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'WHERE THE PARENTS ARE OF THE SAME SEX': QUEBEC'S REFORMS TO FILIATION

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ABSTRACT

To advance debates on legal responses to parenting by gay and lesbian couples, this article introduces reforms enacted by the legislature of Quebec, a civil law jurisdiction with a codified private law, in 2002. Quebec's pioneering regime permits two persons of the same sex to register as a child's parents from birth, not only by adoption. They may do so if they conceived the child as part of a 'parental project'. Moreover, a person alone may have a child via a parental project. The article identifies the policy choices reflected in the amendments and highlights weaknesses in the drafting, instructive to policy makers in civil law or common law jurisdictions. It emphasizes the structural difficulty of amending the civil law's fundamental institution of filiation to recognize two parents of the same sex. Comparing with *ad hoc* judicial developments from a Canadian common law province, it underscores the potential in systematic legislative reform. Conservative scholars have resisted the new regime as an inappropriate departure from the pursuit of filiation's biological vocation. The study reveals how selectively jurists may remember the past and how swiftly they may characterize innovations relating to parentage – such as the earlier abolition of illegitimacy – as natural. The mingling of biological fact and fiction in the new regime underscores the similar blending in more traditional forms of filiation.

INTRODUCTION

In 2002, the Quebec legislature distinguished itself as a family law pioneer on a global scale by amending its civil code to recognize same-sex couples as a child's parents from birth and not only on adoption. The 2002 amendments were enacted in English and French, but their scholarly reception has proceeded almost exclusively in French. Quebec

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family law scholars typically understand themselves as conversing with colleagues in other civil law jurisdictions more than with their counterparts in the Canadian common law provinces. Certainly, the reactions of Quebec scholars to the amendments – largely critical – resonate with concerns squarely within the civil law tradition (eg, Moore, 2005; from Belgium, Renchon, 2005). Whatever the reason, no substantial introduction of Quebec's regime has appeared in English, and some Canadian scholars writing in that language appear unfamiliar with it (eg, Kelly, 2004) or to underestimate its effects (Boyd, 2007: 66 n 14). Consequently, Quebec's innovations remain relatively unstudied outside the province. This inattention is regrettable, as they hold lessons for civil law and common law jurisdictions.

On one level, this article speaks to policy makers responsive to law's need to attend to the parenting practices of gay and lesbian couples. It seeks to advance debates by introducing the 2002 amendments to readers whose lingua franca is English, identifying the policy choices they reflect and pointing to what are arguably weaknesses in the drafting. To complement analysis of the rules undertaken with an eye to their interpretation in individual cases (Campbell, 2007), the article emphasizes a more structural dimension: the amendments' alteration of the civil law's fundamental institution of filiation. The Quebec experience testifies that shoehorning changes into the conceptual framework of a civil code is not easy—nor is designing a regime that attends to the practices of contemporary families without abdicating law's role of establishing baselines to guide conduct.

On another level, the article invites readers to examine parentage and other family law regimes in their own jurisdiction and to reflect on their understandings of family law's relation to the past. The case study reveals how selectively jurists may remember the past and how rapidly they may characterize legislative innovations and structures as natural. In an effort to understand filiation as coherent, legal scholars in Quebec have emphasized the pursuit of biological truth (or resemblance to it). Yet more than they acknowledge, the regime intertwines fact and fiction; it resists interpretation as pursuing a single coherent aim. The doctrinal reactions exemplify how the lawyerly drive for legal coherence may become an end in itself, detracting from family law's mission to serve adults and children.

1. FILIATION: A FUNDAMENTAL INSTITUTION OF THE CIVIL LAW

Filiation is in its primary sense the legal relationship connecting a child to her mother or father. It is also the bond of kinship linking a person to his or her ascendants, whatever the degree of relationship (*Private Law Dictionary of the Family and Bilingual Lexicons,* 1999: 'filiation').

While filiation poetically includes among its objectives ordering a child's fate (Cornu, 1998: 28), it also determines more prosaic matters: who must care for a child; to whom the child will owe certain obligations, such as alimentary support; from whom the child can claim rights, eg concerning successions; and what name she will carry. Filiation is said to be the fundamental element of family belonging (D.-Castelli and Goubau, 2005: 185), a foundation of the social order (Lavallée, 2005: para 48). The common law tradition, while ascribing rights and duties to parentage, has not theorized the parent–child relationship comparably.

Prominent in scholarly discussion of filiation is its characterization as an institution. On the orthodox understanding, an institution is an ideal and an ensemble of statutory and common law rules to which persons adhere in order to realize a particular goal. An institution is said not to be founded by contract, and its members precluded from altering its essential terms. The legislature is said to recognize institutions, not to create them (Marty and Raynaud, 1956: para 384; cf, the subtler exploration of Millard, 1995: paras 14–19). The notion of filiation as institution, which connotes some immunity or at least resistance to change, jostles uneasily with the extent to which the legislature has, in recent decades, changed its recognition of that institution. Until 1980, the Civil Code of Lower Canada, dating from 1866, knew two kinds of filiation: legitimate and illegitimate. Legitimate filiation, which flowed from the social and legal construct of a valid marriage, occupied a position of privilege relative to illegitimate filiation, which was also known as 'natural' filiation. A legislative overhaul in 1980 abolished the status of illegitimacy; since then, it has been a baseline of filiation in Quebec that '[a]ll children whose filiation is established have the same rights and obligations, regardless of their circumstances of birth'.[1] The legislature replaced talk of legitimate and illegitimate filiation with the notion of filiation by blood. The 1980 amendments also brought filiation by adoption into the civil code; it had, prior to that, existed in a stand-alone statute. From 1980 until the amendments of 2002, the codified civil law of Quebec knew two kinds of filiation: filiation by blood and adoptive filiation. Within this state of affairs, filiation by blood occupied a position of privilege relative to adoptive filiation; interestingly, though, the epithet natural shifted from illegitimate filiation, formerly the inferior form of filiation, to attach to what was henceforth the principal one. Filiation by blood was regarded as natural relative to the artificial filiation produced by adoption (Table 1).

On the traditional understanding, the legal establishment of filiation is purely declarative, not constitutive (Cornu, 1998: 32). It is thought that the juridical link of filiation must thus coincide as much as possible with biological reality. Yet despite the lexical implication, filiation by

Table 1. Civil Code of Québec SQ 1991 c 64

Book 2 – the family
Title two – filiation
Chapter I – filiation by blood
Chapter II – adoption

blood is a juridical construct and must not be confused with the biological link (eg, Alland and Rials, 2003: 'filiation'). Family peace or another interest sometimes militates against the pursuit in law of biological reality. Several examples come to mind of these interests' translation into positive law, where (putting it negatively) law 'stifles' biological truth (Flauss-Diem, 1999: 999). The filiation of someone whose possession of status is consistent with his act of birth is legally incontestable, even in the face of genetic proof against that filiation.[2] A presumption of paternity operates in favour of the legal spouse of the child's mother if the child is born within 300 days after the marriage's dissolution or annulment. Moreover, a presumed father has a short prescription period, 1 year, during which to contest the presumed filiation.[3] While the presumption is rebutted if the child is born more than 300 days after a judjment ordering separation from bed and board, the rebuttal (in overt deference to family peace) does not operate if the separated spouses, before the birth, had voluntarily resumed their shared life.[4] In such instances, filiation by blood harmonizes itself less with genetic truth than with a filiation 'wished or lived' (Pineau and Pratte, 2006: para 387).

Exemplary of codification's ambitions of logical and conceptual integrity, filiation connects to other juridical institutions. It is entwined in the code's treatment of the registrar of civil status, legal tutorship, the alimentary obligation, and heirship. For example, a bond of filiation inscribes a child within the parent's family for succession purposes. Filiation's most important effect, however, is arguably parental authority. Parental authority is the 'totality of the attributes conferred upon a person acting as a parent in respect of a minor child', and its principal attributes are custody, supervision, maintenance, and education (*Private Law Dictionary of the Family and Bilingual Lexicons,* 1999: 'parental authority').[5] The doctrinal sense, however unconvincing, of a coherent, rationally ordered scheme of interconnected institutions sets the scene for the recent reforms.

2. THE 2002 REFORMS

A. Quebec's Amendments

The Quebec legislature amended its regime of filiation as part of an effort to provide a civil status for same-sex couples. When the consultation process regarding the civil union began, submissions

underscored the need to address parenting by same-sex couples. The legislative process has inspired substantial criticisms, for its speed and shallowness (eg, Kirouack, 2005: 380–3; Moore, 2002, 2005; Pratte, 2003; Roy, 2003: 119; Philips-Nootens and Lavallée, 2003: 358; Tahon, 2004) and for the failure to consult experts regarding the impact on children (Joyal, 2003, 2005; contra: Bureau, 2005). While these objections merit sharper scrutiny than they have yet received, the focus here is on the innovative and systematic character of these legislative reforms.

The legislature interposed into the title on filiation, between the chapter on filiation by blood and that on adoption, a new chapter on the filiation of children 'born of assisted procreation'. This chapter begins:

> A parental project involving assisted procreation exists from the moment *a person alone* decides or *spouses* by mutual consent decide, in order to have a child, to resort to the genetic material of a person who is not party to the parental project.[6]

Contributing genetic material 'for the purposes of a third-party parental project' creates no bond of filiation between the contributor and the child born.[7]

Two innovative features are crucial. First, by stating that 'a person alone' may have a child with the genetic material of another, the regime envisages a 'monoparentalité choisie' (Noreau, 2002: 145–8). Though an individual had already been able to adopt a child,[8] the new regime provides the first opportunity for establishing an original filiation where the father is not only undeclared or unknown, but a priori eliminated.[9] Second, 'spouses' may be of the same sex.[10] This new chapter provides an affirmative basis for a birth mother's same-sex spouse to establish a bond of filiation between herself and the child. It states, oddly, that, '[i]f both parents are women', the mother who did not give birth to the child assumes any rights or obligations legally assigned to the father.[11] In its availability to individuals and to same-sex couples, assisted procreation has departed from its prior vocation of exclusively serving infertile heterosexual couples (Philips-Nootens, 2005: 179–81). In contrast, Alberta, the only other Canadian province to legislate regarding assisted conception, focused on helping opposite-sex couples.[12]

It is worth situating participation in a parental project as a basis for establishing filiation in relation to the interests of the child and to the conventional view of filiation. The civil code provides that every decision concerning a child shall be taken in light of the child's interests.[13] Instantiating this dictate, the code specifies that no adoption may take place except in the interest of the child.[14] In contrast, the regime of filiation by blood is understood as consisting of a set of rules, the modes

of proof hierarchically ordered, such that a determination of filiation by blood requires no 'decision'. It is impossible to establish a child's original filiation outside the specified criteria and rules. At least in theory, they operate mechanically (their application to facts being a syllogistic operation) so as to foreclose arguments framed with explicit reference to the child's best interests (Tétrault, 2005: 1093).[15] Indeed, while the regime refers primarily to the intention of the parties to a parental project, the rules also, secondarily, set up a rebuttable presumption in favour of the birth mother's legal partner on the basis of that status. If a child is born of a parental project involving assisted procreation between married or civil union spouses during the marriage or civil union, or within 300 days after its termination, 'the *spouse* of the woman who gave birth to the child is presumed to be the child's other *parent*'.[16] The presumption of *paternity* towards a birth mother's husband in the case of filiation by blood is now, in the case of assisted procreation, a presumption of *parenthood* towards her spouse, whatever that spouse's sex. The presumption attaches on the basis of formal family status, not the performance of parenting functions (Leckey, 2008: 97). The married or civil union spouse of the child's mother may, in turn, contest the presumptive filiation and disavow the child 'if there was no mutual parental project or if it is established that the child was not born of the assisted procreation'.[17] The presumed parent's merely changing her mind is no basis for displacing the presumption. Only where the parties to a parental project are neither married nor civil union spouses can the party who does not give birth avoid a bond of filiation by refusing to declare herself. In such cases, no presumption of parenthood operates, although the party who consents to a parental project but later fails to declare his or her bond of filiation may incur civil liability towards the mother and child.[18]

The legislature's shift from the earlier rubric of 'medically assisted procreation' to 'assisted procreation' *tout court* is significant. With variable explicitness, the 2002 regime distinguishes three varieties of assisted procreation: (i) medically assisted procreation, (ii) 'artisanal' assisted procreation without medical intervention, and (iii) 'amicable' assisted procreation, in which a 'Good Samaritan' provides the potential mother with genetic material via sexual intercourse.[19] Personal information relating to medically assisted procreation is confidential, subject to a serious harm exception.[20] As has been noted, this rule may collide with the child's right, under international law, to know his or her identity (eg, Giroux, 2006; see generally Besson, 2007). The reality is perhaps not 'a crisp boundary between natural and unnatural reproduction' but rather a continuum of interventions in the procreative process (Jackson, 2001: 171). Nevertheless, medically assisted procreation entails interventions at the weightier end of the continuum.

The second and third varieties of assisted procreation reflect an intention to make it possible for lesbian couples to conceive, as most opposite-sex couples do, without medical assistance. This objective may acknowledge the discrimination encountered by many lesbians when seeking medical assistance for conception. In cases of assisted procreation without medical intervention, personal information is not confidential.[21] In such cases, no bond of filiation connects the donor to the child, but the child's knowledge of the genetic tie may constitute a connection of sorts, one literally *de facto*. It is the distinction between the two forms of assisted procreation without medical intervention that is most contentious.

A single paragraph demonstrates that the legislature contemplated assisted procreation by means of sexual intercourse between the donor and the intended birth mother. It carves out an exception to the general rule that contribution of genetic material for other parties' parental project creates no bond of filiation:

> However, *if the genetic material is provided by way of sexual intercourse*, a bond of filiation may be established, in the year following the birth, between the contributor and the child. During that period, the spouse of the woman who gave birth to the child may not invoke possession of status consistent with the act of birth in order to oppose the application for establishment of the filiation.[22]

While some scholars view the amendments in general as poorly drafted, this provision is thought especially awkward (Lefebvre, 2002: 11–12). The passive voice in the first sentence leaves unclear who may establish a bond of filiation. The rule seems to anticipate that a genetic donor via sexual intercourse may repudiate his role as a third-party donor so as to claim paternity. This scenario does not, however, exhaust the possibilities. It is at least plausible that the mother of the child might attempt to establish the bond of filiation between the donor and the child, as might a legal representative of the child. Some scholars posit that, had the legislature wished to provide for a tardy 'paternal sentiment' on the part of some genetic donors (Tétrault, 2005: 1172), the class of such donors might better have consisted of those known to the mother (contrasted with anonymous clinic donors). Sexual intercourse as the means of effecting the genetic donation does not appear to be the most opportune proxy for a potential paternal commitment (Moore, 2002: 89–90; Pratte, 2003: 578–9).

While the chapter on filiation of children born of assisted procreation is the most visible alteration, the legislature made changes elsewhere in the civil code. An addition to the chapter on adoption is unambiguous that two persons of the same sex may adopt a child. Where 'the parents of an adopted child are of the same sex', the law (perhaps relying on stereotypes (Morin, 2003: 84)) specifies how to assign the rights and

obligations normally assigned differentially to father and mother.[23] The book on persons, as amended, stipulates that where parents are of the same sex, they are designated on a declaration of birth as the child's mothers or fathers, as the case may be (on motherhood versus co-parenthood, see Jones, 2006: 95).[24] In a departure from the amendments' systematic character, the title on parental authority remained unchanged. It still refers to the father and mother.[25] Despite some infelicities and ambiguities, Quebec's amendments model the potential of legislative, as opposed to judicial, innovation to recognize parenting by same-sex couples in an integrated fashion in various corners of private law.

B. A Contrast with Common Law Developments

If the legislature of Quebec has acted relatively recently in the field of parentage, the Canadian common law provinces show greater activity in the judicial forum. Two developments, both from Ontario, are worth considering here. Notable in their own right, they together cast into sharper relief the systematic character of Quebec's legislative amendments, as well as the model of family they reflect.

In *Rutherford* v *Ontario (Deputy Registrar General)*,[26] a judge allowed a constitutional challenge to Ontario's birth registration scheme.[27] The complainants submitted that the male partner of a woman who gave birth after assisted conception could list his name on the Statement of Live Birth without any administrative verification of the biological basis for that declaration. By contrast, they affirmed, the lesbian partner of a woman who conceived by assisted conception was prevented in some (but not all) cases from voluntarily declaring herself the child's second parent. The judge accepted that the differential treatment of non-biological intended fathers and non-biological intended mothers was unconstitutional. It discriminated, contrary to Section 15 of the Canadian Charter of Rights and Freedoms,[28] on the bases of sex and sexual orientation. Rivard J was aware that allowing the registration as parents of two persons of the same sex on a birth record might make it 'necessary to re-define who can be a parent'[29] and entail consequential amendments elsewhere. For example, while the constitutional challenge related only to a same-sex spouse's ability voluntarily to declare herself a parent, a systematic overhaul might, as it had in Quebec, extend a presumption of parenthood.[30] Alert to constraints on a court in terms of democratic legitimacy and technical expertise in the face of complex and contentious design issues, the judge declared the birth registry provisions unconstitutional, but he suspended the effects of that declaration for 1 year to let the legislature advance a remedy. *Rutherford*, consistent with the procedural and institutional constraints, restricts its gaze to voluntary declarations of birth.

In addition to the narrower scope of *Rutherford*, it is worth underlining the judge's assumption that statutory rules regulating parentage were self-evidently subject to scrutiny by the light of constitutional equality principles. The litigation proceeded against background assumptions including the general susceptibility of enacted rules of the private law of general application to constitutional scrutiny.[31] Moreover, an Ontario court had earlier concluded that the opposite-sex requirement for spouses wishing to adopt a child unjustifiably infringed the equality right in the Charter.[32] In Quebec, by contrast, recognition of equality as a value germane in the field of filiation is contentious for some commentators. There is a sense that it was misguided for the legislature to entertain arguments about the equality of same-sex couples relative to opposite-sex couples (Philips-Nootens, 2005: 181–6). Lavallée (2005: para 306) contends that the foundation of the institution of filiation on a difference of sexes and of generations may conceptually exclude equality claims. She suggests too that filiation's unwritten biological and anthropological foundations (themselves not the product of legislative will) are arguably immune to the contingencies of positivist declarations of an equality right (Lavallée, 2005: para 297).[33]

A second Ontario case clarifies by contrast the family model underlying the Quebec reforms. In *AA* v *BB*,[34] a lesbian couple and a man had planned the conception of a child and were raising the child together. All parties wished for the partner of the birth mother to obtain parental status. Both women and the man preferred not, however, to proceed by adoption. Were the father to consent to full adoption of the child by the birth mother's spouse, the adoption judgment would efface the child's connection to the father and his family. These last would all, in turn, become legal strangers to the child. The Court of Appeal for Ontario granted the wish of the involved adults. Exercising its inherent *parens patriae* jurisdiction to fill what it identified as a legislative gap, the court declared the female spouse of the child's biological mother to be a mother too. It relied on the trial judge's finding of fact that according parental status on the second woman would have advanced the child's best interests. The child thus acquired a third legal parent.

Quebec's regime differs from the process shown in *AA* v *BB* in two crucial respects. On one hand, the parental project provides a means to recognize a child as having two mothers as a consequence, not of a discretionary decision, but of the application of rules to facts. The same-sex partner of a child's parent need not persuade a court that her parenthood serves the child's best interests, a difficult task where courts have often sought to 'control and inhibit alternative sexualities' (Richman, 2002: 315). She can achieve recognition as a child's second legal mother as a matter of course, not on an ad hoc basis involving the expense and uncertainty of judicial proceedings.[35]

On the other hand, Quebec's regime reveals a legislative intention to recognize parenting by same-sex couples, but not by three individuals or more. The genetic donor is not a party to the parental project.[36] Moreover, if, say, the partner of a child's birth mother is already recognized by filiation as a parent, anyone else (such as a genetic donor) wishing to establish himself as father must simultaneously challenge the bond of filiation already linking the child and the mother's partner.[37] It relieves some observers that the Quebec reforms preempted a finding similar to that of the Ontario court in *AA* v *BB* (Prémont, 2007; Tétrault, 2007). Others, concerned to make possible models of family life beyond the nuclear model of a closed circle of two parents and children (Kelly, 2004; kelly, 2009), might think the move regrettable.

The thought in introducing Quebec's legislative reforms, and distinguishing them from judicial remedies, is not that the innovations could be wholly transplanted elsewhere (eg, Nelken and Feest, 2001). Even if doing so were possible, the infelicities in drafting would militate against such duplication. Rather, awareness of its legislative choices, including the defects already identifiable, might contribute to debates elsewhere. Quebec's reforms are appropriately understood as modelling something entirely distinct (in their legislative form, as well as in the application to lesbian couples of a formal, two-parent model, drawing on intention and status) from the ad hoc judicial developments elsewhere in Canada.

3. DISPUTING FILIATION'S VOCATION

Legal scholars have objected that the 2002 reforms perturbed filiation's genealogical and biological vocations. They have invoked psychoanalytic theory to criticize the inscription on the declaration of birth of two parents of the same sex, noting that filiation is heavily charged on the symbolic order (Joyal, 2003, 2005; Lavallée, 2005: para 304; Roy, 2006: para 20). Filiation generally is viewed as genealogically important for situating a child in a lineage (Dussault, 2003: 321–2; Joyal, 2005; Pratte, 2003, 2005), while the new filiation is said, darkly, to offer children only emptiness and uncertainty regarding their attachment to the human species (Joyal, 2003: 311–2). Whereas filiation formerly rested on the biological fact of a sexual relation of a man and a woman, introducing, it is said, the symbolic idea of alterity and sexual otherness (Joyal, 2005: 165–6), it is now regarded as having been 'desexualized' (Moore, 2002: 78, 2005; Pratte, 2003: 554) or 'unisexed' (Savard, 2006). The present author, having trained primarily as a jurist, follows Bainham (1999: 33) by regarding these psychoanalytic arguments as beyond his expertise, 'a nebulous subject for lawyers' and 'more the terrain of the anthropologist or psychologist'.

A. Biology and the Heritage of Legitimate Filiation

In arguments predicated on the naturalness of filiation by blood, critics have objected to the amendments' move away from biology (Joyal, 2003; Moore, 2002; Philips-Nootens and Lavallée, 2003; Pratte, 2003). Given the ways in which filiation by blood often does not record biological reality, the argument is necessarily subtler than that filiation formerly consecrated genetic truth into law. It is that filiation by blood has consistently *resembled* genetic reality, thereby 'respecting nature' (Pratte, 2003: 556; also Carbonnier, 2002: 201). Even medically assisted procreation prior to the 2002 reforms is thought to have preserved the biological referent as norm (Savard, 2006: 380). It is said that since 2002, however, filiation has lost its appearance of procreative reality (D.-Castelli and Goubau, 2005: 225; Lavallée, 2005: para 296; Philips-Nootens and Lavallée, 2003: 339; Pineau and Pratte, 2006: para 389; Pratte, 2003: 551).

It is, in part, with an eye on the perceived symbolic importance of filiation that a number of Quebec scholars have suggested that the legislature might better have amended the exercise of parental authority so as partially to recognize a parent figure of the same sex as a child's parent without giving two persons of the same sex parental status. Some distinguish 'les rapports de parenté', the kinship bonds of filiation, from the 'rapport de parentalité', a more functional concept based on an adult's performing as a parent (cf, Bainham, 1999, distinguishing legal *parentage* and *parenthood*). The legislature might, it is said, have recognized social parenting or *parentalité* – responding to an understandable and justifiable need on the part of the parent figure – without inscribing that recognition in the child's filiation (eg, Pratte, 2003: 559; Joyal, 2003: 307; Lavallée, 2005: para 46).

Might not these scholars detect in the regulation of filiation what Carbonnier (2001: 287) calls 'un droit naturel pratique', a natural law stemming from the observer's short sightedness? Scholarly reaction to the 2002 amendments effects a two-fold naturalization of filiation by blood. Both its perceived focus on genetic origin and the legislative concretization of that focus are treated, not as the output of legislative choices less than thirty years old, but as something preceding the positive law or at least traceable to a venerable tradition (Bureau, 2007 unpublished data). This sense is especially plain in the remark that in 2002 the legislature 'remade the traditional schema' (Pineau and Pratte, 2006: para 389). The substantial reforms of 1980 and the recentness of the explicit focus on blood, as opposed to marriage, call into question what 'traditional schema' can be viewed as having survived until 2002. To be sure, earlier scholars sometimes referred to the blood relation (Baudouin, 1970: 59) and to filiation's connection to procreation (Mignault, 1896: t2, 58). They did not, however, explicitly frame the

whole institution as chiefly concerning unmediated biology. Indeed, recall that the adjective natural attached to the despised, inferior form of illegitimate filiation, not the valued legitimate variety.

Since the uncoupling of marriage and filiation in 1980, in furtherance of the equality of all children, Quebec's law of filiation is said henceforth to favour the search for the biological truth of a child's conception (Pratte, 1982: 164; Pratte and Monjal, 1987: para 28). Some evidence supports this view, including, most recently, the addition in 2002 of a rule authorizing a court seized of a filiation action to order analysis of a sample of a bodily substance.[38] It may be mistaken, however, to read the 1980 reforms as erecting a coherent regime of filiation, one deducible from the first principle of genetic truth. Tétrault (2005: 1117) suggests that the regime post-1980 draws more from fiction than from biological reality. Do the rules that, prior to 2002, enabled filiation to reflect something other than a child's biological connections confirm biological reality by their imitation of it, as exceptions proving the rule? Or do they, rather, undermine the idea of a single mission to reflect biological truth?

In their embrace of children's equality, irrespective of the circumstances of their birth, some scholars pass swiftly over legitimate and illegitimate filiation as they preceded the 1980 reforms. Filiation by blood, the 'normal' mode of filiation after 1980, is unproblematically equated with the former legitimate filiation. Savard (2006: 394) explicitly treats the historical legitimate filiation as the predecessor of today's filiation by blood. Yet accounts emphasizing biology as the core of filiation must bracket the prior regime. Both legitimate and illegitimate filiation included a presumed genetic tie. The salient difference lay, not in legitimacy's superior biological verisimilitude, but in its constructed elements: the fact of a marriage, taken as proxy for the couple's intention to create and the stability of their household. On some views, legitimate filiation was not 'a definition of a child's biological parents' but 'essentially a legal construct' (Brierley and Macdonald, 1993: para 235). That acts of birth were until recently religiously maintained records (Brierley and Macdonald, 1993: para 168) perhaps shows a less-than-scientific concern with biological truth and greater interest in who brought a child to baptism. While the Roman Catholic Church long constituted the most developed bureaucracy in Quebec, it would have been possible to charge the notarial profession with keeping birth records. An observation made in France applies: the idea of biological 'truth' has assumed prominence in a law of filiation 'dominé jusqu'alors par l'idée de légitimité' (Supiot, 2005: 217 [footnote omitted]; also Iacub, 2004). However important the imperative of no longer stigmatizing the children of unmarried parents, it is unnecessary to bowdlerize the constructed elements from present memories of past filiation. Whatever one's view on the policy argument that legal parentage should almost always reflect genetic

parentage (Eekelaar, 1994: 88; Bainham, 1999), it fails to account for the positive law in force in Quebec at any moment.

The uncoupling of marriage and filiation in 1980 may have 'deinstitutionalized filiation' (Savard, 2005: 420–4), but links persist. In drafting the regime of filiation by blood, the legislature did not abolish the presumption of paternity, nor has it subsequently. The presumption of the husband's paternity can perhaps be subsumed under the priority of genetic parenthood on the basis that it rests on a 'presumed genetic connection' (Bainham, 1999: 29–30). Yet no such connection obtains in the exceptional cases where separated spouses' voluntary resumption of life together prior to an impending birth resuscitates the presumption.[39] The justification today for some of the rules may be that compulsory DNA testing of all children would intrude excessively into private life (Eekelaar, 2006: 75). Nevertheless, the rules of filiation preserve considerable space for establishing a filiation on a basis other than demonstrated genetic connection. Proof of filiation by act of birth and uninterrupted possession of status do not ferret out biological reality, nor necessarily the appearance of it. They – especially possession of status, the secondary mode of proof – exemplify the expansive view of filiation as treating not only birth and blood but also 'grandir, vivre, vieillir ensemble' (Cornu, 1998: 34).

Is the presumption of paternity an anachronism maintained by oversight or might it, instead, instantiate core elements of filiation? It once operated against an impossibility of scientific proof of biological paternity. Today, however, testing makes it possible to determine biological paternity accurately. Justified by the duty of fidelity attached to married and civil union spouses – or, more cynically, by the husband's implied undertaking on marriage to accept all children his wife bears (Carbonnier, 2002: 250) – the presumption attests that the vocation of filiation by blood is not only biological but also social. It distinguishes *de jure* (married and civil union) spouses from *de facto* ones. Admittedly, the matrimonial (and now civil union) duty of fidelity has no effect on the likelihood of a genetic tie between a woman and the child to whom her lesbian partner has given birth.[40] Yet the absence of even a potential genetic tie does not render the presumption of parenthood arbitrary. By enmeshing the birth mother's married or civil union partner in presumed filial bonds towards a child, the rule incarnates values of equality evidenced in the Canadian Charter and the Quebec Charter. It declares the unit in question to be a 'family'. The justifiability of this presumption, based on bonds of marriage or civil union, not blood, depends on one's alertness to the social and volitional elements in the presumption of paternity traditionally associated with married couples, as well as in the voluntary declaration of parentage on acts of birth. Other objections to the 2002 amendments exemplify the challenges of reforming a codified private law.

B. Taxonomy Troubles

In a civil code, law's organizing mode consists in the classification and sub-classification of the institutions implied by or derived from first principles. Assisted reproduction's placement in the code's 'architectonic mode of presentation' (Brierley and Macdonald, 1993: para 89) thus reveals the legislative understanding of its characterization and meaning relative to filiation by blood and adoption.

There are competing understandings of assisted reproduction's place in the structure of filiation. One view holds that Quebec law still knows just two modes of filiation: blood (now including assisted procreation) and adoption (Tétrault, 2005: 1093). Another is that the means of establishing filiation are now three: filiation by blood, filiation of children born of assisted procreation, and adoptive filiation. Placement of the rules on assisted procreation in an independent chapter is thought to substantiate the view of three distinct situations of filiation (D.-Castelli and Goubau, 2005: 189 n 20; Pineau and Pratte, 2006: para 389). The new chapter's location hints that its substance lies closer to filiation by blood than to adoption. Its modes of proof, act of birth and possession of status – both of which operate extra-judicially – confirm it to be more like filiation by blood than like adoption, which requires a judgement in the interests of the child (Table 2).

Unease with the chapter on assisted procreation derives from a sense that it is a taxonomic aberration. Whereas the prior regime contrasted supposedly 'natural', 'true', original filiation by blood with the artificial or fictitious, substitutive filiation by adoption, the 2002 regime creates an *original* filiation that is patently *fictitious*. An act of birth may now prove an original filiation 'manifestement sans lien avec l'origine biologique de l'enfant' (D.-Castelli and Goubau, 2005: 191). Assisted procreation stands halfway between filiation by blood and adoption ('à mi-chemin': Pineau and Pratte, 2006: para 387; D.-Castelli and Goubau, 2005: 225). It blends the blood and volition understood formerly to have been segregated by separate chapters on filiation by blood and by adoption. The ostensible incoherence with which the hybrid of a fictitious original filiation is thought to infect the civil code founds a lawyerly criticism distinct from any apprehended harms to children

Table 2. Civil Code of Québec SQ 1991 c 64 as amended by SQ 2002 c 6 [emphasis added]

Book 2 – the family
Title 2 – filiation
Chapter I – filiation by blood
Section I – proof of filiation
Section II – actions relating to filiation
Chapter I.1 – filiation of children born of assisted procreation
Chapter II – adoption
[…]

(Pineau and Pratte, 2006: para 389). Admittedly, the assumption that the regime of filiation can and should strive after coherence does not persuade all civilians (eg, Bureau, 2005). Nor may it resonate with common lawyers, possibly more tolerant of family law's 'normal chaos' (Dewar, 1998). For the scholars pursuing objections relating to coherence, however, the past has not only a moral presence (Postema, 1991) but also a structural one, constraining the conceptual possibilities for legislative action. They take seriously that, consistent with the general definitional ambitions of a civil code, family law's enumeration of two kinds of filiation in 1980 was exhaustive.

Even from within the civil law, the complaints about the incoherence of a fictitious original filiation are not immune to criticism. However important a civil code's coherence, its competing principles typically permit its adaptation to changing social circumstances (Brierley and Macdonald, 1993: paras 116–7). The dichotomy of filiations true and original versus fictitious and substitutive ignores the many cases in which volition generates original filiations dosed with fiction. In any event, nothing is sacrosanct about the dichotomy of filiation by blood/filiation by adoption as an organizing device, dating as it does from 1980. Why should it constrain legislative action? Given the historical variation, this comparatively recent legislative construct seems unlikely definitively to channel natural law or anthropological imperatives. Quebec civil law has also known the legitimacy-illegitimacy dichotomy, with a total of five subspecies. France, for its part, had until recently three or four types of filiation, depending which doctrinal scholar is consulted (legitimate, natural, and adoptive: Carbonnier, 2002: 199; legitimate filiation, natural filiation, adoptive filiation, and filiation resulting from assisted procreation: Cornu, 2006: para 195). Given that the civil law tradition emphasizes the 'centrality of the person' (Glenn, 2007: ch 5), it is ironic just how absent persons in general, let alone children, are from arguments of this stripe.

CONCLUSION

How, then, are Quebec's recent amendments best understood? Do they deform what was, until June 2002, a substantively and formally coherent regime of filiation centred on biology? Or, perhaps a better reading, do they underscore the messy way in which the institution of filiation, in its various legislative incarnations, has always intertwined fact and fiction, given and constructed elements of kinship?

Reactions to the amendments by Quebec scholars are richly revealing. Some criticisms of the 2002 amendments reframe the history of legitimate filiation – erroneously – as having been always a pursuit of biological reality. Filiation by blood often acquires an unwarranted

radiance of genetic 'truth' by comparison with the 'fictitious' filiations of adoption and, now, assisted procreation. Yet the present seems an inopportune moment to pursue biological absolutism in the law of filiation. Scientific and social changes have generated situations where the 'biological components', if not genetic composition, furnish to more than one woman a claim to be 'mother' of the same child (Johnson, 1999: 49–58). Anthropologists studying kinship, for their part, have challenged the opposition between biology and fiction or nature and culture (eg, Carsten, 2004). By cleaving to a dichotomy of biology and fiction, jurists may obstruct rich avenues of inquiry. At a minimum, legislatures and scholars should show greater awareness that the lexicon of family law maintains, at best, an 'arm's length relationship with the natural world' (Kasirer, 1999: xviii).

The disputes engendered by Quebec's bold amendments occasion wider reflection on the ambiguities within filiation and the scholarly tendency to erect unreliable demarcations between certainty and uncertainty. At least some reaction to the 2002 amendments reflects regret at the loss in the certainty of filiation as it stood prior to the abolition of illegitimacy in 1980, and not only as it stood in the first half of 2002. Some scholars' comparatively speedy integration of the 1980 reforms into the order of things indicates an instinct to regard juridical regulation of filiation as anchored and stable, to discern a deeper coherence within the positivist output of the legislature regarding kinship and identity. That drive for certainty should not, however, efface important dimensions of the tradition and of the present regime.

An unjustifiably firm contrast arises between the uncertain, unknown identity of children connected by filiation to parents not their progenitors and the certain, known identity of children whose filial bond coincides with a genetic link. Even the compelling literature on the importance of children's knowing their genetic history occasionally implies, unhelpfully, such information to be an end in itself. Surely it is better viewed as material for use, along with relationships, memories, and experiences, in the life-long process of constructing an identity.

The centrality of quests for identity and, specifically, for lost or absent fathers (and mothers) in literature, from Greek mythology through Shakespeare to Harry Potter, underscores the importance of the human quest for self-knowledge and a location in time. Some scholars understand these instances of world literature as establishing the importance of biological ties (Velleman, 2008: 11). Yet what if, in these narratives, blood and biology were themselves metaphors, possibly 'prejudicial both to better understanding of legal phenomena and to better relations' (Glenn, 2006: 358)? Might biology be a metonym for the commitment and desire to parent so manifest on the part of the same-sex couples seeking to deploy the new regime? That many children

bearing an established filiation by blood fantasize that they are adopted hints that a coincidence of legal filiation and biological connection does not resolve all questions nor all longing. Perhaps DNA testing and biological 'truth', however mediated by the institutions of state law, do not reach the heart of the matter. There may be something fundamentally unknowable and mysterious about the origins of each of us. Might Carbonnier (1996: 248) be right that, in folklore and life, the quest matters more than the juridical conclusion?

Legislatures cannot, of course, ignore the juridical conclusion or the need to regulate the search. Quebec's innovations and the scholarly debates it has provoked offer one example of the difficulties of remodelling the civil law's institution of filiation and finding space in a civil code – gapless and exhaustive, at least in aspiration – for new modalities of reproduction. The widely perceived novelty of the challenges posed by the parenting practices of same-sex couples also invites reflection on the conceptual riches of filiation historically, and the relation of present regimes with historical ones (Leckey, 2007a: 96). Ironically, new possibilities for technological intervention in reproduction prompt examination of the constructed elements of legitimate filiation – relational stability, publicly avowed commitment, and intention to parent – in the not-so-distant past.

NOTES

[1] Art 522 CCQ.
[2] Art 530 para 2 CCQ.
[3] Arts 525 para 1, 531 para 2 CCQ.
[4] Art 525 para 2 CCQ.
[5] Art 599 CCQ.
[6] Art 538 CCQ [emphasis added].
[7] Art 538.2 para 1 CCQ.
[8] Art 598 CCQ 1980, Art 546 CCQ 1991.
[9] This feature is striking compared with *Doe* v *Alberta* 2007 ABCA 50, 404 AR 153 1, leave to appeal to SCC refused, (Sub nom Doe v The Queen [2007] 2 SCR vi). In that case, the applicant wished to have a child, while her unmarried cohabiting partner, John Doe, did not. Ms Doe conceived through artificial insemination and gave birth. The two adults agreed between themselves that John Doe would not stand in the place of a parent to the child in the terms of provincial legislation recognizing *de facto* parenthood for purposes such as child support. They sought, unsuccessfully, a declaration that they were entitled to enter a binding written agreement precluding any subsequent recognition of John Doe as a *de facto* parent. If in Quebec, Jane Doe would have qualified as 'a person alone' deciding to have a child and no bond of filiation could have been established between the child and John Doe, a third party vis-à-vis the parental project. Had the facts arisen in Quebec, the civil code's confinement of child support obligations and parental authority to filial relations (see text preceding n 5 above) would have solidified John Doe's status as stranger to the child.
[10] This possibility is a consequence of the new civil union (Arts 521.1*ff* CCQ). The effect of subsequent federal legislation is that married spouses too may be of the same sex (Civil Marriage Act SC 2005 c 33). 'Spouses' *tout court* additionally includes *de facto* spouses, who may also be of the same sex (Interpretation Act RSQ c I-16 s 61.1).
[11] Art 539.1 CCQ. The contemplation in this part of the code of two mothers, but not two fathers, reflects the legislature's maintenance of the nullity of surrogacy agreements (art 541

CCQ). In other words, the legislature seems to understand that two men are not to have a child conceived for them by means of a parental project.

[12] Family Law Act SA 2003 c F-4.5 s 13.

[13] Art 33 CCQ.

[14] Art 543 para 1 CCQ.

[15] For example, the bar against contesting a filiation 'proven' by an act of birth and status consistent with it (Art 530 para 2 CCQ) trumps DNA proof that the designated 'father' is not the genetic father: *Droit de la famille – 3184* [1999] RJQ 201 (Sup Ct).

[16] Art 538.3 para 1 CCQ [emphasis added].

[17] Art 539 para 1 CCQ.

[18] Art 540 CCQ.

[19] Quebec family law doctrine owes the colourful qualifiers set in inverted commas to Senécal J in *FP* v *PC* [2005] RDF 268 at para 14 (Sup Ct).

[20] Art 542 CCQ.

[21] Art 542 CCQ *a contrario*.

[22] Art 538.2 para 2 CCQ [emphasis added].

[23] Art 578.1 CCQ.

[24] Art 115 CCQ, from which this paper's title is taken.

[25] Arts 597ff CCQ.

[26] (2006) 81 OR (3d) 81 (SCJ). see also Fraess v Alberta (Minister of Justice and Attorney General) 2005 ABQB 889, 390 AR 280.

[27] Vital Statistics Act RSO 1990 c V4.

[28] Part I of the Constitution Act 1982 being Schedule B to the Canada Act 1982 (UK) 1982 c 11.

[29] *Rutherford supra* note 26 at para 259.

[30] For rejection of a challenge to Saskatchewan's presumption of paternity under the Canadian Charter, concluding that the lesbians' right to equal treatment did not authorize a court's meddling with the biological fundamentals underlying the paternal presumption, see *PC* v *SL* 2005 SKQB 502, 273 Sask R 127.

[31] *RWDSU* v *Dolphin Delivery Ltd* [1986] 2 SCR 573.

[32] *Re K* (1995) 23 OR (3d) 679 (Prov Ct).

[33] This view of conservative civil-law scholars regarding the potential threats that a constitutional equality norm may pose to the integrity of the civil law of the family echoes concerns expressed concerning marriage (Leckey, 2007b: 186–7). See also EB v France [2008] ECHR 43546/02 (22 January 2008).

[34] 2007 ONCA 2, 83 OR (3d) 561, leave to appeal to SCC refused, *Alliance for Marriage and Family* v *AA* 2007 SCC 40, [2007] 3 SCR 124.

[35] Given what seems to have been a legislative objective to avoid recourse to judicial proceedings, it is regrettable that the regime specifies no formalities or modes of proof for the existence of a parental project (Leckey, 2009). Evidentiary disputes concerning the formation of a parental project and the identity of its parties have found their way to court: *SG* v *LC* [2005] RJQ 1719 (Sup Ct) (interim proceeding in dispute whether a parental project of two women aided by a genetic donor or a parental project of the birth mother and the biological father); *MG v M-JG* [2004] RDF 888 at para 5 (Sup Ct) (interim proceeding; claim of a parental project on the basis that the female plaintiff had cohabited with the defendant and that they had discussed having a child).

[36] Art 538 CCQ.

[37] Art 532 para 2 CCQ.

[38] Art 535.1 CCQ.

[39] Art 525 para 2 CCQ.

[40] It is possible for one woman to donate an ovum which, once fertilized, will be carried by her civil union spouse, but the status of civil union spouse does not *per se* increase the probability of such an arrangement.

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