the matrix of belief. In the face of inherent factual ambiguities, it soothes our nagging doubts, teaching us both what to believe and how to behave. It “settles” facts, and in the course of that, it settles our nerves, providing relief from the anxious state of striving for elusive knowledge. Of course, no system is

perfect. The law can no more eradicate doubt altogether than it can prevent all actors from ever violating the rules. No mother is perfect. (And thank goodness for that.) No mother can, or should, still every anxiety. And neither can or should the law.

But the power it has to do just that should not be overlooked or underestimated. In a quiet way, behind the noisier scene of law as prohibition, the law is operating all the time to construct beliefs and construct facts. Like everything else, this maternal function is an object of ambivalence. Winnicott said, "If organized defences against anxiety are more in evidence than the instincts and their conscious control and their influence on action and imagination, then the clinical picture is of psycho-neurosis rather than of health" (1988, 62). But he also recognized, more than anyone, our essential need for defenses against anxiety. In which case the conventional wisdom is true: law is (nothing but) the best defense. Highly imperfect, often arbitrary, the source of great pain as well as injustice, but an immensely effective defense system nonetheless, one that, for good or for bad—for good *and* for bad—frequently succeeds in the improbable task of stilling our anxieties and putting our doubts to rest.

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