



# **‘Duped Fathers’, ‘Cuckoo Children’, and the Problem of Basing Fatherhood on Biology: A Philosophical Analysis**

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## 11.1 Introduction

In this chapter, we explore the philosophical intricacies of aiming to establish legal parenthood of a child on the basis of biological contribution to the existence of that child. More specifically, we explore the claim that men who participate in raising children in the false belief that those children were their biological offspring have been thereby ‘duped’ and have a legitimate claim to know if this is the case and be compensated for their loss.

We use conceptual analysis, a philosophical method of investigating the use of a concept and the logical implications of its various interpretations. We propose a number of reproductive scenarios in order to stimulate reflection on the relation between genetic contribution, biological relatedness, and social parenting. We will show that new and forthcoming possibilities in reproduction raise questions about the adequacy of any account of parenthood that is based primarily on biology. In demonstrating the limitations of our intuitions about who a child’s father is, we highlight the complexity of the underpinnings of parenthood, the fragility of the reliance on genetics to determine family relationships, and ultimately the tenuousness of the assumption that children have, or should have, fathers whose children they ‘really’ are.

These questions, of course, have implications for parenthood more generally, and for motherhood specifically. However, in this paper we focus on fatherhood for two key reasons. Firstly, the subdivision of biological motherhood into gestational and genetic components, and the further subdivision of genetic motherhood into chromosomal and mitochondrial components, have been identified and discussed in the literature (Zeiler and Malmquist 2014; Cutas and Smajdor 2015). However, with a few exceptions (see e.g. Hubin 2014), the degree to which biological *fatherhood* can be broken down into component parts has not been well recognised. The second basis for the focus on fatherhood is the still-prevailing fact that, in law as in medicine,

fatherhood is commonly treated differently from motherhood. So called ‘paternity fraud’ (where a man is misled into bringing up ‘someone else’s’ child as ‘his own’) has no parallel for mothers. The concept of ‘maternity fraud’ simply does not exist.

The means by which societies should expose or avoid ‘paternity fraud’ are widely debated in the popular press. The whole discourse of ‘paternity fraud’ rests on an assumption that there is a biological truth as to the ‘real’ father of a child. If this is not the case, the utility of the term, and the behaviour of the judicial systems in responding to this phenomenon, are both highly questionable.

## 11.2 Background: Incognito Third-Party Reproduction

Third-party reproduction is a well-known expression in the literature on medically assisted reproduction, denoting cases in which people have children with the help of gamete donors. Informed, explicit consent from all parties is one of the core principles of gamete or embryo donation. However, ‘third-party reproduction’ *without* medical assistance has a long history—though it may not always have involved consent or even the knowledge of all parties concerned.

If a heterosexual couple is married, the husband is the legal father of any child born to his wife during that marriage: this is called the fatherhood presumption. At least at first glance, this demonstrates the legal preference for legal relations in favour of biological connections. However, should it turn out that the child is *not* the biological offspring of the husband, the fatherhood presumption can be contested. When the legal father wrongly assumes that he is *also* the child’s biological father, this mismatch has been called ‘paternity fraud’.

The starting point for our analysis here is a legislative proposal discussed in the German parliament in 2016, at the initiative of the minister of justice. According to this initiative, married women who may have conceived a

child with a man other than their husbands would be required to name the men they had intercourse with around the time of conception, so that the biological father can be identified (BBC 2016; Spiegel Online 2016). The biological father could then be required to pay compensation to the husband for raising *his* child. The language used in the debate that ensued was that of 'Kuckuckskinder' (cuckoo-children) and 'Scheinväter' (duped fathers). In the international media, this terminology was also translated as 'bogus fathers', 'sham fathers', 'false fathers' and 'milkmen's kids' (see e.g. The Guardian 2016a). While the legal proposal as such didn't use the term 'Kuckuckskinder', it did use 'Scheinväter' (Bundesministerium der Justiz und für Verbraucherschutz 2016).

Similar proposals for dealing with 'paternity fraud' have been advanced in other countries. In its 2015 general election manifesto, the British political group "Justice for men and boys" argued for compulsory DNA paternity testing at birth for every baby born in the UK, irrespective of the mother's marital status or her testimony as to the identity of the child's biological father (Buchanan 2015). The term 'paternity fraud' suggests that misperceptions about genetic paternity amount to a crime. One of the reasons for this is that men may find themselves expending emotional and financial resources on a child who is not 'really theirs'. According to one account,

- » (m)any admirable men knowingly bring up other men's children as their own without telling the child, because to do so would confuse and upset them. But for most men, the idea of doing so unwittingly wouldn't just be a theft of the love, effort and time that they put into the relationship, but would affect them on a primal level, almost as deeply as if their own children were to be taken from them. (Rubin 2015)

According to this account, the very love that a man bestows upon a child whom he believes to be his biological offspring is stolen if it turns out that the child is *not* in fact his biological offspring. The man's time (and money,

as we know from the German legislative proposal) is also stolen—and the realisation of this theft is presented as being almost on a par with the loss of the children themselves. It is interesting here to ask who the thief is. One answer is that the fraudulent behaviour is that of the mother: so she is the thief. The biological father is the cuckoo, who placed his seed in others' care—or the milkman, who enjoyed a sexual encounter the consequences of which are supported by an innocent, maybe even admirable, other man. Therefore, he too is a thief. As for the child, she is only worth the love, effort, time, and money spent on her so long as she really is the biological offspring of those who invest in her. She may be an innocent thief, but a thief nevertheless: a pawn at best, in other people's deception.

In a paper on 'paternity fraud', Heather Draper suggests that the case for compensation of the legal father only holds sway when a parent-child relationship between the legal father and the child has not been formed. For example, this could be the case when the legal father has been required to contribute financially to the upbringing of a child, under the false assumption of genetic parenthood, and has not been involved in the child's life (Draper 2007). However, when a man has raised a child, he has experienced not only the burdens but also the benefits of fatherhood and ought thus not to be reimbursed for the burdens. Draper also criticises the focus on financial compensation that has been a part of these debates. The case for fatherhood fraud not only identifies fatherhood specifically with having contributed sperm to the creation of children, argues Draper, but also treats financial contribution to the upbringing of children as the most significant aspect of fatherhood.

Terms such as 'paternal discrepancy' and 'non-paternity events' are also commonly used in this context and may appear more neutral. However, they are very explicit in their meaning that the husband is not 'the' father. One of the questions that these accounts of 'paternity fraud' or 'non-paternity events' raise is what it means for a child to be 'not really one's

own, and whether a child does have, in all cases, someone whose child they ‘really are’. In short, what does it mean to be someone’s child, or someone’s parent?

With increased access to DNA testing, these mismatches between legal and biological fatherhood are becoming easier to detect. Furthermore, in the context of new possibilities and developments in reproductive technology, questions about who it is that has reproduced or what constitutes a ‘real’ mother or father are becoming even more pressing. In the next section, we will see how.

### 11.3 The Scenarios

In the following, we tell the story of a couple, Mary and Billy, and ten variations of how they become parents. We say ‘they become parents’, but whether they *do* both become parents will depend on the reader’s conception of what it is that makes one a parent: and, more specifically, a mother or a father. Our main aim in this section is to present several ways in which children could be conceived, and see what the implications of these respective paths are for the determination of fatherhood (■ Table 1).

■ Table 1 Cutas & Smajdor

**Scenario 1:** Mary and Billy have always wanted to become parents. However, Billy is azoospermic: his semen does not contain viable sperm. With Mary’s eggs and the help of a sperm donor, they finally see their dream come true: their baby Suzanne.

**Scenario 2:** Mary and Billy have always wanted to become parents. However, Billy is azoospermic: his semen does not contain viable sperm. With Mary’s eggs and gametes developed in vitro from Billy’s somatic cells, they finally see their dream come true: their baby Suzanne.

**Scenario 3:** Mary and Billy have always wanted to become parents. However, Billy is azoospermic: his semen does not contain viable sperm. With Mary’s eggs and gametes developed from Mary’s somatic cells, they finally see their dream come true: their baby Suzanne.

**Scenario 4:** Mary has always wanted to have a child with Billy. However, their relationship ended acrimoniously some months ago. Mary manages to obtain a sample of Billy’s sperm and inseminates herself with it, eventually giving birth to baby Suzanne.

**Scenario 5:** Mary and Billy have brought up their child, Suzanne, together. Billy is not aware that Mary had had a fling just before Suzanne was conceived, and that another man, John, is the genetic father of Suzanne.

**Scenario 6:** Mary and Billy have always wanted to become parents, but Billy is azoospermic. Billy has undergone a procedure to have some of his brother’s testicular tissue transplanted into his own testicles. Subsequently, Billy and Mary conceive Suzanne together. However, the sperm is genetically that of Billy’s brother.

**Scenario 7:** as above, except that Billy’s brother is his identical twin. Since Billy and his brother are identical twins, this means that they are (nearly) genetically identical. The same genetic make-up is reshuffled in the sperm, as it would be if it had been Billy’s own sperm. Suzanne is conceived, being just as genetically related to Billy as she would be had she been his own genetic offspring.

**Scenario 8:** Mary and Billy have always wanted to become parents. Billy is a trans man who has retained his uterus. Using donated sperm and one of Mary’s eggs, they conceive a baby, Suzanne. Billy gestates and gives birth to Suzanne.

**Scenario 9:** Mary and Billy have always wanted to become parents. Mary is a trans woman who has undergone a uterus transplant. Billy is a trans man who retained his ovaries. Using Mary’s sperm and one of Billy’s eggs, they conceive a baby, Suzanne. Mary gestates and gives birth to Suzanne.

**Scenario 10:** Mary and Billy have always wanted to become parents, but they have fertility problems. At the fertility clinic, a mistake is made, and Mary’s egg is fertilised with the sperm of another man. The mistake is not noticed until their child, Suzanne, is already 9 years old.

Some of these scenarios may seem far-fetched but they are not as implausible as they appear. In vitro created gametes have been successfully used to produce mouse pups (Hendriks et al. 2015). Some scientists hold that creating sperm from women's somatic cells is also possible, although such claims are very controversial in the research world (Highfield 2008). Women have inseminated themselves with sperm from non-consenting men (Tritt 2009). Uterus transplants have successfully led to the birth of babies: including, recently, a transplant from a deceased donor (Ejzenberg et al. 2018). Trans women are born without a uterus and could be argued to be eligible for uterus transplantation as well as other women who have also been born without one (see also Murphy 2015; Alghrani 2018). Moreover, Mats Brännström, the pioneer of uterus transplantation, has stated that such transplants for men are technically possible (Sample 2003). Testicular tissue transfers may offer azoospermic men the possibility of 'begetting' children through intercourse in the future (Vij et al. 2018). Trans men have given birth (see e.g. BBC 2008). Following the removal of the requirement that trans men and women undergo sterilisation before their gender is legally recognised, births by men have created challenges for legal authorities in Germany (Kleinhubbert 2013). So long as both retain their reproductive functions or have stored gametes, both trans men and trans women can reproduce—and they could reproduce with each other. Mistakes in clinics—and even fraudulent behaviour—involving reproductive material, have happened (see e.g. The Guardian 2016b). Thus, although our scenarios may seem whimsical in some respects, many of them have already happened, and those that have not, may happen in the near or more distant future.

In all the scenarios, a child is born. In some cases, we might intuitively think that Billy is the father. In others, it seems less obvious that he is. Where we do not regard Billy as the father, we may think either that some other individual is the 'real' father, or that in

fact there *is* no 'real' father. Some of the scenarios raise questions about parental rights and responsibilities, and others raise questions about justice and morally culpable behaviour. Scenarios 4 and 5 involve the use of Billy's reproductive material without his permission and deception, respectively.

The answer to whether Billy has become a father in these scenarios depends on a host of answers to other underlying questions. Is the person who gives birth a *mother*, regardless of their gender—and are, therefore, men who give birth, mothers? Does consent play a role in determining paternity? For example, is Billy's fatherhood established in scenarios 1 and 2 but not in scenarios 4, 5 or 10? Is genetic relatedness the essential part of begetting, and if so, has Billy reproduced in scenarios 6 and 7? Does the degree of relatedness matter: is Suzanne Billy's baby in scenario 7 *more than* in scenario 6—or even *rather than* in scenario 6? Does the element of begetting itself—the fact that Suzanne was conceived as a result of intercourse between Billy and Mary—make Billy a father? Does it matter that it is Billy's sperm that was developed in Billy's testes, rather than the sperm of his identical twin (scenario 7), non-identical brother (scenario 6), or an unrelated donor?

In scenario 5, Mary conceives a child outside her marriage, with her lover, John. We may complicate this scenario by revealing that, prior to this, John has had a testicular tissue transplant from an unrelated donor. The child thus conceived would be a cuckoo child. Under the German bill proposal, Mary would be required to name John as the man with whom she has had intercourse. Upon genetic testing, he turns out not to be the genetic father. It is unclear whether John himself or the testicular tissue donor would be required to pay compensation to Billy, who in this scenario is the 'duped father'. Being a gamete donor comes with the legal assurance that one will not bear parental responsibility in relation to the children conceived with one's genetic material. Presumably, this assurance would transfer to donation of testicular tissue. In this



case, then, who *is* the cuckoo? It would seem that it is John: however, John is not Suzanne's genetic father in this variant of scenario 5.

Commonly, when people talk about biological parenthood, they mean genes. However, as these scenarios show, biology encompasses more than just genetic connections. There are many other ways in which we can be biologically connected to one another. With new and forthcoming scientific developments, the ascription of genetic paternity may become more complex than it is at present. One research avenue for creating gametes in vitro has been via 'therapeutic cloning'. A skin cell from an adult man could be inserted into an enucleated egg cell to create a cloned embryo, from which embryonic stem cells would be derived, giving rise to sperm which would be genetically related to the original cell donor (scenario 2). We might think that in such a case the 'real' father is the donor. However, this does not take into account the fact that the empty egg contains residual mitochondrial DNA. Therefore, the makeup of the resulting sperm would include a connection to the egg donor.

Setting aside the question of the mitochondrial DNA, the prospect of deriving sperm from stem cell lines also raises questions about how we define the *father* per se of a particular child. Is it the organism which generated the specific gamete from which that child was conceived? If so, the adult donor is *not* the father. Rather, the embryo from which the stem cell line was derived is the father, or perhaps even the stem cell line itself (Mertes and Pennings 2008). Alternatively, in such a scenario, perhaps it would be more plausible to think of several different genetic contributors. However, if we think fathers must be *people* in a way in which embryos are not, it would make no sense to say that the genetic father is an embryo or stem cell line.

So long as one takes genetic kinship to prevail over social kinship as being indicative of parent-child connections, then even in scenario 1, it is the donor rather than Billy who is Suzanne's *real* father. Thus, regardless of what Billy, Mary, and Suzanne themselves may

think, regardless of what the law says about who Suzanne's father is, Billy's status as Suzanne's father could be contested. Even if he fully accepts Suzanne as his daughter, others around him might not. The donor might claim father status in relation to Suzanne: if not legally, at least conceptually. Suzanne herself might come to see the donor as her father. For example, she might appreciate that she looks a lot like him, and feels close to him and his other children.

In this regard, scenario 1 is substantially different from scenario 3 in which, even though Billy is not Suzanne's genetic father, no one else is either. One advantage of scenarios 2 and 3 over scenario 1 is that there is no one outside of the relationship who has had a reproductive contribution to Suzanne's creation: there is no man other than Billy who might be seen as Suzanne's father—either by Billy, or Mary, or Suzanne herself, or by third parties—no 'cuckoo'. However, in scenario 3 it could be argued that, because she is the source of both the egg and the sperm, Mary herself is Suzanne's biological mother *and* father.<sup>1</sup> If by "father" we mean genetic father and more specifically the person from whom the sperm originates, then she is a father. Furthermore, Mary is the only one who has contributed genetic material to Suzanne's creation. As long as biological connections are given weight in determining family relationships, Mary has *more* claim to be Suzanne's parent than Billy does—and more than any other human parent has had to any child yet. Indeed, she is Suzanne's *only parent*. Should Billy and Mary split up, this could mean that Mary's parenthood might stand a stronger claim in court to prevail over Billy's claim, just because of genetics.

Let us imagine a variation of scenario 3, in which the sperm created from Mary's somatic cells is placed for maturation in Billy's testes, and Suzanne is conceived naturally by Mary and Billy. Has Billy reproduced in this scena-

1 We discuss solo reproduction more thoroughly in Cutas and Smajdor (2017).

rio? To answer in the negative to this question would be to claim that that it is *only* genetic transmission that is the essential marker of reproduction. Arguably, in this case the presumption in favour of birth mothers as children's prima facie parents regardless of genetic contribution might also need to be revisited. It may be that there are good reasons to treat biological motherhood and fatherhood differently. Maturing sperm in one's testes would probably require a different level of investment from gestating a baby to term, and this difference may justify a different legal approach. However, just as a woman who carries to term 'someone else's' baby is a biological parent, so is the man who conceives a child with sperm matured in his testes.

#### 11.4 The Role of Subjectivity in Determining Fatherhood Status

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If biological links do not give such a clear indication of 'real' fatherhood as we usually assume, perhaps fatherhood could be interpreted in a more subjective way. One could say that it is at least in part the man's view of himself as a father that gives rise to his entitlement to be recognised as such. In this case, biological connections may be secondary, or indeed completely irrelevant. In scenario 1 above, Billy may be just as happy knowing that the baby is born in his relationship with Mary, and that he and Mary will share social parenthood. For Billy, then, the result might be just as good as it would have been had Suzanne been created with his sperm. He might even prefer that the child is not biologically related to him. Billy could, for example, have had a difficult relationship with his own biological family. Or he could have been himself adopted and felt love and gratitude towards his adoptive parents and believe it is love, rather than biological kinship, that is valuable in family relationships (in line with the argument developed in Gheaus 2018). He might then not regard genetic relatedness as an essential component of parenthood in the

way in which many of us do. Alternatively, Billy could come from a family burdened by genetic conditions that have made life difficult for them for many generations: he might regard the lack of a genetic connection between him and the baby as a fresh start and a chance to break that unfortunate legacy.

Subjective interpretations might also be important in scenario 10, where the 'wrong' embryo was created and transferred. Having raised Suzanne for 9 years, Billy might feel that in terms of labour, he *is* the father. Indeed, Suzanne herself might share this view. However, the man whose sperm was accidentally used to fertilise the egg might feel differently. He might think that Suzanne is *his* child despite the fact that they have never met. Does he then have a claim to have a relationship with Suzanne, and if so, what is this claim? Is he Suzanne's father? And if he is, is Billy *not* her father?

The point here is that however accommodating we might want to be towards subjective views of parenthood, if the law has to take a stance, the purely subjective approach is never going to be satisfactory, since different stakeholders may have different interpretations. As we have shown, recourse to genetics is not straightforward either in the case of conflicts.

#### 11.5 Responsibility and Causal Contribution

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If neither genes nor subjective interpretations are sufficient to tell us who the 'real' father is, an alternative route might be to focus on questions of responsibility. One could argue that contributing to the creation of a child confers fatherhood status on the man who does so. When a man raises a child to whose creation he did not contribute, he may falsely assume that he has this causal responsibility for that child. Thus, Billy of scenario 5 was 'duped'—but in scenario 1, he was not duped. Moreover, had Billy and Mary not decided to become parents with the help of third-party reproduction, Suzanne would not have

existed. This means that Billy *did* cause her to exist, not through his own genetic contribution, but through his decision—with Mary—to seek a donor. On this view, the donor is also a part of the chain of events that have led to the creation of Suzanne. Thus, both he and Billy have different sorts of causal claims to the status of father. Again here, one might want to say that both Billy and the donor are fathers. This would undermine the contention that there can only be *one* ‘real’ father.

A further difficulty in focusing on causal roles in determining ‘real’ fathers is that it does not seem to accommodate the intuitive feeling that intention and/or consent are significant. In one sense, the provider of sperm is a key causal factor in the creation of a child, regardless of whether he consented to becoming a father. This might be problematic in the context of scenario 4, in which Billy did not know that Mary had ‘stolen’ his sperm. In scenario 10, the man whose sperm is accidentally used to create Suzanne does not know that this has happened. Although he wanted to create a child, Suzanne is not the specific child whose existence he intended to cause. These examples raise questions about the justice of holding a particular man *financially* responsible for a child to whose birth he has causally contributed, in terms of being her genetic progenitor, but whose existence he never intended to cause. The legal suggestions discussed earlier tend to assume that genetics and causal contribution are not separable, and that intention can either be inferred on the basis of genetic connections or is of no particular concern.

Scenarios 6 and 7 are very interesting here. Because the testicular tissue genetically belongs to Billy’s brother, any child conceived with the sperm matured in Billy’s testes will be his brother’s genetic offspring. But it will also be Billy’s biological child: she was after all conceived with sperm developed in Billy’s testes. Between Billy and his brother, who is causally responsible for Suzanne’s existence? They both are, but it seems that if any paternal responsibility should be attached to this

causal relation, it pertains to Billy rather than his brother. It was Billy who engaged together with Mary in the act of Suzanne’s creation—not his brother.

We could turn this around by positing that instead of his brother’s sperm having been placed in Billy’s testes, it was Billy who donated testicular tissue to his brother. Mary has sex with Billy’s brother and one of those sperm fertilises her egg resulting in the birth of Suzanne. Billy raises Suzanne as his daughter not knowing that Mary cheated on him with his brother. Therefore, Suzanne is Billy’s genetic offspring, but she is also his brother’s biological child (because the brother is the one who together with Mary conceived her), and she is the product of her mother’s adultery. Would this be a case of ‘paternity fraud’? If the answer is no, because she *really is* Billy’s genetic offspring, it also means that the most direct form of causal contribution is deemed to be less important than genetic filiation. Billy *has* been ‘duped’ because it was his brother, not him, who participated in the act of conception—even if the child really is Billy’s own genetic offspring. If Billy wrongly assumes that it was he who ‘made’ Suzanne together with Mary, his version of how Suzanne came to be is mistaken—and if Mary is aware of how Suzanne was conceived and has chosen not to share this with Billy, she has ‘duped’ him.

When it comes to the genetic relation, in scenario 7 the child will be just as genetically related to Billy as she would have been had it been Billy’s own sperm that was used in her conception. In addition, the sperm was matured in Billy’s testes and, again, it is Billy who begets Suzanne together with Mary, and the child is born within their marriage. Is Billy’s brother anything other than Suzanne’s uncle and would we say he has causally contributed to Suzanne’s creation? If the answer to this question is that he is her uncle rather than her genetic father, and that he did causally contribute, this could raise further problems in how we conceptualise causal responsibility for children’s creation (we will illustrate this further down when we look at scenario 4).



We could think of a variation of scenario 7, in which while intoxicated at a party, Mary has sex with Billy's identical twin brother, believing it is Billy. The brother does not even realise who he is having sex with (because he is himself intoxicated, sexually adventurous and generally indiscriminate in this regard), and the next day neither he nor Mary remember the incident. The child, again, would be just as related to Billy as she would be had Billy conceived her. However, the causal contributor is the brother, not Billy. Yet a genetic test would be unlikely to uncover the circumstances of Suzanne's creation. Nor would it identify Billy's brother either as a causal contributor or as someone who has any financial responsibility towards Suzanne. Interestingly, in a recent court case in Brazil it was concluded that two identical twin brothers, one of whom was responsible for the creation of a child, would both be named on the child's birth certificate and be required to contribute financially to her upbringing. The brothers had refused to disclose which of them was the father, and genetic testing could not clarify the question (BBC 2019).

In scenario 4, Billy has causally contributed to Suzanne's creation, albeit without his knowledge. The responsibility here is all Mary's. But if we change some aspects of this scenario, looking at causal contribution to establish responsibility might prove too much. Let's say that instead of inseminating herself with 'stolen' sperm, Mary forges Billy's signature to have embryos created during their relationship transferred into her womb. The healthcare personnel at the clinic participate in Suzanne's creation, believing that both Billy and Mary consented to this. Billy has causally contributed to Suzanne's creation, because his sperm has been an essential building block of this process. However, other people have engaged in Suzanne's actual creation—and if causal contribution determines responsibility for children's existence, then in this version of scenario 4, that responsibility is shared between Billy, Mary, and the healthcare personnel at the clinic—even though Billy has not consented

and the healthcare personnel acted on his behalf, falsely believing he *has* consented.

### 11.6 Who Is Harmed in 'Paternity Fraud' Cases: And What Does the Harm Consist in?

The legal father who has contributed to raising a child who is not his biological offspring is 'duped' if he has been deceived. But what does the deception consist in? In the example of the German draft law requiring mothers to reveal the name of the genetic father, the husband has invested in a child on the basis of a lie. The revelation of the child's genetic fatherhood is supposed to clarify whether he has been duped or not. As our scenarios suggest, he may have been cheated on and yet the child could still be 'his' genetically. So the cheating itself is only a confounding factor here: the problem is genetic fatherhood. Billy is not a 'duped father' in scenario 10 so long as the involvement of another man's sperm was a mistake. Has he been harmed nevertheless? It seems that the answer to this question has to be yes, he has. He has raised a child in the understanding that she was 'his own', when she was not. But what exactly *is* the harm? Unless we hold that men—and maybe women—have a legitimate *prima facie* claim that, unless they consent otherwise, they only raise their *own* genetic children, it is difficult to substantiate what the harm could be.

However, the husband is not the only party in this equation. The way in which the problem has been phrased—'duped fathers' and 'cuckoo children'—establishes the husband as the individual being deceived, the child as the object of the deception, the woman as the deceiver, and the genetic father as the 'cuckoo'. But it is the female of the cuckoo bird who places her fertilised egg in other birds' nest. In the human cuckoo counterpart, the female does actually raise the child. This makes the analogy half-cuckoo at best. We could only assume that the male cuckoo bird does not object to this practice. From all these

accounts, we know nothing about the human male cuckoo. Did he participate in the deception? Was he deceived himself? If so, does *he* have grounds for complaint alongside or against the ‘duped father’?

It may well be that the cuckoo would have been all too happy to assume legal parenthood of ‘his’ child: if only he knew of her existence. Maybe he cannot become the (biological) father of another child. His loss may be greater than the loss of the Scheinvater. If we accept that rearing ‘one’s own’ child is a valuable endeavour, and not only a burden, then the cuckoo has also been deprived of something valuable. The Scheinvater has had the opportunity to raise a child, to experience a form of human bonding like no other. To only conceive of the Scheinvater as duped *because the child was not his biological offspring* is to make all the worth of parent-child bonding hinge on genetics. Arguably, most biological fathers have the first choice of whether or not they want to take up parental rights and responsibilities in relation to the children to whose conception they contribute. The human cuckoo may not have had this choice. If genetics determines fatherhood status, then the ‘cuckoo’ who is unaware that he is a ‘father’ has also been ‘duped’. If so, he has been harmed, as well as finding himself in an unfair situation: being nominated out of the blue and asked to financially compensate the man who *did* get to experience that parent-child relationship *with his child* may only add insult to injury. (We say *his child* here only to inhabit the worldview of which the Scheinvater concept is part).

The mother may also be harmed in the process of having the identity of the biological father revealed. The time of the conception may be traumatic for her to confront: for example, if she was a victim of rape, because the conception took place in the midst of a difficult break-up, or because the biological father passed away. In such a case, she would be forced to reveal traumatic incidents that she may be unwilling to have to revisit. The German draft law had provisions about situations in which it may be unreasonable to

demand of the mother to reveal the information, but even so, any such demand would constitute a major intrusion into the woman’s private life, perpetrated by the state in the interests of the legal father.

Lastly, the child herself would have no control of whether or not the information is sought: or with whom it is shared. In the context of gamete donation, even where donor anonymity has been abandoned, whether children even know that they are donor conceived depends on the will of their parents. Once they do know that they are donor conceived, it is up to them if they want to find out the identity of the donor. That they would have no control on this process in the case of a Scheinvater trial suggests that their interests are inferior to those of the adult men who are their legal fathers. After all, unless fatherhood itself hinges on genetics, why would this information concern the legal father at all?

It might concern him, because he was likely raised in a society that valued genetic relatedness greatly, and that has traditionally associated it with the very *legitimacy* of a child’s existence. It is not so long ago that children who had no legal fathers were *bastards* with limited rights, whose very birth was a great harm to their mothers, and a source of shame for their extended families. If one goes further enough back in time, one can find that illegitimacy used to be a fine reason to kill a child (deMause 2006). So it makes sense, historically, that it has been very important *for children* to have a legal father. However, if the legal father turns out to not also be the biological father, then we are talking about ‘covert illegitimacy’, yet another term for paternal fraud, non-paternity events, or paternal discrepancy: the bastard child has stolen legitimacy from the ‘duped father’.

## 11.7 So, Who *Is* the Father?

Until recently, appeals to biology seemed to make it easier to settle questions about who a child’s ‘real parents’ are. Today, however, those

looking at biology to simplify matters might be disappointed. In this chapter, we have shown some of the ways in which such an endeavour is likely to complicate things even further. What our scenarios illustrate is that reproduction can be split into more than two different components. The attempt to demonstrate that every child has exactly one biological mother and one biological father, and that these can always be readily identified, is futile. This is the case even without our more speculative scenarios ever coming to pass.

The idea that the special worth of a child to a parent lies in their biological connection is also problematic in the context of the progress that has been made in conceptualising children as adults' moral equals. That children are seen as holders of rights and legitimate interests independently from their parents is a recent development. Historically, parent-child relationships have been conceptualised, socially and legally, as near proprietary—throughout the Western world (Archard 2008). Today, children are recognised as not only holders of moral status, but adults' moral equals—at least in principle (Wiesemann 2016). In practice, the degree to which our societies have fully incorporated these changes varies.

The desire to allocate children to adults according to biological contribution conflicts with this progress: unless we still see children as *belonging* to the adults who have made them—*literally* made them—we would arguably not insist on looking at biology in order to settle questions of paternity. Expecting of mothers to nominate the men who they had intercourse with, so that the one responsible for the creation of the child can be identified and made to pay, treats children as if they were sexually transmitted diseases<sup>2</sup>. The very way in which this discussion has been framed—in terms of 'paternity fraud', 'duped' or 'false' fathers, and 'cuckoo children'—establishes the children themselves as the

thing through which men are hurt: the *corpus delicti* of men's manipulation by deceitful women and their responsibility-ducking cuckoo lovers.

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2 We thank our colleague Berit Åström for coming up with this analogy.

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