Always Uncertain: The Presumption of Legitimacy in Two *fin de siècle*

Andrew J. Counter

The famous three-hundred-and-twelfth article of the French Civil Code of 1804, “L’enfant conçu pendant le mariage a pour père le mari” [the child conceived during marriage has the husband for its father], has a long and august history.¹ This article, which presumptively assigned legal paternity with its attendant rights and, perhaps more pertinently, duties, to the mother’s husband in all but a few narrowly defined cases, codified a rule of the French customary law that had been inherited from the Roman principle that *pater is est quem justae nuptiae demonstrant* (“the father is the one indicated by the marriage”), itself a formalization of much older customary traditions.² From Roman Law, the presumption entered Canon Law and from there the Civil and the common law, before the age of empire expanded its influence yet more widely.³ In the most literal sense, its role across that span of time has ostensibly varied very little. In all cases, we might say, such provisions seek to resolve by means of a convenient legal fiction the epistemological difficulty that was until very recently inherent in all attributions of paternity, succinctly stated in the well-known tag of Roman Law: *pater semper incertus est*, “the father is always uncertain.”

And yet it is clear that the social, affective, ideological and symbolic consequences of this single legal artefact will vary enormously between different cultures and historical moments. Émile Durkheim, indeed, arguing in 1895 that social facts must be considered independently of their apparent purpose at any given historical moment, takes just this principle as an example:

The rule of *is pater est quem justae nuptiae declarant* [an alternative rendering of the above formula] has remained substantially the same in our legal code as it was in ancient Roman law. But while its purpose there was to safeguard the property rights of the father over children born of his legitimate wife, it is much more the rights of the children that it protects today.⁴

Sure enough, comparison of ancient and modern commentaries on the presumption confirms Durkheim’s sense that a single legal rule might serve almost opposite purposes at different times in its existence. More importantly, of course, the present-day father is uncertain no longer, and the persistence of the presumption in some jurisdictions alongside medical testing which may confirm to a near certainty who is or is not the biological father of a particular

child has produced its own curious legal, epistemological, and cultural problems. This article combines these two observations, to consider the meanings of the presumption in two very different cultural and epistemological contexts: first, in Durkheim's own, that of late nineteenth-century France, which is also that of the novelist and short story writer Guy de Maupassant; and second, in late twentieth-century California, where a series of court cases, the most interesting of which, *Michael H. v. Gerald D.*, was decided by the federal Supreme Court in 1989, questioned the constitutionality of that State's rigorous enforcement of its own statutory presumption of legitimacy.⁵

My primary texts will be two narratives of familial breakdown and recomposition: Maupassant's short story "Monsieur Parent" (1885), and the *Michael H.* record. The purpose of this double reading will be, on the one hand, to compare and contrast the ideologies of family that appear to obtain in two texts, separated by a hundred years, which present structurally very similar family crises; and on the other, to suggest how Maupassant's narrative, though rooted in and bearing the traces of an earlier historical context in which the presumption of paternity was understood to function quite differently, nevertheless already points to the social and ideological changes that would produce situations such as the one facing the Supreme Court in 1989. The first section of this article traces the most salient features of the French and Californian presumptions and the jurisprudential contexts from which they emerged, and considers different possible understandings of the presumption of legitimacy: either as a rule of evidence in the absence of a definitive determination of fact, or as a substantive policy (or means of furthering a policy) in its own right. The second section considers Maupassant's short story and other nineteenth-century French cultural discourse in relation to the themes of husbandly uncertainty and insecurity, both intimately associated in the nineteenth-century imagination with the operation of article 312. The final sections contrast the ideological inscriptions of Maupassant's tale with those of the United States Supreme Court's final disposition of *Michael H.*'s constitutional claims, in order to illuminate the changes and continuities in cultural understandings of the family that the impressive persistence of the presumption might otherwise tend to obscure.

The Presumption of Legitimacy: A Matter of Ideology?

Justice Scalia's lead opinion in *Michael H. v. Gerald D.* is one that takes "history" and "tradition" as its watchwords.⁶ It deploys these concepts in ways that we have come to see as characteristic of Scalia's constitutional jurisprudence, most notably through the requirement that asserted unenumerated rights be demonstrably "so rooted in the traditions

and conscience of [the American] people as to be ranked as fundamental.”⁷ While it will not be my purpose in this article to evaluate the merits of the Court’s holding in *Michael H.*, much of my argument will necessarily imply that Justice Scalia’s analysis of the presumption of legitimacy, his search for a coherent tradition through a maze of “older sources,”⁸ exaggerates continuities and ignores changes in the history of its meanings and the manner of its application.⁹ These shifts and discontinuities will be essential to our understanding of the relationship between “Monsieur Parent” and *Michael H.*, and I shall therefore begin with a brief account of the modern history of the presumption.

To the denizens of nineteenth-century France, as much as to the ancients, paternity was a matter that nature, to quote one drafter of the French Civil Code, had “*couvert d’une voile impénétrable*” [covered with an impenetrable veil].¹⁰ It was this unknowability that the presumption of legitimacy contained in article 312 of the Code sought to eradicate, supplying the irresponsible anarchy of nature with a sturdy legal conjecture rooted, in the words of jurist Honoré Duveyrier, speaking to the Corps législatif in 1803 in his capacity as *rapporteur* of the drafting committee of the Civil Code, in “*l’autorité de tous les siècles et l’exemple de tous les peuples*” [the authority of all ages and the example of all peoples].¹¹ Many of his contemporaries evidently agreed that this legislative remedy to a lack in nature had itself acquired a certain ersatz naturalness by virtue of its millennial history, its origins in what we might call the “deep time” of western civilization. Indeed, legal commentaries on the topic often insisted that social order, broadly understood, depended precisely on the substitute certainty afforded by *justae nuptiae* clauses; as the eminent eighteenth-century French jurist Louis Boullenois put it (in a formula subsequently cited in *Michael H.*), the presumption guaranteed “*le repos et la tranquillité des états & des familles*” [the peace and tranquillity of nations and families].¹² In order to serve this high purpose, however, it was not sufficient for the presumption simply to be well founded in empirical terms, that is, accurate “in an immense majority of cases,” as one jurist hopefully put it.¹³ It had also, or so many authorities concluded, to be extremely difficult to rebut.

The question of the “rebuttability” of the presumption is perhaps the central problem in the modern history of this particular legal artefact. The extent to which the presumption should be regarded as an epistemological makeshift rebuttable by evidence was already hotly contested within the drafting committee of the Civil Code of 1804, with no less a figure than Jean-Jacques-Régis de Cambacérès arguing vehemently that courts must imperatively not be required to “*repousser la vérité*” [reject the truth] in favor of a mere presumption.¹⁴ The opposite case was put most forcefully by none other than the First Consul, Napoleon

Bonaparte himself, whose unshakeable view it was that “*dès qu’il y a possibilité que l’enfant soit du mari, le législateur doit se mettre la main sur les yeux*” [whenever there is even a possibility that the child is the husband’s, the legislator must cover his eyes].¹⁵ And while Duveyrier’s preamble before the Corps législatif paid lip-service to Cambacérès’s fear that “*toute loi qui donnerait au mensonge évident le titre et le pouvoir de la vérité ne serait qu’un scandale social*” [any law that gave the name and power of truth to an obvious falsehood would be a mere social scandal], the framework established by the Civil Code arguably reflected Napoleon’s concerns more than those of his chief jurist.¹⁶ Perhaps most significantly, the presumption enacted by article 312 is described nowhere in the text *as* a presumption: both its phrasing, “*l’enfant conçu pendant le mariage a pour père le mari,*” and its position within the first book of the Code entitled “*Des personnes*” [“Of Persons”] ensure that it reads more like the “*règle fondamentale*” [fundamental rule] announced by Duveyrier in his speech than, say, a rule of evidence.¹⁷

Although the “fundamental rule” could be challenged, moreover, the regime established in subsequent articles set a high burden of proof for doing so.¹⁸ Where the child was born during the marriage, a successful *action en désaveu de paternité* [suit for disavowal of paternity], as the relevant suit was called, would need to demonstrate: either the impossibility of cohabitation between the spouses for the entire period between the tenth and the sixth month before the birth, with no time unaccounted for; or that the husband had been rendered impotent by an accident *after* the marriage (meaning a severe and unambiguous physical mutilation); or that the wife had committed adultery (subject to the normal standards of proof for those cases) *and* had concealed or attempted to conceal the birth from the husband *and* had been separated from him at the time.¹⁹ A law of 6 December 1850, finally, made it possible to bring a suit where a child was born more than three hundred days after the couple had obtained an official separation (*séparation de corps*).²⁰ Beyond these exceptions, civil law jurists proved “*très-difficile*” [very difficult], as another of the Code’s drafters had hoped they would be, when it came to admitting any other sort of evidence in rebuttal.²¹

In California, meanwhile, the presumption of legitimacy was first codified by the Legislature in § 1962(5) of the Code of Civil Procedure (1872): “The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.”²² In fact, the provision seems on the face of it to have been rather moderately drawn: the exception made where the husband was impotent or sterile was notably retained, and following common law precedent, the State did not require the total impossibility of sexual contact demanded by the French Civil Code, before rebuttal on grounds of non-access

could be countenanced. On the other hand, while the English courts of the eighteenth and early nineteenth centuries had begun to expand the doctrine of “moral impossibility,” occasionally setting aside spousal paternity where it was not strictly impossible but only very improbable,²³ California limited such exceptions with a simpler but rather more arbitrary rule: where the wife was “cohabiting” with her husband, the presumption was conclusive.²⁴ Yet even then, state courts allowed themselves some latitude in their adjudication of its reach. In 1919, dicta issued by the California Supreme Court boldly assured Californian husbands that

it is always permitted to show that it was not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, [...] or that the child is of a race or color such that it could not have been conceived by the husband.²⁵

This last exception was doubtless undergirded by motives less noble than a mere judicial love of truth, but it nevertheless indicated the court’s ongoing willingness to admit as evidence what was, so to speak, evident, and to permit rebuttal of the presumption where it was manifestly inaccurate. In a separate case of the same year, the court made clear its understanding that when “the actual fact [of paternity] is capable of definite determination, [...] the conclusive presumption which is a substitute for such determination is not properly applicable.”²⁶

In the mid-twentieth century, however, unforeseen developments generated case law that seemingly departed from this moderate understanding of the presumption’s function. As early blood-typing began to lift the “impenetrable veil” of nineteenth-century rhetoric and permit at least the exclusion of certain men as possible fathers, California courts declined to allow these tests to be submitted as evidence in rebuttal of the presumption.²⁷ From the late 1960s, moreover, they also began to repudiate earlier dicta that had hinted at possible exceptions in the case of apparent racial difference between child and presumed father—these had never been law, the courts now declared, since no such exception was named in the statute.²⁸ Indeed, despite the continued existence of an exception for impotence, and the state Supreme Court’s earlier assurance that the presumption was a mere “substitute” for a “definite determination” of fact, from 1960 onward the same court began to maintain that the paternity established in § 1962(5) reflected an “overriding social policy” whereby the legislature preferred children to be raised by married couples, and sought more broadly to reinforce marriage as a social model. As such, the conclusive presumption was not to be viewed as a “substitute” for anything; it was rather, in the Court’s influential phrase, a

“substantive rule of law” that new forms of evidence could not rebut without specific legislative authorization.²⁹

This new jurisprudential approach may be said to have definitively shifted prevailing understandings of the Californian presumption from the domain of epistemology to that of ideology. And yet of course, independently of its basic epistemological function (or rather, by means of that very function), the presumption had *always* served ideological ends—ends that were, crucially, subject to change over time. As we have seen, Durkheim suggested that the attribution of paternity mattered in Antiquity because the father held extensive rights in the person of his child (including, for instance, the right to the fruit of the child’s labour); the presumption existed therefore to “safeguard the property rights of the father” over his legal offspring, and thus acted as a vehicle of the authority of the *paterfamilias*. In the nineteenth century, however, the principle function of the presumption has changed: now, Durkheim assures us, “it is much more the rights of the children that it protects.” Sure enough, the discussion among the drafters of the Civil Code reveals a degree of solicitude for the child that verges at times on the sentimental. The child threatened with repudiation is “*un malheureux enfant*” [an unfortunate child]; to pronounce a child a bastard, meanwhile, is to “*flétrir une pauvre créature*” [brand a poor creature].³⁰ Subsequent language makes clear, moreover, that the protection extended to the poor child here is understood primarily as protection from repudiation *by the presumptive father*: hence the soundest rule to adopt would be “*celle qui obligerait le père à adopter l’enfant*” [one which obliged the father to take responsibility for the child]; hence the state’s primary interest is seen to be to “*forcer ses père et mère à le reconnaître*” [force its father and mother to acknowledge it].³¹

And yet even Durkheim’s historical observation oversimplifies the presumption’s evolution. The intuitive symmetry to be found in a shift from an ancient principle binding child to father to a modern one binding father to child (or, put differently, from a law allocating paternal rights to one assigning neatly converse paternal responsibilities) obscures the fact that throughout the medieval and early modern periods, bastardy suits in England as in France were invariably brought not by presumptive fathers, but by their heirs in the course of inheritance disputes; the child whose legitimacy was impugned would most typically find himself in court facing a sibling or an uncle, who disputed the child’s legal right to be considered his deceased father’s heir.³² The French codifiers’ summary exclusion of this historically important class of litigant is thus indicative of an significant shift at the beginning of the nineteenth century: namely, a sudden refocusing of legal attention, in no sense inevitable given the presumption’s history, upon the personal relationship between

(presumed) father and child.³³ As if in annunciation of the new century's preoccupation with the dramas of the nuclear family, and with narratives of adultery, jealousy, and betrayal, that is, the presumption was now understood first and foremost in relation to the subjectivity of the husband: its strictures existed principally to curb *his* imagined eagerness to repudiate offspring he considered, justifiably or not, spurious; the greatest threat to the "poor child" was assumed to come not from greedy collateral kinsmen (as had so recently been the case in actual fact), but from husbandly insecurity. By constraining such ungenerous urges in the husband so vigorously, the legislators of 1804 set the stage for Maupassant's unhappy husbands.

Uncertain Fathers, Unhappy Husbands

In coming to the aid of the child by rigorous application of the presumption, nineteenth- and twentieth-century jurists effectively chose to set aside husbands' misgivings as to the paternity of their wives' progeny in all but the most well-founded of cases, evidently considering whatever private strife might seem likely to stem from such misgivings as preferable to the official sundering of legal families. Indeed, as William Hoffman has pointed out, when California subsequently defended its presumption on the grounds that it worked to preserve "family integrity," that term should almost certainly be understood to designate *legal* integrity, rather than a genuine lack of dissension among family members.³⁴ It is obvious, after all, that whenever a husband wished to rebut the presumption but was legally prevented from doing so, intimate dissension could hardly have been far away; Boullenois's "*tranquillité [...] des familles*" was, in this sense, more an administrative fable than an affective reality. The protection of Napoleon's "pauvre créature" may thus even be seen to have created another object of pity in the later nineteenth century: namely, the husband whose child is not his own.

In a treatise of 1836, written in defence of the presumption and fiercely critical of the Lords' decision to deviate from it in the interminable *Banbury Peerage* case some years before, Sir Harris Nicholas noted with some frustration that:

Much has been said [...] of the absurdity and injustice which have attended the rigid application of that rule of law which fixed upon an injured husband the burthen of a spurious progeny [...]. These appeals have been addressed to the feelings, and in defence of moral justice [...], the mind is easily excited.³⁵

Despite Sir Harris's best efforts, however, nineteenth-century minds would continue to be excited by this very question, and few were the nineteenth-century French writers, at least, who shared his optimistic belief that the inevitable effect of the presumption was "in an immense majority of cases, to render the *de facto*, consistent with the *de jure*, paternity."³⁶ The historian Patricia Mainardi highlights a passage of Alexandre Dumas *père*'s memoirs which purports to explain the nineteenth-century's deadly serious attitude towards adultery—as opposed to the eighteenth century's supposedly more indulgent view of such matters—in terms of the new legal position created by the Code of 1804:

*La loi a aboli le droit d'aînesse. [...] Or, du moment où le quem nuptiae demonstrant sait que les enfants nés pendant le mariage partageront sa fortune en portions égales, il tient à ce que ces enfants soient de lui ; car l'enfant qui, n'étant point de lui, partage comme ceux qui sont de lui, est tout simplement un voleur.*³⁷

[The law has abolished primogeniture. Now, from the moment that *he who is indicated by the marriage* knows that all the children born during his marriage will share his inheritance in equal portions, he is very keen that all his children should be his own. For the child who, though not of his loins, shares his fortune, is quite simply a thief.]

Modern-day historians of gender and sexuality such as Mainardi, Robert Nye and Rachel Fuchs only confirm bourgeois France's anxious solicitude for its patrimony and the biological correctness of its transmission.³⁸ The husband who fails to ensure that smooth transmission and thus finds himself saddled with legal offspring not of his own loins is, of course, a cuckold—the nineteenth century's favorite figure of contemptuous fun, and one who enjoyed an impressive prominence in the popular (and sometimes the high) culture of the age.³⁹ In a 1902 series of cartoons entitled "*Le Code civil pour rire*" ["The Civil Code for Laughs"], for instance, comic newspaper *Le Frou-Frou* offered a hyperbolic image of the potential consequences of article 312 that resonates particularly well for our comparative study: above the caption "*L'enfant conçu dans le mariage a pour père le mari*" (a slight misquotation of the Civil Code), a midwife hands a horrified white husband a crudely racialized black newborn.⁴⁰ The joke, such as it is, turns on the fact that unlike the Supreme Court of California circa 1919, French judges could offer no remedy to a husband "burdened" with a progeny even as spurious as this. More importantly, however, the racist image knowingly presents what is only an extreme version of a general, and generally recognized, husbandly vulnerability—for in the absence of external markers such as, say, different skin color, no

man could ever be sure that his legal children were his own. The abject role of the cuckold was one that any husband might occupy quite unwittingly.

It is difficult to augur from these cultural trends or *mentalités* to what extent real nineteenth-century French men worried about the possibility that they might be raising a stranger's child. What is certain, however, is that Guy de Maupassant found it literarily very fruitful to convert this cultural obsession with adultery and doubtful paternity into a particularized, psychologized account of the suffering of a husband who fears his child is not his own. The story "Monsieur Parent" is perhaps the finest example of this almost obsessive interest. The eponymous protagonist is rather unhappily married to the horrid Henriette, but dotes exaggeratedly on his darling little boy Georges, a toddler as the story begins. Being a father is his greatest, perhaps his only joy—his *raison d'être*, as his surname unsubtly suggests. Disaster strikes when a trivial argument with his long-suffering housekeeper leads her to resign in a fit of pique, and announce as a parting shot that "Madame" is unfaithful (with omnipresent family friend Limousin), and that the beloved child is the fruit of this adulterous liaison. Having subsequently confirmed the adultery with his own eyes, Parent turns his wife and her lover out of the marital home and, crucially, allows them to take little Georges with them—for Parent is so horrified by what he has heard that he cannot bear to keep the child himself. Years pass as Parent lives in miserable solitude, until an improbable chance encounter with the adulterous family, in which a frenzied Parent harangues his estranged (though not divorced) wife, her lover, and the now adult Georges, demanding that Henriette reveal the name of the true father. It is Parent's paranoid belief that his wife knows this information, but he is soon disabused. The story ends with his realization that no one will ever know the truth, at which point he drinks himself into a stupor and is carried home by the local publican.

Mentioned (almost) nowhere in the text, yet I should like to suggest legible everywhere between the lines, is article 312 of the Civil Code. By virtue of the presumption of legitimacy, as any contemporary reader would understand, Parent is indisputably Georges's legal father; this is implicitly acknowledged, indeed, when he briefly toys with the idea that he might "*requérir les magistrats pour se faire rendre Georget*" [petition the magistrates to have Georges returned to him], his right by virtue of his legal status.⁴¹ He is dissuaded from doing so, however, by his unremitting uncertainty as to his *biological* paternity. One piece of his "reasoning" in this respect is important for our purposes. Knowing that Limousin is raising Georges as his own with Henriette, Parent supposes that Limousin must at the very least believe himself to be the boy's biological father. Ignoring once again

the fact that Limousin cannot possibly know any more than he, Parent imputes to his former friend his own repugnance to raise a stranger's offspring: "*est-ce qu'on élève les enfants des autres?*" [who'd raise another man's child?; 2: 613], he asks himself, apparently rhetorically. For Parent, it seems, it is simple common sense—the use of the general pronoun *on* makes an axiom of this observation—that only a "*misérable*" [wretch; 2: 604] would willingly do such a thing; while elsewhere, Maupassant characterizes such a position as one of "*ignominie*" and "*abjection*."⁴² These assumptions may be taken as symptomatic of precisely that cultural revulsion for the cuckold's role that nineteenth-century narratives so loved to explore, and whose consequences article 312 of the Civil Code strove to restrain.

"Monsieur Parent" thus at once converts the Roman tag *pater semper incertus est*, concerning the uncertain status of paternity, into an exploration of a father's private, agonizing uncertainty; and, conversely, uses a specific family narrative to reflect on paternity in the abstract. An epistemological vocabulary runs through "Monsieur Parent"; from the moment the departing housekeeper makes her sensational allegation, Parent confronts the prospect of a future in which "*chaque jour, à toute heure, à toute seconde, il se demanderait cela, il chercherait à savoir, à deviner, à surprendre cet horrible secret*" [every day, every hour, every second, he would ask himself that question, would try to know, to guess, to figure out that horrible secret; 2: 595]. In the final confrontation scene, Parent delivers himself of a rant in which the narrative's obsession with the verb *savoir*, "to know," enters a heavily-handedly paroxysmal phase:

Elle ne sait pas... Je parie qu'elle ne sait pas... Non... elle ne sait pas... parbleu !... elle couchait avec tous les deux !... Personne ne sait... personne. Est-ce qu'on sait ces choses-là ?... Tu ne le sauras pas non plus, mon garçon, tu ne le sauras pas, pas plus que moi... jamais.... [...] demande-lui... tu verras qu'elle ne sait pas. Moi non plus... lui non plus... toi non plus... personne ne sait. (2: 616-17)

[She doesn't know... I bet you she doesn't know. No... she doesn't know! Good God! She was sleeping with us both! No one knows... no one. Who can know these things? You'll never know either, my boy, you'll never know, no more than I will... never. Ask her... you'll see, she doesn't know. Me neither; him neither; you neither. No one knows.]

Stylistically, this fragmentary passage marks and mimics Parent's final psychological breakdown, the end of his exceptionally sad private drama. Yet it clearly has wider resonances. For it is not finally the conviction that he is *not* the father that determines Parent's ultimate renunciation of his parenthood, but rather, the absolute impossibility of

knowing for certain that he *is*. By that token, the story's denouement calls into question the very notion of happy fatherhood *in general*: in this strange prose poem of unknowability, we might say, Maupassant dramatizes the father's irreducible uncertainty, with the impersonal "*Est-ce qu'on sait ces choses-là ?*" gesturing once again beyond Parent's immediate predicament to a more fundamental biological reality. For Maupassant, it seems, the position of the father at the intersection of biological and legal knowledge can only be one of insecurity and, most likely, pain.

In "Monsieur Parent," then, as early nineteenth-century jurists feared, natural uncertainty breeds social disorder—yet this is not a disorder that any legal presumption can curb, for it is emotional rather than social in character. Indeed, Maupassant's story pushes the distinction between the "legal integrity" of the family and its actual disintegration to an ironic breaking-point. From the Olympian standpoint of the French state, after all, the Parent household remains perfectly intact, even functional—indeed, we learn that Parent pays his wife a regular allowance, precisely to "*éviter tout scandale*" (avoid any scandal; 2: 602). And yet by the end of the story, the real-life Parent family has entered what the dominant morality of the age at least was bound to regard as a topsy-turvy world, in which the wife leads "*une existence familiale*" [a family existence; 2: 612] with her lover and child, forming what looks almost like "*un bon ménage de bons bourgeois*" (a nice bourgeois family; 2: 607; the word *ménage* arguably suggests greater intimacy than the general *famille*), while the legal husband is cast out, wandering the dystopian city "*sans famille, sans amis, sans espérance*" [without family, without friends, without hope; 2: 611]. The explicit reversion of Parent to the status of a bachelor—we are told that "*il avait repris son existence de garçon*" (he had resumed the life of a bachelor; 2: 601)—is itself as dramatic an inversion as the metamorphosis of Henriette's liaison from adultery to pseudo-marriage, and is arguably even more significant. In Third Republic France, the prevailing familialist ideology had adopted the figure of the bachelor as a potent symbol of social decline, associating him variously and at once with impotence, sterility, defeatism, sexual frustration, antisocial self-interest and unproductive consumption; the description of Parent's existence as "*vide*" and "*inutile*" [empty; useless; 2: 612] recycles the classic language of this imagined social pathology.⁴³ This dispossession of the husband and legal father, his casting out of the family circle, is, in one sense at least, the hyperbolic nightmare vision of paternalist ideology—though it may not be quite accurate to consider this the definitive ideological burden of Maupassant's tale. That nightmare vision is, however, closely akin to the one imagined—and ultimately thwarted—by the United States Supreme Court, in *Michael H. v. Gerald D.*

Unhappy Fathers... Happy Cuckolds?

If the ideological purpose of the presumption had shifted from the protection of the rights of the ancient father to the defense of those of the nineteenth-century child, California, as we have seen, stated its own “overriding social policy” somewhat differently: in *Kusior v. Silver* (1960), the state Supreme Court noted that “there are significant reasons why the integrity of the family when husband and wife are living together should not be impugned.”⁴⁴ At the time of *Kusior*, however, the indicative application of the presumption still seems closely to have resembled that familiar to nineteenth-century Frenchmen, namely, the placing of a certain “burden” on husbands; thus the court simultaneously indicated that, “given a certain relationship between the husband and wife, the husband is to be held responsible for the child.”⁴⁵ It was thus a highly significant change when in 1965 the California Legislature adopted as part of the state’s new Code of Evidence a revised iteration of the former § 1962(5), allowing husbands to submit blood-test evidence in rebuttal of the presumption up to two years after the child’s birth.⁴⁶ This innovation did not, however, obviate the “substantive rule of law” argument, but merely altered the direction of its deployment. It would now serve to foreclose challenges to family integrity originating not *within* the legal family unit, but *without*: with natural fathers.⁴⁷

Michael H. v. Gerald D. was an example of this new breed of cases in which the litigant was not a presumptive, but rather a putative father: Michael, sometime lover of “international model” Carole and biological father of Victoria, with whom he had lived at various times in the first eighteen months of her life, and who had learned to call him “daddy.”⁴⁸ According to Michael’s suit, California’s dogged insistence that, pursuant to § 621, Carole’s husband Gerald was Victoria’s father, was unconstitutional because it denied him due process in the form of a hearing on a legally consequential issue, and more importantly for our purposes, because it abridged his substantive right to enjoy a parental relationship with his biological child. In asserting this right, Michael relied on a number of cases recently decided by the federal Supreme Court, beginning in 1972 with *Stanley v. Illinois*.⁴⁹ These cases had gradually established that unwed fathers who had made clear efforts to develop a relationship with their children—so-called “paternity plus”—had a constitutional right not to have that relationship terminated arbitrarily by the state, and to enjoy what Justice Stevens, writing for the Court in *Lehr v. Robertson* (1983), called “the blessings of the parent-child relationship.”⁵⁰ Michael supposed, perhaps not unreasonably, that his relationship with Victoria was sufficiently developed to give rise to the sort of

constitutional solicitude identified in the *Stanley* line of cases. Yet the facts in those cases had never involved a child born to a woman married to another man, and thus conclusively presumed to be a child of the marriage. In a particularly fractured plurality ruling, with a lead opinion authored by Justice Scalia, Michael's constitutional claims were rejected. First, Michael's procedural due process claim was set aside on an argument essentially identical to that made by the California Court of Appeals: though expressed as a presumption, § 621 was in fact a substantive rule of law furthering a particular social policy, and Michael's claims would thus have to be evaluated as liberty interests weighed against the State's own ends. The lead opinion then proceeded to dismiss the substantive due process claim by distinguishing the *Stanley* line of cases from the instant facts. Those cases, Scalia argued, had protected the family unit, marital or not; but they certainly did not authorize the disruption by a natural father of an extant marital family where the husband was willing to raise the child. Michael's right to do so would only be constitutionally protected if it could be shown to be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Having consulted a variety of nineteenth-century legal sources (including a number of those considered here) concerning rebuttal of the presumption of legitimacy, Justice Scalia concluded that claims such as Michael's had no such deep roots. Justices White and Brennan entered sharp dissents; Justice Stevens, crucially, concurred in the judgement on perplexing grounds,⁵¹ and Gerald D. prevailed.

The contradictory character of the various opinions issued in *Michael H.* struck many commentators as unsatisfactory, and the case's most important consequence was undoubtedly the California legislature's decision to repeal § 621 in 1990.⁵² Yet the text of the case itself merits attention by virtue of the enormous shifts it implies in prevailing conceptions of the family: jurists of the late nineteenth century could scarcely have augured that the presumption would ever be challenged in quite this way. First, as Michael discovered to his cost, his own claim was passably novel, or could at least be described as being so; as Justice Scalia notes, "we have found nothing in the older sources [...] addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man."⁵³ In Scalia's constitutional framework at least, this newness alone is enough to defeat Michael's asserted right. But in a rather slippery footnote (footnote 6, which Justices O'Connor and Kennedy specifically declined to join), this mere absence becomes a more positive "specific tradition" which "unqualifiedly denies protection to such a parent," a gloss that seems far-fetched for a number of reasons. Even setting aside both the then impossibility of establishing biological paternity *and* the fact that nineteenth-century laws

against adultery made coming forward as the father of a married woman's child an act of reckless self-incrimination,⁵⁴ is it not more likely that nineteenth-century legal sources say nothing of an adulterous father's (in)ability to rebut the presumption because it was to the nineteenth-century legal mind *extremely* improbable that any such man might wish to do so?⁵⁵ To be sure, one early nineteenth-century commentator, in a note on the subject, speculated melodramatically that a lover might be "flattered and pleased" at the idea of being a father and thus attempt to kidnap the child.⁵⁶ But neither his nor Harris Nicolas's closely contemporary and much more extensive defense of the presumption appears even momentarily to consider the principle, or indeed marriages, as being threatened by the pretensions of natural fathers to "assert parental rights" through lawsuits. However sweet we may consider the "blessings of the parent-child relationship," in Justice Stevens's phrase, nineteenth-century legal thought took an unsentimental view of paternity, regarding it fundamentally as a set of, mostly financial, duties. Thus while Justice Scalia alludes to the natural father's unheard-of assertion of "parental *rights*," the presumption was understood in this period (as Scalia clearly understands elsewhere in his opinion) much more as assigning those onerous parental *duties* in cases where the law feared they would fall to the state if they were not instead imposed upon husbands. From a legal point of view, we might say, Michael H.'s had simply never existed before.

It is clear, on the other hand, that what the law cannot imagine is not necessarily unimaginable to literature; "Monsieur Parent," though responsive to this nineteenth-century legal context, nevertheless looks beyond it to emerging modes of family life. In the character of Limousin, after all, Maupassant's tale presents us with precisely an "accomplice to adultery," as the French penal code put it, who, "flattered and pleased" by the idea of his paternity, comes forward to raise (what he takes to be) his illegitimate child. In fact, Maupassant seems to have been rather drawn to this idea. In another story, "*Le Testament*" (1882), he presents a similar situation, in which a young man discovers in his mother's will that as an unhappy new wife, she had taken a lover, and that this lover, not his despised legal father, is his true progenitor. The lover, M. de Bourneval, being present at the reading of the will, immediately welcomes the young man as his own and the two will, it is implied, live as father and son henceforth. In "*Le Testament*," Maupassant takes this willingness on the part of a natural father to play the role of a parent to symbolize the praiseworthy contempt of an intellectual elite for hypocritical bourgeois prejudice. M. de Bourneval is explicitly presented to us as the descendant—via adulterous connections, of course—of the Enlightenment *philosophes* and of eighteenth-century libertinism, and makes no secret of his scorn for fin-

de-siècle small-mindedness. I have suggested elsewhere, however, that this appeal to an imaginary Enlightenment inheritance makes “Le Testament” read more like a fantasy than a realistic family narrative—for it is precisely its justification in the name of a bygone philosophical moment that makes this extra-legal renegotiation of the family seem practically impossible in the 1880s (and sure enough, the plot of “*Le Testament*” is riddled with holes from a legal point of view).⁵⁷

So while Maupassant’s earlier narrative does in some sense contest Justice Scalia’s implicit certainty that the past is always at least as conservative as the present (and thus that whatever he is minded to forbid must always have been forbidden), both seem in agreement at least that wherever it is located, the propitious moment for unconventional behavior is certainly not *now*. And yet, might we not consider “Monsieur Parent” equally fanciful as “*Le Testament*,” in its eagerness to toy with the possibility that, on the contrary, the grand moment of the flouting of bourgeois social order might be *precisely* now; that, in the teeth of social pressure, verisimilitude, and, of course, article 312, the legal father might be done out of his place by a sentimentally inclined adulterer? In any case, the pessimistic tone of the later story makes very clear that such revolutionary behavior is hardly commendable. On the contrary, as I have already hinted, “Monsieur Parent” is on the surface at least a conservative tale, and could be thought of as providing anticipatory proof of California’s patriarchal wisdom, as enacting the grave social and personal consequences that would follow, the lead opinion suggests, if Michael’s selfish assertion of his “rights” were permitted to succeed: the tearing apart of a legal family, the wounding of an innocent husband by an interloper as insouciant of others’ wellbeing as one who would exercise his “liberty interest in firing a gun,” without caring that he is about to do so “into another person’s body.”⁵⁸ Justice Scalia’s analogy seems flamboyantly hyperbolic, which makes it all the more striking that Maupassant should accord his legal father a similar victim status: after the revelation of his wife’s adultery and his child’s dubious parentage, the doorbell announcing the return of wife and lover makes Parent jump “*comme si une balle l’eût traversé*” [as if pierced by a bullet; 2: 589], and indeed, the confrontation heralded by their arrival is as devastating in its consequences as any bullet wound could be.

On this showing, though I shall want to nuance it in the final section, the texts’ shared conservative implication would be that such metaphorical bloodshed is inevitable where sexual “liberty” is not restrained, and more precisely, where *female* sexual liberty is not restrained. For while both Michael and Gerald possess a certain tragic pathos, and while even Limousin seems an inoffensive chap at heart, the disgrace of Henriette and Carole is made

plain (and the latter not only in the lead opinion). That Henriette is a harridan, a hypocrite, and a “*gueuse*” [tramp; 2: 601] is immediately obvious from even a cursory reading of “Monsieur Parent.” Carole’s shame is more subtly writ: in implications (Carole “took up residence with *yet another* man,” Justice Scalia grumbles);⁵⁹ in irony (as when Justice White comments wryly on “Carole’s vicissitudes”);⁶⁰ and, through a kind of guilt by proximity, in Justice Scalia’s apparently more general, morally prescriptive opening gesture, “The facts of this case are, we must hope, extraordinary,” which is immediately followed by: “On May 9, 1976, in Las Vegas, Nevada, Carole D., an international model [...]” This incriminating incipit subtly indicates Carole—a woman whose profession, legally irrelevant yet irresistibly *significant*, makes her the object of the general public’s erotic attention not merely locally, but *internationally!*—as the promiscuous *fons et origo* of the extraordinariness that follows.⁶¹ Until confined by strong legal intervention into a stable marriage where she may figure as quite a different sort of “model,” the gyrations of such a woman can create neither families nor households, but only “a variety of quasi-family units”—Justice Scalia’s sniffy description of the situations in which little Victoria found herself during the alternating periods when she lived with her mother and Michael, or with her mother and Gerald, or with her mother and “yet another man.”⁶² The querulous might wonder what, precisely, is “quasi” about a family unit formed of a child and her biological parents (or for that matter a child, her biological mother and the mother’s husband); but Maupassant, for his part, appears to agree. We have already noted how, as Parent sees his wife, her lover, and their presumed child together in public for the first time in years, the narrator observes that “*on eût dit un ménage, un bon ménage de bons bourgeois*” [one might have taken them for a family, a nice bourgeois family; 2: 607]. It would certainly be possible to read this phrase as suggesting, with Justice Scalia, that there is something lacking in a group so constituted; that “*on eût dit*” could well imply that one might have taken them for what they nevertheless *are not*—namely, a real family.

What Maupassant’s tale, forward-looking as it is, apparently *cannot* imagine is on the other hand the very subjectivity upon which *Michael H.* (the case) depended: that of Gerald D., the happy cuckold, the husband who is willing knowingly to “*élever les enfants des autres*” [raise the children of others]. That the nineteenth century did not believe these creatures to exist in any great numbers may be inferred from the law’s determination, as we have seen, to limit the husband’s right to rebut the presumption as far as possible, a determination that seems indicative of the perceived likelihood of his wishing to do so. Maupassant, indeed, alludes explicitly to the subjectivity of the cuckold in a chronicle of

1884 on the theme of adultery, but does so precisely in order to underscore the impossibility of understanding him: who, Maupassant wonders rhetorically, could ever be sharp-sighted enough to “voir [...] *au fond du cœur* [...] *du mari impénétrable, ignorant ou complaisant*” [see into the heart of the impenetrable husband, who either does not know or does not mind]?⁶³ Such incomprehension reflects the nineteenth-century cultural presumption that the fatherly role was not *intrinsically* desirable, but only became so when combined with the “flattering” idea of biological paternity—always, as we have seen, uncertain. Gerald D. may be taken as exemplary of a new phase of bourgeois familialism in which the “blessings” of parenthood are understood to correspond to a fundamentally affective experience in which biological fact is incidental (or, much as it is for California law, “*irrelevant*”);⁶⁴ the cultural certainty now is that *everyone* must desire what is so self-evidently desirable, so central to “the good life.” A case like *Michael H.*, moreover, constructs these “blessings” or “rights” as being, at bottom, rivalrous: their enjoyment by one, that is, precludes their being enjoyed by others.⁶⁵ As Justice Scalia puts it, with deceptive simplicity, “California law, like nature itself, makes no provision for dual fatherhood”⁶⁶—thus “one of [Michael or Gerald] will pay a price for asserting [the] ‘freedom’” to enjoy family life that the case ultimately appears to adjudicate.⁶⁷ And this, finally, is the most striking metamorphosis undergone by the presumption between our two *fins de siècle*: where once it determined who would be burdened, it now decides who shall be blessed. In the age of Maupassant, we might say, it locked *into*, while in our own, it locks *out of*, the family.

The Family... conclusively

While the meaning of the presumption may have changed entirely between 1885 and 1989, the family narratives of “Monsieur Parent” and *Michael H. v. Gerald D.* seem in another sense to reveal the same abiding possibility: that the family itself might, or indeed must, be the site of an exclusion, that it is predicated, to paraphrase André Gide’s *Les Nourritures terrestres* (1897), on “bolted doors” and the “jealous possession of happiness.”⁶⁸ In each case, the person who finds himself the victim of this exclusion—Michael H., M. Parent—is rendered abject, and the similarities between the two men’s rhetorical plights are telling. Parent, as we have seen, is reduced to the life of a superfluous bachelor by his wife and child’s departure, but subsequent descriptions of his fate go further, revealing a uniquely nuanced and provocative view on the question of the family. First, in an extension of bourgeois cultural discourse’s tendency to situate the bachelor outside society, the story even describes this legal father as an outlaw, living “*une vie de forçat*” [a convict’s life; 2: 615]

and following his hated wife around like a “*voleur*” [thief; 2: 607]. No longer then is he the *paterfamilias*, but rather the outsider who threatens the tranquil enjoyment—the jealous possession—of bourgeois property and propriety. Having initially been the injured party, struck by the metaphorical bullet of his wife’s adultery, he now joins Michael H. on the side of the villains, the casually murderous gunman or, indeed, the rapist, to whom Michael is unkindly likened in Justice Scalia’s footnotes.⁶⁹

Crueller still, the two rejected fathers’ (or would-be fathers) very *desire* for the family, once defeated, is itself refigured as pathological and perverse, as retroactively justifying their exclusion from the happiness they have been denied. Parent’s longing for his little Georges is heavy-handedly sexualized by the narrator as “*une obsession physique, un besoin sensuel [...] de l’embrasser, de le tenir, de le manier [...], de le faire sauter et culbuter dans ses mains*” [a physical obsession, a sensual need to kiss him, hold him, fondle him, to bounce him up and down in his lap];⁷⁰ and, just in case the reader has not gotten the message, as being “*comme le désir d’une femme aimée qui s’est enfuie*” [like the desire one feels for a beloved woman who has walked out; 2: 602]. In the lower court, meanwhile, Michael fell victim to the worst excesses of circular forensic psychiatry. “Michael H.’s personality has failed to bring him the close relationships he seeks, leading him to feel victimized” and provoking “his sympathy-eliciting pursuit of relationships,” a court-appointed shrink asserted, before noting with breath-taking hypocrisy that while there was “no evidence of any inappropriate sexual contact between Michael H. and Victoria D., [...] Michael H. exhibits all of the characteristics associated with parents who engage in incestuous-type relationships.”⁷¹ These moments exemplify that chilling familialist tendency to attribute perversity to those who have been excluded from the “blessings” of family life, even against their will, an impulse that appears as strong in the text of 1885 as in the case of 1989. So while his contemporary jurists may have had little official regard for those same “blessings,” Maupassant clearly understood the enormous power of the family, its astonishing capacity to enthrall and exclude, and the insufficiency of positive law to account for the longings it provoked. That power is made starkly visible in a case like *Michael H.*; for while Justice Scalia may defend California’s right to prefer the “marital family,” and Justice Brennan Michael’s right to enjoy family life on some other terms, there is little doubt that the winner of this argument will, one way or another, be the Family.

Let us return, in light of this, to the moment in “Monsieur Parent” when the narrator says of Henriette, Limousin, and Georges: “*on eût dit un ménage, un bon ménage de bons bourgeois.*” I have already tentatively likened this expression to Justice Scalia’s description

of Victoria's early life as unfolding in a "variety of quasi-family units." And yet I should like finally to suggest that Maupassant's phrase is more ambiguous than Scalia's, and even rather subversive, for what it equally raises, above and beyond its obvious irony, is the troubling possibility that this adulterous ménage and its "existence familiale" *is in fact* indistinguishable from the respectable, legal family that it has displaced. Indeed, this is perhaps the most intriguing and prescient implication of Maupassant's story: the revelation that a socially and sexually transgressive force like Henriette's adultery might nevertheless gravitate seemingly ineluctably towards the very normative pattern—the triadic bourgeois family—against which it might otherwise be thought to rebel. To be sure, in newspaper chronicles published around the time of the *loi Naquet* (the 1884 law allowing divorce in France for the first time since 1816), Maupassant entertained wry imaginings of all the genuinely subversive "quasi-family units," including polyandrous (Maupassant's word) ménages-à-trois, that might proliferate if fin-de-siècle libidos were finally given free rein.⁷² Yet against this phantasmatic profusion of sexual forms, "Monsieur Parent" more perceptively suggests on the contrary the power of bourgeois familialism to subvert subversion, to define the terms even of transgressive desire itself, and ultimately to recuperate that desire as the agent of its own ideological propagation. *Michael H. v. Gerald D.* should be seen as the triumph of this recuperative process, the proof of familialism's influence upon even the wildest *desiderata* of the modern western subject. In his passionate dissent, Justice Brennan defended Michael's constitutional "right not to conform" against what he saw as the Court's conservatism.⁷³ And yet the phrase "right not to conform" seems singularly inapt to describe the right Michael actually asserted: namely, the right to act as a father to his biological offspring, to live with her as a family.⁷⁴ It is surely a bad day indeed for non-conformity when such a desire can be considered non-conformist; though worse still, of course, when the right not to conform is found not even to stretch so far.

I should like to thank Marco Wan and Michael Boucai for their invaluable comments on an early draft of this article. My thinking about Maupassant has also benefitted enormously from my continuing conversations with Nick White, to whom I am very grateful.

¹ *Code civil des Français: édition originale et seule officielle* (Paris: Imprimerie de la République, Year XII/1804), art. 312.

² See *Digest of Justinian*, 2.4.5.

³ On the earliest history of the presumption, and its passage from Roman to Canon Law, see Anne Lefebvre Teillard, "'Pater is est quem nuptiae demonstrant': jalons pour une histoire de la présomption de paternité," 69 *Revue historique de droit français et étranger* 331 (1991); and in the Common Law, see R. H. Helmholz, "Bastardy Litigation in Medieval England," 13 *American Journal of Legal History* 360 (1969), 369-70; and Harris Nicolas, *A Treatise on Adulterine Bastardy* (London: William Pickering, 1836).

⁴ Émile Durkheim, *The Rules of Sociological Method' and Selected Texts on Sociology and its Method*, ed. Steven Lukes, trans. W.D. Halls (London: Macmillan Press, 1982), 121.

⁵ See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) [hereinafter "*Michael H.*"].

⁶ See in particular *id.*, at 122-23.

⁷ *Id.* at 122 (Scalia, J.) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

⁸ *Id.* at 125.

⁹ For critical responses to the Court's decision, see Michael L. Oddenino, "The Good, the Bad, and the Ugly: A Critical Analysis of the U.S. Supreme Court Decision in *Michael H. v. Gerald D.*," 25 *Family Law Quarterly* 125 (1991-92); and David Line Batty, "*Michael H. v. Gerald D.*: The Constitutional Rights of Putative Fathers and a Proposal for Reform," 31 *B. C. L. Rev.* 1201-04 (1989-90); Robin West, "The Ideal of Liberty: A Comment on *Michael H. v. Gerald D.*," 139 *U. Pa. L. Rev.* 1373 (1990-91); and, perhaps most influentially, Jack M. Balkin, "Tradition, Betrayal, and the Politics of Deconstruction," 11 *Cardozo L. Rev.* 1623 (1990). For a more approving analysis, see Lynne Marie Kohm, "Marriage and the Intact Family: The Significance of *Michael H. v. Gerald D.*," 22 *Whittier L. Rev.* 327 (2000-01); and David M. Wagner, "The Man Who Declines to be Socrates: Justice Scalia, Truth, and the Jurisprudence of Tradition," 12 *Widener L. Rev.* 473 (2005-06).

¹⁰ Félix Bigot de Préameneu, cited in Jean-Guillaume Locré, 4 *Esprit du Code Napoléon*, 5 vols (Paris: Imprimerie impériale, 1805-07), 4.

¹¹ Honoré Duveyrier, cited in 10 *Recueil complet des travaux préparatoires du Code civil*, ed. Pierre-Antoine Fenet (Osnabruck: O. Zeller, 1968), 206.

¹² Louis Boullenois, 1 *Traité de la personnalité et de la réalité des loix, coutumes, ou statuts, par forme d'observations* (Paris: Desprez, 1766), 62 ; see *Michael H.*, at 125.

¹³ Nicolas, *Adulterine Bastardy*, *supra* note 3, at 8.

¹⁴ 10 *Travaux préparatoires*, *supra* note 11, at 4, 35-37.

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 207.

¹⁷ *Id.* at 208.

¹⁸ See *Code civil*, *supra* note 1, arts 312-18.

¹⁹ See Georges Costes, *De la présomption légale de paternité d'après le droit romain, l'ancien droit et le Code civil* (Paris: Arthur Rousseau, 1884), 121-202; Lucien Pion, *De l'action en désaveu de paternité* (Paris: Gros, 1854), in general; and Émile Landon, *Preuve de la filiation légitime en droit romain et en droit français* (Paris: Victor Goupy, 1867), 81-108.

²⁰ See Dalloz's *Recueil de jurisprudence générale*, 1850 (4), 207-08.

²¹ Maleville; cited in 10 *Travaux préparatoires*, *supra* note 11, at 9.

²² See Cal. Civ. Proc. Code, § 1962(5), as amended, ch. 948, § 3, 1955 Cal. Stat. 1835 (repealed Jan. 1, 1967); replaced by Cal. Evid. Code § 621.

²³ See *Pendrell v. Pendrell*, 2 Strange 925 (1732), allowing the jury to consider non-access even though it was undisputed that the husband was in the realm and thus able to cohabit with his wife; and the Dickensian *Banbury Peerage Case*, 1 Sim. & St. 153 (1811), an inheritance dispute that lasted from 1661 until its resolution by the Lords in 1811, in which the concealment of the birth of Nicholas, disputed Earl of Banbury, from his legal father, was taken to prove *morally* that Nicholas was adulterine, though his mother had cohabited with her husband continuously during their marriage.

²⁴ California's 1872 enactment thus closely resembled the English law following *Pendrell* but before *Banbury*, as was generally the case in the United States; see James Kent, 2 *Commentaries on American Law*, 4th ed. (New York: 1836), 210-11. For a specifically

Californian refutation of “moral impossibility”, see *In re. Estate of Mills*, 137 Cal. 298 (1902).

²⁵ *In re. Estate of Walker*, 180 Cal. 478, 491 (1919). See William P. Hoffman, Jr., “California’s Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy”, 20 *Stan. L. Rev.* 754, 757 (1968).

²⁶ *In re. Estate of McNamara*, 181 Cal. 82, 96 (1919).

²⁷ See in particular *Kusior v. Silver*, 54 Cal. 2d 603 (1960).

²⁸ See Hoffman, “California’s Tangled Web,” *supra* note 25, at 762; citing *Hess v. Whitsitt*, 65 Cal. Rptr. 45 (1967). It is worth noting in this connection that California was the first U.S. state to judicially abolish anti-miscegenation laws. See *Perez v. Sharp*, 32 Cal.2d 711 (1948).

²⁹ *Kusior*, 54 Cal. 2d at 619.

³⁰ 10 *Travaux préparatoires*, *supra* note 11, at 12; both phrases are attributed to the First Consul.

³¹ *Id.* at 11, 12.

³² See Helmholz, “Bastardy Litigation,” *supra* note 3, at 361; and Nicolas, *Adulterine Bastardy*, *supra* note 3, at 3-5. In England, indeed, the so-called Lord Mansfield’s Rule (preventing husband and wife from bastardizing their own presumed offspring) made bastardy suits *essentially* the business of heirs.

³³ Article 317 of the Civil Code granted the husband’s heirs very limited to powers to pursue an *action en désaveu de paternité* where the husband died within the short statutory timeframe allotted to such suits.

³⁴ Hoffman, “California’s Tangled Web,” *supra* note 25, at 758-59.

³⁵ Nicolas, *Adulterine Bastardy*, *supra* note 3, at 1.

³⁶ *Id.* at 2.

³⁷ Alexandre Dumas, *Mes mémoires*, 2 vols (Laffont, 1989), II, 475. Cited in Patricia Mainardi, *Husbands, Wives, and Lovers: Marriage and its Discontents in Nineteenth-Century France* (New Haven: Yale University Press, 2003), 1-3.

³⁸ See Mainardi, *Husbands, Wives and Lovers*, *supra* note 37, at 158; Robert A. Nye, *Masculinity and Male Codes of Honor in Modern France* (New York: Oxford University Press, 1993), 9; and Rachel G. Fuchs, *Contested Paternity: Constructing Families in Modern France* (Baltimore: Johns Hopkins University Press, 2008), 156.

³⁹ On cuckoldry in nineteenth-century France, see Masha Belenky, *The Anxiety of Dispossession: Jealousy in Nineteenth-Century French Culture* (Cranbury, NJ: Bucknell University Press, 2008), 33-43.

⁴⁰ *Le Frou-Frou*, 100 (September 1902), 1644.

⁴¹ Guy de Maupassant, *Contes et nouvelles*, ed. Louis Forestier, 2 vols (Paris: Gallimard, 1974-79), II, 603. Subsequent references to this edition are given in the text.

⁴² Guy de Maupassant, “L’Adultère,” in *Chroniques*, ed. Gérard Delaisement (Paris: Rive droite, 2004), 433.

⁴³ For more on this topic, see Judith Surkis, *Sexing the Citizen: Morality and Masculinity in France, 1870-1920* (Ithaca: Cornell University Press, 2006), 69-123; and Jean Borie, *Le Célibataire français* (Paris: Sagittaire, 1976), generally.

⁴⁴ *Kusior v. Silver*, 54 Cal. 2d 603, 619 (1960).

⁴⁵ *Id.*

⁴⁶ See Cal. Evid. Code § 621(c), amended by ch. 543, § 2, replaced by Cal. Fam. Cod § 7540(b)-(c). On this change, and its relation to the Uniform Parentage Act, see Smernoff, “California’s Conclusive Presumption of Legitimacy and the Expansion of Unwed Fathers’ Rights,” 26 *Golden Gate U. L. Rev.* 337, 341-42 (1996); and Mary Kay Kisthardt, “Of

Fatherhood, Families and Fantasy: The Legacy of *Michael H. v. Gerald D.*,” 65 *Tul. L. Rev.* 585, 589-93 (1990-91).

⁴⁷ See in particular *Vincent B. v. Joan R.*, 126 Cal. App. 3d 620 (1981); and *Michael H. v. Gerald D.*, 191 Cal. App. 3d 996 (1987). Note that the presumption continued to be enforced against husbands who failed to act within the time limit stipulated in § 621(c); see *In re. Marriage of Sharyne and Stephen B.*, 124 Cal. App. 3d 526 (1981).

⁴⁸ For a full description of the facts and analysis of the various opinions, see Joan C. Sylvain, “*Michael H. v. Gerald D.*: The Presumption of Paternity,” 39 *Cath. U. L. Rev.* 831 (1989-90); and Sharon Smith, “*Michael H. v. Gerald D.*” (case note), 14 *J. Contemp. Legal Issues* 305 (2004-2005).

⁴⁹ See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); and *Lehr v. Robertson*, 463 U.S. 248 (1983).

⁵⁰ *Lehr*, 463 U.S. at 262.

⁵¹ For a withering critique of Justice Stevens’s concurrence, see Oddenino, “Good, the Bad, and the Ugly,” *supra* note 9, at 133-35; and also Batty, “Constitutional Rights of Putative Fathers,” at 1202-03.

⁵² See Mindy S. Halpern, “Father Knows Best – But Which Father? California’s Presumption of Legitimacy Loses Its Conclusiveness: *Michael H. v. Gerald D.*,” 25 *Loy. of L.A. L. Rev.* 275, 277 (1991).

⁵³ *Michael H.*, at 125.

⁵⁴ “Notorious” adultery was criminalized by statute in California in the same legislative session as the promulgation of the new Codes; see 1871-72 Cal. Stat. 380. The French Penal Code (1810) punished wifely adultery more severely than adultery by husbands, but the male “accomplice” of an adulteress could be imprisoned for as long as his lover; see *Code Pénal*, arts 336-340.

⁵⁵ Indeed, Rachel Fuchs and Nicholas White have convincingly demonstrated that the nineteenth century in France at least was, in White’s phrase, an “age of paternal irresponsibility,” in which men were protected from the consequences of their affairs by article 340, “*la recherche de la paternité est interdite*” [paternity suits are forbidden]. See *White*, 93-94; Fuchs, *Contested Paternity*, *supra* note 38, at 37.

⁵⁶ See “Legitimacy,” 4 *Law Mag. Quart. Rev. Juris.* 25, 42 (1830).

⁵⁷ See Andrew J. Counter, *Inheritance in Nineteenth-Century French Culture: Wealth, Knowledge and the Family* (Oxford: Legenda, 2010), 117-21.

⁵⁸ *Michael H.*, at 132 (n. 4).

⁵⁹ *Id.* at 114.

⁶⁰ *Id.* at 160 (White, J., dissenting).

⁶¹ *Id.* at 113.

⁶² *Id.* at 114.

⁶³ Guy de Maupassant, “L’Amour à trois,” in *Chroniques*, 826.

⁶⁴ *Id.* at 119; emphasis original. On this notion, see Oddenino, “Good, the Bad, and the Ugly,” *supra* note 9, at 129-30.

⁶⁵ Cf. Kisthardt, “Of Fatherhood, Families and Fantasy,” *supra* note 46, at 616.

⁶⁶ The English language, we might note, is more capacious: to Victoria, Michael was “Daddy” and Gerald “Poppa.” Brief for Appellant Victoria D., *Michael H. v. Gerald D.*, at 28.

⁶⁷ *Michael H.*, at 130.

⁶⁸ André Gide, *Les Nourritures terrestres* (Paris: Gallimard, 2008), 67.

⁶⁹ *Michael H.*, at 132, n. 3, 4.

⁷⁰ Both *culbuter* and *sauter* were commonly used to refer to sex acts in this period.

⁷¹ *Michael H. v. Gerald D.*, 191 Cal. App. 3d 995, 1002 (1987) (internal quotations marks omitted).

⁷² See Maupassant, “L’Amour à trois,” *supra* note 63, at 827.

⁷³ *Michael H.*, at 141 (Brennan, J., dissenting).

⁷⁴ A similar argument is developed by Robin West, who argues that the position of both justices is “deeply conservative,” and suggests moreover that all of the Warren and Burger Courts’ landmark substantive due process cases “ultimately protect the ‘liberty’ of the individual to conform to established historical traditions.” See West, “Ideal of Liberty,” *supra* note 9, at 1378, and in general.